Muchiri v Republic (Criminal Appeal E030 of 2024)
[2025] KEHC 7060 (KLR) (28 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7060 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL APPEAL E030 OF 2024

JK NG'ARNG'AR, J

MAY 28, 2025

BETWEEN

ALBERT CHOMBA MUCHIRI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against both conviction and sentence arising from Org. S.O No. E008 of 2021 at Karaba mobile court under Wang'uru Magistrate's Court delivered on 25/7/2021 by Hon. M. Opanga (PM)

JUDGMENT

1. Albert Chomba Muchiri , 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 10/1/2021 in Mbeere south sub county he intentionally caused his penis to penetrate the vagina and anus of PM a child aged 5 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 of the alternative charge were that on 10/1/2021 in Mbeere south sub county he intentionally touched the vagina and anus of PM a child aged 5 years with his penis.

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 10/1/2021, the minor was 5 years at the time. That she was sent by one Wa Mary to pick a sweater from her home and she went together with P and M (PW2 and PW3 respectively). That they did not find Mary at home and on their wat back to the market, they met a man on a bicycle and he was wearing torn trousers and a t-shirt. That he carried the three girls on his

bicycle and dropped P and M at T's home and left with the complainant herein after telling her that he would buy her fish.

5. That he then took her to a thicket where he removed her trouser and threw it away. He then pulled out his penis from his boxers and defiled the minor threatening to pull out her teeth and kill her. That he then poured water into her hands and asked her to wash and she proceeded to wash her feet only after which he dropped her near a police station time by which it was already dark. The minor was at the time only dresses in a shirt and she met two ladies who covered her with a leso and took her to the police station. The police called Vivian who came with her clothes and she was taken to Kimbibi hospital and later to Kenyatta National Hospital.

6. That the medical examination revealed that her hymen and anus were torn and a colostomy bag was fitted as the minor had suffered recto vaginal fistula. Later on, the appellant was identified by the minor and by the other two girls and the appellant was arrested. 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 in failing to appreciate that the instant matter was not proved to the required standards.

   II. That the learned magistrate erred in both facts and in law in failing to appreciate that the charge as laid out was incurable defective contrary to section 214 of the *Criminal Procedure Code* hence based on quick sand occasioning a serious dereliction of justice.

   III. That the learned magistrate erred in law and facts when she imposed a minimum mandatory which is conformity to *the Constitution* 2010.

   IV. That the trial magistrate erred in law and in facts in failing to appreciate that the critical elements of defilement in age, penile penetration and identity of the alleged perpetrator were not proved to the required standards occasioning a prejudice.

   V. That the trial magistrate further failed to appreciate that the instant matter was riddled with material discrepancies capable of unsettling the verdict and further misdirected herself on very pertinent issues including reliance on the accused defense to fill in the glaring gaps in defense occasioning a serious dereliction of justice.

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

9. This Court directed that this Appeal be canvassed by way of written of submissions. On record are the respondent's submissions dated 17/3/2025 whereas the appellant's submissions were dated 11/3/2025. 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."

Appellant's submissions

11. The appellant limited his submissions to five issues including that; there was no positive identification of the appellant so as to secure a conviction; there were inconsistent testimonies; the charge sheet as drawn was defective; there was a violation of the appellant's right to a fair trial due to failure to be promptly notified of his right to legal representation; and the mandatory life sentence under the act.

12. On identification, it was submitted that there were inconsistencies in the identification of the appellant by the victim and PW2, MA. That the minor stated she did not know the victim and had been coached by her mother thus her testimony was unreliable. That PW1 and PW2 gave different descriptions of the appellant's clothing on the material day and this affected positive identification.

13. The appellant also submitted that there were inconsistent testimonies between PW1 and PW3. That PW3 stated that the appellant was arrested at home whereas the minor testified that he was arrested among 20 water vendors at the market thus their testimonies were not accurate. That PW2 and PW3 both testified that they did not know the man they were shown to identify as a suspect and PW1 testified that the chief showed her the person who carried her on a bicycle thus the minor's evidence was not credible and there was external influence in the identification process.

