



REPUBLIC OF KENYA



**KENYA LAW**  
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**DMS v Republic (Criminal Appeal E022 of 2024)  
[2025] KEHC 5273 (KLR) (26 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 5273 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CRIMINAL APPEAL E022 OF 2024  
AN ONGERI, J  
MARCH 26, 2025**

**BETWEEN**

**DMS ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the conviction and sentence by Hon. D. Wangeci (SPM) in  
Wundanyi Sexual Offence Case No. E011 of 2023 delivered on 4th April 2024)*

**JUDGMENT**

1. The Appellant was convicted with the offence of defilement contrary to Section 8(1) as read with Section 8(12) of the [Sexual Offences Act](#) No. 3 of 2006 and he was sentenced to twenty (20) years imprisonment.
2. The Appellant was acquitted of the alternative offence of indecent act with a child under Section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006.
3. The particulars of the charge were that on 29<sup>th</sup> September 2022 at around 1800hours at [particulars withheld] village in Mwachambo Location of Mwatate SubCounty within Taita Taveta, the Appellant had carnal knowledge of F.M, a juvenile boy aged 7 years against the order of nature.
4. The Appellant pleaded not guilty to the charge and the prosecution called seven (7)witnesses in support of their case.
5. The prosecution evidence in summary was that the Appellant who is an Uncle to the complainant sodomized him at the material day at a stall belonging to the Appellant's mother who is also the grandmother of the complainant.
6. The complainant's grandmother had left the complainant home and gone to water vegetables that were part of a project in the village.



7. The matter was reported to Mwatate Police Station and the complainant was taken to Mwatate Sub County Hospital.
8. The complainant said the Appellant took him to the stall, undressed him took some oil and applied on his anus. He then removed his trousers and inserted his penis into the complainant's anus. After he was done, he left the complainant in the stall and went away with the oil.
9. PW6 who was also playing with the complainant on the material day said the Appellant went and took the complainant away and PW6 never saw the complainant again that day.
10. The Appellant in his defence said on the material day he was attending a vigil in the village where he stayed the whole night.
11. The trial court found the Appellant guilty as charged and sentenced him to twenty (20) years imprisonment.
12. The Appellant has appealed to this court on the following grounds:-
  - i. That the learned trial Magistrate erred in law and fact by sentencing him to serve 20 years imprisonment for the offence of indecent act which is harsh, excessive and superfluous.
  - ii. That the learned trial Magistrate erred in law and fact by sentencing him without considering the period he spent in remand custody pursuant to Section 333(2) CPC.
  - iii. That may the sentence imposed on him be reduced to the lesser severe sentence as provided by Article 50(2)(p) of the Constitution.
13. The parties filed written submissions as follows:-
14. The appellant submitted that the sentence is excessive, harsh, and violates his constitutional rights. He contended that the 20-year sentence is harsh and excessive, especially since the Sexual Offences Act prescribes a minimum of 10 years for such offences.
15. That the trial magistrate failed to consider the time the appellant spent in remand custody, as required under Section 333(2) of the Criminal Procedure Code.
16. The appellant invoked Article 50(2)(p) of the Constitution, which guarantees the right to the least severe punishment for an offence.
17. That the appellant was acquitted of the main charge but convicted on an alternative charge of an indecent act with a child.
18. That he was sentenced to 20 years imprisonment, which he now appeals, focusing solely on the sentence.
19. The appellant argued that the 20-year sentence is disproportionate and amounts to double jeopardy, as it exceeds the minimum 10-year sentence prescribed by law. He cites Article 50(2)(p) of the Constitution, which guarantees the right to the least severe punishment.
20. The appellant emphasizes his right to a fair trial under Article 25(c) and 50(2) of the Constitution, which includes the right to a fair hearing and the least severe punishment. He also references Article 27, which advocates for non-discriminatory justice.
21. The appellant referred to the International Covenant on Civil and Political Rights (ICCPR), which Kenya has ratified, to support his claim for a fair trial and proportionate sentencing.



22. He said he was arrested on 30/09/2022 and convicted on 4/04/2024. He argued that the trial magistrate failed to consider the time he spent in remand custody, as required by Section 333(2) of the *Criminal Procedure Code*. He requests that this period be deducted from any new sentence imposed.
23. The appellant requests the court to reduce his sentence, arguing that the 20-year imprisonment is excessive, violates his constitutional rights, and fails to account for the time he spent in remand custody. He seeks a more lenient sentence in line with the law and constitutional provisions.
24. The respondent submitted that the appellant, DMS, was convicted of incest contrary to section 20(1) of the *Sexual Offences Act* and sentenced to life imprisonment. His appeal to the High Court in Mombasa was dismissed, and the sentence was upheld.
25. That the appellant was charged with having carnal knowledge of a 7-year-old boy, F.M., against the order of nature. An alternative charge of committing an indecent act with a child was also presented. The appellant pleaded not guilty, but after a trial with 7 prosecution witnesses, he was convicted and sentenced to 20 years imprisonment. He appealed for resentencing.
26. That the appellant based his appeal on the principle established in Francis Karioko Muruatetu & Another v. Republic (2017), where the Supreme Court ruled that mandatory death sentences for murder were unconstitutional. The appellant argued that mandatory sentences under the *Sexual Offences Act* should also be deemed unconstitutional.
27. The respondent countered that the appellant's actions caused severe physical and emotional trauma to the child, and the appellant has shown no remorse or taken any rehabilitative steps. The respondent argued that the sentence of 20 years imprisonment was fair and appropriate given the gravity of the offense and the harm caused to the victim.
28. The respondent cited several cases John Muendo Musau v. Republic and Bernard Ochieng Opiyo v. R to argue that an appellate court should only interfere with a trial court's sentence if the sentence was based on a wrong principle, overlooked a material factor, or was manifestly excessive. The respondent contended that none of these conditions applied in this case.
29. The respondent submitted that the appellant's sentence should be upheld, and the appeal should be dismissed for lack of merit.
30. In summary, the respondent argued that the appellant's sentence was just and appropriate, given the severity of the crime and the lack of remorse or rehabilitation shown by the appellant. The respondent urged the court to dismiss the appeal.
31. This being a first appeal, the duty of the first appellate court is as stated in the case of *Selle v Associated Motor Boat Co.* [1968] EA 123 where the Court of Appeal held that:

