Asiago v Republic (Criminal Appeal 140 of 2020)
[2026] KECA 773 (KLR) (24 April 2026) (Judgment)

Neutral citation: [2026] KECA 773 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 140 OF 2020

P NYAMWEYA, LA ACHODE & JM MATIVO, JJA

APRIL 24, 2026

BETWEEN

DENNIS ASIAGO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the Judgment of the High Court of Kenya at Nyamira (E.N Maina. J) delivered on 22{{^nd}} November 2018 in HCCRA No. 14 of 2016)

JUDGMENT

1. On the 2nd of November 2015, the appellant's trial ended at Keroka Principal Magistrate's Court with a conviction for the offence of defilement contrary to section 8 (1) as read with 8 of the Sexual Offence Act, (SOA). He was sentenced to life imprisonment. On appeal at Nyamira High Court, E.N Maina.J. upheld the conviction and affirmed the sentence, sparking the present appeal.

2. The chronicle of this appeal began with the appellant facing a charge of defilement contrary to section 8 (1) as read with 8 of the SOA at Keroka Principal Magistrate's Court. The particulars were that on 5th November 2012 he unlawfully and intentionally committed an act which caused penetration to the anus of L.A., a boy aged three and a half years old with his penis. That in the alternative, he committed an indecent act contrary to section 11(1) of the SOA, on the same date and place by intentionally touching the said minor's anus with his penis.

3. To bring this appeal into perspective we set out a brief summary of the case that was before the trial court.

4. The prosecution's case was presented by five witnesses. First on the stand was L.A, (PW1) a minor aged three years old. He testified without taking an oath and told the court that on the material day, the appellant accosted him at home and made him lie down on his side. The appellant removed his

trousers and using his penis did what the minor termed as "bad things" to his back side "where faeces come out." The minor later reported the incident to his grandmother.

5. Banjiri Nyagaka (PW2), the minor's grandmother who lived with him, confirmed that he was aged three and half years old at the material time. She noticed scratches on the minor's cheek when he was brought home by Josephine Mbera, (PW4). She asked him about them, and he told her that another child had scratched him. When she went to bathe him, she noticed that he had faeces, mucus-like substance, and a tear on his anus. She took him back to PW4 and together they interrogated him. The minor then told them that Dennis had defiled him. PW2 took him to hospital, and later reported the matter to the police. She stated that Dennis was the appellant and he lived nearby.

6. PW4 corroborated the evidence of PW2 stating that the minor came to her home crying and walking with difficulty. She asked him why he was crying but he did not answer. She took him to his grandmother, PW2. A short while later PW2 brought him back and PW4 was present when they examined him, and saw bruises on his anus with faecal matter and blood oozing out. The minor told them that Dennis had done "bad things" to him.

7. Joel Ongaro (PW3), a Clinical Officer at Kijauri hospital examined the minor on 6th November 2012 and noted lacerations in the anal region, with loose muscles and faecal incontinence. He concluded that the minor had been sodomised. PW3 also examined the appellant on 7th November 2012 and noted recent bruises on his groin and penis. He conducted an age assessment and found that the appellant's age was nineteen years.

8. Lumbasi Serah (PW5), received the report of the assault at Keroka police station on 6th November 2012 from PW2. Upon interrogating the minor, she noted that he and the appellant were known to each other. She saw the minor's treatment notes and issued him with a P3 form. The incident had already been reported to the area Assistant Chief and the appellant was arrested by members of the community.

9. At the close of the prosecution case, the appellant was found to have a case to answer. In his unsworn defence, he denied knowing the minor or having defiled him. He however, acknowledged that he knew PW2 and PW4 as his neighbours.

10. Hellen Nyanjama, the appellant's mother testified as DW2 on his behalf. She stated that the appellant was arrested on a different date from the date of the alleged offence and that she did not know whether the appellant did what he was accused of as she was not there.

11. At the close of the case, Hon. J.Mwaniki PM, the learned trial Magistrate, considered the evidence and found that the prosecution had proved its case to the required standard. He convicted the appellant and sentenced him to serve life imprisonment.

12. As expected, the appellant was aggrieved by the judgment and he appealed to the High Court at Nyamira on grounds that: penetration was not proved; there was inconsistency in the prosecution case; the prosecution did not prove its case beyond reasonable doubt; and, the sentence meted upon him was not warranted.

13. In a judgment dated 22nd November 2018, E. N. Maina J. considered the appeal and found that it had no merit. The learned Judge dismissed it and upheld the sentence imposed, observing that it was the minimum provided under the law.

14. The appellant was still dissatisfied with the judgement of the court, hence the present appeal. The grounds in his undated memorandum of appeal stated verbatim are that the courts below erred in law:

1. In not appreciating the contradictions, discrepancies and inconsistencies in the prosecution case that are inconsequential to conviction.

2. In not making a finding on lack of DNA test, in this case that had multiple evidential gaps and was fatal to conviction.

3. In making a finding that indeterminate, indefinite life sentence provided under section 8(2) of the SOA is minimum and constitutional and not manifestly excessive.

