



REPUBLIC OF KENYA



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**SKM v Republic (Criminal Appeal E069 of 2023)
[2025] KEHC 8361 (KLR) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 8361 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E069 OF 2023**

EN MAINA, J

MAY 29, 2025

BETWEEN

SKM APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal against the judgment by Hon. R.W.Gitau (RM) in Mavoko
Chief Magistrate's Court in Cr. S.O No. 44 of 2020 Delivered on 21st April, 2022)*

JUDGMENT

1. The Appellant herein was charged with the offence of Defilement contrary to Section 8(1)(B) of the [Sexual offences Act](#) No.3 of 2006. The particulars of the offence being that on 8th September 2020 in Athi River Sub-County within Machakos County, he intentionally and unlawfully caused his penis to penetrate the vagina of NAN a child aged 14 years.
2. In the alternative charge it was alleged that the Appellant committed an indecent Act with a child contrary to Section 11(1) of the [Sexual offences Act](#) No.3 of 2006 the particulars being that on 8th September 2020 in Athi River Sub-County Machakos County, the Appellant intentionally and unlawfully committed an indecent act by touching the vagina of NAN a child aged 14 years.
3. After hearing and analyzing the testimonies of the six prosecution witnesses and that of the Appellant the trial Magistrate found the Appellant guilty on the charge of defilement, convicted him and sentenced him to imprisonment for twenty years.
4. Aggrieved by the conviction and sentence, the appellant preferred this appeal which, according to the Amended Petition is premised on the following grounds;
 - i. That the Trial magistrate erred in law when he convicted the Appellant for an offence of defilement whose elements to wit penile penetration and identification were not conclusively



proved to the required standard of beyond reasonable doubt and where evidence of doubtful character was admitted was admitted to prove penetration.

- ii. That the trial magistrate erred in both law and fact by failing to find the investigations conducted by the police were shoddy, biased, barely sufficient and highly fabricated leading to an erroneous deduction that the accused defiled the complainant.
 - iii. That the trial magistrate allowed and relied upon incredible, unreliable and embellished prosecution's evidence to the prejudice of the appellant herein.
 - iv. That the sentence imposed by the trial magistrate was a mandatory minimum sentence that fettered with the discretion of the trial magistrate and that failed to factor in the circumstances of the alleged offence and the current jurisprudence in defilement cases and related offences.
5. The Appeal was canvassed by way of written submissions. The Appellant appeared in person while the Respondent was represented by Makena Kaburu, Prosecution Counsel.
 6. In his very well researched albeit homegrown submissions, the Appellant stated that the prosecution did not prove the elements of the offence of defilement beyond reasonable doubt; that penile penetration and identification were not conclusively proved. Relying on the case of *Jacob Odhiambo Omuombo v Republic* CR APPNO 8 OF 2008 (citation not provided) the Appellant contended that recent penetration of the victim's genitalia by a penis ought to have been proved. He submitted that given that the testimony of the victim was that of a complete sexual act, which was accompanied by force, it was of concern that the medical evidence indicated that her genitalia was normal, with no discharge or injuries. He raised concern that the medical reports of the other facilities visited by the Appellant were not produced in evidence. He contended that the evidence of penetration was manufactured at the MSF France Hospital under the direction of the victim's mother due to an inheritance related grudge. He urged this court to find guidance in the Court of Appeal case of *John Mutua Musyoki v Republic* (citation not provided) where it was held that as the victim had admitted to having sexual intercourse before, the absence of a hymen could not be attributed to the alleged incident involving the Appellant.
 7. On identification, the Appellant submitted that the evidence must go beyond the victim knowing, identifying or recognizing the Appellant to irresistibly connecting the Appellant to the offence, through medical evidence or in lieu thereof, by truthful, consistent and cogent testimony of the victim which according to him, was lacking in this case. He faulted the investigating officer for failing to subject the evidence allegedly collected at the scene to forensic evidence. He wondered why the samples taken from him at the Kenyatta National Hospital were not taken for DNA analysis. He invited this court to draw an adverse inference from that omission. He asserted that the proviso to Section 124 of the *Sexual Offences Act* is not a carte blanche for a court to ignore all aspects of the evidence even where that evidence is shaky. He submitted that the trial court must set out the reasons for believing the victim and must consider the evidence as a whole. He contended that during cross examination, he did establish bad blood between him and the victim's mother arising from an inheritance related dispute.
 8. The Appellant urged this court to find that the evidence adduced was unverifiable, incredible and unreliable and that it shifted the burden of proof to him. He also urged that the prosecution's deliberate failure to call key witnesses occasioned him prejudice. He contended that those key witnesses would have given credence (sic) to the complainant's story. He urged this court to find that the case was not proved beyond reasonable doubt; that without DNA the complainant cannot be trusted to be truthful.



