HMM v Republic (Criminal Appeal E059 of 2023)
[2025] KEHC 7368 (KLR) (28 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7368 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL APPEAL E059 OF 2023

JK NG'ARNG'AR, J

MAY 28, 2025

BETWEEN

HMM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against both conviction and sentence imposed by Hon. W. Kabaria (SRM) at Gichugu Law Court on 24/4/2020)

JUDGMENT

1. HMM, the Appellant herein, was charged with the offence of defilement contrary to Section 8(1) & 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of this offence were that on 22/6/2018 at [particulars withheld] village, Thumaita sub location, Thumaita location in Kirinyaga County, he unlawfully and intentionally caused his penis to penetrate the anus of EMM a child aged 9 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*. The particulars were that on 22/6/2018 at [particulars withheld] village, Thumaita sub location, Thumaita location in Kirinyaga County, he unlawfully and intentionally caused his penis to come into contact with the anus of EMM a child of 9 years.

3. The Appellant pleaded not guilty to the said charge and the matter proceeded to full trial with the prosecution calling a total of eight (8) witnesses in support of its case against the Appellant.

4. It was the prosecution's case that on 22/6/2018, the appellant lived with the minor who was 9 years old and in grade 3 at [name withheld] Primary. The appellant was the minor's father. That on that day, the minor ate and went to sleep and later the appellant joined hi min bed and turned the minor who was sleeping on the side. The appellant turned him and made the minor slepp facing down. That the then removed his penis and inserted it into the minor's anus. That the following day when the minor was in school, his teacher saw him walking legs apart limping and on inquiry, the minor informed her

what had transpired. That she took the minor to the headmaster and the minor again narrated the incident to him. The headmaster took him to hospital at Kianyaga Subcounty where he was treated and afterwards they went to the police station to report. It was the prosecution's case that the minor knew it was the appellant committed the offense as the minor knew his voice and identified him as the offender and that only the minor and the appellant were in the house on the material night.

5. After full trial, the Appellant was found guilty, convicted accordingly, and sentenced to life imprisonment.

6. The Appellant has now come before this Court faulting the trial court for the aforesaid decision based on the following grounds: -

   i. That the learned magistrate erred in law and in facts by failing to appreciate that there were discrepancies, contradictions and inconsistencies capable of henceforth creating doubt.

   ii. That the learned magistrate erred in law and facts by admitting the evidence of the investigating officer which was shoddy and could not hold weight.

   iii. That the trial magistrate erred in law and in facts by failing to note that prosecution did not prove all the ingredients of the offence of section 8(1) as read with section 8(2) of the *sexual offences Act* no. 3 of 2006.

   iv That the trial magistrate erred in law and facts by rejecting the appellants sworn evidence which clearly pointed out that the case was planted against him.

   v That the learned magistrate failed to find that failure to call crucial witnesses by the prosecution entitled the court to draw an adverse presumption against it based on the rule in Bukenya v Uganda [1972] E.A. 544.

   vi. That the trial magistrate erred in law and facts by not observing that the entire prosecution case was impeached under section 163 of the *Evidence Act* thus unworthy of being relied upon.

7. The Appellant thus prayed that the appeal be found to be merited.

8. This Court directed that this Appeal be canvassed by way of written of submissions. On record are the respondent's submissions dated 11/5/2025 whereas the appellant's submissions were dated 16/3/2025. I have considered the respective submissions by both parties and the entire record before court.

9. I am mindful that this is a first appeal. As a first appellate court, this Court is obligated to re-evaluate the evidence and make its own conclusions while bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See the cases of Pandya v R [1957] EA 336; Ruwalla v R [1957] EA 570 and Kisumu Criminal Appeal No. 28 of 2009 David Njuguna Wairimu v Republic [2010] eKLR where the Court of Appeal held that: -

> "the duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusion on that evidence without overlooking the conclusion of the trial court. There are instances where the first appellate court may depending on the facts and circumstances of the case, come to the same conclusion as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

Appellant's submissions

10. On ground one, the appellant submitted that on 22/6/2018, he was not at home and was working and only got home at 2:00am and was not aware of the offence until 4/7/2018 when he was arrested. That the minor slept in a separate room and the appellant never defiled him. That on cross, the minor testified that the appellant never removed his trouser. That the minor was coached by his teacher to disclose false defilement to the headteacher, PW3, who in turn gave hearsay evidence. That PW8, the police officer was not the investigating officer in the matter and he testified that the appellant was arrested on 4/7/2019 whereas the charge sheet indicated 4/7/2018. That there were lots of contradictions and the prosecution did not prove its case to the desired standard noting that the minor testified that he was not defiled by the appellant. It was also submitted that no investigations were done in the matter.