15. The appellant filed his submissions dated 15th August 2025 in person and urged that the Supreme Court decision in Republic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (2024) KESC 34 (KLR), did not affect life sentence under section 8(2) of the SOA. According to him, life sentence is not a minimum sentence as it does not meet the characteristics of a minimum sentence set out in Republic vs Mwangi (supra). He urged that an indeterminate, indefinite life sentence is discriminative and disenfranchises the appellant's dignity under Article 28, 27, 25(c), 50 (2) (p), and 29(f) of *the Constitution*. He relied on Manyeso vs Republic (Criminal Appeal No.12 of 2021) (2023) KECA 827 (KLR), where he states that guidelines were given in resentencing of life imprisonment. The appellant prayed for a least severe sentence should his appeal on conviction be dismissed.

16. The appellant also urged that, PW1, PW2 and PW4 gave contradictory evidence as to where the defilement took place, and whether PW2 and PW4 were present when PW1 was sodomised. Further, that the minor having told PW2 that the injuries on his face were caused by another child, could it be that the mentioned child sodomised him?

17. The appellant urged that a DNA test could have linked the victim to the defiler and was paramount to proving the prosecution's case. That there were gaps in the prosecution case and therefore, it was not proved beyond reasonable doubt.

18. In opposition, Mr. David Mwangi, the learned Principal Prosecution Counsel, filed submissions dated 25th August 2025 on behalf of the respondent and urged that the prosecution proved all the elements of defilement under section 8(1) as read with section 8(2) of the SOA.

19. Counsel submitted that the age of the minor was recorded as three years old. The minor explained to the court the ordeal he underwent and he identified the appellant as the perpetrator. That PW2 and PW4 identified the appellant as a neighbor. That PW3 found a laceration in the anal region with loose muscles and faecal inconsistence on the minor, and recent bruises on the groin and penis of the appellant when he examined the two.

20. Regarding the DNA test, counsel cited the case of Evans Wamalwa Simiyu v R [2016] KECA 555 (KLR), where this Court held that DNA is not mandatory to prove defilement and asserted that in the present case, the prosecution discharged the burden of proof.

21. Turning to sentence, counsel urged that unlike the case of Republic v Mwangi (supra), the present matter is an appeal and not a petition challenging the constitutionality of minimum sentences in the SOA and this Court lacks proper jurisdiction to aptly ventilate that issue. That the sentence imposed is valid and should be upheld. To buttress this argument counsel cited the case of Korir v R (Criminal Appeal 55 of 2019) [2025] 1095 (KLR), where this Court held that:

> " Sentencing is a matter of discretion by a trial court, and an appellate court must not replace its views on sentence with those of the trial court unless there are concrete grounds for doing so".

22. The appeal came before the Court for plenary hearing on 3rd September 2025. The appellant joined the proceedings virtually from prison in person, while Mr. Mwangi was present for the respondent. They both opted to rely on their filed submissions entirely without highlighting them.

23. This is a second appeal and by dint of section 361 of the Criminal Procedure Code the mandate of this Court is circumscribed to consideration of matters of law only and severity of sentence is a matter of fact and not law. The Court will not interfere with concurrent findings of facts arrived at in the two courts below, unless they were based on no evidence.

24. The was well stated in Karingo vs Republic [1982] KLR 213 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 v R (1956) 17 EACA 146)."

25. Upon considering the record and grounds of appeal, the rival submissions and the law, what arises for consideration in the appellant's grounds is whether: the contradictions and inconsistencies in the prosecution's case were fatal to its case; the absence of a DNA test to link the appellant to the offence, interfered with proper identification; and, the indeterminate and indefinite life imprisonment imposed upon the appellant was unconstitutional.

26. The appellant was convicted and sentenced under section 8(1) as read with section 8(2) of the SOA which provide that:

> "8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> 8(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."

27. For a conviction to be secured on the offence of defilement under the SOA, the prosecution must prove that there was penetration of the minor's genital organ by the accused. This was articulated in John Mutua Munyoki v Republic [2017] KECA 376 (KLR) by this Court as follows:

> "For an offence of defilement to be committed, the prosecution must prove each of the following ingredients:
>
> i. 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."

28. The appellant's contention was that he was not the perpetrator. He urged that the prosecution case was dented by inconsistencies and contradictions and he challenged the credibility of the prosecution witnesses. The respondent countered that the appellant was properly identified.

29. The superior court, considered the totality of the evidence touching on the ground that there were contradictions in the prosecution case and observed as follows:

> "The contradictions referred to by the Advocate for the appellant are in respect of the whereabouts of PW4 at the time of the commission of the offence. She was clear as to where she was – in the shamba – and as I have stated even independent of her witness this court believed the complainant. He was only a child, yet he was so clear regarding what the appellant did to him as to leave no doubt in my mind that he did it."

30. Contradictions in a prosecution case are not a novel thing. This Court has addressed this ground time and again. For example in Joseph Maina Mwangi v Republic [2000] KECA 282 (KLR) the Court held that:

> "In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of Section 382 of Criminal Procedure Code viz, whether such discrepancies are so fundamental as to cause prejudice to the appellant, or they are inconsequential to the conviction and sentence."

31. The approach in appreciating evidence is whether the evidence of the witnesses read as a whole, appears to have a ring of truth. Once that impression is formed, the Court should scrutinize the evidence keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether they are against the general tenor of the evidence given and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief.

32. Minor discrepancies on trivial matters not touching the core of the case, a hyper-technical approach by taking sentences torn out of context here or there from the evidence, or attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. (See - Supreme Court of India in State of U.P. v M.K. Anthony; Criminal Appeal No. 19 of 1976.)

33. Indeed, we note that there are inconsistencies and contradictions in the prosecution case. These are bound to occur in any trial, more so of this nature, where a child of tender years is involved. However, upon considering the case for the prosecution in totality, and following the reasoning in Joseph Maina Mwangi v Republic (supra), we are satisfied that the two courts below correctly found that the said inconsistencies and contradictions were inconsequential to the conviction and did not cause any prejudice to the appellant. We therefore, find no basis to interfere with the findings of the two courts below.

34. Next the appellant urged that a DNA test was the only way the prosecution could have identified the person who defiled the minor in this case, while the respondent asserts that a DNA test is not a requirement for proving penetration in sexual offences.

35. We reiterate that sexual offences are proved through any cogent and credible evidence and there is no requirement under our laws for the prosecution to produce DNA tests linking an accused person to the crime in a sexual offence. This is in line with the holding in AML v Republic [2012] KEHC 2554 (KLR) where the court held that:

> "The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."

36. This Court elaborated the position further in Geoffrey Kionji vs Republic CR. Appeal No 270 of 2010, as follows:

> "Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80, Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

37. The minor told PW2 and PW4 that the appellant defiled him. During the trial he gave a vivid account of what the appellant did to him. PW3 examined him and confirmed that he had been sodomised. PW3 also examined the appellant and noted that he had bruises on his groin and penis. We have examined the record to ascertain whether any error of law or miscarriage of justice was occasioned by the appellate court in affirming and upholding the findings of the trial court. It is evident from the record that the appellant was a person known to the minor. His identification as the perpetrator was by recognition.

38. In light of the evidence, and the holding in AML v Republic (supra) and Geoffrey Kionji vs Republic (supra), we find that the two courts below properly held that the prosecution proved its case beyond reasonable doubt.

39. Turning to the sentence, the appellant argued that the indeterminate nature of the sentence meted upon him is unconstitutional and is not the same as the minimum sentence referred to in Joseph Maina Mwangi v Republic (supra). The respondent on the other hand argued that this Court has no jurisdiction to ventilate on the constitutionality of the sentence in this appeal. That unlike Joseph Maina Mwangi v Republic (supra), this is an appeal and not a petition challenging the constitutionality of the minimum sentence. Further, that sentencing is a matter of discretion and that the appellate Court should not replace the sentence meted unless there is concrete ground to do so.

40. As stated earlier, section 361(1) of the Criminal Procedure Code bars this Court from interfering on matters of fact unless the findings arrived at in the two courts below, were based on no evidence. The section goes on to stipulate that severity of sentence is a matter of fact and not of law. section 361(1) provides that:

> "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 a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."

Therefore, we find first, that this Court lacks the jurisdiction to delve into the appeal on the excessiveness of the sentence being a matter of fact.

41. Secondly, on whether this Court can determine the constitutionality of the indeterminate nature of the sentence, we note that this was not one of the grounds of appeal before the superior court. For clarity, we reproduce the ground of appeal concerning sentence that was before the superior court hereunder:

> " 5. The learned trial magistrate misdirected himself in law and fact by not reaching a conclusion that the evidence as a whole and the seriousness of the offence and the punitive sentence provided by law did not reach the threshold of beyond reasonable doubt (sic)."

42. Consequently, since the issue of the constitutionality of section 8 (2) of the SOA was not before the first appellate Court, we cannot, on second appeal, consider it. The Supreme Court in Joseph Maina Mwangi v Republic (supra) rendered itself in no uncertain terms that the High Court has the original jurisdiction to hear a constitutional issue before it is escalated to this Court and eventually to the Supreme Court. This is what the apex Court held:

> " Before Kenyan courts can determine whether or not the above trends and decisions are persuasive, we reiterate that there ought to be a proper case filed, presented and fully argued
>
> before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. This was our approach and direction in Muruatetu which must remain binding to all courts below."

43. In any event, the Supreme Court has since held in Republic v Manyeso [2025] KESC 16 (KLR) that life imprisonment is a legal sentence. We think we have said enough in this matter and the upshot is that we find no merit in the appeal and accordingly, dismiss it on both conviction and sentence.

DATED AND DELIVERED IN KISUMU THIS 24TH DAY OF APRIL, 2026

NYAMWEYA

JUDGE OF APPEAL

....

L. ACHODE

JUDGE OF APPEAL

....

J. MATIVO

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR