



**M v Republic (Criminal Appeal E022 of 2024)  
[2025] KEHC 7359 (KLR) (28 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7359 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CRIMINAL APPEAL E022 OF 2024  
JK NG'ARNG'AR, J  
MAY 28, 2025**

**BETWEEN**

**PGM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. PGM was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act*. The particulars of the offence were that on diverse dates between 1<sup>st</sup> April 2022 and 4<sup>th</sup> May 2022 at [particulars withheld] village Baragwi location Kirinyaga East sub county within Kirinyanga County, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of AAN a child aged 5 years old. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. The particulars of the offence were that on those days and in the same place, the appellant unlawfully and intentionally caused his penis to come into contact the vagina of AAN a child aged 5 years old.
2. The appellant was arraigned before the trial court. He pleaded not guilty. After conducting a full trial, the trial court convicted the appellant for the offence of defilement. He was sentenced to 50 years imprisonment. Those findings have triggered this appeal. The appellant filed grounds of appeal dated 28<sup>th</sup> June 2024. He prayed that his appeal be allowed on account of the following summarized grounds: the prosecution failed to prove beyond reasonable doubt that he had committed the offence; the evidence of the prosecution was filled with contradictions and inconsistencies titling towards an acquittal; PW1 was coached by her mother and was therefore not a credible witness; there existed a grudge between the complainant's mother and the appellant concerning dowry; his alibi defence was not considered; and the sentence meted out was harsh and excessive. For those reasons, the appellant urged this court to quash the conviction and set aside the sentence in favor of a retrial.



3. The appeal was disposed of by way of written submissions. The appellant's undated written submissions argued that he was framed by PW4 who was his wife together with her mother. That a domestic dispute arose between PW4 and the appellant prompting the former to fiddle lies to the mother. As a result, they framed him for the offence. He submitted that the prosecution failed to prove the offence to the required standard of proof. He particularly pounced upon PW4's evidence stating that it failed to prove the aspect of penetration and was furthermore marred with contradictions. He stated that on account of the fact that he had surety, it was an apparent indication of his innocence. He lamented that his defence was not considered yet it was cogent.
4. In its written submissions dated 17<sup>th</sup> March 2025, the respondent submitted that all the ingredients of the offence of defilement were proved beyond a shadow of a doubt. Furthermore, it defended that the trial court duly complied with the lawful procedure in the appointment of an intermediary since the minor was of tender years. On the appellant's defence, the respondent pointed out that it was carefully considered and rejected for failing to shake the prosecution's evidence. Finally, on the sentence, it was submitted that the same was commensurate to the crime and was therefore fair. It prayed that the appeal be dismissed.
5. This being a first appeal the Court must re-evaluate the evidence and make its own findings. [See *Bethwel Wilson Kibor v Republic* [2009] KECA 143 (KLR)]. The evidence at trial is captured in the record before me as follows: PW1 AN, the complainant testified that she was a five-year-old PP2 student at [particulars withheld]. She disclosed that she lived with her mother PW4 and grandmother. Her evidence was that she accompanied the appellant to cut bananas. He then removed her clothes and his clothes, lay her on the ground and defiled her. After the ordeal, he dressed her up and proceeded back home.
6. She then recalled that the appellant, on two other occasions, repeated the offence. In those occasions, they took place at home when they were alone after PW4 left for work. PW1's evidence was that the appellant never told her anything. Furthermore, she kept quiet. However, she told PW4 about what the appellant had done to her. PW1 was thereafter taken to hospital and treated. The matter was later reported at the police station.
7. PW3 (sic) Rita Wanjira Makumi a clinician at Kianyaga Sub County Hospital testified she saw the complainant on 5<sup>th</sup> May 2022. After collecting the minor's history, PW3 noted that she was anxious when narrating what had transpired but was calm. On examination of her private parts, she noted that she had lacerations on her urethra. She had a healed/old broken hymen. She also noted that she had pus cells and epithelial cells in her vagina which was tender. There were red blood cells indicative that she was bleeding. She formed the opinion that in light of those findings, there was habitual rape and penile penetration taking into account the fact that her vaginal opening had stretched. She produced the treatment notes, lab request and report, PRC form and P3 form in evidence.
8. PW3 also examined the appellant on 5<sup>th</sup> May 2022. Her findings were that the appellant was calm and defensive. There were no significant findings on urinalysis. That the tests were done on his own volition. She maintained that the lab results were not fabricated to the best of her knowledge.
9. PW3 Joseph Wachira Kathimba assistant chief Rwambiti sublocation stated that on 5<sup>th</sup> May 2022, he was in the office when a village informed him that PW1 had been defiled by her father. When PW1's grandmother found out, she notified the pastor of their church because the father was a congregant. On reaching the church, PW3 found the appellant, the grandmother and the pastor. He knew the appellant who was an area resident.



10. PW3 stated that on inquiring from the appellant, he admitted to have committed the offence stating that he did not know what possessed him to defile PW1 when he had PW4 to satisfy his sexual needs. PW3's evidence was that the appellant disclosed that the offence occurred more than once and he occasionally touched the minor's private parts. PW3 arrested the appellant thereafter and escorted him to the police station. He was accompanied by PW1, PW4 and her grandmother.
11. PW4 JN stated that she is PW1's mother and the appellant's wife. She confirmed that the appellant was the complainant's father. The complainant was born on 30<sup>th</sup> September 2016. She confirmed that her daughter was a class two student at [particulars withheld] Primary School. On 4<sup>th</sup> May 2022, upon returning from work, PW4 spoke to her children and they all went to sleep. The next morning, she woke up her children to take a bath. As she was bathing PW1, she told her that she was in pain in her private parts. That was when PW1 eventually disclosed to her that the appellant had defiled her severally and in the coffee plantations; though initially she was afraid to state as much. PW1 went to school while PW4 returned home.
12. Back home, PW4 asked the appellant whether he had committed the offence to which he denied. PW4 called the pastor and in his presence, denied once more. She recalled as they were seated with the pastor, the appellant, her mother and the church elder, the chief walked in. She informed her grandmother what she had found out. She testified that the chief walked outside with the appellant and had a small meeting. Later, the pastor was told by the chief that the appellant admitted to have committed the offence. The appellant was arrested and taken to Kianyaga police station while the minor was treated at Kianyaga hospital.
13. PW5 PC Dorcas Nyaga attached to Kianyaga police station testified that on 5<sup>th</sup> May 2022, she was informed about the offence by the OCS Kianyaga police station. PW5 interrogated the witnesses, collected their statements and gathered evidence. The appellant was subsequently arrested and charged with the present offence. She produced the minor's birth certificate disclosing that she was born on 30<sup>th</sup> September 2016. She was therefore five years of age at the time of the offence. PW5, when cross examined, stated that there was no grudge between him and his wife's family. That was why the complainant's grandmother wanted to protect him so that he remained married to PW4. That he had lived with the minor for six months prior to the offence.
14. At the close of the prosecution's case, the trial court found that the prosecution has established a prima facie case against the appellant. He was placed on his defence. The appellant put up a spirited defence and gave sworn evidence. He gave a background of his family life growing up and how he ended up as a pastor. He confirmed that PW4 was his second wife having married her in December 2020.
15. He recalled that his brother Daniel, a university student, called him asking him for Kshs. 30,000.00 to purchase a laptop. The appellant sent the money. PW4 later discovered the text message confirming the transaction. This angered PW4 who reported him to her mother stating that he had a propensity of sending money to other people but not her. PW4's mother called him and told him that they would need to resolve that issue.
16. The appellant continued that when PW4's mother summoned him, she demanded for a sum of Kshs. 65,000.00 in order to support the two children PW4 had walked into the marriage with. The appellant declined. In July 2021, the appellant purchased a motor vehicle creating more rift. As a consequence, PW4 occasionally left the matrimonial home leaving him with her children. This caused the appellant distress. He confided in an elderly lady called Rose Muthoni who advised him to stay. He narrated that in one of those days that he was deserted, he received an epiphany that he would preach to prisoners while in prison and wrote this down. He did not disclose this to anyone. He received several others later.



17. The appellant testified that he foresaw being taken to jail and a path would be created. That PW4 would wait for him after leaving jail. He was then accused of committing the offence on 4<sup>th</sup> May 2022. He stated that on that day, he worked till 5:00 p.m., received the complainant at 5:30 p.m. when she came back from school and received a call shortly thereafter. When he was done with the call, he found that the complainant had fallen asleep. Later PW4 joined them and had dinner with her children.
18. On 5<sup>th</sup> May 2022, while at church, PW4 and her mother asked him for the pastor's number which he gave them. He did not inquire why. Later on, he discovered that they were speaking about the defilement to his great shock. In their presence, together with the pastor and Joseph Murage, he denied committing the offence. On having a private conversation with PW3, the appellant stated that he admitted that he committed the offence because PW3 informed him that he would assist him if he so admitted. He was thus arrested by PW3 and taken to the police station and subsequently to the hospital. He then stated that the doctor was suspicious that something was off because he did not find anything on the minor. That he offered the doctor money but the doctor refused.
19. The appellant was keen on going to prison for the reasons stated earlier. He would later give the doctor Kshs. 25,000.00. He was later interrogated by PC Dorcas. The following day, he was informed by the investigating officer that if he paid PW4's mother, who refused to record a statement, the case would be diluted. He declined. He maintained that the evidence of the prosecution was fabricated. He further advanced that the complainant had been coached by her grandmother. She recalled that when the complainant called her by his name, he was bitter.
20. The appellant continued that he did not ask PW1 questions because of the revelation he had earlier of staying in prison. That PW4's mother visited him later crying stating that she felt bad because PW4 was pregnant. That she no longer wanted the money but a resolution. That was when she agreed to stand surety for him. That she advised him to ask for a reduction in bond terms. However, the appellant informed him that the application would not sail through. He advanced that they told the probation officer that the case was built on falsities.
21. The appellant maintained that all the witnesses had lied; particularly PW4. He stated that in retrospect, he regretted marrying PW4 but recalled that God encouraged him because of his difficult childhood. He was emphatic that he had not done the devil's work. He stated that the only negative thing he had ever faced was a strained relationship with his father. He maintained that he was of sound mind and that he volunteered to take himself to prison to do the Lord's work. He clarified that the minor was his step-daughter.
22. In defilement, the following crucial elements must be established: the age of the complainant, penetration and the identity of the perpetrator. On the age of the complainant, PW1 testified that she was five years old. This was corroborated by PW4. PW5 produced the minor's birth certificate in evidence confirming that she was born on 30<sup>th</sup> September 2016. I therefore find that the age of the minor was proved to the required standard and will not disturb that finding.
23. On penetration, PW1 testified that the appellant severally had sexual intercourse with her. Clinician Rita Wanjira Makumi saw the complainant on 5<sup>th</sup> May 2022. On examination of her private parts, she noted that she had lacerations on her urethra. She had a healed/old broken hymen. She also noted that she had pus cells and epithelial cells in her vagina which was tender. There were red blood cells indicative that she was bleeding. She formed the opinion that in light of those findings, there was habitual rape and penile penetration taking into account the fact that her vaginal opening had stretched. I therefore find that penetration was proved in line with its definition at section 2 of the *Sexual Offences Act*.



