DG v Republic (Criminal Appeal 153 of 2019)
[2026] KECA 674 (KLR) (25 March 2026) (Judgment)

Neutral citation: [2026] KECA 674 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 153 OF 2019

J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA

MARCH 25, 2026

BETWEEN

DG ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Meru (Sitati, J.) dated 27th July, 2018 in HCCRA. No. 66 of 2017)

JUDGMENT

1. DG(the appellant) was arraigned before the Chief Magistrate's Court at Meru, and charged, in Count I, with the offence of defilement contrary to Section 8(1) (3) of the *Sexual Offences Act*. The particulars of the charge alleged that on 5th February, 2015, at [Particulars Withheld], Rwarera Location in Buuri District within Meru County, the appellant intentionally caused his penis to penetrate the vagina of F.N., a child aged 12 years. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on the same date and place, the appellant committed an indecent act to F.N., by causing his penis to come into contact with her vagina.

2. In count II, the appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section8(2) of the *Sexual Offences Act*. The particulars of the charge were that on 5th January 2015, at 10.00 p.m., in Buuri District, Rwarera Location, [Particulars Withheld] of Meru County, the appellant intentionally caused his penis to penetrate the vagina of W.K., a child aged 9 years. The appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on the same date and place, the appellant committed an indecent act against W.K., a child aged 9 years, by causing his penis to come into contact with her vagina.

3. The appellant denied all the charges. At trial, the prosecution called six (6) witnesses. The appellant, who was the grandfather of the two complainants, was alleged to have visited their home on 5th February, 2015. PW1, W.K., testified that on that date, the appellant requested their mother to allow PW1 and her sister, PW2, to accompany him to his house so that they may cook food for him. PW1 recalled that they went to the appellant's house and cooked for him. Darkness fell. The appellant asked them to spend the night. PW1 stated that the three of them slept on the same bed. That night, the appellant undressed her and inserted his penis in her vagina. The following day, he gave her Kshs.5 and gave PW2 Kshs.20. On a later date, she informed her mother what had transpired at the appellant's house. Her mother took them to hospital for medical examination.

4. PW2, F.N., told the court that she was 13 years old. It was her evidence that on 5th February, 2015, the appellant came to their home and asked her and PW1 to go to his house and cook food for him. She testified that they used to cook for the appellant whenever their grandmother was away. It was her evidence that after they had cooked and ate the food, they went to sleep with the appellant on the same bed. It was her testimony that on that particular night, she slept in the middle, with the appellant on one side and PW1 on the other. That night, the appellant removed her dress and panty, and proceeded to insert his penis in her vagina. The appellant bought her a pair of shoes the next day. PW2 testified that the appellant had sex with her on two other occasions, and that he bought her a dress on one occasion, and on another gave her Kshs.150. She stated that PW1 informed their mother that the appellant had had sexual intercourse with PW2. When their grandmother questioned her about it, she admitted it. It was her testimony that they reported the matter at Tutwa Police Station. They were later escorted to Meru General Hospital for treatment.

5. The mother to the complainants, AK (PW3), testified that on 5th February, 2015, the appellant requested her daughters (PW1 and PW2) to go to his house and cook for him. They spent that night at the appellant's house. The following day, the complainants went to school and came back home in the evening. The appellant called them to go to his house again that evening. They went and came back home at about 8.00 p.m. PW1 was crying. PW1 told her that the appellant wanted them to spend the night at his home. However, she did not want to. The following day, PW3 asked PW1 why she was crying. That was when PW1 told her that the appellant had defiled PW2 the previous night on 5th February, 2015, when they spent the night at his house. PW1 told PW3 that they slept on the same bed, and that she heard the appellant ask PW2 to remove her clothes. The appellant then lay on top of PW2 and defiled her, and that he gave Kshs.150 the following morning. PW3 asked PW2 to confirm the information she had just heard from PW1. PW2 confirmed it. PW3 testified that she reported the matter to the area elder, who took them to a police station at Tutwa. She thereafter took the complainant to Meru General Hospital for medical examination.

6. PW4, Police constable John Kiritu, investigated this case. It was his evidence that PW3 came to Tutwa Police Station on 7th February, 2015, and reported that she had received information from her younger daughter (PW1) that the appellant had defiled her other daughter (PW2), on 5th February, 2015. PW3 reported that the appellant had been giving her daughters money to buy their silence. PW4 recalled that he interviewed PW2, who confirmed that the appellant had defiled her on the material night. PW4 stated that in the course of his investigations, PW1 informed him that the appellant had also defiled her on 5th January, 2015, while she was at his house. PW4 testified that he issued the complainants with P3 forms. They were escorted to hospital for medical examination. He testified that he was unable to immediately arrest the appellant since the appellant went into hiding after the incident was reported. On 28th September, 2015, a daughter-in-law of the appellant went to the police station and reported that the appellant had made sexual advances towards her. The police accompanied her to the appellant's home and arrested him. The appellant was subsequently charged with the offences.

