Emathe v Republic (Criminal Appeal 185 of 2017)
[2026] KECA 651 (KLR) (25 March 2026) (Judgment)

Neutral citation: [2026] KECA 651 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 185 OF 2017

S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA

MARCH 25, 2026

BETWEEN

STEPHEN EMATHE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nanyuki (Kasango, J.) dated 8th November 2017 in HCCRA No. 157 of 2015)

JUDGMENT

1. Stephen Emathe, the appellant herein, is before this Court by way of a second appeal, his first appeal having been dismissed by the High Court (Kasango, J.) on 8th November 2017.

2. The appellant had been charged before the Chief Magistrate's Court at Nanyuki, with the offence of defilement, contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. ('the Act'). The particulars of the offence were that, on 7th October 2014 at xxxx Village in Laikipia County, he caused his penis to penetrate the vagina of J.A., a child aged 9 years.

3. {He also faced an alternative charge of committing an indecent act with a child, contrary to section 11(1) of the Act. The particulars were that on 7th October 2014, at xxxx Village in Laikipia County, the appellant committed an indecent act with a child, by allowing his penis and hands to come into contact with the vagina of the said J.A., a child aged 9 years.

4. The appellant pleaded not guilty to both counts, and the matter proceeded to trial, where the prosecution called 6 witnesses. The appellant was found to have a case to answer and was placed on defence. Upon considering the evidence, the trial magistrate convicted the appellant of the offence of defilement and sentenced him to life imprisonment. The appellant was dissatisfied with the verdict and appealed to the High Court, which dismissed the appeal; the conviction and sentence were affirmed.

5. The appellant, aggrieved by the High Court's decision, preferred this appeal. Before addressing the grounds, we will summarize the evidence presented in the trial court in brief in order to put the matter into context.

6. PW1, E.E, the complainant's mother, testified that on 7th October 2014, at around 5:00 pm, the appellant, who was an employee of her neighbour, went to her house; he was drunk.

   At approximately 7:00 pm, PW1 sent her daughter PW2 (J.A., {complainant), to fetch paraffin from their neighbour, MM. The appellant also left at the same time, and PW1 assumed he had gone to use the washroom. After about 15 minutes, when her daughter had not returned, PW1 went to MM's house and learnt that her daughter had not been to MM's. They began searching for the PW2 everywhere, and on returning home, she found that PW2 had returned.

7. PW1 further testified that she started to beat her daughter, demanding to know where she had been, as her neighbour had mentioned to her that she had seen PW2 with the tall man. PW2 opened up and told her that the appellant had dragged her into the bush and had done bad things to her. After the incident, the appellant disappeared but returned later and was arrested by the police. PW2 was taken to the hospital for treatment, and a P3 form was filled out. PW2 was 9 years old at the time of the incident.

8. PW2, J.A., testified that she knew the appellant and that he had done bad things to her. Her mother (PW1) had sent her to buy paraffin, and the appellant, who was at their home, followed her and told her that PW1 had sent him to escort her. He held PW2's hand and took her to a bush near Mama Shiro's home. The appellant removed both his and her clothes. He took off PW2's underwear and lay on top of her and covered her mouth with his hands. She saw the appellant's 'thing'. He placed it in her private part and that it was bad. When the appellant was done, they went home. When she got home, she met her mother (PW1), who started to beat her, and the appellant ran away but returned later. PW2 then told her mother what the appellant had done to her. As a result, the appellant was arrested and taken to the police.

9. PW3, Cypriane Mwirigi, testified that on 7th October 2014, he went to bed at around 7:00 pm because he was feeling unwell. He was informed by a woman named Eunice that a man was being attacked by a mob. PW3 rushed to the scene and found the appellant being beaten. He did not know the reason behind the mob's actions. He called the assistant chief, Madam Kawira, to report what was happening. The appellant was tied with tape. PW3 informed the mob that the assistant chief had ordered them to take the appellant to the police station, and they did so. He did not follow them to the police station.

10. PW4, PC Salome Nzilani, the investigating officer, testified that the appellant was arrested by members of the public and brought to the police station. The Occurrence Book indicated that the appellant was alleged to have defiled a child. Further, PW2 and the appellant had been referred to the hospital. PW4 issued a P3 form, which was completed, and she recorded statements regarding the incident. She gathered information that the complainant had been sent by her mother to the shop, but it took her too long to return home. As a result, the mother and the other villagers began searching for her. Later, PW2 returned and claimed that she had been with the appellant, who had defiled her. The appellant was later identified and apprehended by members of the public. PW4 subsequently charged the appellant with the offence.

