LMM v Republic (Criminal Appeal E025 of 2025)
[2026] KEHC 1102 (KLR) (29 January 2026) (Judgment)

Neutral citation: [2026] KEHC 1102 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CRIMINAL APPEAL E025 OF 2025

FN MUCHEMI, J

JANUARY 29, 2026

BETWEEN

LMM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the conviction and sentence in the Senior Principal Magistrate Court in Ruiru by Honourable J. A. Agonda (PM), in Criminal (S.O) Case No. E053 of 2021 on 6th October 2023)

JUDGMENT

Brief Facts

1. The appellant lodged this appeal against the entire judgment of the Principal Magistrate Ruiru whereby he was charged and convicted of the offence of defilement contrary to Section 8(1) as read with 8(3) of the *Sexual Offences Act* No. 3 of 2006. He was sentenced to serve (16) sixteen years imprisonment.

2. Being aggrieved by the decision of the trial court, the appellant lodged the instant appeal citing 6 grounds which can be summarised as follows:-

    a. The learned trial magistrate erred in law and in passing the judgment convicting the appellant when the prosecution had not proved its case by discharging the required burden of proof;

    b. The learned trial magistrate erred both in law and in fact by failing to observe that the victim was not truthful in accordance to Section 124 of the Criminal Procedure Code.

    c. The learned trial magistrate erred in law and in fact by failing to consider the appellant's defence.

3. Parties disposed of the appeal by written submissions.

The Appellant's Submissions

4. The appellant submits that the evidence of identification was not safe to warrant his conviction as the complainant never reported the alleged defilement to the authorities until her uncles stated so. Further the victim did not have any description of her perpetrator but claimed to know him as Msafi, which the appellant submits is not his name. The appellant argues that no one witnessed the incident and it is only PW1 who testified that she was defiled twice by Msafi. The appellant refers to the cases of Kariuki Njiru & 7 Others vs Republic Criminal Appeal No. 6 of 2001 and Wamunga vs Republic (1989) KLR 42 and submits that the alleged defilement took place at night and the victim never gave any description of her assailant to her uncles or medical officers apart from merely stating that she was defiled by Msafi. Further there was no identification parade conducted despite the victim being absent during his arrest.

5. The appellant argues that the report and statements did not indicate the specific date for the alleged incidents which was prejudicial to him. The appellant further submits that the evidence by PW2 and PW3 are hearsay and thus unreliable.

6. The appellant relies on the case of Mary Wanjiku Gichira vs Republic Criminal Appeal No. 17 of 1998 and submits that the only thing that connects him to the offence is suspicion which cannot be a basis of inferring guilt.

7. The appellant submits that although PW1 and the medical officers and uncles of the victim testified that she was 14 years at the time of the incident, they had no documentary proof of the same. Further PW1 never mentioned her age nor did she testify as to her date of birth. The appellant additionally submits that the mother of the victim was not called to testify who would have ascertained the age of the victim. The appellant further refers to the case of Christina Sila Mutuku vs Republic (2021) and submits that no document was produced to ascertain the age of the victim and only PW5 testified to the date of birth of the victim but she did not shed light on where she got the victim's year of birth as the year 2007.

8. The appellant further refers to the case of Hillary Nyongesa vs Republic Cr. Appeal No. 123 of 2009 and submits that the investigating officer did not clarify the procedure he used when mounting the charges on the age of the victim.

9. Relying on the cases of Woolmington vs DPP (1935) AC 462; Millers vs Minister of Pensions (1947) ALL ER 373; Gerald Ndoho Munjuga vs Republic (2016) eKLR and R vs Lifchus (no citation given), the appellant submits that the prosecution did not prove the element of penetration beyond reasonable doubt.

10. The appellant refers to the cases of Tekerali son of Korongozi & Others vs R (1952) EACA 259 and Kyiafi vs Woro (1967) GLR 463 and submits that the prosecution's case was marred with inconsistencies with the likelihood of the complainant being untruthful in her statements as her oral testimony was coached. The appellant argues that PW1 narrated how her mother took her from the rural area in March and how she was moving from one house to another up to September but she did not give clear details on what was happening in the houses for them to move and how long they stayed at one point for the purpose of ascertaining the occurrences. PW2 testified that PW1 had been loitering around with her mother yet PW1 testified that only her mother had been loitering. Further, PW1 was not clear on who was responsible for her pregnancy and the prosecution remained quiet on the said issue.

11. The appellant relies on Section 124 of the *Evidence Act* and the cases of Stephen Nguli Mulili vs Republic [2014] eKLR and Erick Onyango Odeng' vs Republic [2014] eKLR and submits that the victim was not truthful whilst giving her testimony. Further, the trial magistrate did not comment on the victim's demeanour and credibility.

The Respondent's Submissions.

12. The respondent submits that the prosecution proved its case beyond reasonable doubt. The respondent refers to Section 8(1) and 8(3) of the *Sexual Offences Act* and the case of Kyalo Kioko vs Republic (2016) eKLR and submits that it proved the ingredients of the offence of defilement. The respondent relies on the case of Mwalango Chichoro Mwanjembe vs Republic (2016) eKLR and submits that PW1 was 14 years old at the time of the offence. PW2 and PW4 also confirmed that the victim was 14 years at the time of the offence.

13. The respondent relies on Section 2 of the *Sexual Offences Act* and the case of Mark Oiruri Mose vs Republic (2013) eKLR and submits that PW1 testified that on diverse dates between March and September 2021 at 10pm, her mother was not home and Msafi asked her if she knew about sex and she told him that she did not know and he said that he would show her. She further testified that Msafi remover her clothes and inserted his penis in her vagina and left claiming that he was tired. The victim further testified that Msafi defiled her twice on Sunday, he told her to remove her clothes and had sex with her and then he was called for work with his friends.

14. The respondent submits that PW4 and PW5 confirmed that on examination there were old tears on the hymen at 3 and 9 o clock and the victim was pregnant. The respondent argues that the evidence produced during the trial clearly proved the element of penetration to the required standards. Further, P3 and PRC Forms were produced as evidence which corroborated the evidence of the victim and was not impeached by the appellant during cross examination.

15. The respondent submits that proof of participation of an accused person is crucial as it enables one to determine who to attach criminal responsibility to. The respondent submits that PW1 testified that she lived with the appellant under the same roof when her mother left her for a long time. Thus it was identification by recognition. The respondent submits that from the evidence that was adduced at trial, it is clear that the appellant is the person who defiled the victim and there was no possibility of mistaken identity.

16. The respondent submits that there were no contradictions or inconsistencies hence all the prosecution witnesses corroborated each other.

17. The respondent submits the complainant was a truthful and credible witness. Further that the trial court had the opportunity of observing her while testifying and recorded reasons as to why the complainant was a truthful witness in accordance with Section 124 of the *Evidence Act*.

Issues for determination

18. The appellant has cited 6 grounds of appeal which can be compressed into two main issues:-

    a. Whether the prosecution proved its case beyond any reasonable doubt;

    b. Whether the sentence meted out against the appellant is justified.

The Law

19. This being a first appeal, this court is guided by the principles set out in the case of David Njuguna Wairimu vs Republic [2010] eKLR where the Court of Appeal stated:-

> " The duty of the first appellate court is to analyse and 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 appellate 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 that 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.

20. Similarly in the case of Okeno vs Republic [1972] EA 32 where the Court of Appeal set out the duties of the appellate court as follows:-

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs Republic (1957) EA 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion.
>
> (Shantilal M. Ruwala vs R (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs Sunday Post [1958]EA 424." This was also set out in the case of Kiilu & Another vs Republic [2005] KLR 174.

Whether the prosecution proved its case beyond any reasonable doubt

21. In order to establish whether the prosecution proved its case beyond a reasonable doubt I shall address the following issues as raised by the appellant:

    a. Whether there was conclusive evidence of all the ingredients of defilement;

    b. Whether the prosecution case was filled with contradictions and inconsistencies;

    c. Whether the complainant's testimony required corroboration in line with Section 124 of the *Evidence Act*.

Whether there was conclusive evidence of all the ingredients of defilement

22. Relying on the case of Charles Wamukoya Karani vs Republic, Criminal Appeal No. 72 of 2013 where it was stated that:- "The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

23. On the age of the victim, the court of Appeal in Edwin Nyambogo Onsongo vs Republic (2016) eKLR, the court stated as follows in respect of proving the age of the victim in cases of defilement:

> " ....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.

24. PW1 testified that she was in class 6 in March 2021. PW2, the complainant's maternal uncle testified that the minor was 14 years old. PW4, Dr. Beth Gachungia testified that the minor was 14 years old and PW5, a nurse who treated the victim testified that the victim was born in the year 2007. From the record, it is evident that the evidence of the victim and that of the prosecution witnesses confirm that the minor was 14 years at the time of the incident. Furthermore, the medical evidence particularly the SGBVSS Medical summary Sheet indicates that PW1's date of birth as 30th May 2007 and the PRC Form and P3 Form both show that the minor was born in the year 2007 and was 14 years old at the time of the incident. It is therefore my considered view that the prosecution proved the age of the minor.

25. Section 2(1) of the *Sexual Offences Act* defines penetration as:

> " The partial or complete insertion of the genital organs of a person into the genital organ of another person."

26. On the element of penetration, PW1 testified that she was living in their rural home with her grandmother when her mother went and took her and they went to live with the appellant known as Msafi. She further testified that her mother would return home drunk and she would sleep out. She further testified that although her father sent her mother money to take her to school, her mother failed to take her to school. The witness testified that on diverse dates between March and September 2021 she was living with the appellant after her mother had left when at around 10pm the appellant had asked her if she knew about sex and when she told him that she did not know, he told her that he would teach her. She further testified that Msafi told her to remove her clothes and he inserted his penis into her vagina and he left afterwards as he was tired. The victim testified that Nancy came for her and they went to Dave's place. She further testified that the appellant defiled her twice and on Sunday he told her to remove her clothes and had sex with her, afterwards he was called to work with his friends.

27. Dr. Beth Gachungia, a doctor at Ruiru Level 5 Hospital, PW4 testified that she examined the minor and filled the P3 Form. The doctor testified that she examined the minor upon receiving a report from Mwihoko police station to physically examine the victim who had been defiled between March and September 2021 by someone known to her. Upon examination, the doctor stated that she found that the minor's hymen had old tears and there was white discharge from her vagina. Furthermore, the doctor testified that the minor was pregnant. PW4 produced the P3 Form as an exhibit.

28. Joan Machogu, a nurse at Kasarani Health Centre, PW5 testified that she examined the minor at their facility on 21st September 2021 and filled the SGBV Report and PRC Form. The witness testified that upon examination she found that the minor's hymen had old tears at 3 and 9 o clock and that she was pregnant. PW5 produced the SGBV Report and the Post Rape Care Form as exhibits.

29. To prove penetration, the key evidence in a defilement matter is the complainant's testimony which is usually corroborated by the medical evidence. Thus the evidence of PW1 is corroborated by the

medical evidence adduced by PW4 and PW5. PW4 and PW5 pointed out that the examination done on PW1 revealed that her hymen had old tears and further that she was pregnant. Thus the inevitable conclusion from the analysis of the evidence is that there is ample evidence to prove that penetration did occur.

30. On the issue of identification, PW1 testified that she lived with her mother and the appellant before her mother left. The witness further referred to the appellant as Msafi and testified that on one occasion they went to his place with her aunt. The minor testified that Nancy took her to the appellant's house and she took her clothes. Thus the appellant was well known to the complainant. This was a case of recognition and not simple identification. Although the appellant claimed that he lived alone, he did not refute that he stayed with the minor and her mother in the same house. Neither did he dispute the relationship he had with the complainant's mother. Furthermore, the appellant did not deny that he was known as Msafi but only raised the issue of his identification on appeal. The evidence of PW1 identifies the appellant as the perpetrator. It is thus my considered view that the appellant was positively identified by the victim.

31. The appellant has complained that the minor's evidence ought to have been corroborated. It is trite law that in sexual offences cases, pursuant to Section 124 of the *Evidence Act*, corroboration of evidence by the victim is not a mandatory requirement as long as the court believes the victim is telling the truth and records the reasons for believing the victim. On perusal of the record, the trial magistrate conducted a voir dire examination on the complainant and the noted that the minor was intelligent enough to give rational answers to questions put to her and that she understood the purpose and nature of oath. Thus, the trial magistrate directed that the minor gives sworn evidence. The learned magistrate further observed that the minor did not appear to have been coached and her evidence remained firm on cross examination. I have perused the trial court's proceedings and noted that PW1's evidence was precise and consistent and unshaken on cross examination. It is trite law that PW1's evidence does not require corroboration by any other evidence save for medical evidence as provided for under Section 124 of the *Evidence Act*. The medical evidence of PW4 and PW5 was to the effect that there was forceful penetration which was found credible by the trial court. The corroboration of PW1's evidence by that of by PW4 and PW5 was sufficient under the law.

32. The appellant argues that the prosecution did not call crucial witnesses to prove its case, in particular, that of one Ann who would have shed light on what the complainant told her and also confirm his identity.

33. It is trite law that the prosecution is required to avail to the court all relevant evidence to enable the court make an informed decision based on the evidence available. However, there is no legal requirement on the number of witnesses to prove a fact. Section 143 of the *Evidence Act* (Cap 80) Laws of Kenya provides:-

> No particular number of witnesses shall in the absence of any provision of law to the contrary, be required for the proof of any fact.

34. In the case of Bukenya & Others vs Uganda [1972]EA 549 the court addressed itself thus:-

    a. The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

    b. That the Court has the right and duty to call witnesses whose evidence appears essential to the just decision of the case.

35. Similarly in Keter vs Republic [2007] 1 EA 135 the court held inter alia thus:-

> " The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."

36. It is evident here that the prosecution did in fact call the material witnesses whose evidence as a whole it assessed to be sufficient. Failure to call a witness will only be fatal if the evidence presented by the prosecution is insufficient to sustain a conviction and contains gaps which could have been filled by a witness who was not called to testify. PW1 gave a consistent account of how the appellant defiled her on the material day. She told the court that at the time the appellant defiled her twice with the first incident occurring at 10pm where he asked her if she knew about sex and then proceeded to tell her that he would teach her about it. The appellant then inserted his penis into her vagina and when he finished defiling her he left. The second occasion occurred on a Sunday when the appellant told the minor to remove her clothes and had sex with her and left for work after getting a call from his

friends. Furthermore, on cross examination, the complainant's evidence was not shaken as she maintained that the appellant defiled her. The trial court found that the complainant's evidence was consistent and clear and was not shaken on cross examination by the appellant as she maintained that the appellant defiled her. The trial court further observed that the appellant was well known to the complainant as she lived with him in the same house for a long while. The omission by the prosecution of not calling Ann as a witness was not prejudicial to the appellant as the complainant gave a cogent account of how the appellant defiled her. He was a person well known to the victim. According to the law, the prosecution is an independent entity and ought not to consult any one as to who to summon as a witness. Furthermore, a case will not be proved according to the large number of witnesses but by the quality of the evidence adduced.

37. The appellant argues that the prosecution's case was filled with material inconsistencies and contradictions thus creating doubt on the alleged offence. Relying on the case in the Court of Appeal Tanzania of Dickson Elia Nsamba Shapwata & Another vs The Republic Cr App. No. 92 of 2007, addressed the issue of discrepancies in evidence and concluded as follows:-

> " In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

38. The appellant argues that the testimony of PW2 and PW1 was contradictory. PW2 testified that only the mother of PW1 was loitering whereas PW1 testified that her mother was loitering with her daughter, the victim herein. The appellant further argues that the victim was not clear as to who was responsible for her pregnancy and the prosecution was silent on the issue. The issues raised by the appellant on loitering and on the pregnancy are not material to the offence of defilement. As such, any inconsistency on the two issues is not material in this case. After all, the inconsistencies are minor and do not go to the root of the ingredients of the offence. After careful analysis of the evidence, I am of the considered view that the prosecution established all the ingredients of the offence. As such, this case was proved beyond any reasonable doubt.

Whether the sentence is harsh and excessive

39. The Court of Appeal, on its part in Bernard Kimani Gacheru vs Republic [2002] eKLR restated that:-

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence, unless that sentence is manifestly excessive in the circumstances of the case or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

40. Section 8(3) of the *Sexual Offences Act* No. 3 of 2006 provides that:-

> A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

41. The Supreme Court decision in Republic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment) held that:-

> Mandatory sentences left the trial court with absolutely no discretion such that upon conviction, the singular sentence was already prescribed by law. Minimum sentences however set the floor rather than the ceiling with regards to sentences. What was prescribed was the least severe sentence a court could issue, leaving it open to the discretion of the courts to impose a harsher sentence.

The judgment of the Court of Appeal delivered on October 7, 2022 was one for setting aside. In any case, the sentence imposed by the trial court against the respondent and affirmed by the first appellate court was lawful and remained lawful as long as Section 8 of the *Sexual Offences Act* remained valid. The Court of Appeal had no jurisdiction to interfere with that sentence.

42. Taking into consideration the nature and circumstances of the offence, the mitigation given by the appellant and the ramifications of the appellant's actions on the child's future, it is my considered opinion that the sentence of 16 years was lawful and reasonable. The trial court took into account the period the appellant spent in custody when meting out the sentence pursuant to Section 333(2) of the Criminal Procedure Code. For that reason, the appellant was sentenced to serve sixteen (16) years imprisonment instead of the minimum of not less than twenty (20) years as provided by Section 8(3) of the Act.

43. Consequently, the conviction and sentence are hereby upheld.

44. Having found no merit in the appeal, it is hereby dismissed.

45. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALY, DATED AND SIGNED AT THIKA THIS 29TH DAY OF JANUARY 2026.

F. MUCHEMI

JUDGE