7. PW5, Kelvin Mwania, a clinical officer at Meru Level Five Hospital, testified that he examined the two complainants on 7th February, 2015. The complainants were alleged to have been defiled by their grandfather at his home. It was his evidence that PW1 had normal external genitalia, and that her hymen was intact with no lacerations. PW2 had normal genitalia, but her hymen was broken. PW5 produced their post rape care forms in evidence.

8. The complainants' P3 forms were filled by Dr. Paul Wambugu, and produced in court on his behalf by PW6, Dr. James Kisilu. According to the P3 forms, both PW1 and PW2 had normal external genitalia, but their hymens were broken. The forms were filled on 13th February, 2015. PW6 further produced the complainants' age assessment reports, which estimated that PW1 was between ages 10-11 years, while PW2 was between ages 15-16 years.

9. When the appellant was placed on his defence, he opted to give sworn evidence. He denied sexually assaulting the complainants. He attributed his troubles to the desire by his sons to take over his parcel of land. He stated that according to medical evidence, the complainants were not defiled.

10. At the conclusion of the trial, the learned magistrate determined that the case against the appellant with respect to count II was not sufficiently established by the prosecution. He was acquitted of the charge. The appellant was however found guilty and was convicted in Count I on the main charge of defilement. He was sentenced to serve twenty (20) years imprisonment.

11. The appellant, aggrieved by this decision, challenged the same before the High Court at Meru. According to the appellant, the learned trial magistrate erred in law and fact: by finding that the prosecution's case was proved beyond reasonable doubt; by failing to note that no exhibits were availed by the prosecution linking him to the said offences; by failing to note that the evidence by PW4 was inconclusive; by failing to appreciate that the charge sheet as drafted was defective as it did not indicate the sex, age and nationality of the appellant; and, by rejecting the appellant's defence without giving cogent reasons.

12. Upon review of the trial court record and the evidence adduced, the first appellate court found that the prosecution had proved all the essential elements of the offence of defilement as alleged in Count I. However, in view of the relationship between the appellant and PW1, the learned Judge held that the proper charge ought to have been incest. Consequently, the court substituted the appellant's conviction with one for incest contrary to Section 20(1) of the *Sexual Offences Act*, and affirmed the sentence of twenty years' imprisonment.

13. The appellant is now before us seeking to overturn the decision of the High Court. He has advanced five (5) amended grounds of appeal challenging the said verdict. The appellant faulted the learned first appellate Court Judge: for ignoring the expert evidence by PW5 and PW6; for failing to find that the case against him was not sufficiently proved by the prosecution; for failing to appreciate that the evidence by the prosecution witnesses was contradictory; for not properly considering his defence; for failing to take into account his mitigating circumstances and especially the fact that he was an old man of 79 years of age.

14. The appeal was heard by way of written submissions. The appellant appeared in person. It was his submission that elements forming the offence of defilement were not sufficiently established by the prosecution. He urged that medical evidence adduced did not support the evidence of penetration. He stated that PW2's age was not proved beyond reasonable doubt, and that though PW2 stated that she 13 years old, the age assessment report indicated that she was between the ages of 15-16 years. It was his submission that suspicion, however strong, cannot form the basis for a conviction. In summary,

he urged us to allow his appeal, quash his conviction and set aside the sentence affirmed by the first appellate court.

15. In rebuttal, learned prosecution counsel, Ms. Nandwa, was of the view that the prosecution proved its case against the appellant to the required standard of proof beyond any reasonable doubt. It was her submission that PW2 told the court that she 13 years old, at the time she gave evidence before Court. She asserted that PW2's mother testified that PW2 was 12 years old when the incident occurred. She urged that the age assessment, which was undertaken on 6th September, 2016, placed PW2 between the ages of 15 and 16 years. She reiterated that the evidence on record sufficiently established that PW2 was a minor at the material time, and that she was 12 years old when the appellant defiled her.

16. Ms. Nandwa further submitted that the fact that the appellant was PW2's grandfather was not contested. She urged that due to the said relationship, PW2 was able to positively identify the appellant as the perpetrator. This was further because the appellant had defiled her on more than one occasion. It was her submission that PW2's evidence was supported by that of PW1.