24. Lastly is the identity of the perpetrator. PW1 testified that she accompanied the appellant to cut bananas. He then removed her clothes and his clothes, lay her on the ground and defiled her. After the ordeal, he dressed her up and proceeded back home. On two other occasions, the appellant repeated the offence. In those occasions, they took place at home when they were alone after PW4 left for work.
25. PW1 was the single identifying witness. It is trite law that section 124 of the *Evidence Act* provides that a person shall not be convicted of a criminal offence on the evidence of a single identifying witness. However, the proviso to that section states that in sexual offences, the evidence of a single identifying witness can sustain a conviction as long as the trial court is satisfied that the witness is telling the truth.
26. In this case, the trial court believed the testimony of the complainant. The court noted that she was consistent in her evidence in spite of her age and was firm. The court most importantly noted that from her demeanour, she was not coached and her evidence was not rehearsed. The medical evidence further corroborated her evidence.
27. The appellant maintained that he had been framed. Looking at the evidence on record, I find that the appellant never put it to the witnesses that he had been framed. It was only asked to the investigation officer and extensively stated in his defence; a fact that I find was an afterthought. The appellant came up with several angles to his defence which were flaccid and unbelievable. It is as if the appellant was in a trance of his own in his own world. I do not believe that he was framed. I say this that the burden of proof in criminal matters never shifts to the appellant. The evidence of the prosecution was a chain of events that was consistent and truthful. That chain was never broken to which explained the truth of the facts before the court.
28. During the taking of evidence of PW1, the prosecution applied under section 31 of the *Sexual Offences Act* for the court to declare her a vulnerable witness and appoint an intermediary to testify on her behalf. After considering the appellant's response, the court stated that it had the opportunity to observe the witness and response to questions posed by her. The court noted the difficulty in responding. Accordingly, the court found that she was a vulnerable witness on account of her age. As such, the grandmother was appointed as an intermediary. The appellant failed to substantiate or lay a basis for allegations that the complainant had been coached by her grandmother.
29. Interestingly, he had even asked the same person to stand in surety for him. In that case, I don't see how she coached him especially taking into account the fact that the grandmother would have stood surety after the complainant had testified. However, the prosecution rejected her application on grounds that there was conflict of interest. This was PW4's mother. How would she have coached the witness and be willing to stand surety for him? Furthermore, her readiness to stand surety for him was not tantamount to his innocence. That argument indeed fails.
30. The trial magistrate properly assessed the evidence. I find that PW1 was deliberate with the truth. The appellant took advantage of PW4's absence and PW1's innocence. It is for this reason that he willingly confessed to the offence. I do not believe he did so for the reasons that he advanced. In the circumstances, I come to the unwavering conclusion that the appellant was the perpetrator of the offence. In light of the above, I find that the appeal against the conviction lacks merit and it is hereby dismissed.
31. Lastly, on sentencing, the appellant was condemned to 50 years imprisonment. Section 8 (2) of the *Sexual Offences Act* provides that a person convicted shall be sentenced to life. The recent jurisprudence from the Supreme Court have held that the mandatory nature of life sentence set out in section 8 (2) is lawful and the trial court ought to award such a sentence. In the circumstances, the trial magistrate



gave an unlawful sentence. However, since the prosecution failed to challenge that sentence, my hands are tied. For those reasons, the appeal against sentence lacks merit and it is hereby dismissed.

It is so ordered.

**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).

