FKG v Republic (Criminal Appeal E008 of 2024)
[2026] KEHC 3152 (KLR) (5 March 2026) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E008 OF 2024

PN GICHOHI, J

MARCH 5, 2026

BETWEEN

FKG ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal arising from the conviction and sentence by Hon A Mukenga (PM) delivered on 8th February, 2023 in Chief Magistrate Court at Molo Sexual Offense case No. E164 of 2023)

JUDGMENT

1. The Appellant FKG had been charged with the offense of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual offences Act* No. 3 of 2006. The particulars of the charge were that between 1st and 3rd October, 2021 at Kasarani Site Village, Elburgon Location in Molo Sub County within Nakuru County, he intentionally and unlawfully caused his penis to penetrate the vagina of A.W.W a girl child aged 10 years.

2. He also faced an alternative charge of committing an indecent act with the said child contrary to Section 11(1) of the *Sexual Offences act* No. 3 of 2006.

Prosecution case before the trial court.

3. In support of its case, the Prosecution called five (5) witnesses. The case was that between1st and 3rd of October 2021, the complainant's mother had gone to visit their grandmother. Her father returned home from work on Saturday night and instructed her and the other children to sleep. He then requested for food, and she served him ugali in his bedroom but as she was turning back to leave, he removed his trousers and her clothes.

4. He proceeded to touch her private parts and inserted his "thing for urinating" into her "thing for urinating," causing her pain. He blocked her mouth to prevent her from screaming and threatened to kill her with a knife if she disclosed the incident.

5. He hit her head, causing her to lose consciousness momentarily, after which he released her to sleep. Her mother returned the following day at 7:00 PM, but due to the threats he had issued by her father, she was afraid to tell her mother what her father had done to her due to the threats he had issued. It was not until 29th November 2021 that she finally disclosed the incident to her Head Teacher of [Particulars Withheld] Primary School in Elburgon, (PW2 - LW).

6. Upon receipt of the report from the complainant (a Grade 3 pupil) in the school, she called her Deputy FM (PW3) also to listen to the complainant as to her father had done 'tabia mbaya' to her.

7. Consequently, she telephoned Elburgon police station and the call was received by No.73XXXX CPL Beth Kamau (PW4) , who started investigations. She proceeded to the school and found that the Head teacher had already summoned the complainant's mother to come to school and had come in company of the accused.

8. The complainant narrated the incident to the Investigating Officer what her mother's boyfriend (accused) had done to her while her mother was away to visit her own mother and how he had threatened to kill her if she disclosed the incident to anyone. PW4 recorded witness statements including that of the complainant's mother but later, the mother declined to testify.

9. The complainant's mother admitted that at the time of the incident, she had travelled to Ol Kalou to visit her mother. The accused who worked in Nairobi had come home on that day. The complainant identified him as the perpetrator. On the same day, PW4 caused the complainant to be taken to Elburgon Sub-County Hospital for age assessment, The complainant was estimated to be Ten (10) years old and a report to that effect made (PExh. 1).

10. From the complainant's history of having been sexually assaulted at night by someone she knew well, she was examined on 29th November 2021. Her age was estimated as Ten (10) years and the Assessment report filled to that effect (PExh. 1).

11. Dr. George Butali, (PW5) an Assistant Director of Medical Services Nakuru County and by then based at the hospital found the complainant's hymen torn. When he considered the time of the alleged incident and the time of examination, the approximate age of the broken hymen as one (1) year could not be estimated because the hymen was already healed. Therefore, the estimated age of the broken hymen was Seven (7) Weeks. He filled the Post Rape Care (PRC) Form and the Medical Examination Report (Pexh. 2 and 3 respectively).

Defence case

12. His case was that he was away at work in Nairobi on the date of the alleged offence. He exhibited a work time sheet to that effect (DExh 1). He was called to Nakuru and travelled to his house. He denied the allegations which he termed as false. He was sacked from work due to the said allegations. He urged the Court to dismiss the case.

13. His father GW (DW2) and a farmer in Elburgon, was not aware of the charges against the accused. However, he asserted that the accused was at work in Nairobi for the entire month the incident allegedly occurred.