11. The appellant submitted that the elements of the offence were not proven. That on age, there was no birth certificate produced and PW7 did not examine the minor yet testified that he was 9 years old. That the minor was not asked his age in voire dire examination and the appellant, the minor's father, was also not questioned on the minor's age thus the minor's age was never proven.

12. On identification, it was submitted that the incident happened at night under difficult circumstances and there was no source of light and that even though the minor could have been defiled, it was not by the appellant. That the appellant was not home on the material day and the minor would sleep without locking the door. That only the appellant's voice was relied on for identification and the same was not proven more so as it was nighttime and dark thus the minor could not see. That the trial court relied on the evidence of a single witness to convict the appellant thus the conviction was not safe.

13. On penetration, it was submitted that the minor was examined 5 days after the offense and no spermatozoa could possibly have been seen after 24 hours. That there were no bruises and both HIV and syphilis tested negative thus there was no evidence of penetration.

14. As regards the appellant's defense, it was submitted that the same was not considered. That the appellant was the primary caretaker of the minor and could not have defiled him. That his sworn evidence was rejected with no reason contrary to section 169 of the CPC thus the conviction was unsafe.

15. On the sentence, the appellant submitted that the life sentence without prospects of release was degrading and inhumane punishment and denied him a chance at rehabilitation. That the appellant was a first offender but his mitigation was not considered.

16. Consequently, the appellant urged this court to uphold the appeal on both conviction and sentence.

Respondent's submission

17. On the part of the Respondent, it was submitted that the prosecution proved its case against the Appellant for the offence of defilement to the required legal standard of beyond reasonable doubt. That an age assessment report was produced as PEXH5 proofing that the minor was aged between 7 and 8 years old.

18. On the issue of penetration, it was the respondent's submission that PW7, the clinical officer, testified that the minor had blood in his external orifice and tenderness which indicated penetration. That spermatozoa was also seen as per the treatment notes and laboratory results thus penetration was proven.

19. On identification, the respondent submitted that the appellant was identified by the minor as the perpetrator. That the minor testified that the appellant went to his bed and removed his thing for urinating and put it in his. That the appellant's was the minor's father thus there was no mistaken identity.

20. It was also submitted that the sentence was not excessive and was based on statute. This court was urged to find that the appeal lacked merit.

Issues for Determination

21. Having considered the record of appeal as well as the submissions by parties, I discern the following issues for determination: -

    a) Whether the offence of defilement was proved;

    b) Whether there were contradictions and inconsistencies; and

    c) Whether the sentence was harsh and excessive

Whether the offence of defilement was proved

22. Section 8(1) of the *Sexual Offences Act* (herein The Act) provides that: -

> " a person who commits an act which causes penetration with a child is guilty of an offence termed defilement". While 8(2) states: 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."

23. In the case of George Opondo Olunga v Republic [2016] eKLR the ingredients for the offence of defilement were set out as: -

    a. Proof of the age of the victim;

    b. Proof of penetration or indecent act;

    c. Identification of the perpetrator.

24. On the issue of age, it is trite that the age of the victim of defilement is essential element because defilement is a sexual offence committed against a child who under the Children's Act is a person below the age of 18 years. In addition, the age of the child is an aggravating factor for purposes of determining the sentence to be imposed as per the penalty clauses in the *Sexual Offences Act*. The younger the child the more severe the sentence.

25. In this case, I note that there was an age assessment report produced as PEXH5 by PW8 which proved that the minor was between 7 and 8 years old. The minor himself testified that he was 9 years old and was in grade 3 at the time of his testimony which was an year after the offense, further showing that he was around 8 years old at the time of the offense. Thought the appellant submitted that no birth certificate was produced to proof the minors age, I note that the appellant was the minor's father and custodian of such a document and it was not expected that the prosecution would get the same from the appellant.

26. I also note that the clinical officer testified that the minor was 9 years old. Further, even where the actual age of the victim is not proved, the apparent age of the victim suffices. The Court of Appeal

in Jackson Mwanzia Musembi v Republic [2017] eKLR quoted with approval its earlier decision in Evans Wamalwa Simiyu v R [2016] eKLR and held that: -

> " Consequently, where actual age of a minor is not known, proof of his/her apparent age is sufficient under the *Sexual Offences Act*."

27. Further, in Thomas Mwambu Wenyi v Republic [2017] eKLR the Court of Appeal cited with approval Francis Omuromi v Uganda, Court of Appeal Criminal Appeal No.2 of 2000 which held that: -

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may be proved by birth certificate, the victim's parents or guardian and by observation and common sense...."

28. From the foregoing, I find that there was prove that the minor was 7-8 years at the time of the offence as found in the age assessment report. Even though the actual age was not proved, the minors age could be assessed from common sense including that the was in grade 3 even at the time of testifying.

29. On penetration, Section 2 of the *Sexual Offences Act* define penetration as follows: -

> " The partial or complete insertion of the genital organ of a person into the genital organs of another person."

30. Section 2 of *Sexual Offences Act* describes genital organs as: -

> " genital organs" includes the whole or part of male or female genital organs and for purposes of this Act includes the anus"

31. On standard of proof, Hon. R. Nyakundi J. in Republic v Ismail Hussein Ibrahim [2018] eKLR stated: -

> " ...the prosecution has the duty to prove all the ingredients of the offence beyond reasonable doubt and there is no burden on the part of the accused to proof his innocence at any one given time. The law only permits very few statutory exceptions where an accused person can be called upon to give an explanation in rebuttal. However, this does not shift the burden of proof from the prosecution."

32. The Court of Appeal in Chila v Republic [1967] E.A 722 articulated this position and held that: -

> " The Judge should warn ... himself of the danger of acting on uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless court is satisfied that there has been no failure of justice."

33. On the issue of penetration, the minor was categorical that on 22/6/2028, he ate supper and went to sleep then the appellant, his father, joined him in the bed, turned him from his side and made him sleep on his stomach. That the appellant then removed his 'thing for urinating' and put it where the minor goes for 'choo kubwa' , his anus. He testified that when he went to school, he was in pain 'behind there' and when his teacher Mrs. Macharia inquired, he narrated what transpired. The minor was to narrate the same occurrence to several other witnesses including his classteacher, the headmaster, the

area chief, and the chief. All these witnesses confirmed what the minor narrated and I do note that he remained consistent that his father, the appellant, had defiled him through his anus.

34. Even without further corroboration, I note that the minor was sure of what she saw and gave a detailed elaboration of the day without inconsistencies. He gave a clear narration of how the appellant defiled him and though he froze when his father cross-examined him and testified that his father did not remove his trouser, the minor had already fearlessly narrated the ordeal to enough witnesses to cast out any doubt that he was indeed defiled. I do agree with the trial court that it was expected that the minor would fear his father during cross-examination thus the retracted testimony did not have great consequence.

35. Indeed, the minor testified that the following day he was in pain. This was collaborated by, PW2, his teacher, who noted that the minor looked sick and sad. That during break, she noted that the minor was walking with a limp and when she called to inquire, the minor informed that his father had gone to his bedroom the previous day at 10pm, removed his shorts and defiled him.

36. There was also the medical evidence on record which corroborated the minor's evidence. PW7, a clinical officer at Kianyaga Subcounty Hospital testified that the minor was brought to the facility on 27/6/2018 and was examined by PW7's colleague, one Gideon Nyaga but he had since been dismissed due to a strike. That the boy claimed he was sodomozed and a rectal examination was done and there was tenderness, pain, and the areas was reddened though no bruises were found. That there was blood in the external orifice and blood on the examining finger which indicated penetration. That anal swab was done and spermatozoa was seen. HIV sand Syphillis tests were negative. All the medical records were produced which I have seen and considered.

37. From the medical evidence above, I do find that there was penetration on the minor's anus as alleged.

38. Weighing the minor's evidence against the medical evidence before court, I do find that there was proof of penetration.

39. As for the issue of identification, I note that the appellant was the minor's father and was well known to the minor. The minor also testified that he knew his father's voice very well and recognized it during the act. It was the minor's testimony that his father asked him to keep quite when he went to the minors bed. The minors testified that he knew that it was him who did the act because of his voice. Further, as already found, the minor was consistent to around four witnesses that it was his father, the appellant, who went to his room, removed his shorts and defiled him. I have no doubt that the appellant was positively identified through recognition and there were no inconsistencies in the minor's narration despite his tenderer age to cast doubt on possible error. In any case, the minor testified that it was just him and his father and I do not see any reason why the minor would make up such a horrific accusation against his father.