11. PW5, Ronald Mutai, a clinical officer, testified that he completed the P3 form for a 9-year-old complainant who was allegedly defiled by someone she knew. She was taken to the hospital the same night. Upon examination, the hymen was absent, and there were blood stains with a few pus cells. No sexually transmitted diseases (STDs) were detected, and no sperm was found. However, there was

evidence of recent penetration. PW5 signed the P3 form on 10th October 2014. Additionally, a rape care form was issued to the complainant.

12. PW6, L.L., PW2's father, testified that on 7th October 2014, he arrived home at around 5:00 pm and found the appellant outside his house. The appellant was looking for PW6's neighbour, Embuai. PW6 did not engage the appellant, who kept going and coming and sending PW2 on small errands. Later, PW1 sent PW2 to buy paraffin, and the appellant followed her. After some time, PW2 did not return home, prompting them to start looking for her. Eventually, PW2 came back home with the appellant. When PW1 asked PW2 where she had been, PW2 revealed that she was with the appellant and that he had done bad things to her. PW1 called another woman to check PW2, and they confirmed that she had been defiled. The incident was reported to the police, leading to the appellant's arrest.

13. {At the close of the prosecution's case, the trial court found the appellant had a case to answer, and he was put to his defence. DW1, the appellant, denied the offence and elected to give an unsworn testimony. He stated that on 7th October 2014, at 3:00 pm, he left his home to sell miraa in the Ngendo area. He passed through a certain village in search of a man named David, who owed him money. He stopped at a plot and found PW1, who was his friend. They were taking traditional liquor (Chang'aa), and PW1 informed the appellant that Daniel had gone to work and would return by 5:00 pm. The appellant was invited into PW1's house, but he declined. Afterwards, he went to his workplace, where he sold miraa.

14. The appellant further testified that he returned to the village at 5.00 pm and visited the same plot he had visited earlier. While at the gate, he heard a child crying. PW1 was beating PW2. The appellant tried to intervene by asking her to stop beating PW2, but PW1 turned on him and demanded to know where the appellant was with PW2. She then began to scream, attracting many people to the scene, who confronted him and questioned his intentions towards PW1.

15. He stated that the women said they wanted to check on PW2 to confirm whether she had been defiled. They entered the home and later came out, reporting that PW2 was okay, but that there was some discharge. One of the individuals at the scene contacted the chief, who then ordered that the appellant be taken to the police. He testified that his phone, Kshs. 7,000, a cap, and a wristwatch were stolen. The appellant was taken to the police station, where he was charged with the offence.

16. The trial court, having considered the evidence by both the prosecution and the defence, was persuaded that the appellant had committed the offence. He was convicted and sentenced to life imprisonment. The appellant appealed against both conviction and sentence to the High Court; the appeal was dismissed, the conviction affirmed, and the sentence confirmed.

17. Aggrieved by the conviction and sentence, the appellant lodged the instant appeal by filing undated grounds of appeal containing the following grounds: both lower courts erred in the conviction and sentence; the prosecution evidence was uncorroborated and fraught with inconsistencies; the court failed to recognize that the evidence adduced on injuries sustained by the complainant was inconsistent; no treatment notes were provided to confirm the contents of the P3 form and PCR form; key witnesses were not summoned to testify and the court did not consider the appellant's credible defence, which undermined the prosecution's case.

18. The appellant has filed undated written submissions. On ground 1, the appellant argues that both courts erred in law by failing to require medical, forensic, and scientific evidence (specifically DNA) to corroborate the defilement charge, as mandated by section 36 of the *Sexual Offences Act*. He contends that without such evidence, the defilement was not proven to the required legal standard, and the courts should have warned themselves against convicting based solely on the minor's testimony, especially given the ease with which such stories can be fabricated. In support he cited Mutonyi vs.

Republic [1982] KLR 203, where this Court held that on matters of corroboration, an important element in the definition of corroboration is that it affects the accused by connecting him or tending to connect him with the offence or crime, confirming not only the evidence that the crime has been committed but also that it is the accused who committed it.

19. On ground 2, the appellant contends that the complainant's testimony was obtained through duress, threats, and intimidation as the minor was allegedly beaten by her mother, which contravenes section 26 of the *Evidence Act* and section 33 of the Act. He argues that this renders the trial unfair, null, and void, and the evidence should have been excluded under Article 50(4) of *the Constitution*.

20. On ground 3, the appellant asserts that both courts ignored his mitigation, thereby violating sections 216 and 329 of the Criminal Procedure Code. He claims that this oversight constitutes a violation of his fundamental rights during the trial, rendering the trial unfair, null, and void. He also argues that this situation led to discrimination, contrary to Articles 27(1) and 27(2) of *the Constitution*, which guarantee equal treatment in the trial process.

21. On ground 4, concerning the harshness of the sentence imposed, the appellant argues that it is inhuman and degrading, and violates Articles 25(a), 28, and 29(f) of *the Constitution*. He specifically challenges the indeterminate life sentence, arguing that it fetters judicial discretion, is inconsistent with international law on rehabilitation, and is unconstitutional. He also highlights his acquired skills and association with the Muslim faith as evidence of rehabilitation.