9. In regard to the sentence, he urged the court to set aside the sentence saying, that the same was excessive. He argued that the minimum nature of the sentence fettered the discretion of the learned magistrate and was hence unconstitutional. He placed reliance on the case of Phillip Mueke Maingi v Republic Machakos Petition NO E 017 of 2021 (citation not provided) and the case of Edwin Wachira & nine others v Republic Mombasa Petition NO 97 of 2021 (citation not provided). He reiterated that the complainant acted under instructions of PW2 but added that PW2 was the complainant's grandmother and had no obligation to look after her: that it was admitted that he had taken part in PW1's upbringing and had never defiled her. He urged this court to find that he is a caring young man and ignore his previous conviction for carrying out development without a permit as the same was instigated by his mother PW2. He asserted that a sentence should not over emphasize one element but strive to balance all the elements. He cited the case of State v Warren Vorster CC NO 125/2009 to support his submission. He also urged this court to consider a non-custodial sentence for the remainder of his term.
10. For the Respondent it was submitted that the prosecution discharged its burden of proof; that the three elements of the offence of defilement were proved beyond reasonable doubt; that the inconsistencies pointed out by the Appellant were immaterial as to vitiate the prosecution's case and further that the sentence of 20 years was lawful and, in any event lenient, considering the age of the victim and the circumstance of the case.

Determination

11. As this is a first Appeal I am entitled to reconsider and evaluate the evidence adduced in the court below so as to arrive at my own independent evaluation. I do so whilst bearing in mind that I neither saw or heard the witnesses and have made provision for that.
12. The burden of proof in this case lay squarely upon the prosecution and at no time did occasion arise for that onus to shift to the Appellant. As for the standard of proof, this being a criminal case, degree is beyond reasonable doubt. The degree was discussed by Lord Denning in *Miller vs. Ministry of Pensions (1947) 2 All ER, 372* where he stated:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”
13. The above is the applicable degree even in this case. The elements for the offence of defilement are now settled. They are: That the victim is a child and the age of the child for purposes of the sentence. That there was penetration. Positive identification of the accused/appellant as the perpetrator.

(See the case of *George Opondo Olunga vs. Republic [2016] eKLR*).
14. In the case of *Edwin Nyambogo Onsongo vs. Republic [2016] eKLR* the Court held as follows in regard to proof of the age of a victim of a sexual offence-

“... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of



the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.”

15. Further, in the case of *Fappyton Mutuku Ngui vs. Republic* [2012] eKLR it was held that:

... That “conclusive” proof of age in cases under *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.
16. In this case, the prosecution tendered a birth certificate as proof of the age of the complainant. The same shows she was born on 3rd November 2005 so as at 8th September 2020 she was about one month short of her 15th birthday. The *Children Act* defines a child as a person under eighteen years so the complainant was a child.
17. Section 8(1) of the *Sexual Offences Act* makes commission of an act which causes penetration with a child, an offence. The Act defines penetration as-

“The partial or complete insertion of the genital organ of a person into the genital organs of another person
18. In the case of *DS v Republic* [2022] eKLR, the court stated;

“Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred. Where the medical examination may not be available or conclusive, the court ought to weigh with thorough scrutiny and utmost caution, the evidence of the child, in order to determine whether there was penetration.”
19. In this case, the victim testified that she lived with her grandmother (PW2) and younger brother while her mother worked in Umoja Estate in Nairobi; that they lived in the same compound with the Appellant who is her uncle; that on the material day her grandmother went to Umoja to weave baskets as she usually. She and her brother were left under the care of the Appellant. She testified that the Appellant arrived home at about 8 or 9pm and asked if their grandmother was home. When she responded in the negative, he instructed her to lock the door saying it was cold. He then told her that he was not happy that she was talking with boys before telling her that he had a condom and nothing would happen. She stated that she refused his advances and even refused to undress when he told her to and instead threatened to scream but he said he would cut her with a machete. He then shoved her to the bed, pulled off her trouser, put out the lamp removed his trousers and wore a condom. She described what he did to her next as rape. She stated that he used his dick to enter her vagina and asshole. When she tried to scream, he covered her mouth and threatened to beat her. Her plea to him to leave her fell on deaf ears as he said he only wanted a shot and it was only once he was done that he let go of her dressed and left. She picked the used condom from the floor and wrapped it with a newspaper.
20. The complainant testified that the Appellant approached her the next day but when she threatened to scream, he backed off and told her to go call one Purity, his cousin, so he could do it to her and she obliged and went to call Purity. It was the said Purity who told her own mother what had happened and she, the complainant, was taken to Mama Lucy Hospital. Purity and her friend had taken her to another hospital but because that was a private facility they had to take her to Mama Lucy Hospital.



21. Contrary to the Appellant's submission the complainant's testimony received a lot of corroboration from other evidence. PW2, for one, confirmed that she left the complainant and her brother under the Appellant's care on the day in issue. She also confirmed that she received information concerning the occurrence for the complainant and from her own sister. She stated that she met up with her sister and the complainant at Mama Lucy Hospital which referred them to MSF France. The medical evidence tendered confirmed that the complainant was in fact defiled. all this despite that the proviso to Section 124 of the Sexual Offences Act removes the necessity for corroboration in regard to sexual offences. The only eye witness to this offence was one who was too young to testify. The Appellants defense was that he was being framed. The person he alleges to have instigated this frame up is none other than his mother. Nothing can be further than the truth. Having considered his evidence I found nothing that would have motivated his mother to lie against him. From the record, the issue concerning land had arisen much earlier and had long been dealt with before the commission of this offence and it is my finding that it was not the cause of the allegation. To the contrary I am satisfied that the complainant told the truth about what the Appellant did to her. DNA was not necessary. The law is that her word alone was sufficient but even then, as I have stated there was corroboration from other evidence. The law does not require the prosecution to call any number of witnesses provided it proves its case to the required standard.
22. The victim knew the complainant very well as he is admittedly her uncle. The offence took place in his mother's house where the victim and her younger brother were living. His identity as the perpetrator is not therefore in doubt and I am satisfied from her narration and courage to repeat it to several people that she was telling the truth. As I have stated there is nothing to prove that the Appellant's mother had any ill motive which could have caused her to turn the complainant against the Appellant other than that he committed this heinous crime. The omission to tender the reports of the other medical facilities where the complainant was taken was explained to the satisfaction of this case. The medical evidence produced has not been discredited and this court therefore finds no reason to disbelieve it.
23. As regards the issue of contradictions that have been raised by the Appellant, the way to treat contradictions in a case was stated by the Court of Appeal in Jackson Mwanzia Musembi v Republic (2017) eKLR where the court cited with approval the Ugandan case of Twahangane Alfred –Vs- Uganda CR. Appeal No. 139 of 2002 (2003) UGCA,6 where it was held that:
- “with regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case”.
24. Also, in the case of Joseph Maina Mwangi vs. Republic CA No. 73 of 1992 (Nairobi) the Court of Appeal held that: -
- “In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the 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.”
25. The discrepancies pointed out by the Appellant are not material enough to impeach the credibility of the case for the prosecution as to warrant this court to interfere with the conviction. I find no merit in the appeal against the conviction.



26. In regard to the sentence the punishment for this offence where the child's age is between 14 years and 15 years is a minimum term of imprisonment for twenty years. That is what was imposed by the learned magistrate. The same is a lawful sentence as was indeed held recently by the Supreme Court in the case of Republic v Joshua Gichuki Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition 18 of 2023) [2024] KESC 34 (KLR) 12th July 2024 (Judgment), where the Court faulted the Court of Appeal's decision to reduce the sentence imposed on the appellant from 20 years to 15 years and stated that the minimum sentences under the *Sexual Offences Act* are constitutional and lawful. The sentence being the minimum provided by the law it cannot be said to be harsh or excessive and the appeal against sentence must also fail. A noncustodial sentence would be illegal in the face of the minimum sentence prescribed and it would be amiss for this court to impose it. It would be a wrong exercise of the discretion of the court.

27. The appeal is dismissed in its entirety.

JUDGMENT SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 29TH DAY OF MAY, 2025.

E. N. MAINA

JUDGE

In The Presence Of:

Miss Makena Kaburu for the state

The Appellant online from Kamiti Maximum Prison

Geoffrey - Court Assistant/Interpreter