40. Though the appellant submitted that PW2, the minor's teacher, coached the boy into lying to the headteacher, there was nothing before the trial court to show that the teacher had a grudge against the appellant to frame him. In any case, PW2 questioned the minor when she noticed that he was sad, looked ill, and was walking with a limb. This is what prompted her to question the minor and she immediately acted. I find this to be true noting that the minor testified that the following day, he felt pain on his anus and was walking legs apart.

41. In the end, I find that positive identification was established.

42. As regards the appellant's defense, I do note that though he testified that he was not home till 2:00am on the material day, the prosecution's evidence was water tight and impeached the appellant's defense

noting that the minor positively identified the appellant as the offender, and there was proof of penetration even five days after the ordeal. The defense as raised could not succeed.

Whether there were contradictions and inconsistencies

43. Though the appellant submitted that the prosecution's case was marred with inconsistencies and contradictions, a careful consideration of the entire record revealed none of this and there was no justification to interfere on the trial's court conviction. Though the appellant took issue with PW8's testimony that the case file was opened on 4/7/2019 whereas the charge sheet indicate that the appellant was arrested on 4/7/2018, I find that the evidence before this court was consistent that the appellant was arrested in 2018 thus the contradiction did not go to the root of the matter such as to have an effect on the conviction.

Whether the sentence was manifestly harsh and excessive

44. On the sentence meted out against the Appellant, I equally find that the trial court did not err as Section (2) states: -

> " 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."

45. The offence of defiling a child aged eleven years and below with which the Appellant was charged with, prescribes for a minimum sentence of life imprisonment. There has been judicial discourse on constitutionality of the minimum and life sentences under Section 8 of the Act.

46. However, in its most recent precedent, the Supreme Court settled the issue in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment) where it overturned the decision of the Court of Appeal which had found Section 8 of The Act to be unconstitutional for prescribing a mandatory minimum sentence upon conviction. The Supreme Court upheld the constitutionality of the said law and this Court is bound by such precedent. The Supreme Court held that: -

> " 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.
>
> This is why, even in the Muruatetu case, this Court was keen to still defer to the Legislature as the proper body mandated to legislate. While the courts have the mandate to interpret the law and where necessary strike out a law for being unconstitutional, this mandate does not extend to legislation or repeal of statutory provisions. In that regard, we echo with approval the words of the High Court in the case of Trusted Society of Human Rights v Attorney-

General and others, High Court Petition No 229 of 2012; [2012] eKLR, at paragraphs 63-64 where it held as follows:

"Although the Kenyan Constitution contains no explicit clause on separation of powers, the Montesquieuian influence is palpable throughout the foundational document, *the Constitution*, regarding the necessity of separating the Governmental functions. *The Constitution* consciously delegates the sovereign power under it to the three branches of Government and expects that each will carry out those functions assigned to it without interference from the other two."

We reiterate the above exposition of the law and the answer to the two questions under consideration is that, unless a proper case is filed and the matter escalated to us in the manner stated above, a declaration of unconstitutionality cannot be made in the manner the Court of Appeal did in the present case."

47. Further, as held in Abdalla v Republic KECA 1054 (KLR), the Supreme Court in Francis Muruatetu and Another v Republic pronounced itself that its earlier decision in the case only applied to murder charges and did not invalidate the mandatory or minimum sentences in the *Penal Code* or *Sexual Offences Act*. The sentence of life imprisonment upon conviction provided for under Section 8(2) of The Act thus remains valid and ought to have been applied. It then follows that until a matter is duly filed to successfully challenge the constitutionality of Section 8 of The Act, courts must follow the mandatory and minimum sentences provided in the statute.

48. I thus find that the trial court correctly applied the law when it sentenced the appellant to life imprisonment.

49. The upshot is that the appeal is found to be without merit and the trial court's decision both on conviction and sentence is hereby upheld.

It is so decreed.

JUDGEMENT DATED AND SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF MAY, 2025.

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J.K.NG'ARNG'AR

JUDGE

Judgement delivered in the presence of the Appellant and Mamba for the Respondent. Siele/Mark (Court Assistants).