22. Furthermore, the appellant contends that if a prisoner is incarcerated without the possibility of release or review of their sentence, there is a greater risk that they may never atone for their offence. Regardless of any progress made toward rehabilitation while in prison, the punishment remains fixed and unreviewable. This principle aligns with Articles 2(5) and (6) of *the Constitution*, which state that the general rules of international law and any treaties ratified by Kenya shall form part of the Law of Kenya.

23. The appellant relies on Evans Wanjala Wanyonyi vs. Republic [2019] KECA 679 (KLR) and Jared Koita Injiri vs. R, Kisumu Criminal Appeal No. 93 of 2014, where this Court considered the legality of minimum mandatory sentences under the *Sexual Offences Act*.

24. In opposition, the respondent has filed submissions dated 25th September 2023. On uncorroborated and inconsistent prosecution evidence, the State argues that the victim's evidence was corroborated by other witnesses and medical findings (P3 and PRC forms) showing a missing hymen and recent penetration. Furthermore, the State emphasises that for sexual offences, corroboration is no longer a mandatory legal requirement. Reliance is placed in the case of J.W.A vs. Republic [2014] eKLR and Mohamed vs. Republic 2KLR 138.

25. On ground 2, counsel for the respondent argues that the failure to produce treatment notes was not fatal to the prosecution's case, as the P3 form alone is sufficient. It is noted that the contents of the P3 form and the PRC form were never challenged by the appellant. The law is now settled that sexual assault can be proven by evidence rather than solely through medical examination. Testimony from the victim or even circumstantial evidence can suffice to prove rape or defilement, depending on the case, as stated in Kassim Ali vs. Republic [2006] eKLR.

26. On ground 3, on failure to summon key witnesses, the State asserts that calling witnesses is at the prosecution's discretion, and an appeal court will only interfere if there's evidence of oblique motive, citing Julius Kalewa Mutunga vs. Republic, Criminal Appeal No.32 of 2005. The State contends that it called all the relevant witnesses to support its case. The appellant has not demonstrated that the decision not to call additional witnesses was driven by any improper motive. Ultimately, the State

argues that the appeal lacks merit and urges the Court to dismiss it in its entirety, upholding the findings of both the trial court and the High Court.

27. This is a second appeal, and our mandate is defined in section 361 of the Criminal Procedure Code as follows:

    1. A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section—

        a. on a matter of fact, and severity of sentence is a matter of fact; or

        b. against sentence, except where the High Court has enhanced a sentence, unless the subordinate court had no power under section 7 to pass that sentence.

    2. On any such appeal, the Court of Appeal may, if it thinks that the judgment of the subordinate court or of the first appellate court should be set aside or varied on the ground of a wrong decision on a question of law, make any order which the subordinate court or the first appellate court could have made, or may remit the case, together with its judgment or order thereon, to the first appellate court or to the subordinate court for determination, whether or not by way of rehearing, with such directions as the Court of Appeal may think necessary.

27. This Court in the case of Karingo vs. Republic [1982] KLR 213, expounded on the Court's mandate as follows:

> "A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari c/o Karanja vs. R (1956) 17 EACA 146)."

27. Having considered the record and submissions by counsel, we are of the view that the issues for consideration before us are: whether the prosecution proved its case beyond any reasonable doubt; whether the defence was ignored; and whether the sentence meted out was lawful.

27. The two courts below believed the facts of the case, and we, at this stage, are bound by their decisions. The evidence of PW2 was clear. She was known to the appellant, who held her hand, took her to the bush, and did 'bad things' to her. Pushed further, PW2 said he put his thing in her vagina, and she felt bad. Upon examination, PW5, the clinical officer noted that the hymen was absent and that there was evidence of recent penetration.

27. On proof and corroboration, the proviso to section 124 of the *Evidence Act* permits the court in sexual offences to rely on uncorroborated evidence of a sexual assault victim where the court believes the testimony of the victim. Such offences are committed discreetly and not openly in the glare of third parties. Apart from medical evidence, it is rare to obtain an eyewitness account. In the circumstances of the case, we agree with the two courts below that the evidence of defilement was established by PW2 and corroborated by PW4.

27. As for the defence, both courts considered the same, but found that it did not dislodge the cogent prosecution evidence. We do agree with that finding.

27. The severity of the sentence is not a matter of law as stipulated by section 361 (supra); we will not address the same, as it is not an issue within our mandate. We, however, restate that the sentence is lawful as prescribed by the Act.

27. In the end, the appeal fails and is dismissed in its entirety.

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

S. ole KANTAI

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL ALI-ARONI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR