



REPUBLIC OF KENYA



KENYA LAW
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**Khanili v Republic (Criminal Appeal E010 of 2022)
[2025] KEHC 5477 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5477 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL APPEAL E010 OF 2022
JN KAMAU, J
APRIL 30, 2025**

BETWEEN

LEVIS MAGUNAMU KHANILI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Judgment of Hon S. Manyura (RM) delivered at Hamisi in
Principal Magistrate's Court in Sexual Offence Case No 17 of 2022 on 5th August 2022)*

JUDGMENT

Introduction

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.
2. The Learned Trial Magistrate, Hon S. Manyura (RM) convicted him on the main charge of defilement and sentenced him to life imprisonment.
3. Being dissatisfied with the said Judgment, he lodged an appeal herein. His Petition of Appeal was dated 16th August 2022 and filed on 17th August 2022. He set out seven (7) grounds of appeal.
4. His Written Submissions were dated 11th June 2024 and filed on 14th June 2024 while those of the Respondent were dated 18th September 2024 and filed on 26th September 2024. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.



Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify.
6. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify, and thus make due allowance in that respect.
7. Having looked at the Appellant's Petition of Appeal and his Written Submissions, this court noted that he only submitted on the issue of sentencing. However, as it was not clear whether or not he had abandoned his grounds of appeal on conviction, this court found it prudent to determine the same for completeness of record and to save the court's time. Therefore, the issues that had been placed before it for determination were as follows:-
 - a. Whether or not the Prosecution proved its case beyond reasonable doubt; and
 - b. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.
8. The court therefore dealt with the said issues under the following distinct and separate heads.

I. Proof Of Prosecution's Case

9. Grounds of Appeal Nos (2), (3), (4), (5) and (7) of the Petition of Appeal were dealt with under this head.
10. In determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases was proof beyond reasonable doubt, this court considered the ingredients of the offence of defilement.
11. It is now settled that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and identification of the perpetrator as was held in the case of *George Opondo Olunga vs Republic* [2016] eKLR. This court dealt with the same under the following distinct and separate heads.
12. Notably, the Appellant did not submit on any of the ingredients of the offence of defilement but focused on the severity of the sentence that was meted upon him.

A. Age

13. The Respondent submitted that the Charge Sheet indicated that the Complainant, EM (hereinafter referred to "PW 1") was six (6) years old at the time of the defilement. It placed reliance on the case of *Musyoki Mwakavi vs Republic* [2014] eKLR where it was held that in a charge of defilement, the age of a minor could be proved by medical evidence, baptism cards, school leaving certificates, by the victim's parents and/or guardians, observation or common sense.
14. It asserted that PW 1's mother, SM (hereinafter referred to as "PW 3") testified that PW 1 was born on 1st June 2016 and No 113023 PC Jeremiah Ges (hereinafter referred to as "PW 6") produced a Dedication Card/Certificate issued by Pentecostal Assemblies of God which proved that PW 1 was six



- (6) years old. It submitted that as she was a minor at the material time, the ingredient of age had been proved beyond reasonable doubt.
15. This court had due regard to the case of *Kaingu Elias Kasomo vs Republic* Criminal Case No. 504 of 2010 (unreported) where the Court of Appeal stated that the age of a minor in a charge of defilement could be proved by medical evidence and documents such as baptism cards, school leaving certificates. It could also be proved by the victim's parents or guardian and observation or common sense as was held in the case of *Musyoki Mwakavi vs Republic* (Supra).
 16. According to the Dedication Certificate dated 1st June 2016 by the Pentecostal Assemblies of God-Kenya that PW 6 tendered in evidence, PW 1 was born on 1st June 2016. The incident occurred on 10th March 2022. She was therefore five (5) years, nine (9) months old at the material time.
 17. The Appellant did not challenge the production of the aforesaid Dedication Certificate and/or rebut this evidence by adducing evidence to the contrary. This court was therefore satisfied that PW 1's age was proven beyond reasonable doubt and that she was a child at all material times.