“The first appellate court has a duty to re-evaluate the evidence presented before the trial court and arrive at its own independent conclusion. The appellate court must subject the entire evidence to a fresh scrutiny and draw its own inferences. While the appellate court should consider the trial court's findings, it is not bound by them and must form its own independent judgment”.
32. The issues for determination in this appeal are as follows:-
  - i. Whether the Appellant was properly identified.
  - ii. Whether penetration was proved.



- iii. Whether the age of the complainant was proved.
33. The prosecution's case relied heavily on the testimony of the complainant (F.M.), a 7-year-old boy, who identified the Appellant as his uncle and the perpetrator of the act. The complainant testified that the Appellant took him to a stall, undressed him, applied oil to his anus, and sodomized him. This testimony was corroborated by PW6, who stated that the Appellant took the complainant away and that he did not see the complainant again that day.
  34. In Kenyan law, the identification of an accused person is crucial, especially in sexual offence cases. The court must be satisfied that the identification was free from error. In the case of *R v. Turnbull* (1976), the court held that the quality of identification evidence must be carefully assessed, especially where the witness is a child.
  35. In this case, the complainant's identification of the Appellant as his uncle and the person who committed the act was clear and consistent. There was no evidence of mistaken identity, and the trial court found the complainant's testimony credible.
  36. Penetration is a key element in proving the offence of defilement under Section 8(1) of the *Sexual Offences Act*. The complainant testified that the Appellant inserted his penis into his anus, which constitutes penetration as defined by the Act. The medical evidence from Mwatate Sub-County Hospital further corroborated the complainant's account, as it confirmed that the complainant had been sodomized.
  37. In the case of *Mark Oiruri Mose v. R* (2013) eKLR, the Court of Appeal held that penetration, even if slight, is sufficient to prove the offence of defilement. The court also emphasized that the testimony of a minor, if credible, can be sufficient to establish penetration. In this case, the complainant's testimony, supported by medical evidence, was sufficient to prove penetration beyond a reasonable doubt.
  38. The age of the complainant is a critical element in defilement cases, as it determines the severity of the sentence. The prosecution produced a birth certificate for the complainant, which confirmed that he was 7 years old at the time of the offence. This evidence was not contested by the defence.
  39. In the case of *Kaingu Elias Kasomo v. R* (2016) eKLR, the Court of Appeal held that the age of the victim in defilement cases must be proved beyond a reasonable doubt, and the best evidence for this is a birth certificate. In this case, the prosecution provided a birth certificate, which conclusively proved the complainant's age.
  40. The Appellant appealed against the 20-year sentence imposed by the trial court, arguing that it was excessive and that the trial magistrate failed to consider the time he spent in remand custody under Section 333(2) of the *Criminal Procedure Code* (CPC). He also invoked Article 50(2)(p) of the *Constitution*, which guarantees the right to the least severe punishment for an offence.
  41. In the case of *Francis Karioko Muruatetu & Another v. Republic* (2017) eKLR, the Supreme Court of Kenya held that mandatory sentences could be unconstitutional if they do not allow for judicial discretion in sentencing. However, in this case, the trial court did not impose a mandatory sentence but rather exercised its discretion in sentencing the Appellant to 20 years imprisonment, which is within the range provided by the *Sexual Offences Act* for defilement of a child under 11 years.
  42. Regarding the remand period, Section 333(2) of the CPC requires the court to consider the time spent in custody during sentencing. The trial court failed to do so, and the appellant is entitled to have that period removed from the sentence period.



43. In the case of *Ahamad Abolfathi Mohammed & Another v. Republic* (2018) eKLR, the Court of Appeal held that the period spent in remand custody must be considered when sentencing. Therefore, the Appellant is entitled to have the time he spent in remand custody deducted from his sentence.
44. The conviction of the Appellant for the offence of defilement contrary to Section 8(1) as read with Section 8(12) of the *Sexual Offences Act* is upheld.
45. The prosecution proved beyond a reasonable doubt that the Appellant defiled the complainant, a 7-year-old boy, and the trial court's finding of guilt was proper.
46. The sentence of 20 years imprisonment is upheld, but the period the Appellant spent in remand custody from 30th September 2022 to 4th April 2024 shall be deducted from the sentence. The Appellant shall serve the remainder of his sentence accordingly.
47. The Appellant is informed of his right to appeal to the Court of Appeal within 14 days if he is dissatisfied with this judgment.

**DATED, SIGNED AND DELIVERED THIS 26<sup>TH</sup> OF MARCH 2025 IN OPEN COURT VOI HIGH COURT.**

**ASENATH ONGERI**

**JUDGE**

In the presence of:-

Court Assistants: Maina/Millicent