14. The appellant submitted that the charge sheet was defective as it did not indicate whether the act was unlawful or not making it defective as a charge sheet must explicitly state the unlawful nature of the act for it to be valid. That the defect was substantive as it affected the appellant's right to a fair trial. He further submitted that there was a violation of his right to a fair trial as he was not accorded prompt legal representation notification. That the failure to inform the appellant of his right to representation jeopardized the fairness of the trial and could lead to the nullification of proceedings.

15. As regards the mandatory life sentence under Section 8 of The Act, it was submitted that the Supreme Court declared the mandatory nature of death sentence unconstitutional and this influenced mandatory life sentences under The Act. The appellant thus urged this court to uphold the appeal as pleaded.

Respondent's Submissions

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 indicating that the minor was born on 2/4/2016.

17. On identity, it was submitted that the minor positively identified the appellant as he man who carried her together with PW2 and PW3 on his bicycle between 6:30-7:00pm. That PW1, PW2, PW3, PW4 and PW6 went round the village looking for the appellant and PW1 and PW3 were able to identify a man who resembled the appellant at the water vending machine but he was not the one. That he turned out to be the appellant's brother and PW6 took the minor to the appellant's home where he was identified. That PW2 and PW3 later identified him at the station as the man who gave them a lift and left with the victim.

18. It was thus submitted that the investigations done were not shoddy or inadequate and that the case was based on solid and cogent evidence. That though the appellant alleged that he had an affair with the victim's mother in 2020 when he had separated with his wife, the same could not be proved as he did not cross-examine her or produce any evidence to support his claim.

19. On whether the conviction was legal and regular, it was submitted that the conviction and sentence were based on law and thus regular. This court was urged to uphold the conviction and sentence.

Issues for Determination

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

    a. Whether the charge sheet was defective

    b. Whether the appellant's right to a fair trial was infringed

    c. Whether the offence of defilement was proved;

    d. Whether there were contradictions and inconsistencies; and

    e. Whether the sentence was harsh and excessive

Whether the charge sheet was defective

21. It was the appellant's submissions that failure to include the word 'unlawfully' in the charge sheet made the same incurable and defective. When faced with a similar situation, the court in Amos Wamalwa Ombo v Republic [2018] eKLR held that: -

> " As regards the second issue, it is noted that indeed the word "unlawfully" was not indicated in the particulars of the charge sheet. However the failure by the prosecution to indicate the same was not fatal as the same is curable under Section 382 of the *Criminal Procedure Code*. Indeed under the *Sexual Offences Act*. No. 3 of 2006 intercourse with a child is termed as defilement. Section 2 of the said Act defines defilement as the complete or partial insertion of a sexual organ of a person into the Sexual organ of another person. Again under Section 43 of the said Act an act is intentional and unlawful if it is committed as follows:-
>
> (a) in any coercive circumstances.
>
> (b) under false pretences or by fraudulent means, or
>
> (c) in respect of a person who is incapable of appreciating the nature of an act which causes the offences.
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> From the above provisions and bearing in mind that the complainant then aged 13 years old was for all intents and purposes a minor and a child at that and therefore she did not have capacity to consent to any sexual intercourse. It is therefore obvious that any sexual intercourse involving a minor or child is ipso facto unlawful. It is my considered view that the Appellant who admitted to the charge of defilement cannot seek refuge on the failure by the prosecution to indicate the word "unlawful" on the particulars of the charge sheet yet the act of defilement in itself is unlawful. As pointed out above the provisions of Section 382 of the *Criminal Procedure Code* cures the said defect. Hence the Appellant was not prejudiced by the omission to include the word "unlawful" in the particulars of the charge."