B. Identification

18. The Respondent submitted that the Appellant was well known to PW 1 prior to the incident and she could not have mistaken his identity. It averred that evidence of recognition was more reliable and weightier than that of identification of a stranger as was held in the case of *Anjononi & Others vs Republic* (1976-80) 1 KLR.
19. Notably, PW 1 testified that on the material day of 10th March 2022, at around 4pm, she was at the river with MS (hereinafter referred to as "PW 2") and two (2) other children namely, S and K, when the Appellant came to where they were fetching water. She told the Trial Court that S and K left and because she was struggling to carry her water, the Appellant caught her, took her to the bushes and defiled her causing her to bleed. She was categorical that she knew the Appellant. She also identified him during the virtual court proceedings.
20. PW 2 confirmed having been with PW 1 on the material day when the Appellant caught her and took her to the bushes. She stated that when she went to check on PW 1, he ran away leaving her bleeding. She pointed out that she knew the Appellant as he used to carry manure at Serem.
21. PW 3 testified that PW 1 told her that it was the Appellant who defiled her. She confirmed that she knew the Appellant as their neighbour.
22. Without belabouring the point, this court came to the firm conclusion that the ingredient of identification was proven through recognition as the incident occurred during the day when conditions were favourable for a positive recognition of the Appellant herein.

C. Penetration

23. The Respondent invoked Section 2 of the *Sexual Offences Act* and placed reliance on the case of *Mohammed Omar Mohammed vs Republic* [2020]eKLR where it was held that the key evidence relied by the courts in rape cases and defilement to prove penetration was the complainant's testimony which was usually corroborated by the medical report presented by the medical officer.
24. It submitted that PW 1's evidence was without doubt understood to mean that the Appellant penetrated her vagina which proved the ingredient of penetration. It added that the same was corroborated by the medical evidence of Broyln Omondi Ochieng' (hereinafter referred to as "PW 5"),



- a Clinical Officer at Serem Health Centre. It contended that there were no contradictions in the days PW 1 was taken to hospital and that the medical documents were recorded correctly and dated.
25. It placed reliance on the case of Charles Wamukoya Karani vs Republic Criminal Appeal No 72 of 2013 (eKLR citation not given) where it was held that the critical ingredients forming the offence of defilement were age of the complainant, proof of penetration and positive identification of the assailant. It was emphatic that all the ingredients of defilement were proved in this case beyond reasonable doubt.
 26. It added that pursuant to Section 211 of the *Criminal Procedure Code*, the Appellant chose to remain silent and not defend himself. It was categorical that his assertion that the Trial Court failed to consider his defence statement was not merited.
 27. PW 1 testified that the Appellant took her to the bushes, lay her on the ground, pulled up her dress and inserted his penis into her private parts. PW 5 observed that she was irritable and was crying when he examined her. He said that her panty was blood-stained and that her hymen was broken and she had a tear in her vagina. He concluded that she had been defiled. He produced P3 Form, Post Rape Care (PRC) form and treatment notes as exhibits in this case.
 28. It was clear from the evidence that was adduced during trial that the ingredient of penetration had been proved beyond reasonable doubt. The Appellant had the opportunity to adduce evidence in his defense to rebut the evidence adduced by the Prosecution but he chose to remain silent.
 29. In the premises foregoing, this court found and held that the Prosecution had proven its case to the required standard, which in criminal cases, was proof beyond reasonable doubt that the Appellant defiled PW 1 on the material date.
 30. Grounds of Appeal Nos (2), (3), (4), (5) and (7) of the Petition of Appeal were therefore not merited and the same be and are hereby dismissed.

II. Sentencing

31. Grounds of Appeal Nos (1) and (6) of the Petition of Appeal were dealt with under this head.
32. The Appellant submitted that the sentence meted on him was severe and unconstitutional as many courts had changed tides as far as mandatory sentences were concerned by virtue of Article 27, 28 and 50(2)(p) of *the Constitution* of Kenya, 2010 amongst other provisions of law regarding the safeguards highlighted in the Sentencing Policy Guidelines, 2016. He urged this court to consider imposing a lighter sentence keeping with the spirit of the said safeguards which included enhancing delivery of justice and/or promoting confidence in the judicial process apart from deterrence and retribution as imposed by the Trial Court.
33. He further contended that the sentence meted on him did not fit in the administration of justice thus unconstitutional as declared in numerous cases and the recent one being that of Julius Kitsao Manyeso vs Republic (2023) (eKLR citation not given).
34. He pleaded for leniency of court and urged it to consider that he was a first offender, reformed and remorseful. He further urged the court to consider the period he spent in custody from the day of his arrest as per the provisions of Section 333(2) of the *Criminal Procedure Code*.
35. On its part, the Respondent submitted that the Trial Court considered his mitigation and imposed on him the life imprisonment sentence. It was its contention that the said sentence was warranted and should be sustained.



