



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nyasimi v Republic (Criminal Appeal 77 of 2019)  
[2025] KECA 199 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KECA 199 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 77 OF 2019  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
FEBRUARY 7, 2025**

**BETWEEN**

**NURICK OMBUI NYASIMI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at Kisii (Ougo, J.) dated 3rd April, 2019 in HCCRA No. 99 of 2018)*

**JUDGMENT**

1. The appellant, Nurick Ombui Nyasimi, was the accused person in the trial before the Senior Resident Magistrate's Court at Ogembo in Criminal Case No. 69 of 2017. He was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the offence were that on the 22<sup>nd</sup> April, 2017, at around 14:00 hours within Kisii County, the appellant unlawfully caused his penis to penetrate the vagina of HNM, a child aged 12 years.
2. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act No. 3 of 2006*. The particulars of the victim, date and place of the alternative count were the same as that in the main charge.
3. The appellant pleaded not guilty and the case proceeded to full hearing. At the conclusion of the trial, the learned trial magistrate convicted the appellant and sentenced him to imprisonment for twenty (20) years.
4. The appellant was aggrieved by the decision of the lower court and filed an appeal against the conviction and sentence before the High Court.



5. The High Court (R.E. Ougo, J.) dismissed the appeal and upheld the conviction and sentence in a judgment dated 3<sup>rd</sup> April, 2019.
6. The appellant was again dissatisfied with the decision of the High Court and has lodged the present appeal. Acting pro se, he has raised eleven (11) grounds in his Memorandum of Appeal, which in summary are that: the prosecution did not prove its case beyond reasonable doubt; the prosecution evidence was contradictory and inconsistent; the prosecution failed to call vital witnesses to testify; his rights under Article 50(2) of *the Constitution* were infringed as the two lower courts were biased and did not accord him a fair trial; and the mandatory nature of his sentence was unconstitutional.
7. A summary of the evidence that emerged at the trial through five (5) prosecution witnesses, which was subjected to a fresh review and scrutiny by the High Court, is as follows.
8. The (complainant), HNM, was a class seven (7) pupil at [Particulars withheld] Primary School at the time of the incident. She testified as PW1 and gave sworn testimony. She recalled that on the material day at around 14:00 hours, she was on her way to visit her grandmother when she met the appellant who was riding a motor cycle. She knew him since they both attended their local SDA church. Upon inquiring where the complainant was heading to, the appellant offered to take her to the church. When they got there, he persuaded her to go with him to his house which was not far from the church.
9. On reaching his house, the appellant requested PW1 to help him move a seat in the sitting room; and that was when he lifted her up, placed her on a three-seater seat, removed his clothes and defiled her for about ten minutes. She resisted and screamed as she felt pain, but it was raining and nobody could hear her. After the ordeal, the appellant left the house and took off with his motor cycle. PW1 then went to her grandmother and spent the night. The following day, she went to her mother and told her what had happened. Her mother took her to hospital and reported the matter to the police who recorded her statement.
10. CMS, the complainant's mother, testified as PW3. She told the court that on 23<sup>rd</sup> April, 2017, at about 10.00am, PW1 narrated to her how the appellant lured and defiled her the previous day. Thereafter, she made a phone call to the appellant who was her neighbour. According to PW3, the appellant admitted to committing the crime and told her not to disclose the incident to his wife. She then took PW1 to hospital where she was treated and later reported the matter at Itumbe Police Station.
11. KKA the complainant's uncle, testified as PW4. He told the court that he received a call from PW3 on 23<sup>rd</sup> April, 2017, who told him that the complainant had been defiled by the appellant. He advised her to take the complainant to hospital and he followed them there. The following day, they recorded their statements at Itumbe Police Station and also went back to hospital for the remainder of the medical examination.
12. Albert Simba Samuel, a clinical officer at Bomachoge Chache Sub- County Hospital, testified as PW2. He told the court that PW1 went to the facility on 23<sup>rd</sup> April, 2017, with a history of being defiled by a person known to her. The medical examination showed that her hymen was broken and she had bruises on her vagina. The lab test showed the presence of epithelial cells; and no spermatozoa was seen. HIV and pregnancy tests were both negative. The conclusion was that PW1 was defiled under struggle which was penetrative, unprotected vaginal sex. He produced PW1's P3 form, PRC form, medical examination report and outpatient card as exhibits.
13. The last witness was PC Pauline Anyango Aluoch, the investigating officer in the case. She testified that the matter was reported at Itumbe Police Station on 23<sup>rd</sup> April, 2017, by PW1's father and uncle who accompanied PW1. She recorded their statements and accompanied them to hospital whereby PW1



was treated and told to go back the following day for lab tests. Thereafter, she issued an order of arrest of the appellant who at the time had fled the area.

However, he was arrested on 30<sup>th</sup> October, 2017, with the help of motor bike operators from Daraja Mbili – Kisii, and escorted to the police station. She produced PW1’s birth certificate and P3 form.

14. When he was placed on his defence, the appellant gave sworn testimony and called no witnesses. He denied the charge against him and testified that he did not know the complainant and only saw her for the first time during trial. He told the court that on 23<sup>rd</sup> April, 2017, he ran his errands in Kisii town and was arrested on 30<sup>th</sup> October, 2017. Lastly, he said that PW3 and PW4 have land issues with him at a family level.
15. The appeal was argued by way of written submissions by both parties. During the virtual hearing, the appellant appeared in person, whereas learned counsel, Ms. Kitoto appeared for the respondent. Both parties relied on their submissions.
16. This is a second appeal. Our jurisdiction is, therefore, limited to a consideration of matters of law only by dint of section 361(1) of the *Criminal Procedure Code*. It is only on rare occasions that we interfere with concurrent findings of fact by the two courts below. In *Samuel Warui Karimi vs. Republic* [2016] eKLR, it was held as follows:

“This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See *Chemangong -vs- R*, [1984] KLR 611.”
17. We have carefully considered the appeal, the rival submissions of the parties and the authorities cited in support of the opposing positions. We will now address them.
18. The appellant alleged that the prosecution did not prove their case beyond reasonable doubt in large part because, in his opinion, penetration had not been proved. He contended that penetration was not proved since the doctor had concluded that the complainant had an old torn hymen. Further, he complained that there was no DNA evidence linking him to the crime. Additionally, he submitted that since no spermatozoa was seen and the HIV and pregnancy tests were negative, the same should be to his benefit.
19. The respondent noted that the doctor was categorical that there had been penetrative sex; and that the complainant had orally testified as much at trial. Further, the respondent noted that sexual offences are not necessarily proved through DNA evidence but through any evidence that is cogent and credible.
20. We agree with the respondent. After perusing the record, we have no hesitation in endorsing the concurrent findings of the two courts below that the prosecution proved penetration beyond reasonable doubt through the oral testimony of the complainant and the medical expert opinion of PW2. The complainant gave graphic details of how the appellant pounced on her, lifted her and defiled her in his house amidst her protests and screams. PW2 confirmed that his examination showed that there was forceful penetrative sex. He concluded this after seeing the bruises on the complainant’s vagina and after the laboratory results showed the presence of epithelial cells.
21. We reiterate that there is no requirement under our law for the prosecution to present DNA tests linking an accused person to the crime in sexual offences. Sexual offences are proved through any admissible cogent and credible evidence. In his complaint that there was no DNA evidence to link



him to the defilement, the appellant misunderstands the law. There is no requirement that DNA must be availed in order to secure a conviction in a sexual offence. Sexual offences are proved by way of evidence; not just scientific or DNA evidence. See *AML vs Republic* 2012 eKLR and section 36 of the *Sexual Offences Act*. Section 36(1) of the *Sexual Offences Act* empowers the court to direct a person charged with an offence under the Act to provide samples for tests, including DNA testing to establish the linkage between the accused person and the offence. However, that provision is not couched in mandatory terms.

22. The appellant also lamented that the prosecution case was marred with inconsistencies and contradictions and that this should have led the two courts below to find that there was reasonable doubt concerning his guilt. He pointed to at least two such contradictions. The first one is about the dates. He pointed out that both the complainant and the mother seemed confused about the dates – whether the incident happened on 23/04/2017 or 24/04/2017. The same confusion appears in the investigation diary and the P3 form. The second contradiction the appellant points to is that the P3 form stated that the complainant went to the hospital by herself, and yet she was escorted there by PW5. He also pointed out that the OB No. (23/24/4/2017) indicated in the charge sheet was different from the one indicated in PW4’s statement (13/24/4/2017) which was showed in court. Finally, the appellant made the omnibus claim that the testimonies of PW1, PW2, PW3 and PW4 were inconsistent and not believable.
23. The respondent rejected the appellant’s allegations that the prosecution case was marred with contradictions and argued that if there were any, they were trivial and did not affect the credibility of the prosecution witnesses, and as such were not fatal to the case. She further pointed out that there were no material contradictions which would have cast doubt on the prosecution evidence.
24. We have parsed the trial record paying keen attention to the contradictions the appellant claims make the conviction unsafe. All these contradictions are minor and do not go to the root of the prosecution case. Trifling contradictions on dates or file references do not weaken the prosecution case unless overall they undermine the credibility of the witnesses. Differently put, not every inconsistency, however small, introduces reasonable doubt to the prosecution case. See *Erick Onyango Ondeng’ v Republic [2014] eKLR Criminal Appeal No. 5 OF 2013*. Here, the alleged inconsistencies according to the appellant ranged from contradictions about exact dates; typographical errors in entering reference numbers; and wrongly indicating that the complainant was unaccompanied to see the doctor. All these discrepancies had no bearing on the root of the charge and its ingredients. They do not affect the substance of the prosecution case.
25. Next, the appellant contended that failure to call the complainant’s grandmother who received firsthand information regarding the incident suggested that her evidence was adverse to the case. For this proposition, he relied on the case of *Bukenya and Others vs. Uganda* (1972) EA 549 and argued that the court is entitled under the general rule of evidence to draw an inference that the evidence of those witnesses if called, would have been or would have tended to be adverse to the prosecution case.
26. This issue was first raised in the High Court. The learned Judge dealt with it comprehensively. The learned Judge found that the appellant’s argument that PW1’s grandmother would have testified on her condition after the incident was speculative as there was nothing on record to support his contention. The learned judge found that the record did not state that PW1 informed her grandmother about the incident. Therefore, it was clear that she would not have added value to the prosecution case. On this issue, learned judge relied on the case of *Bukenya and Others vs. Uganda* [1972] EA 549 and this Court’s decision in *Mwangi vs. Republic* [1984] eKLR 595. We think the learned Judge was eminently correct in her treatment of the matter and we have nothing useful to add.



