



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kehiu v Republic (Criminal Appeal E007 of 2022)
[2025] KEHC 6953 (KLR) (28 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6953 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL APPEAL E007 OF 2022
JK NG'ARNG'AR, J
MAY 28, 2025**

BETWEEN

SIMON NJOGU KEHIU APPELLANT

AND

REPUBLIC RESPONDENT

*(From the conviction and sentence in Sexual Offence Case Number 6 of
2019 by Hon. Mugure P. in the Principal Magistrate's Court in Wang'uru)*

JUDGMENT

1. The Appellant was charged with the 1st count of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the charge were that on 15th February 2019 in Mwea East Sub-County within the County of Kirinyaga, the Appellant intentionally caused his penis to penetrate the vagina of JN, a child aged 5 years.
2. The Appellant was charged with the 2nd count of defilement. of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the charge were that on 15th February 2019 in Mwea East Sub-County within the County of Kirinyaga, the Appellant intentionally caused his penis to penetrate the vagina of PN, a child aged 6 years.
3. The Appellant was charged with the 3rd count of defilement. of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the charge were that on 4th March 2019 in Mwea East Sub-County within the County of Kirinyaga, the Appellant intentionally caused his penis to penetrate the vagina of JN, a child aged 5 years.
4. The Appellant pleaded not guilty to the three counts before the trial court and a full hearing was conducted. The prosecution called eight (8) witnesses in support of its case. The trial court found that



the Prosecution had proved a prima facie case against the Appellant and put him on his defence. The Appellant gave unsworn testimony and did not call a witness in aid of his defence.

5. In a Judgement dated 10th March 2022, the trial court found the Appellant guilty of all the three counts of defilement, convicted him and sentenced him to serve life imprisonment in all three counts.
6. Being aggrieved with the Judgment of the trial court, the Appellant, Simon Njogu Kehiu through a Petition of Appeal filed on 16th May 2022 appealed against his conviction and sentence.
7. This being the first appellate court, I have a duty to re-evaluate the evidence on record afresh and come to my own conclusion. I now proceed to consider in summary, the case before the trial court and the parties' submissions in the present Appeal.

The Prosecution's Case.

8. It was the Prosecution's case that the Appellant defiled JN (PW1) on 15th February 2019 and 4th March 2019. It was their further case that the Appellant also defiled PN (PW2) on 4th March 2019. PW1 and PW2 testified that on 4th March 2019, the Appellant lured them to his house, lay on top of them and did bad manners to them. PW1 testified that it was not the first time that the Appellant did bad manners to her.
9. Patrick Munene Ndamberi (PW7) who was the clinical officer stated that he examined JN (PW1) and found that she had an inflammation on her labia minora and a broken hymen. PW7's conclusion was that PW1 had been defiled. PW7 further testified that he examined PN (PW2) and found that she had an inflammation on her labia minora, pus cells in her urine and a broken hymen. PW7's conclusion was that PW2 had been defiled.
10. In their written submissions dated 17th March 2025, the Respondent submitted that they proved their case beyond reasonable doubt. That they were able to prove the positive identification of the Appellant and the ages of the minors which were proved through the Birth Notifications as P. Exh 1 and 2 respectively.
11. It was the Respondent's submission that when the Appellant was placed on his defence, he did not deny knowing or meeting the minor. It was their further case that there was no challenge on the mandatory sentence.

Appellant's Case

12. The Appellant, Simon Njogu Kehiu (DW1) denied committing the offence. He testified that on 15th February 2019 he was working in Nairobi and he finished his job on 4th March 2019 when he returned home and was promptly arrested on the allegation that he had defiled a minor.
13. It was DW1's testimony that he had a grudge with the complainant over money. It was his further testimony that he did not live in [Particulars withheld] and that he had been framed up and that if he had committed the offence, he would have been caught red handed.
14. In his written submissions, the Appellant submitted that the Prosecution did not prove the ingredients of age, penetration and identity. That penetration was not proved as the medical evidence was inconclusive. The Appellant further submitted that there was no medical evidence showing that the minor was defiled on 4th March 2019.
15. It was the Appellant's submission that he was not medically examined. That the minor's hymen was not freshly broken and further that the type of weapon used to cause penetration was not proved. It was the Appellant's submission that the absence of hymen did not mean penetration occurred.



16. The Appellant submitted that there was no direct link linking him to the offences. That the minors were coached to lie to the trial court. He further submitted that PW5 threatened and forced the minors to adduce evidence against him.
17. It was the Appellant's submission that it was important for the court to conduct DNA tests and compare the results. That the trial court based his conviction on unreliable witnesses i.e. PW1, PW2 and PW5. It was his further submission that the trial court did not consider his defence.
18. The Appellant submitted that this court should interfere with his sentence as it was harsh.
19. I have gone through and considered the trial court's proceedings, the Petition of Appeal filed on 16th May 2022, the Appellant's written submissions and the Respondent's written submissions dated 17th March 2025. The following issues arise for my determination: -
 - i. Whether the Prosecution proved its case beyond reasonable doubt.
 - ii. Whether the Appellant's defence placed doubt on the Prosecution case.
 - iii. Whether the sentence preferred against the Appellant was just and fair.

i. Whether the Prosecution proved its case beyond reasonable doubt.

20. It is trite law that for the offence of defilement to be established, the age of the victim, penetration and positive identification or recognition of the offender have to be proved.
21. On the issue of age, Rule 4 of the Sexual Offences Rules of Court 2014 provided that: -

When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document.
22. EWN (PW4) testified that she was JN's (PW1) mother and the PW1 was aged 6 years old. SWK (PW6) testified that she was PN's (PW2) mother and that PW2 was aged 7 years old. The Court of Appeal in *Richard Wahome Chege v Republic* [2014] KECA 453 (KLR), held as follows: -

“On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth?.....” (Emphasis mine)
23. No. 10xxxx PC Faith Maloba (PW8) who was the investigating officer produced the Birth Notifications for JN (PW1) as P. Exh 1 and PN (PW2) as P. Exh 2. I have looked at the Birth Notifications and I have noted that PW1 was born on 14th August 2013 which would make her 5 years old. I have also looked at PW2's Birth Notification and I have noted that she was born on 22nd August 2012 which would make her 6 years old. It is therefore my finding that PW1 was aged 5 years old and PW2 was aged 6 years old at the time of the commission of the offence.
24. With regard to penetration, Section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of genital organs into the genital organs of another person. The Prosecution has to prove penetration or act of sexual intercourse to sustain a charge of defilement.



25. Penetration can be proved through the evidence of the victim corroborated by medical evidence. It should however be noted that if the medical evidence is insufficient, courts can convict solely on the evidence of a victim provided they believe the testimony of the victim and record such reasons.
26. In the instant case, I proceed to carefully evaluate the victim’s testimony and the medical evidence tendered in the trial court.
27. According to the charge sheet, the Appellant was charged with defiling both PW1 and PW2 on 15th January 2019 and further PW1 on 4th March 2019. I have looked at PW1 and PW2’s testimonies and they did not state the date that they were defiled. The court got clarity through PW1’s parents (PW4 and PW5) that PW1 had been taken by the Appellant on 4th March 2019. PW2’s mother, SWK (PW6) also made reference to the events of 4th March 2019.
28. I have gone through the evidence and the testimonies in the trial court and there was no evidence to sustain the charge of defilement that occurred on 15th January 2019. I hereby dismiss counts 1 and 2.
29. On count 3, I have carefully gone through JN’s (PW1) testimony. She testified that on the material day, the Appellant took her, Nyakio (PW2) and Muthoni (PW3) to his house, made her (PW1) remove her clothes, lay on top of her and did bad manners to her. PW1 further testified that it was not the first time that the Appellant had done bad manners to her. For victims of defilement who are of tender years, courts have accepted the use of the words “bad manners” or “tabia mbaya” as definitions of defilement. In the case of *Muganga Chilejo Saha v Republic* [2017] KECA 359 (KLR), the Court of Appeal held: -
- “Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a court room. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms such as “alinifanyia tabia mbaya”.
30. PN (PW2) testified that the Appellant took her, J (PW1) and M (PW3) to his house, slept on her and “married” her. She further testified that after he completed the act, he wiped her with a towel.
31. Having considered the victim’s (PW1) testimony as a whole, I have no reason to disbelieve her. I say so because she was able to vividly narrate to the trial court how the Appellant defiled her and pointed to her genitals while narrating the ordeal.
32. Regarding medical evidence, Patrick Munene Ndamberi (PW7), a clinical officer at Kimbimbi Sub-County Hospital testified that he examined JN (PW1) on 5th March 2019 and found that she had a broken hymen and an inflamed labia minora. PW5 produced PW1’s P3 Form, treatment notes, and PRC Form as P. Exh 3, P. Exh 4 and P. Exh 5 respectively. I have looked at the exhibits and their contents mirror and corroborated the clinician’s testimony and conclusion of penetration and I accept the medical evidence presented by PW7.
33. The Appellant submitted that a broken hymen was not conclusive proof of penetration. In addition to the provisions of section 2 of the *Sexual Offences Act* stated earlier in this Judgment, the Court of Appeal in *Serem v Republic* [2023] KECA 30 (KLR) held: -
- “The place of Penetration in sexual offences was elaborated in this Court’s decision in *Erick Onyango Ondeng’ v Republic* [2014] eKLR, relied on by the respondent, in which this