36. The Appellant herein was convicted under Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. Section 8(2) of the *Sexual Offences Act* provides that:-

“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.”

37. The Trial Court convicted the Appellant to life imprisonment. This court could not therefore fault it in that regard as the sentence was lawful.

1. In the case of Joshua Gichuki Mwangi vs Republic [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR where it held that Section 8 of the *Sexual Offences Act* had to be interpreted so as not to take away the discretion of the court in sentencing offences and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.
2. However, in a decision that was delivered on 12th July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case Joshua Gichuki Mwangi vs Republic (Supra) and stated that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence.
3. Going further, there had been emerging jurisprudence that substituted life sentences with thirty (30) or forty (40) years pursuant to the holdings of two (2) separate benches of the Court of Appeal in Ayako *vs Republic (Criminal Appeal 22 of 2018)* [2023] KECA 1563 (KLR) (8 December 2023),(Judgment), and Manyeso vs Republic (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) (Judgment) respectively.
4. However, in its decision that was delivered in Petition No E013 of 2024 Republic vs Julius Kitsao Manyeso on 11th April 2025, the Supreme Court of Kenya overturned the decision of the Court of Appeal in Manyeso vs Republic (Supra) and rendered itself as follows:-

“68. Courts cannot therefore extend their determination to rectifying or amending the statute in question, as this would contravene the doctrine of separation of powers, which delineates the functions of the judiciary, legislature, and executive. Courts must exercise caution when crafting remedies to avoid overstepping their judicial mandate and intruding upon legislative functions by prescribing or enacting amendments. When courts recognize the need for legislative intervention, and it is both proper and imperative for them to recommend such measures to be to the appropriate authorities for adoption....

69. We therefore find no difficulty in finding that the Court of Appeal erred in substituting the life imprisonment with a 40- year sentence, thereby usurping the legislative power to define sentences....

72. Consequently our final orders are as follows:-

- a. The Petition of Appeal is hereby allowed.



- b. The life imprisonment that was imposed by the trial court and affirmed by the High Court is hereby reinstated.
- c. The Respondent, Julius Kitsao Munyeso shall therefore complete the life imprisonment imposed by the trial court.”

42. Further, in its decision in Petition No E002 of 2024 Republic vs Evans Nyamari Ayako that was also delivered on 11th April 2025, the Supreme Court overturned the Court of Appeal decision in the case of Ayako v Republic (Supra). It pronounced itself as follows:-

“ 52. In the instant case, the Court of Appeal in its judgment, referred to the case of Manyeso vs Republic Case, where a different bench of the Court of Appeal cited the Muruatetu I case in stating that the rationale therein applied mutatis mutandis to the issue of mandatory indeterminate sentence.

53. In the Muruatetu II Case we reiterated that the rationale of the Muruatetu I was only applicable to the mandatory death penalty for the offence of murder under Section 203 as read with 204 of the *Penal Code*. Further, we disabused the notion that the rationale could be applied as is to other offences with a mandatory or minimum sentence...

54. It is therefore abundantly clear that it was not open to the Court of Appeal to apply the ratio decidendi in Muruatetu I in the instant matter. Therefore to the extent that the Court of Appeal did so, it has offended the principle of stare decisis.

58. Consequently, and for the reasons aforesaid, we make the following orders:-

- 1. The Appeal dated 1st February 2024 is allowed.
- 2. The Judgment of the High Court is hereby reinstated.
- 3. For the avoidance of doubt, the Respondent shall serve life imprisonment as sentenced by the Magistrate’s Court...”

43. It was therefore abundantly clear that the Supreme Court had pronounced itself on the validity of the life sentence that had been prescribed for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*.

44. Given that this court was bound by the decisions of courts superior to it in the principle of stare decisis, this court had no option but to uphold the life imprisonment that was imposed by the Trial Court.

45. In view of the fact that the sentence herein was indeterminate, this court could now not consider the provisions of Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) as the Appellant herein had sought.

Disposition

46. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Petition of Appeal dated 16th August 2022 that was lodged on 17th August 2022 was not merited and the same



be and is hereby dismissed. The conviction and the sentence be and are hereby upheld as they were both safe.

47. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 30TH DAY OF APRIL 2025

J. KAMAU

JUDGE