22. Going by the above finding which this Court fully associates with, it follows that such failure was not fatal and the charge sheet herein was not defective.

Whether the appellant's right to a fair trial was infringed

23. The Appellant submitted that his right to legal representation was infringed as he was neither informed of the right to legal representative nor accorded legal representation by the state.

24. Article 50 of *the Constitution* provides for the right of an accused person as follows: -

> " 50. Fair hearing
>
> (2) Every accused person has the right to a fair trial, which includes the right—
>
> g. to choose, and be represented by, an advocate, and to be informed of this right promptly;
>
> h. to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;"

25. This Court's understanding of the provision is that the right of an accused person to be assigned an advocate is not absolute and is only a requirement where substantial injustice may occur in the absence of such representation. In David Macharia Njoroge vs R (2011) eKLR the court held thus: -

> " State funded legal representation is a right in certain instances. Article 50 (1) provides that an accused shall have an advocate assigned to him by the State and at state expense. Substantial injustice is not defined under *the Constitution*, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2 (6). Therefore, provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory.
>
> We are of the considered view that in addition to situations where substantial injustice would otherwise result, persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such legal representation was provided."

26. In Karisa Chengo & 2 Others vs. R, Cr. Nos. 44, 45 & 76 of 2014, the court also stated: -

> " It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. *The Constitution* is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal

representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise."

27. From the above discourse, it follows that it is not mandatory that an accused is offered legal representation at state expense unless he will otherwise suffer substantial injustice. In the instant case, though the trial court did not inform the Appellant of his right to legal representation, the omission was not incurable nor prejudicial to the appellant. I do note from the court record that the appellant understood the charges brought against him and he was able to cross-examine the accused critically. He even applied to have certain witnesses re-called and he cross-examined them again competently.

28. I further note that the appellant was not charged with a capital offence that carried a death penalty to warrant the mandatory need for for legal representation. It then follows that the trial was conducted in a fair manner with no prejudice occasioned to the appellant due to lack of legal representation. In Mokaya v Republic (Criminal Appeal E020 of 2023) [2024] KEHC 4607 (KLR) (11 April 2024) (Judgment), the court similarly held that: -

> " In the instant case, I note that even though the trial court did not inform the Appellant of his right to legal representation, such failure was not fatal or prejudicial to the Appellant's case as the record shows that he understood the charges brought against him and that he competently cross examined all the prosecution witnesses. It is also noteworthy that the Appellant was not charged with a capital offence whose penalty is death so as to necessitate the mandatory requirement for legal representation. I find that the trial court conducted a fair trial and that the Appellant did not suffer any injustice due to lack of legal representation."

Whether the offence of defilement was proved

29. 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."

30. 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.

31. 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.

32. In this case, the minor's birth certificate was produced in evidence and the same indicates that the complainant was born on 2/4/2016 and was therefore around 10 years 9 months when the incident

occurred. The minor was thus aged between 5 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 5 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 vs. 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."

33. I find that this ingredient was sufficiently met.

34. On penetration, I do note that the appellant abandoned this issue in his submissions and the finding on it remained uncontested. 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."

35. 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."

36. On the issue of penetration, the minor despite being of tender age was categorical that the appellant gave her a lift on his bicycle together with her two friends, PW2 and PW3 who he dropped at T's mother home and cycled off with the minor herein under the promise that he would buy her fish. She narrated how he took her to a thicket where he took of her trouser/tights and threw it away and proceeded to remove his trousers, pulled put his penis from hos boxers and inserted his penis into her vagina. She testified that she felt a lot of pain in her urinating thing and bled a lot. The appellant threatened that he would pull out her teeth. She testified that the appellant gave her water to wash and she only washed her feet and he then left her near the police station where she was found by some women.

37. She remembered vividly that it was dark by then but she could see some light ahead. She also remembered that she was only dressed in a shirt that reached her stomach, that the two women covered her with a lesso before taking her to the station where Vivian was called. She proceeded to testify that she was taken to two hospitals and was put a colostomy in her stomach. She even narrated how she was able to identify the appellant. PW2 and PW3 both confirmed that the appellant indeed gave them a bicycle ride and after dropping them, he cycled off with the victim herein. The minor's evidence was also collaborated by PW1-PW5.

38. From the foregoing, even without further collaboration, the minor's testimony was strong enough to proof penetration. However, her testimony was collaborated by the medical evidence on record. PW7 testified that there was indeed penetration based on the treatment notes, P3 form and PRC form. He produced those documents as well as the discharge summary dignity card. A review of those documents reveals that there was indeed vaginal and /or anal penetration as there was excreta coming out through

the minor's vagina thus the need to fit her with a colostomy bag. There was strong medical evidence collaborating the minor's testimony on penetration. I do find that this ingredient was proven to the required standard.

39. As for the issue of identification, I note that the appellant was not only identified by the minor, but by PW2 and PW3 as well. I do note that when PW1, PW2, PW3, PW4 and PW6 went looking for the appellant in the village, the minors PW1, PW2 and PW3 had an opportunity to identify another person as the appellant but they noted that though they looked alike, the man was not the offender. It turned out that the man was the appellant's brother thus the resemblance. PW1 was able to recall that the appellant was dressed in dirty gumboots at the time of his arrest and this was collaborated by PW4.

40. PW4, PW6 and PW8 narrated how the minor was in obvious fear when she saw the appellant at his home and said that the appellant was the one who threatened to kill her. PW8 further testified that after arrest, PW2 and PW3 also identified the appellant as the man who carried them on the bicycle. Through out the trial, the trial court noted how PW1, PW2 and PW3 were in visible distress at the sight of the appellant and had trouble looking at him.

41. When PW4 took all the children to the market and placed them at a strategic position in order to identify the person that carried them on a bicycle, PW1, PW2 and PW3 waited to identify the appellant despite having a chance to identify the appellant's lookalike as the person who carried them on a bicycle. I have no reason to doubt the truthfulness of the identification. PW6 even conducted an identification parade at the water vending area with around 20 water vendors and PW1 did not identify any of them as the offender. She was sure of who committed the act and even under pressure, she did not falsely identify any other person until she saw the appellant at his home and quickly tensed up.

42. I also note that the appellant carried the children around 6:30pm when it was still daytime and there was no possibility of error. PW1 was also physically stressed and scared at his sight. I am convinced that the appellant was positively identified. Though the defendant brought out the issue of a grudge with the minor's mother during his defense, I do agree with the trial court that he had an opportunity to cross examine PW4 and PW6 on the issue but failed to do so. His allegation that he had a past affair with PW4 and there was a vendetta between him, the minor's mother and the chief seemed to be an after thought and desperate attempt to untangle himself from the crystalized evidence against him.

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. PW2 and PW3 testified that the appellant was arrested at his home. This testimony was corroborated by PW4, PW6 and PW8 who clearly testified on the circumstances of the appellant's arrest without any contradictions. I do not find any inconsistencies that go the material root of the case so as to overturn the conviction.

44. I also note that the appellant's submission that the minor testified that she was coached by her mother to lack merit. I have carefully considered her testimony and there is nowhere she talked of being coached. Her credibility remained unshaken and despite her tender age and the trauma she had gone through after the heinous act of defilement, she was able to recall the event and elaborate all that transpired. There was no contradiction between PW1 and PW2 on how the appellant had dressed on the material date as submitted. Both of them testified that the appellant was dressed in torn pair of trousers and a torn t-shirt.

Whether the sentence was manifestly harsh and excessive

45. 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."

46. 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.

47. 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.
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> 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:
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> "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."
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> 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."

48. Further, as held in Abdalla vs Republic KECA 1054 (KLR), the Supreme Court in Francis Muruatetu and Another Vs 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.

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

50. 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).