14. After hearing both parties, the trial court delivered its judgement on 8th February 2023 where the Appellant was convicted of the offence of defilement as charged and sentenced to life imprisonment.

The Appeal

15. Aggrieved by both the conviction and sentence the Accused/Appellant . lodged this appeal through Bore K. Peter Advocate and based on Four (4) grounds that:-

    1. The learned magistrate erred in law and fact by failing to inform the appellant of his right to be represented by Counsel thus violating his fundamental right to a fair trial under Article 50 (2)(g) of *the Constitution*.

    2. The learned magistrate erred both in law and fact by convicting the appellant on account of insufficient evidence laden with glaring contradictions, gaps, inconsistencies, falsehood, uncorroborated evidence and which evidence in totality did not meet the threshold of proof beyond reasonable doubt.

    3. The learned magistrate erred both in law and fact by disregarding and dismissing the appellant's defence without critically analysing the same.

    4. The learned magistrate erred both in law and in fact by harshly and unlawfully sentencing the appellant to the life imprisonment, which was excessive, unlawful, incompatible with the weight of the evidence adduced, did not take into the appellant's previous record, and did not capture the mitigation adduced by the Appellant.

16. He therefore urged this Court to allow the appeal, quash the conviction and sentence and set him free.

Appellant's Submissions

17. The Appellant's submissions are around the main grounds of appeal challenging the conviction for Defilement contrary to Section 8(2) of the *Sexual Offences Act* No. 3 of 2006 and the resultant sentence to life imprisonment.

18. He contended that his fundamental right to a fair trial under Article 50(2)(g) of *the Constitution* was violated noting that the trial court record failed to show he was informed of his non-derogable right to counsel, or his entitlement to apply for legal aid under the *Legal Aid Act* No. 6 of 2016.

19. He relied on the ruling in Francis Ochieng Osura v Republic [2019] eKLR, where it was held that proof of derogation of the right under Article 50 (2)(g) renders the entire trial a nullity, and emphasised that the right must be explained promptly upon the accused's first appearance.

20. Further reliance was placed on Owuor v Republic (Criminal Appeal 16 of 2019) [2022] KECA 18 (KLR), which cited Pett v Greyhound Racing Association (1968) to illustrate the disadvantage of an unrepresented accused, and the Supreme Court decision in Republic vs Karisa Chengo & 2 Others [2017] eKLR, which affirmed legal representation as a fundamental ingredient of a fair trial.

21. The Appellant also cited Article 14(3)(d) of the International Convention on Civil and Political Rights (ICCPR), and Section 43(1)(a) of the *Legal Aid Act*, which mandates the court to promptly inform the accused of this right.

22. He consolidated the second and third grounds of appeal, asserting that the conviction was based on insufficient, contradictory and uncorroborated evidence and that the court disregarded his defence.

23. In regard to the evidence, he submitted that the trial court relied on hearsay evidence from two unknown women who initially reported the defilement to the teacher (PW2), contrary to the principle established in Kinyatti v Republic [1984] eKLR.

24. He argued that the Respondent's failure to call the child's mother, who had recorded a statement, created a fatal evidential vacuum, inviting the adverse inference established in Bukenya & Others V. Uganda (1972) EA 549.

25. Regarding the offence he was charged with, he submitted that the charge sheet was fatally defective because the evidence indicated the Appellant was the child's father, meaning the correct charge ought to have been Incest contrary to Section 20 (1) of the *Sexual Offences Act*. In support of this, reliance was placed on the case of Mokera v Republic (Criminal Appeal E012 of 2022) [2023] KEHC 22910 (KLR) and Peter Ngure Mwangi v Republic [2014] eKLR on the need for the court to address such defects.

26. Regarding documentary evidence in support of the prosecution case, it was his submissions that the court erred by relying on the Age Assessment Report (P. Exh. 1) produced by the Investigating Officer (PW4), a non-maker, thereby denying the Appellant the right to cross-examination.

27. The report was further criticised as being vague and lacking scientific methodology like radiography, contrary to the standards discussed in Moses Barasa Saeko v Republic [2018] KEHC 2156 (KLR) and Evans Wamalwa Simiyu vs. Republic [2016] eKLR.

