JM v Republic (Criminal Appeal E076 of 2023)
[2025] KEHC 11657 (KLR) (31 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11657 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E076 OF 2023

EN MAINA, J

JULY 31, 2025

BETWEEN

JM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the judgment by Hon. V Ochanda (SRM) in Machakos Chief Magistrate's Court in Cr. S.O No. 3 of 2019 Delivered on 21st November, 2023)

JUDGMENT

1. The Appellant herein JM was charged with an offence of Defilement contrary to Section 8(1) as read with section 8(4) of the *Sexual offences Act* No.3 of 2006.

2. The particulars of the offence being that on the 19th day of December 2018 at [Particulars Withheld] area in Machakos sub-county within Machakos County intentionally and unlawfully caused his penis to penetrate the vagina of FM a child aged 16 year

3. In the Alternative Charge it was alleged that the Appellant committed an indecent Act with a child contrary to Section 11(1) of the *Sexual offences Act* No.3 of 2006 the particulars being that on the 19th day of December 2018 at [Particulars Withheld] area in Machakos sub-county within Machakos County intentionally and unlawfully touched the vagina of FM a child aged 16 years with his penis

4. After hearing and analyzing the testimonies of the five prosecution witnesses and also the testimony of the appellant, the trial Magistrate found the appellant guilty on the charge of defilement, convicted him and sentenced him to imprisonment for 16 years.

5. Aggrieved by the Judgment the appellant preferred this appeal which according to the Amended Petition is premised on the following grounds;

1. That the Learned Magistrate erred in law and in fact by failing to note that there existed procedural technicalities in the prosecution case

2. That the Learned Magistrate erred in law and in fact when she failed to properly evaluate the evidence on record and relied on insufficient, uncorroborated and incredible evidence and came to the wrong pronouncement.

3. That the Learned Magistrate erred in law and fact in failing to find that the key adversely mentioned witnesses were not called to testify and this left waging gaps and unexplained questions in the whole prosecution case whose doubts ought to have been resolved in favour of the accused person.

4. That the Learned Magistrate erred in law and fact in failing to observe that the prosecution did not discharge the factum probandum on the ingredients of the offence charged which is an indispensable legal prerequisite

5. That the Learned Trial Magistrate imposed a jarring and repressive sentence on the appellant in defiance of his alleviation which was in tandem with the sentencing policy guidelines

6. The Appeal was canvassed by way of written submissions.

7. The Appellant submitted that he was not accorded a fair trial and this was by the fact he was not represented yet he was illiterate and was competing against experienced legal minds. He contends that there were procedural technicalities which prejudiced his entire trial

8. The appellant also contended that there were inconsistencies with the evidence of the prosecution witnesses which in turn displaced the credibility of those witnesses thus dislodging the prosecution's burden of proof.

9. The Appellant also took issue with what he described as failure by the prosecution to avail key witnesses who would have shed more light on the case and thus there was failure to corroborate the testimonies of the prosecution witnesses.

10. The appellant submitted that the prosecution did not prove the ingredients of defilement namely age, penetration and identification.

11. on the sentence imposed he submitted that the same was excessive and failed to take into account the mitigating factors and also failed to take into account the period spent in custody as per section 333 (2) of the *Criminal Procedure Code*

12. He urged the court to quash his conviction and set aside the sentence

13. For the Respondent it was submitted that the prosecution discharged its burden of proving the offence beyond reasonable doubt; that the three ingredients of the offence of defilement were proved.

14. On the issue of inconsistencies pointed out it was submitted that they were immaterial and could not vitiate the prosecution's case.

15. It is finally submitted that the sentence was sufficient and appropriate taking into consideration the circumstance of the case.

Determination

16. I have considered the Appeal, the Trial Court record and the submissions of parties on record.

17. This is a first Appeal and in the case of *Okeno v Republic* [1972] EA 32 the court stated:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the Trial Court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E. A. 424."

18. It is trite that all criminal offences require proof beyond reasonable doubt. Lord Denning in *Miller vs. Ministry of Pensions (*1947) 2 All ER, 372 stated as follows:

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

19. The Appellant herein was found guilty and convicted of the offence of defilement contrary to Section 8(1) as read together with section 8(4) of the *Sexual Offences Act*.

20. Section 8 (1) and (3) of the *Act* provide as follows;

> A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

21. The elements of defilement are thus age of the victim (must be a minor), penetration and the proper identification of the perpetrator. This was stated in the case of *George Opondo Olunga vs. Republic* [2016] eKLR.

22. The first element of age was elucidated by 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."

23. Further, in the case of *Fappyton Mutuku Ngui vs. Republic* [2012] eKLR it was held that:

> ... That "conclusive" proof of age in cases under *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.

24. In this case the Child's Birth certificate was produced which clearly indicated her date of birth was 1st February 2002 and was thus 16 years and 10 months as at the time of the offence thus a child. A child is defined as a person under the age of 18 years old by the *Children's Act*. No 29 of 2002 under section 2.

