Kyalo v Republic (Criminal Appeal E036 of 2024)
[2025] KEHC 7365 (KLR) (28 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7365 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL APPEAL E036 OF 2024

JK NG'ARNG'AR, J

MAY 28, 2025

BETWEEN

TITUS WAEMA KYALO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment dated 3/10/2024 by Hon. D.M. Ireri (PM) in SO Case No. E039 of 2022 Baricho)

JUDGMENT

1. TWK, 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 19/12/2022 in Kirinyaga West Sub-County within Kirinyaga County, he unlawfully and intentionally caused his penis to penetrate the vagina of CMY a child aged 10 years and 9 months.

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 of the alternative charge were that on 19/12/2022 in Kirinyaga West Sub-County within Kirinyaga County, he unlawfully and intentionally caused contact of his penis with the vagina of CMY a child aged 10 years and 9 months.

3. The Appellant pleaded not guilty to the said charge and the matter proceeded to full trial with the prosecution calling a total of five (5) witnesses in support of its case against the Appellant.

4. It was the prosecution's case that on 19/12/2022 at about 10:00am, the minor CMT escorted her mother and on her way back she met the appellant who confessed his love for her and asked her to hug him but she declined and went home. That the appellant visited her home about three times. That around 12:00pm, the appellant went to her home to fetch water and as she was sleeping on the verandah, the appellant went there blocked her mouth, removed her biker and proceeded to touch her private part with his penis and defiled her.

5. That the minor reported the incident to her mother in the evening at around 6:00pm after having a bath. That her mother reported the issue to the police and sought medical attention which confirmed that the minor had been defiled as she had lacerations on the left vaginal wall, broken hymen and discharge from her vagina. She also had pus cells in the urine. That on 21/12/2022, the area chief was informed that the mob had turned violent against the appellant and he went to the scene, and rescued him. It was the prosecution's case that the appellant attended the same church as the minor and he was an alter boy and also worked as a soldier.

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

7. 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 making a judgment against the weight of the evidence.

    ii. That the learned magistrate failed to consider that the prosecution did not prove the particulars of the charges.

    iii. That the learned magistrate erred in law and facts by not considering the circumstances of the case.

    iv. That the trial magistrate erred in law and in facts by failing to consider that the case was full of contradictions and inconsistencies.

    v. That the trial magistrate erred in law and facts by failing to establish that the evidence that was adduced before the court was uncollaborative and full of malice.

    vi. That the learned magistrate erred in law and in facts by not considering that the ingredients of defilement was not proved.'

    vii. That the trial magistrate erred in law and facts by failing to consider my defense and mitigation factors.

8. The Appellant thus prayed that the appeal be allowed and the conviction be quashed and sentence to be set aside and he be set at liberty.

9. This Court directed that this Appeal be canvassed by way of written of submissions. On record are the respondent's submissions dated 18/3/2025 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.

10. 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."

11. The appellant amended his grounds of appeal vide his submissions and reduced them to: -

    1. The sentence of life imprisonment was awarded in a mandatory form without considering other circumstances which prevailed during the commission of the offence and other constitutional provisions Article 50(2) (p).

    2. The trial magistrate erred in upholding the offence of defilement without noting that the ingredients of the offence were not proved by the prosecution.

    3. The trial magistrate erred in failing to note that the prosecution case was marred with inconsistencies and contradictions which would have overturned the prosecution case.

    4. The trial magistrate erred when he failed to consider the defense evidence given by the appellant alongside other prosecution evidence.

12. It was submitted the mandatory sentence was bad law and denied the trial court a chance to consider the appellant's mitigation and individual circumstances. That the mandatory nature of the sentence as provided in The Act infringed the doctrine of separation of powers between parliament and the judiciary thus the court was empowered to depart from the prescribed sentences. On age, it was submitted that the age of the victim was in doubt and the court made a conclusion of age without any proof. That the charge sheet indicate that the victim was 10 years 9 months whereas the p3 form captured 11 years. That the victim testified that she was 11 whereas her mother did not say when she was born. That the birth certificate was not produced by the maker and the clinical officer did not testify how the victim's age was assessed.

13. On penetration, it was submitted that the prosecution witnesses did not prove penetration to the required standard. That the hymen was not freshly broken yet she was examined a day later and she had no bruises in the vagina. That no one witnesses the offence being committed. That the trial court attached too much weight to the broken hymen which was not proof of defilement.

14. It was also submitted that the prosecution's case had inconsistencies and contradictions which made the conviction unsafe. That PW1 testified that the minor informed that the appellant wanted to defile her when she was asleep but she woke up before he could do the act but on cross-examination, she testified that she examined the minor and found that she had been defiled. That just because the hymen was broken did not mean that the appellant broke it. That though the minor testified that it was her first time to have sex, the examination revealed that the hymen was not freshly broken. That PW1's evidence was of attempted defilement whereas the minor's was for defilement thus a misleading contradiction.

15. The appellant also submitted that his defense was considered as he testified that he was framed by the minor's mother who was angry after she borrowed Kshs. 100,000/= from the appellant who declined. He denied committing the offense and testified that on 19/12/2022 he was at his home and later went to work as a security officer. That the prosecution did not rebut the defense of alibi and did not bring any of his statement made post arrest. That the appellant was well known to the minor's mother PW2 and attended the same church thus the defense of being framed was not far-fetched. This court was thus urged to allow the appeal as pleaded.

16. 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 the minor's birth certificate was produced proving that the minor was 10 years 9 months when

the incident occurred. On identity, it was submitted that the appellant was well known to the minor and all her witnesses as he worked as an altar boy at the local parish and the day care. That the incident occurred during the day thus there was positive identification free from any possibility of error.