28. Regarding the Appellant's defence, it was argued that the trial court misconstrued the Appellant's alibi that he was on duty in Nairobi throughout October 2021, supported by a timesheet (D. Exh 1). Therefore, it was submitted that the trial court's conclusion that the possibility of the Appellant travelling home after work on 3rd October, 2021, was a conjecture that completely distorted the defence evidence.

29. Lastly, he contended that the trial court relied on extraneous evidence by finding the Appellant arrived late at night, a phrase that was not used by the child, and unlawfully attempted to force the evidence to refer to the date of 3rd October 2021, ignoring the charge sheet's particulars which stated the offence occurred in between 1st and 3rd October, 2021.

30. In conclusion thereof, the Appellant prayed that the appeal to be allowed, the conviction quashed, and the life sentence set aside.

Respondent's Submissions

31. Through James Kihara, Prosecution Counsel, the Respondent opposed the Appeal. He submitted that for offense of Defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, for which the Appellant was convicted of, they were tasked with proving the child's age, the identity of the perpetrator, and proof of penetration.

32. While addressed the four grounds of appeal, the Respondent gave a detailed summary of its case before the trial court starting with the child (PW1). It was submitted that the ten (10) year old child gave an unsworn statement after a voire dire was carried out. That the child testified about the incident between 1st and 3rd October 2021, where the Appellant, her father, defiled her, threatening to kill her with a knife if she disclosed the incident.

33. It was submitted that the child lost consciousness after the Appellant struck her head and only disclosed the incident to the teacher in November. Crucially, that during cross-examination, the child denied being coerced or told what to say. Further that evidence by the Investigating Officer (PW4) confirmed the mother's alibi of having travelled to Olkalau on the said date and the production of the Birth Certificate confirming the child's age as ten years.

34. Further, that the Head Teacher (PW3) corroborated the child's confession and denial of the allegation by the Appellant, noting the child's irregular school attendance was due to home responsibilities.

35. Regarding the medical evidence, it was submitted that Dr. George Biketi (PW5), who produced the P3 and PRC forms confirmed the child was ten years old at the time of examination and that upon examining the child, he found her hymen was torn . He further opined that the tear was approximately seven weeks old, which was near the time of the alleged incident, although no visible injuries were noticed.

36. In regard to the Appellant's alibi defence, the Respondent submitted that though the Appellant claimed he was at work in Nairobi when the defilement took place and presented a timesheet to support this, he failed to call a company representative to confirm the timesheet's authenticity, his employment, or his presence at work on the relevant dates, hence this defence was never proved. The Respondent therefore termed this line of defence an afterthought as the information was not raised at the prosecution stage.

37. It was submitted that the minor's mother, who was a good friend of the Appellant, chose to stay away and therefore, the only inference of her conduct is a corroborated effort to scuttle the case. The Respondent therefore submitted that the Appellant's testimony lacked credibility and did not shake the Respondent's case.

38. Terming the trial court's Judgment as well reasoned, balanced and based on on cogent evidence , it was submitted that the Respondent's case was devoid contradictions, gaps, or inconsistencies and that there was no doubt that the perpetrator defiled the minor.

39. In regard to the Appellant's alleged violation of his right to legal representation under Article 50(2)(g) of *the Constitution*, the Respondent conceded that the trial court record does not indicate that the Appellant was informed of his right to be represented by an advocate or warned of the seriousness of the offence. However, the Respondent contended that since the Appellant did not ask to be provided with counsel, proceeded with the trial, cross-examined witnesses, and mounted a defence, the failure to inform him of the right did not cause him any prejudice.

40. Lastly, and regarding the sentence to life imprisonment, the Respondent submitted that they had no objection to the court handing a determinate sentence. However, that the sentence must reflect the seriousness of the offence and maintain a reasonable proportionality to the crime committed, serving the purpose of denouncing the offender's conduct.

Analysis and Determination

41. After considering the appeal, the record of the proceedings before the trial court as well as the rival submissions by both parties, the issues for determination are:-

    1. Whether the Appellant's fundamental right to a fair trial under Article 50(2)(g) of *the Constitution* was violated by the trial magistrate's failure to inform him of his right to be represented by legal counsel, and if so, the legal consequence on the entire trial.

    2. Whether the charge sheet is defective.

    3. Whether the prosecution established the case against the Appellant beyond a reasonable doubt and whether the trial court disregarded the Appellant's defence.

4. Whether the sentence of life imprisonment imposed upon the Appellant was harsh, unlawful, and excessive in the circumstances.

42. This being the first appellate court , its duty to re-analyze and re-consider the evidence tendered before the trial court so as to arrive at its own independent conclusions bearing in mind that it did not have the advantage of seeing and hearing the witnesses -See Okeno Vs Republic [1972] EA 32.

43. Further, the Court of Appeal in David Njuguna Wairimu Vs Republic [2010] eKLR reiterated the said principle thus: -

> " The duty of the first appellate court is to analyze the re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

Whether the Appellant's right to legal representation were violated

44. Article 50 (2) of *the Constitution* provides that;

> " 2. Every accused person has the right to a fair trial, which includes the right;
>
> a. To be presumed innocent until the contrary is proved.
>
> b. To be informed of the charge, with sufficient detail to answer it.
>
> c. To have adequate time and facilities to prepare a defence;
>
> d. To a public trial before a court established under this Constitution.
>
> e. To have the trial begin and conclude without unreasonable delay.
>
> f. To be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;
>
> g. To choose, and be represented by, an advocate, and to be informed of this right promptly.
>
> h. To have an advocate assigned to the accused person by the State and at State expense, it substantial injustice would otherwise result, and to be informed of this right promptly.
>
> i. To remain silent, and not to testify during the proceedings..." [Emphasis added]

45. There is therefore no doubt as to an accused's constitutional right as stated under Article 50 (2) (g) and (h). From the original record, there is nothing to show that the Appellant was informed of that right, or that he was aware of the same, or requested for it and was denied. However, this Court has looked at the case law relied on by the Appellant herein in support of the alleged violation.

46. In the case of Karisa Chengo & 2 others v Republic [2015] KECA 756 (KLR) cited by the Appellant herein, the Court of Appeal acknowledged the right of an accused person under Article 50 (2) (g) of *the Constitution* but emphasized Article 2 (h) on the right of the accused to have an advocate assigned to the accused person by the state and at State expense, " if substantial injustice would otherwise result and to be informed of this right promptly...".

47. The Court then quoted the case of David Macharia Njoroge Vs Republic [2011] eKLR where it was held: -

> " State funded legal representation is a right in certain instances Article 50 (1) provides that an accused shall have an advocate assigned to him by the State, at the States expense, if substantial injustice would otherwise result. Substantial injustice is not defined under *the Constitution*, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2 (6). Therefore, provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal and is mandatory...We are of the considered view that in addition to situations where 'substantial injustice would otherwise result,' persons accused of capital offences where the penalty is loss of life have the right to legal representation at State expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a retrial where no such legal representation was provided. The reasons are that, firstly, the provisions of the new Constitution will not apply retroactively, and secondly, every case must be decided on its own merit to determine if there was serious prejudice occasioned by reason of such omission."

48. In Karisa Chengo case (supra), the Court of Appeal went ahead to states that;

> " Substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise... As regards the denial of that representation in the instant case, we do not think that an acquittal is the remedy available to the appellants as they submitted. It cannot have been the intention of the framers of *the Constitution*, to halt all criminal prosecutions of persons charged with capital offences until the implementation of a scheme to provide legal representation to all persons charged with such offences. Sadly, again an acquittal is not the remedy available to the appellants even if their right was violated in the trial court. This Court in Julius Kamau Mbugua v Republic Criminal Appeal No. 50 of 2008 has held that an acquittal is not an appropriate remedy where the alleged violation of fundamental rights of the accused has been proved. Nor did the appellant point out that the substantial injustice was caused to them by such failure. The respective records show that they were never inhibited at all in the prosecution of their cases during the trial. They actively participated in their trials and subjected to intense cross-examination the witnesses availed by the prosecution. We therefore discern no substantial injustice occasioned to the appellants by the State's failure to accord them legal representation. This ground must of necessity therefore fail."

49. From the above cases and though dealing with capital offences where the only sentence was death, it is apparent that an accused person's right to representation heavily depends on prejudice that might be occasioned on him if such representation is not granted to him by the state.

50. The Court of Appeal has elaborated further that even when there is a violation of such right to representation under Article 50(2) (g) of *the Constitution*, an acquittal is not the appropriate remedy unless the Appellant demonstrates that the failure caused substantial injustice.

51. In this case, though the record shows that the trial court did not inform the Appellant of his right to legal representation under either Article 50 (2)(g) or (h), it is noted that the Appellant herein participated fully in the hearing of his case and even cross- examined the witnesses at length.

52. Upon being placed on his defence, he defended himself , even by mounting an alibi defence. He produced documentary evidence and called a witness in support of his case.

53. From the record, there is nothing to suggest that the Appellant had difficulty in understanding the proceedings and/or that he was prejudiced in any way by the trial court's failure to inform of his right to representation or to have him accorded legal representation at the state expense. Consequently, that ground of Appeal fails.

Whether the charge sheet is defective

54. Regarding whether a charge is defective or not and the consequent effect was dealt with by the Court of Appeal in Nyamai Musyoka v. Republic [2014] eKLR thus :-

> " The test for whether a charge sheet is fatally defective is a substantive one.....If a defective charge is followed by a series of other procedural or substantive mistakes and which in particular affect the rights of the accused person, or the defect goes into the root of the charge distorting it in a way that the accused person cannot understand the charge, then the Court ought to be reluctant to apply Section 382 C.P.C. to cure the defect..."

55. In this case, Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* 2003 under which the Appellant was charged and convicted on provides that;-

> " 8 (1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement8 (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

56. The Appellant argued that the charge against him ought to have been "Incest contrary to Section 20 (1) of the *Sexual Offences Act*" and not defilement.

57. For emphasis the Section provides as follows:

> 20. Incest by male persons
>
> (1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years: Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or

the indecent act was obtained with the consent of the female person." [Emphasis added]

58. Further, the test of the relationship between the child and perpetrator is well captured under Section 22 of the Act as follows :-

> 22. (1) In cases of the offence of incest, brother and sister includes half-brother, half-sister and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a mother includes a half mother and an aunt of the first degree whether through lawful wedlock or not." [Emphasis added].

59. Though in this case the minor referred to the Appellant as her father, he was referred to in the same proceedings as a boyfriend complainant's mother. Even though there is no evidence that the Appellant was a biological father to the complainant, the Appellant ought to have been deemed the " father" to the complainant under Section 22 of the *Sexual Offences Act*.

60. The issue then is whether charging him with offence of defilement rendered the charge sheet fatally defective. Section 382 of the Criminal Procedure Code provides:-

> " Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:.."

61. Regarding a defective charge, the Court of Appeal in Nyamai Musyoka v. Republic [2014] eKLR held:-

> " The test for whether a charge sheet is fatally defective is a substantive one.....If a defective charge is followed by a series of other procedural or substantive mistakes and which in particular affect the rights of the accused person, or the defect goes into the root of the charge distorting it in a way that the accused person cannot understand the charge, then the Court ought to be reluctant to apply Section 382 C.P.C. to cure the defect..."

62. The consequences of an accused found to be guilty of the offence of incest under Section 20 (1) is life imprisonment. That is the same sentence under Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act*. If the Appellant herein could be charged with either of the offence without nullifying the other, no injustice would arise in the circumstances herein and the charge sheet cannot be said to be fatally defective to cause the Appellant an acquittal.

63. As to whether, by their evidence, the Respondent proved its case as required by law, the Court of Appeal in John Mutua Munyoki vs Republic (2017) eKLR emphasised that:-

i. "For an offence of defilement to be committed, the prosecution must prove each of the following ingredients:- The victim must be a minor.

ii. There must be penetration of the genital organ by the accused and such penetration need not be complete or absolute. The partial penetration will suffice."

64. Arising from Section 8 (1) of the Act, the prosecution must prove beyond reasonable doubt :-Age of the complainant, Penetration and Positive identification of the assailant.

65. In regard to age of the victim in this case, the particulars of the charge stated that the victim, A.W.W, was a girl child aged 10 years at the time of the offence. The Complainant (PW1) stated during the voire dire that she was ten years old and in Standard 3 at the time the offense.