25. Section 2 of the *Sexual offences Act* defines a child as "has the meaning assigned thereto in the *Children Act*".

26. The second ingredient is penetration. Penetration is defined under Section 2 of the *Sexual Offences Act* as follows:

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

27. Section 124 of the *Evidence Act*, Cap 80 provides as follows:

> " Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him.
>
> Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

28. In the case of *DS v Republic* [2022] eKLR, the court stated that;

> " Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred. Where the medical examination may not be available or conclusive, the court ought to weigh with thorough scrutiny and utmost caution, the evidence of the child, in order to determine whether there was penetration."

29. In this case, the victim PW2 testified that the accused removed her underpants and his underpants. He then inserted his penis inside her vagina many times whereby she felt pain

30. Medical evidence By PW5 doctor John Mutunga revealed that PW1's genitalia was normal. Virginity broken and was bleeding from the vagina. The hymen was freshly broken. I find that indeed there was penetration.

31. The last ingredient is identification. PW1 the victim's mother testified that her daughter had disappeared and was told the minor had gone with a man. She decided to look for her in the nearby market and that's when she saw the minor coming out of a rented house which house she was told by the owner of the plot that it had been rented by the accused. It is clear that it was the accused who was staying with the victim and they knew him well. She was able to call him Makotha and that she had

stayed with him for 3 days. He was the one who removed her pants and his underpants and inserted his penis inside her vagina. I find that identification was positive and thus this ingredient was proved.

32. As regards the issue of contradictions that have been raised by the Appellant, the way to treat contradictions in a case was stated by the Court of Appeal in *Jackson Mwanzia Musembi v Republic* (2017) eKLR where the court cited with approval the Ugandan case of *Twahangane Alfred –Vs-Uganda* CR. Appeal No. 139 of 2002 (2003) UGCA,6 where it was held that:

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case".

33. Also, in the case of *Joseph Maina Mwangi vs. Republic* CA No. 73 of 1992 (Nairobi) the Court of Appeal held that: -

> "In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."

34. The discrepancies highlighted by the Appellant have been noted. Most of those inconsistencies pointed do not go to the core of the offence before the court. This court has subjected the evidence adduced to fresh scrutiny and though it is true that there were inconsistencies in the evidence of the said witnesses, I am unable to find that the same were material enough to warrant interference with the conviction and the same is upheld.

35. On the issue of the prosecution failing to call key witnesses, Section 143 of the *Evidence Act* Cap 80 Laws of Kenya makes provision that no number of witnesses is required to prove any fact.

36. In *Keter versus Republic* [2007] 1EA135 the court was categorical that:-

> " The prosecution is not obligated to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."

37. I find that the witnesses called by the prosecution were enough to help it in discharging the burden of proof which they did.

38. The appellant in his sworn testimony testified that on 5th January 2019 he was at his work place when two officers arrested him and later charged him with defilement yet he did not know anything. He also stated that he was HIV positive and that the court should order for a test to determine his innocence or guilt.

39. From the evidence adduced there is no doubt that the victim was defiled by the appellant herein and there is no reason to disturb the judgement of the trial court on conviction.

40. On the issue of sentence, the Appellant was sentenced to 16 years imprisonment.

41. Section 8(4) of the *Sexual Offences Act* provides that:A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

42. The victim was 16 years 10 months at the time of the offence and thus having found the appellant guilty of the offence I find that the sentence was appropriate.

43. In Petition No. E018 of 2023 *Republic v Joshua Gichuki Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (Petition 18 of 2023) [2024] KESC 34 (KLR) 12th July 2024) (Judgment) the apex court in overturning the Court of Appeal judgment where the court had reduced the offender's sentences, and affirmed the minimum sentence as provided in the *Sexual Offences Act*. The Court held that:

    i. Judges of the Court of Appeal acted ultra vires and without jurisdiction by assuming original jurisdiction on constitutional matters which were not raised at the High Court while canvassing the minimum mandatory sentences question; i. In departing from the decision on minimum mandatory sentences for sexual offences as stated in *Muruatetu & another v Republic* S.C Petition 15 & 16 of 2015) [2021] KESC 31 (KLR)(Muruatetu directions) the learned judges of the Court of Appeal violated the principles of stare decisis and proceeded to determine 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*;

    ii. Mandatory minimum sentences do not deprive judicial officers of the power to exercise judicial discretion. However, minimum sentences set the floor rather than the ceiling when it comes to sentences with that which 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.

    iii. That the Court of Appeal on 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 failed to identify with precision the provisions of the *Sexual Offences Act* it was declaring unconstitutional, left its

    iv. declaration of unconstitutionality ambiguous, vague and bereft of specificity. Thus, creating inconsistency in sentences for the same offences would also create mistrust and unfairness in the criminal justice system.

    iv. The Respondent who had been released should serve the remainder of his sentence from the date of conviction by the trial Court."

44. Being guided by the above decision of the Supreme Court (Supra), I find no reason to interfere with the judgment of the trial Court.

Disposition

1. In the result the appeal fails. The conviction and sentence are upheld.

2. Right of appeal to the Court of Appeal is explained to the appellant.

JUDGMENT SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 31ST DAY OF JULY 2025.

E.N. MAINA

JUDGE

In the presence of :

Ms Nyauncho for the state

The Appellant (virtually)

Miriam – Court Assistant/Interpreter