



REPUBLIC OF KENYA



**Ndwiga v Republic (Criminal Appeal E073 of 2024)  
[2025] KEHC 5509 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5509 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL APPEAL E073 OF 2024  
RM MWONGO, J  
APRIL 30, 2025**

**BETWEEN**

**JAMES NYAGA NDWIGA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal arising from the decision of Hon. S. Ouko, SRM in  
Runyenjes MCSO No. E020 of 2023 delivered on 06th March 2024)*

**JUDGMENT**

**The Charge**

1. The appellant herein was charged with the offence of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act*. Particulars are that on 28<sup>th</sup> November 2023 at Embu East Subcounty, in Embu County, the appellant intentionally and unlawfully caused his penis to penetrate the anus of SWN, a child aged 9 years. He faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, whose particulars are that on 28<sup>th</sup> November 2023 at Embu East Subcounty, in Embu County, the appellant intentionally and unlawfully caused his penis to touch the anus of SWM, a child aged 9 years.
2. At the trial, the appellant pleaded 'not guilty' to the charge. A full hearing was conducted and the appellant was subsequently convicted and sentenced to life imprisonment.

**The Petition of Appeal**

3. Dissatisfied with the decision of the trial court, the appellant filed a petition of appeal dated 18<sup>th</sup> March 2024, seeking orders that the appeal be allowed, conviction quashed and the sentence of life imprisonment be set aside and that he be set at liberty. The appeal is premised on the grounds that:



1. The learned trial magistrate erred in both law and fact by not proving the ingredients of defilement to the required standard;
2. The learned trial magistrate erred in both law and fact by relying on riddled narrative which was enough to displace the case;
3. The learned trial magistrate erred in both law and fact by misleading herself by failing to consider the irregularities and illegalities occasioned;
4. The learned trial magistrate erred in both law and fact by rejecting the appellant's defense without giving cogent reasons; and
5. The learned trial magistrate erred in both law and fact by convicting and sentencing the appellant to life imprisonment, a sentence which is harsh and inhumane.

### **The Evidence**

4. PW1, the victim, gave sworn evidence following a voire dire examination. She stated that she had been in the company of her uncle who had stepped away when the appellant called her. When she went, he closed her mouth, removed his and her clothes and inserted his penis into her anus while touching her vagina. Soon after, her uncle returned and found the appellant defiling her. Her uncle screamed and a mob quickly gathered and started beating the appellant. The police took her to Runyenjes Hospital.
5. PW2 was FM, the victim's uncle who stated that the appellant was his co-worker and was in his company on the day of the incident. The appellant had gone to ask for work and he showed him the place where he was required to work, making baskets. At 11am, the appellant took a break and when PW2 saw him leaving, he followed him, only to find him defiling PW1 while bending her over. On seeing what was happening, he raised an alarm and people gathered at the scene. Someone called the police who arrived at the scene. On cross-examination, he stated that PW1 and other children were playing outside the house where the appellant was working. The appellant had been hired to weave 5 baskets but he did not finish the work, that is why he was not paid his wages.
6. PW3 was Arnold Njagi, a neighbor, who stated that he was at home for lunch when he heard noise outside. When he went to check, he found people beating the appellant. He tried to stop them and he accompanied them to the police station where he recorded a statement.
7. The victim's grandmother I.W testified as PW4. She produced PW1's birth certificate showing that she was 9 years old at the time of the incident. She said she was away from home attending a funeral at the time of the incident, when she received a phone call with information that her granddaughter had been defiled by the appellant. She rushed home and then to the police station where the matter had been reported. According to her, PW1 had been penetrated vaginally and anally.
8. PC Jackson Kithiki of [Particulars Withheld] Police Station, PW5, was the Investigating Officer in the case. He stated that that appellant was brought to the police station on allegations that he had defiled PW1. The minor was taken to Runyenjes Level 4 Hospital and PW4 produced her birth certificate. The appellant was charged with the offence after he was treated following his lynching by a mob.
9. Humphrey Mwenda Ndwiga, a clinician at Runyenjes testified as PW6. He produced the P3 form as evidence. He examined PW1 about 1 hour after the incident and he observed that there was an anal laceration caused by penile penetration. There were no injuries on her vagina. He concluded that there was partial penetration of the victim's anus.



10. At the close of the prosecution's case, the trial court put the appellant to his defense. The appellant, testifying as DW1, gave sworn testimony in which he denied the charges. He stated that on the day of the incident, he went to work with PW2 at 7:30am and left at 11:30am for a lunch break. He returned at 1pm and told PW2 that he was not interested in the work anymore. He asked PW2 to pay him his wage but PW2 refused and started screaming saying that he had defiled PW1. The alarm attracted a mob who beat him up until a police officer from [Particulars Withheld] police station rescued him. He stated that PW1 lied and that there is a land dispute between him and PW4 which is why they implicated him. However, he did not tell the police about this alleged dispute.

### **Parties' Submissions**

11. The appeal was canvassed by way of written submissions.
12. The appellant submitted that the evidence adduced did not satisfy the required standard of proof. That the laceration on PW1's anus could have been caused by the use of toilet paper and not necessarily by penile penetration. It was his submission that there were contradictions in the prosecution's case such that PW4 testified that there was vaginal and anal penetration yet the medical examination revealed only an anal laceration.
13. He impugned the testimony of PW1 as not credible since she is a minor and stated that the proviso to section 124 of the *Evidence Act* is punitive as to identification of the appellant. He argued that the sentence imposed on him is unconstitutional and it defeats the tenets of fair hearing according to Article 50(2) of *the Constitution*. He relied on the case of *Ayako v Republic* [2023] KECA 1563 (KLR) and urged the court to reconsider the life imprisonment sentence.
14. On its part, the respondent submitted that the elements of the charge were proved beyond reasonable doubt. Reliance was placed on sections 2 and 8 of the *Sexual Offences Act* and the cases of *Hadson Ali Mwachongo v. R* (2016) eKLR, *Mwangi v Republic* [2022] KECA 1106 (KLR) and *AML Vs R* (2012) eKLR. It submitted that the testimonies of PW1 and PW2 were corroborated by that of the clinician PW6, that the victim was defiled. The defense offered by the appellant was rightly disregarded since it did not do much to displace the prosecution's case. As regards the sentence, it stated that the same was meted out as prescribed in the *Sexual Offences Act*, thus, it should be upheld. It cited the case of *Shadrack Kipchoge Kogo v Republic, Eldoret Criminal Appeal No.253 of 2003*.

### **Issues for Determination**

15. The issues for determination are as follows:
  1. Whether the offence was proved beyond reasonable doubt; and
  2. Whether the sentence meted on the appellant should be reviewed.

### **Analysis and Determination**

16. In the case of *Kiilu & Another v Republic* [2005]1 KLR 174, the Court of Appeal stated as follows regarding the role of an appellate court:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions;



Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."

17. As to whether the offence was proved beyond reasonable doubt, section 8(1) and (2) of the *Sexual Offences Act* provides:
- “(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- (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.”
18. Therefore, as well established by legal authority, the elements of the offence may be broken down as follows:
1. The age of the complainant- that the complainant was a child;
  2. Penetration as defined under section 2(1) of the *Sexual Offences Act* occurred to the child;
  3. The perpetrator was positively identified.
19. As to age of the complainant, PW4 produced PW1's birth certificate which shows that she was born in February 2015. Therefore, she was aged 8 years and 9 months at the time of the incident, 2 months shy of 9 years. She was a child according to the *Children Act*. It is noted that the charge sheet indicates that the child was aged 9 years. However, this is not a fatal flaw since the age falls within the bracket set at section 8(2) of the *Sexual Offences Act*.
20. The second ingredient is proof of penetration. PW1 narrated that the appellant took her, closed her mouth, removed her clothes and his clothes and then inserted his penis into her anus. Her uncle, PW2 caught the appellant in the act and he raised alarm. PW2 stated that he witnessed the appellant defiling the child while bending her over. He screamed and a mob instantly gathered and beat the appellant before he was rescued by the police and arrested. PW6 testified that upon examination, the conclusion was that there was partial penetration of the victim's anus.
21. "Penetration" is defined under section 2 of the *Sexual Offences Act* as 'the partial or complete insertion of the genital organs of a person into the genital organs of another person'. According to the same provision, "genital organs" includes 'the whole or part of male or female genital organs and for purposes of this Act includes the anus'. From the available evidence, it is clear that penetration occurred.
22. The third element is the identity of the assailant. PW1 identified the appellant in court as the man who defiled her. PW2 testified that he caught the appellant in the act of defiling PW1. He saw him defiling the child. After PW2 screamed, a mob descended on the appellant in situ and beat him before he was saved by the Police. In his defense, the appellant stated that he was not at the scene and that he had taken a lunch break and when he returned, he told PW2 that he was not willing to continue with the work he had been hired to do.
23. After telling PW2 as much, he stated that PW2 started screaming and that is when the mob accosted and beat him up. He said that he had been falsely implicated because of a pre-existing land dispute with PW4. He asserted that the trial court disregarded this defense and stated that the issue was never raised until the defense case, thus, it should not be held as the truth.
24. The trial court was right in saying that. The evidence by the prosecution is sufficient to identify the appellant as the perpetrator beyond reasonable doubt.



25. The defence allegation that PW2 screamed because of then alleged land dispute does not make sense. If the land dispute was a real issue, PW2 would not need to wait until a sexual assault occurred to scream. He could have screamed at any other time.

26. In any event, when it comes to identification of an assailant in sexual offences, section 124 of the Evidence Act provides that the testimony of the victim is sufficient and it does not need to be corroborated. It states:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

27. Following conviction, the appellant was sentenced to life imprisonment. This is as prescribed by Section 8 (2) of the Sexual Offences Act. In this appeal, the appellant has relied on the sentiments of the court in the case of *Ayako v Republic* (supra), in a judgment delivered on 08<sup>th</sup> December 2023. In that case, the Court of Appeal sitting in Kisumu found that the mandatory nature of the indeterminate life imprisonment sentence hinders the court’s discretion during sentencing. The court in that case defined life imprisonment to mean 30 years imprisonment. The appellant in that case had been charged with defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act.

28. On 12<sup>th</sup> July 2024, shortly after the above-cited Court of Appeal decision, the Supreme Court in the case of *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (Petition E018 of 2023) [2024] KESC 34 (KLR) rendered itself on whether minimum sentences prescribed under the Sexual Offences Act are unconstitutional. It was held as follows by the Supreme Court:

“61. We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in statute, the legislature has already determined the Course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial Arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed”.

29. The position of the Supreme Court in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others* (supra) was further buttressed through its most recent decision in *Republic v Ayako*



[2025] KESC 20 (KLR) (11<sup>th</sup> April 2025) where the Court of Appeal's decision in *Ayako v Republic* (supra) was overturned. The Supreme court noted that the Court of Appeal did not have jurisdiction to review the sentence since that is the function of the legislature. The sentence of life imprisonment imposed by the trial court and upheld by the High Court was reinstated. In that case, it was held:

“In view of the foregoing, we find that the Court of Appeal ought not to have proceeded to set a term sentence of thirty (30) years as a substitution for life imprisonment, as the effect would be to create a provision with the force of law while no such jurisdiction is granted to it. The term of thirty years was arrived at arbitrarily without involvement of Parliament and the people. In consequence, we find that the Court of Appeal ventured outside its mandate and powers.”

30. Further, on 11<sup>th</sup> April, 2025, the Supreme Court in *R – v – Julius Kitsao Manyeso Pet E013 of 2024* reversed the Court of Appeal's findings that life sentences are unconstitutional and awarding a determinate sentence in place of a life sentence. The Supreme Court Stated:

“(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”

31. There, the life sentence issued by the lower court for defilement was upheld with the Court stating:

“[70] .... Consequently, the life imprisonment sentence remains lawful and in line with the *Sexual Offences Act*.”

### **Conclusion and Determination**

32. The Supreme Court decisions bind this Court and the Court of Appeal alike. It means that the sentence prescribed by the Act should be applied without any alterations, unless the statutory provision assigning the sentence is declared unconstitutional and are reviewed accordingly by Parliament.

33. In light of the foregoing discussion, the appeal lacks merit and it is hereby dismissed in its entirety. The decision of the trial court on conviction and sentence is hereby upheld.

34. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 30<sup>TH</sup> DAY OF APRIL, 2025.**

**R. MWONGO**

**JUDGE**

Delivered in the presence of:

Appellant Present in Person

Ms. Nyika for the Respondent

Francis Munyao - Court Assistant