Court quoted with approval the Uganda Court of Appeal decision in *Twehangane Alfred v Uganda*, Crim. App. No 139 of 2001, [2003] UGCA, 6, as follows:

“in sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.”

34. The Appellant submitted that he was not medically examined hence there was no evidence of a link to the offence. He further submitted that the trial court should have ordered for a DNA test. Section 36(1) of the *Sexual Offences Act* provides that: -

Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.

35. The Court of Appeal in the case of *Robert Mutungi Muumbi v Republic* [2015] KECA 584 (KLR), held that: -

“Section 36 (1) of the Act empowers the Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly, that provision is not couched in mandatory terms. Decisions of this court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved.”

36. Similarly in *AML v REPUBLIC* [2012] KEHC 2554 (KLR) the court held: -

“.....The fact of rape or defilement is not proved by a D.N.A test but by way of evidence.....”

37. It is my finding that it was not mandatory for the Appellant to be medically examined to provide a link between him and the offence. What the Prosecution needed to prove was penetration. In the present case, PW1’s testimony was corroborated by the clinician’s (PW7) evidence that they were penetrated. The medical evidence confirmed the presence of a broken hymen and an inflamed minora which was indicative of the act of penetration. It is therefore my further finding that PW1 was penetrated on 4th March 2019.

38. With regard to the issue of identification, the victims (PW1 and PW2) testified that the Appellant did bad manners to them. PW1 and PW2 stated that the Appellant lured them to his house alongside IM (PW3). IM (PW3) corroborated the victims’ testimonies that they were lured to the Appellant’s house by the Appellant.

39. EWN (PW4) who was PW1’s mother testified that she knew the Appellant as he was her husband’s (PW5) friend as they worked together. Sarah Wagichugu Kamita (PW6) testified that the Appellant was her husband and that PW2 was her daughter. The Appellant in his defence admitted that he knew PW1 and her father (PW5) whom he accused of bearing a grudge. In my view, the victims (PW1 and PW2) and the Appellant were not strangers as they knew one another. This was evidence of recognition.

40. As to the Appellant’s positive identification, the victim (PW1) Precious N (PW2) and IM (PW3) placed the Appellant at the scene of crime and their testimonies were consistent that it was the



Appellant who lured them to his house and committed the offences. Having analysed the identification evidence, I am convinced that there was no possibility of mistaken identity. It is therefore my finding that the Appellant was positively identified as the perpetrator of the offence.

41. Based on the totality of the evidence before me, it is my finding that the Prosecution satisfactorily established the age of the complainant, proof of identification and penetration. It is also my finding that Prosecution proved its case against the Appellant beyond reasonable doubt.

ii. Whether the Appellant’s defence placed doubt on the Prosecution’s case.

42. The Appellant (DW1) denied committing the offence. His testimony has been aptly captured earlier in this Judgement.
43. Having analysed the Appellant’s defence, it is my finding that his testimony was a mere denial. The Appellant went ahead to describe events that led to a grudge between him and the complainant. The Appellant had a chance to cross examine PW4 and PW5 on the issue of the alleged grudge but he did not. It smirks to me as an afterthought. The Appellant’s defence did not displace the victim’s testimony that the Appellant defiled her. It is my finding that the Appellant’s defence was weak and as a whole, did not cast any doubt on the Prosecution’s case which I have already found proven.

iii. Whether the sentence preferred against the Appellant was just and fair

44. Sentencing is at the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles and can only interfere with a sentence if it is demonstrated that the trial court acted on the wrong principle, ignored material factors, took into account irrelevant considerations or on the whole that the sentence was manifestly excessive.
45. The penal section for this offence is found in section 8(2) of the [Sexual Offences Act](#) which states 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.
46. On the 3rd count, the Appellant was sentenced to life imprisonment. The Appellant submitted that the sentence above was harsh.
47. The Court of Appeal in the case of Manyeso [v Republic \(Criminal Appeal 12 of 2021\)](#) [2023] KECA 827 (KLR) (7 July 2023) (Judgment) declared a life sentence unconstitutional. However, recently, the Supreme Court has stated that the Court of Appeal had no jurisdiction to declare a section of the law unconstitutional if the constitutionality of the statute or section of law was not brought up first before the High Court. The Supreme Court further clarified that for a statute or a section of the law to be declared unconstitutional, must be litigated first in the High Court and then have the Legislature amend the Act.
48. In Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR), the Supreme Court of Kenya held: -
“We therefore find that in this matter the Court of Appeal did offend the principle of stare decisis. Notably, we observe that the Court of Appeal determined that the ratio decidendi in the Muruatetu Case on the unconstitutionality of mandatory sentences could be applied mutatis mutandis to the mandatory nature of minimum sentences provided for in the [Sexual Offences Act](#). In doing so, and with respect, the Court of Appeal failed to abide by



the clear principles provided in both the Muruatetu case and the Muruatetu directions in this instance.....

.....Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence.....

.....Returning to the issue of the constitutionality or otherwise of minimum sentences under the *Sexual Offences Act* and discretion to mete out sentences under the said Act, we note that the Court of Appeal failed to identify with precision the provisions of the *Sexual Offences Act* it was declaring unconstitutional, left its declaration of unconstitutionality ambiguous, vague and bereft of specificity. We find this approach problematic in the realm of criminal law because such a declaration would have grave effect on other convicted and sentenced persons who were charged with the same offence. Inconsistency in sentences for the same offences would also create mistrust and unfairness in the criminal justice system. Yet the fundamental issue of the constitutionality of the minimum sentence may not have been properly filed and fully argued before the superior courts below.....

.....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.”

49. The import of the above decision was that the life sentence as provided for in section 8(2) of the *Sexual Offences Act* remained valid.
50. I have considered the circumstances of the case and by virtue of the age of the victim (5 years old), the circumstances were aggravating. It is my finding that the Appellant must be held accountable for his actions and must suffer proportionate punishment. A stiff sentence would also serve as a deterrence to others.
51. However, it is my view that a life sentence was indeterminate in nature and by this very nature, such a sentence was degrading and inhuman to the Accused. In *Manyeso v Republic* (supra), the Court of Appeal held: -

“An indeterminate life sentence was inhumane treatment and violated the right to dignity under article 28 of *the Constitution*. An indeterminate life sentence without any prospect of release or a possibility of review was degrading and inhuman punishment. It was a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation was achieved.”



52. Similarly, in *Kaningi v Republic* [2024] KEHC 12758 (KLR), the court held: -

“This court is of the view that an indeterminate sentence limits sentencing to the purpose of retribution. Sentencing should not be restricted to the sole objective of retribution. According to paragraph 4.1 of the 2016 Judiciary of Kenya Sentencing Policy Guidelines, other objectives of sentencing include deterrence, rehabilitation, restorative justice, community protection and denunciation. When carrying out sentencing all these objectives should be considered in totality. A life sentence should not necessarily mean the natural life of the prisoner; that would be an indeterminate sentence that limits sentencing to retribution. Properly construed, a life sentence could mean a set period of time depending on criminal responsibility, retribution, rehabilitation, community protection and recidivism.”

53. Taking my cue from the above authorities, I am of the view that the Appellant should serve a determinate sentence. In the circumstances thereof, I am minded to interfere with the sentence.

54. In the end, whilst I uphold both the conviction, the sentence of life imprisonment is vacated and substituted with 30 years' imprisonment.

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

.....

J.K.NG'ARNG'AR

JUDGE

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