66. The Investigating Officer (PW4) confirmed that an age assessment was conducted, estimating her age at approximately 10 years, and an age assessment form issued by Elburgon Sub-County Hospital was produced to confirm this. Further Medical Evidence by PW5- Dr. George Butali, the Clinical Officer, confirmed that at the time of examination of the victim on 1st November, 2021, the complainant's age was approximated to be ten (10) years old.

67. On issue of the Victim's age, the Court of Appeal in the case of Edwin Nyambogo Onsongo v Republic [2016] eKLR held: -

> "... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

68. The evidence presented before court conclusively established the victim's age as 10 years at the material time, which falls under the category of a child below the age of eleven years. There is no requirement in law for a mandatory application of a scientific methodology in order to determine that age of a victim . The issues raised by the Appellant in regard to the age assessments are inconsequential and therefore, that ground of appeal fails.

69. Regarding proof of penetration, Section 2 of the *Sexual Offences Act* defines penetration to mean;-"the partial or complete insertion of the genital organs of a person into the genital organs of another person."

70. In this case the victim gave a direct and clear account of the incident. She testified that after her father removed his clothes and hers, he inserted his 'thing for urinating' into her 'thing for urinating', causing her pain. She further stated that the accused blocked her mouth to prevent her from screaming.

71. This description, given by a 10-year-old child, constitutes direct evidence of penile-vaginal penetration as required by the Act. Moreover, her testimony was corroborated by Dr. George Butali (PW5) that the victim's hymen was broken.

72. The Doctor opined that the tear was approximately seven weeks old at the time of examination, a time frame which closely aligns with the alleged date of the incident between 1st and 3rd October, 2021.

73. The consistent, direct, and uncontradicted evidence of the victim regarding the act, supported by the medical finding of a recent hymen tear consistent with the timing of the allegation, firmly established the element of penetration.

74. Regarding the identity of the perpetrator, the Appellant raised an alibi defence claiming he was away at work in Nairobi in the month of October 2021 when the defilement allegedly occurred between 1st and 3rd October 2021. In support of his alibi, the Appellant introduced a timesheet (D. Exh 1) to support his claim of being at work.

75. Further, and during cross- examination, the Appellant stated that there was a time his wife, the mother of the complaint had left their matrimonial home and since he was away at work in Nairobi, he tasked a woman called Wanjugu to care for his home.

76. He went on to say that during that period, the said lady demanded that him he marries her but he rejected the demand. As a retaliation, the said lady threatened him to do something he will regret. He thus believes the criminal charges were levelled against him through the said lady.

77. His father GW (DW2) and a farmer in Elburgon, was not aware of the charges against the Appellant . However, he asserted that the accused was at work in Nairobi for the entire month the incident allegedly occurred.

78. On being cross-examined, he reiterated that the accused was at work in October 2021, and clarified that one of the women who came to him was a neighbour, though he did not know what work she was doing for the accused. He stated that he lives far from the accused and does not see him every day. He added that the accused is married to Wangechi, and they used to live in the same house together with the child.

79. Regarding alibi defence , the Court of Appeal in Erick Otieno Meda v Republic [2019] eKLR had this to say:-

> " In an alibi defence based on witness testimony, the credibility of the witness can strengthen or weaken the defence dramatically. A successful alibi defence entirely rules out the accused as the perpetrator of the offence. There is no burden of proof on the accused to prove an alibi. If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt."

80. In his judgement, the trial Magistrate stated:-

> " The accused person 's defence is that during that time , he was away at work in Nairobi. The time sheet he exhibited shows that the accused person was at work on those three days, indeed the whole of that week. However , the complainant recalled that specific day was on a Saturday night which then would coincide with 3rd October 2021. On that day, going by the time -sheet , the accused person though was at work, worked for eight hours with no overtime. The possibility of the accused person having travelled to Elburgon for that night cannot be ruled out. It is noteworthy that the complainant stated that her mother was away on that night , which coincides with the accused person's defence that there was a time his wife had left the matrimonial home. I am thus convinced that the night of 3/10/2021 , being a Saturday though accused was at work in Nairobi at daytime, he managed to travel to his home and arrived late at night as stated by the Complainant and committed the heinous act herein.

81. The identity of the assailant rested on the evidence of the victim. She identified the Appellant in court as the assailant. She stated unequivocally that "The accused is my dad." She was not a stranger to the perpetrator. The incident occurred inside their house and at night. The victim was serving him food in the bedroom, which means there was sufficient opportunity for visual identification. She also recalled his specific threats to kill her with a knife if she disclosed the incident.

82. The victim's subsequent disclosure to her head teacher (PW2) and Deputy Head Teacher (PW3) was immediate and consistent. When confronted by the head teacher in the presence of the Appellant , the child repeated the allegation against her father, reaffirming the identification.

83. The certainty of the victim's identification of the Appellant , coupled with the fact that the assault took place in a familiar environment (the bedroom) and was perpetrated by someone she referred to as a dad, leads to the conclusion that the identification of the Appellant herein as her assailant was free from error.

84. This Court is satisfied with the trial Court's finding that it was the Appellant who committed this offence and that he was not satisfied that the case was orchestrated by a woman called Wanjugu.

85. Further, regarding failure by the Victim's mother to testify being taken as a conspiracy between her and the Appellant, this Court is satisfied that failure by the victim's mother was not fatal to the case and neither any alleged grudge between the Appellant and one Wanjugu had any effect on this case.

86. Indeed, the Court of Appeal in SKM v Republic (Criminal Appeal 62 of 2020) [2023] KECA 758 (KLR) (22 June 2023) (Judgment) had this to say:-

> " In his defence, the appellant alleged that a grudge that existed between himself and SM's mother was the reason for the charges he faced. However, from the record, it is apparent that it was SM, as the victim of the sexual assault, and her teacher, PW2, and not his wife, that finally lodged the report of incest to the police. On this basis, his assertions of the existence of a grudge with his wife leading to the charge is implausible, and the courts below were right in disregarding it. This ground therefore fails."

87. This Court is satisfied that the argument by the Appellant has no effect on this case. The defence did not therefore shake the prosecution case in any manner.

88. On that basis, this Court finds that the prosecution proved the offence of defilement beyond reasonable doubt. The conviction was safe. It is therefore upheld.

89. On whether the sentence of life imprisonment meted against the Appellant herein was unlawful and excessive, Section 8(2) of the *Sexual Offences Act* provides for life imprisonment for defilement of a child below 11 years. The victim in this case was 10 years at time of the incident. And therefore, the sentence provided under the Act is life imprisonment.

90. Prior to the Directions of the Supreme Court in Francis Karioko Muruatetu and Another v Republic [2017] eKLR on 6th July 2021 that emphasised that the said case was only applicable to murder cases, courts re-sentenced Applicants for different offences, including sexual offences.

91. The Court of Appeal in Manyeso v Republic (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) held that the constitutionality of the mandatory and indeterminate sentence of life imprisonment was discriminatory, inhumane and a violation of the right to human dignity. The Court of Appeal partly allowed the appeal, the life sentence was substituted with a sentence of 40 years' imprisonment.

92. Upon further Appeal to the Supreme Court in Republic v Manyeso (Petition E013 of 2024) [2025] KESC 16 (KLR), the Apex Court found that Court of Appeal erred in law by substituting the life imprisonment sentence with a 40-year sentence, thereby usurping the legislative power to define sentences.

93. The Apex Court found that the Court of Appeal did not have jurisdiction to interfere with the sentence imposed by the trial court and affirmed by the first appellate Court.

94. Consequently, the life imprisonment sentence remained lawful and in line with Section 8 of the *Sexual Offences Act*. Guided by the above, this Court declines to interfere with the life sentence meted by the trial court.

95. In conclusion therefore, this Court makes the following Orders:-

    1. The Appellant's Petition of Appeal dated 16th February, 2024 is without any merit and is hereby dismissed in its entirety.

    2. The conviction is upheld and the sentence affirmed.

Dated, signed and delivered at Nakuru this 5th Day of March, 2026.

PATRICIA GICHOHI

JUDGE

In the presence of:

Mr. Bore for Appellant

Ms Anyumba for Respondent

FKG - Appellant

Erickson, Court Assistant