17. On the issue of penetration, it was the respondent's submission that the minor informed court that the appellant had raped her signifying that there was sexual intercourse. That the testimony of the clinical officer collaborated that assertion as there were lacerations on her private parts that signified penetration in line with Section 2 of the *Sexual Offences Act* (herein The Act). That the defence was unsupported by any evidence and the same was considered by the trial court and rejected for good reason. It was also submitted that the sentence was not excessive but based on recent precedent, the same could be interpreted to mean 30 years.

Issues for Determination

18. 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

19. 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."

20. 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.

21. 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.

22. In this case, PW4 (the minor) told the trial court that she was 11 years old and was in class 7. The minor's birth certificate was produced in evidence and the same indicates that the complainant was born on 6/2/2012 and was therefore around 10 years 9 months when the incident occurred. The minor was thus aged between 10-11 years at the time of the commission of the alleged offence. As such, the trial court cannot be faulted for concluding that the complainant was aged about 10 years at the time of the alleged incident as prescribed in Section 8(2) of The Act. The Court of Appeal in Edwin Nyambogo

Onsongo v Republic [2016] eKLR stated as follows in respect of proving the age of a victim in cases of defilement: -

> " ... 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."

23. I find that this ingredient was sufficiently met.

24. 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."

25. 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."

26. On the issue of penetration, the minor was categorical that on 19/12/2023 at around 10:00am, she escorted her mother and on her way back home, she met the appellant in a farm and they conversed about church. He then told her that he loved her and asked for a hug which she declined and went home. That the appellant visited her home thrice and left and after doing chores she lay on a sack on the verandah and slept. That around 12:00pm the appellant came and found her asleep and raped her. That she woke up and saw that it was the appellant who had gone to her home to fetch water. She further testified that the appellant blocked her mouth when he raped her and on cross-examination, she maintained that he also removed her panty and biker after blocking her mouth and raped her.

27. 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. She gave a clear narration of how the appellant defiled her including that he blocked her mouth, removed her biker and panty and touched her private part with his private part then raped her.

28. There was also the medical evidence on record which corroborated the minor's evidence. PW3, a clinical officer testified that she examined the minor on 20/12/2022 and filled the PRC form while at Sagana Sub-County Hospital. According to the medical evidence, the minor had lacerations on the left vaginal wall, discharge from the vagina, absent hymen not freshly broken, and pus cells but there was no spermatozoa seen. She tested negative for pregnancy and syphilis. PW3 testified that the presence of lacerations in the genitalia was evidence of penetration.

29. Weighing the minor's evidence against the medical evidence before court, I do find that there was proof of penetration. It does not matter that there was no spermatozoa seen as it is not always that an offender will complete the act of defilement. Moreover, though the appellant took issue with the old breakage of the hymen, I am alive to the fact that a hymen can break due to different reasons far from sexual intercourse. Even then, a broken hymen is not conclusive proof of penetration and other factors have to be taken into consideration.

30. The minor had lacerations on her genitalia as well as discharge and pus. This was proof of penetration. In Michael Mumo Nzioka v Republic [2019] eKLR the court stated that presence of spermatozoa was not conclusive proof of penetration and further that laceration on the genitalia was proof of defilement. The Judge sated as below: -

> "The hymen was torn/broken and there were also lacerations i.e. bruises around her genitalia...Therefore, lacerations of the genitalia can be proof of penetration even where the hymen is not broken. In fact, the mere fact that no spermatozoa is found does not necessarily mean that there was no penetration though its presence may well prove that there was penetration, though again that is not conclusive proof."

31. From the above, I find that penetration was proved to the required standard following the complainant's testimony which was corroborated by the medical evidence. It therefore follows that there was no need for the trial court to rely on section 124 of the *Evidence Act* since the medical evidence corroborated the minor's evidence.

32. Though PW1, the minor's mother testified on cross-examination that the minor informed that she woke up before the appellant could do the act, I note that this contradiction was solved by the medical evidence that proved there was penetration as testified by the victim. The contradiction was thus resolved.

33. As for the issue of identification, I note that the appellant was well known to the minor. The minor testified that on the fateful day, she met the appellant at around 10:00am at a farm and they had a conversation about church and the appellant also requested for a hug and confessed his love for her. The minor also testified that the appellant visited her home thrice before the incident. That when she woke up around noon, she found the appellant raping her. It is clear that the minor had seen the minor during the day and even interacted with him and there could not have been an error on identification. She reported the incident to her mother on the same day and identified him as the perpetrator. I do note that the appellant testified in his defense that he was at the farm on 19/12/2022, confirming the minor's testimony that she met him at a farm and they conversed. The appellant's defense of alibi could therefore hold no water and was correctly dismissed.

34. The appellant was also well known to the minor's mother as they went to the same church. This collaborates the minor's testimony that she had a conversation with the appellant regarding the church. I do find that the appellant was positively identified as the offender.

35. Though the appellant raised the defense that the minor's mother was framing him over her request for Kshs. 100,000/=, I do agree with the trial court that though the appellant had an opportunity to cross-examine PW2 on the issue, he kept silent and only raised the issue during defense when the same could not be verified. I do agree with the trial court that the defense was an after-thought.

36. There was nothing to show that the minor was framing the appellant, instead, the prosecution's case painted a picture of a man who preyed on the minor and eventually defiled her when he had the perfect opportunity. It would then explain why the appellant kept visiting the minor's home. The intent to defile her was there and the appellant even confessed his love to the minor and requested for a hug. I have no reason to doubt the minor and there is nothing to support the appellant's defense.

Whether there were contradictions and inconsistencies

37. 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.

Whether the sentence was manifestly harsh and excessive

38. 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."

39. 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.

40. 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."

41. 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.

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

43. 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.

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).