27. There is one other matter the appellant has obliquely raised which requires a brief commentary. While wrongly citing section 44 of the *Sexual Offences Act* (which describes certain evidential presumptions about consent), the appellant suggested that complainant “consented” to the sexual activity otherwise there would be no explanation for her getting on to his motor cycle and riding with him to the church, and then to his house. Again, the appellant completely misunderstands the ingredients of the offence of defilement. Lack of consent is not one of the ingredients of defilement. Minors have no capacity to consent to sexual activity. In other words, even positive proof that the complainant had “agreed” to the penetration would not save the appellant from conviction. The only three ingredients that requires proof in a defilement charge are: penetration; age of the complainant; and identity of the perpetrator. All three were proved beyond reasonable doubt in this case.
28. Before us, the appellant also raised a general complaint that the two courts below were biased against him and, therefore, violated his rights under Article 50(2) of *the Constitution*. He does not offer specific details of such bias. Suffice it to say, that we would have no jurisdiction to consider that complaint at this stage since he did not raise it first at the High Court. In any event, he offered no specific instances of such bias to warrant any finding.
29. The last ground raised by the appellant is with regard to the sentence. He complained that the imposition of twenty years sentence on him as a mandatory minimum sentence was unconstitutional because the trial court had no room to exercise its discretion. In making that argument, he cited many of our courts’ recent decisions which had reached the conclusion that the minimum sentences in the *Sexual Offences Act* are unconstitutional because they impermissibly constrain judicial discretion in sentencing. See, for example, High Court decisions in *Maingi & 5 others vs. Director of Public Prosecutions & Another (Petition E017 of 2021)* [2022] KEHC 13118 (KLR) (Odunga J. as he then was) and *Edwin Wachira & Others vs. Republic – Mombasa Petition No. 97 of 2021*, Mativo J. (as he then was) and this Court’s decision in *Joshua Gichuki Mwangi vs. Republic, Nyeri Criminal Appeal No. 84 of 2015*.
30. However, in a recent decision, to wit, *Republic vs. Joshua Gichuki Mwangi (Petition E018 of 2023)* [2024] KESC 34 (KLR) (delivered on 12<sup>th</sup> July, 2024), the Supreme Court has categorically held that the mandatory minimum sentences in the *Sexual Offences Act* are not unconstitutional; and that trial courts have no discretion to go below the statutory minimum sentences in sexual offences.
31. The apex Court held thus:
- “ 56. Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words. Although, the term ‘mandatory minimum’ can be found used in different jurisdictions, including the United States, and in a number of academic articles, it is not applicable as a legally recognised term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different set of meanings and circumstances.



57. In the Muruatetu case, this court solely considered the mandatory sentence of death under Section 204 of the Penal Code as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the Sexual Offences Act, and the Penal Code. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities.”

32. Following the doctrine of stare decisis as divined by Article 163(7) of the Constitution, this decision by the Supreme Court is binding on this Court and overrules the recent decisions of this Court holding otherwise.

33. In the present case, the appellant was convicted under section 8(3) of the Sexual Offences Act. The statutory minimum sentence under that sub-section is twenty (20) years imprisonment. That was the sentence imposed on the appellant. As the law stands, it was a lawful sentence.

34. Consequently, this appeal fails in its entirety. It is hereby dismissed.

35. Orders accordingly.

**DATED AND DELIVERED AT KISUMU THIS 7<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

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**JUDGE OF APPEAL**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**