17. With respect to penetration, counsel maintained that the same was established by PW2's oral evidence, and supported by the medical evidence adduced by PW5. She submitted that the appellant's defence was mere denial, and did not displace the prosecution's evidence against him. She was emphatic that the appellant's claim that he was framed by his sons over a dispute concerning his land was unfounded, noting that the record indicated that his son in fact attempted to obstruct the investigations to prevent the appellant from being charged. It was her contention that the custodial sentence of twenty (20) years that was imposed on the appellant was appropriate in the circumstances, given the fact that the appellant repeatedly defiled the complainant. She further submitted that the appellant's subsequent arrest following allegations of sexual assault by another complainant demonstrated that he was a sexual predator. In the premises, Ms. Nandwa urged us to dismiss the appeal.

18. This is a second appeal. The mandate of this Court on a second appeal was aptly stated in the case of Dzombo Mataza v Republic [2014] eKLR, where this Court expressed itself in the following terms;

> "As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court.... By dint of the provisions of section 361(1) (a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong."

19. As the second appellate Court, we lack jurisdiction to consider matters of fact especially where the two courts below have reached concurrent finding of fact unless the appellant is able to establish that the two courts before failed to evaluate the facts in accordance with the law, thus making the issue one of law rather than facts.

20. In the present appeal, the prosecution was required to establish the following ingredients to prove the charge of incest:

    1. Penetration
    2. The age of the victim
    3. The identity of the perpetrator
    4. That the perpetrator and the victim are related

21. As regards penetration, PW2 testified that on the material night of 5th February 2015, the appellant requested her mother PW3 to allow her daughters (the appellant's granddaughters) (PW1 and PW2) to go to his house and cook him a meal. PW2 testified that the appellant usually made the request when their grandmother (the appellant's wife) was away. PW3 allowed PW2 and her sister to go to the appellant's house.

22. After they had cooked and eaten supper, the appellant requested them to spend the night with him. They agreed. They slept on the same bed with the appellant. During the night, the appellant ordered PW2 to remove her clothes, including her panties. PW2 complied. She testified that the appellant had sexual intercourse with her against her will. On the following day, they went to school. On returning to their home in the evening, the appellant again requested them to go to his house and cook for him. This time PW1 and PW2 refused. Upon inquiry being made by their mother (PW3), PW2 disclosed that she had been sexually assaulted by the appellant.

23. PW3 made a report to the Police at Tutwa and thereafter took PW2 for medical attention at Meru General Hospital. PW2 was examined by PW5, a clinical officer at Meru Level 5 Hospital and later by Dr. Paul Wambugu who prepared a P3 which was produced by the prosecution in evidence. They both confirmed that indeed PW2 had been sexually assaulted.

24. PW2's oral testimony and medical evidence established to the required standard of proof that indeed PW2 had been penetrated. We therefore hold, just like the two courts below, that the prosecution proved penetration to the required standard of proof. 25.As regards the age of PW2, PW2 testified that she was 13 years at the time of the sexual assault. The age assessment report prepared at Meru Level 5 Hospital estimated the age of PW2 to be between 15 and 16 years. There was therefore a discrepancy in the age of the complainant. Did this discrepancy dent the prosecution's case? We do not think so. Both ages adduced in evidence established that the complainant (PW2) was a child within the meaning ascribed to the term under section 2 of the *Children Act*. Even if we were to agree with the appellant that the complainant's age was between 15 and 16 years, that age still makes the complainant a child. We therefore hold that the prosecution established to the required standard of proof that the complainant was a child and therefore lacks capacity to give consent to sexual intercourse.

26. As regards who the perpetrator was, the complainant testified that the appellant, her grandfather, lured her into his bed after which he ordered her to remove her clothes and panties before sexually assaulting her. The identity of the perpetrator was not therefore in doubt. The appellant was known to the complainant since birth. We therefore hold, just like the two courts below, that the prosecution proved to the required standard that it was the appellant that defiled the complainant. The prosecution further established that the complainant was related to the appellant by the fact that she was the appellant's granddaughter. The charge of incest was therefore established to the required standard of proof.

27. On sentence, the appellant was sentenced to serve twenty years imprisonment. That is the minimum sentence provided under section 8(3) of the *Sexual Offences Act*. The Supreme Court in Republic V Mwangi; Initiative for Strategic Litigation in African (ISLA) & 3 Others (Amicus Curiae) [2024] KESC 34 (KLR) held that minimum sentences particularly those provided under the *Sexual Offences Act* are legal unless otherwise repealed. We therefore hold, just like the two courts below, that the sentence that was imposed on the appellant was legal. We cannot interfere with the same.

26. For the above reasons, it is clear that the appeal lacks merit and is hereby dismissed.

27. This Judgment has been delivered pursuant to Rule 34(3) of the

Court of Appeal Rules.

DATED AND DELIVERED AT NYERI THIS 25TH DAY OF MARCH, 2026.

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR