



REPUBLIC OF KENYA



**KENYA LAW**

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**JC v Republic (Criminal Appeal E072 of 2023)  
[2025] KEHC 7228 (KLR) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 7228 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CRIMINAL APPEAL E072 OF 2023  
A. ONG'INJO, J  
FEBRUARY 13, 2025**

**BETWEEN**

**JC ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal arising from the conviction and sentence by Hon.  
Karimi Njeru Senior Resident Magistrate in Kehanch Principal  
Magistrate's Sexual Offence Case No. E059 of 2021 delivered on 7.2.23)*

**JUDGMENT**

1. The Appellant JC was charged with the offence of Defilement Contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offence [Act No. 3 of 2006](#) on 2 Counts.
2. Particulars to Count 1 are that on diverse dates between 2020 to October 30<sup>th</sup> 2021 in Kuria West Sub County within Migori County the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of D. B. K. a child aged fourteen (14) years old.
3. In the alternative the Appellant was also charged with the offence of committing indecent act with a child contrary to Section 11 (1) of the Sexual Offence [Act No. 3 of 2006](#)
4. Based on the evidence of five (5) Prosecutions witnesses and the Appellants testimony as well as his two witnesses testimonies the trial Magistrate convicted the Appellant and sentenced him to serve 25 years imprisonment.
5. The Appellant was aggrieved by the conviction and sentence and he lodged his Petition of Appeal filed on 1.11.23 on the following grounds;-
  1. The learned trial Magistrate erred in law and fact on failing to observe that the age of the victim was not proved beyond reasonable doubt.



2. The learned trial Magistrate erred in law and fact by not considering that the Appellant was not subjected to medical corresponding investigations as underline under Section 36 of the *Sexual Offences Act*.
3. The learned trial Magistrate erred in law and fact in failing to find that the Prosecution's case was not watertight and therefore unsafe conviction.
4. That the sentence meted on the Appellant was unconstitutional and not warranted on plea.
5. The learned trial Magistrate erred in law and fact y failing to note and consider that the evidence tender by eth prosecution was full of contradictions inconsistencies and doubtful evidence all pointing on a fabricated.
6. The Prosecution case was that the Appellant defiled PW1 on two occasions, once in a bathroom and on another occasion on his house on the bed. The complainant said that the Appellate was he uncle a brother to her deceased father. That when the Appellant entered the bathroom where she was taking shower he told her not to scream and did tabia mbaya. That on another occasion when she went to fetch firewood in company of two of the Appellants daughter the complainant passed by the Appellant home and met one of the daughter's who told her that the Appellant had shown her his penis. That the Appellant then called the complainant into the house and forcefully removed her clothes and had sex with her on his bed. That when she tried to scream the Appellant used a piece of cloth to covered her mouth. That the following morning she reported the matter to the school teacher madam Musembi who in turned informed the Chief and the matter was reported to Masaba Police Station. The complainant said that none of her family members had grudge against the Appellant and that what she said in court was the truth. She also said that the Appellant had also raped his own daughter C and she got pregnant.
7. PW2 Mokami Christine was a teacher at [Particulars Withheld] where the complainant was a student in class eight and that on 8.11.21 the complainant's mother to interrogate the complainant over a phone she was having. That when she called the complainant at 9:30 during break time the complainant admitted having a phone which she had left with a cousin who was a form two student. That the complainant reviled to her a man called JC who is her uncle used to give her money and then lure to her to his bedroom when the wide was not around and that one time the Appellant went to their home and found her in the bathroom and forced himself on her. PW2 said that she informed the Assistant Chief of the matter as it was criminal in nature.
8. PW3 George Omondi Olocho clinical officer at Kuria West Sub County Hospital produced treatment notes for the complainant, PRC and P3 forms which were filled when the complainant was presented at their facility with a history of being defiled by a person known to her on several occasions. That as a result of the said defilement the complainant conceived and on examination she also had an infection and she had a broken hymen. PW3 said that he was with his colleagues Nyariki and Christine when they examined the complainant and found that she was defiled.
9. PW4 RJM the mother of the complainant testified that on 9.11.21 the complaint was sent away from school with instructions that she should go back with the parent. The following morning when she went to school she met the teacher and the Assistant Chief and her daughter informed her that her uncle has been seduce her and threatening to harm her. The Assistant Chief advised them to go to the police station. That the Assistant Chief went and took the Appellant to the police station where he was interrogated. That when the Appellant was arrested he was asking PW4 for forgiveness and alleged that it is the devil who caused him to defile the girl. PW4 said that her daughter was found to be three months pregnant.



10. PW5 Insp. Agatha Wekesa testified that a report was made D the daughter of the Appellant and D2 his niece was defiled by the appellant. That when she interrogated the complainant she learnt that the appellant always defiled the complainant at every opportunity he gets. She said that even her mother knew that the mother had known that the Appellant had defiled the complainant severally but could not do anything about it. PW5 escorted the complainant to the hospital and it was established that she was pregnant. She said that the complainant mother did not cooperate when she was told to take the complainant to the police station and she suspected that she must have procured the victim abortion. PW5 said that the Appellant was arrested by the Assistant Chief. PW5 produce the complainant's birth certificate showing that she was born on 2.6.2008.
11. When the Appellant was placed on defence, he gave sworn statement and said that he was a Chef he said that the complainant was a child to his brother and that she was around 14 years. He said he never defiled or sexually assaulted the complainant and the allegation for defilement are false. He said that he differed with complainant's mother on 12.6.21 when she sold land yet she had a son who was meant to inherit the said portion of land. He said he was charged to teach him a lesson. He said that he was called to the Chief's office and he denied the charges as most of the time he left the hotel at 9:00p.m and found the children in bed. He said that he had children between the ages of 17 and 3 years and that he was living with his wife and children, he said he didn't have a grudge with the victim who is his neighbor. The Appellant said further that in year 2020 he was not at home as he was working in Naivasha that he left Naivasha in 2021 when he was arrested.
12. In cross examination, the Appellant said that he didn't cross examine the complainant and her mother on the grudge allegations of the land dispute.
13. JN the brother to the Appellant testified that the complainant was a daughter to his deceased brother. He said that in the year 2020 the Appellant was in Mombasa where he was to be taught Islam so that he could come and convert people to Islam at home. He said that the Appellant returned in July 2021. According to PW2 the complainant framed the Appellant for differing with his wife.
14. This Appeal was canvassed by way of written submissions. He said that the complainant must have heard the Appellant and his wife quarreling. The Appellant works in a hotel and returns at around 8:00p.m. DW2 he does not live with Appellant throughout and he does not know what he spends his time doing all the time. He also said that he does not know if the Appellant differed with the complainant's mother. DW3 Hellen Moragwa said he was a neighbor to the Appellant and that the complainant was known to her as she also a neighbor. She said that the Appellant works in a hotel in Masaba and leaves in morning and returns in the evening. The Appellants stays home only Saturdays. She also said that before the Appellant in Masaba he had gone to live in Mombasa. She also said that she didn't know the year when the Appellant went to Mombasa and that she learnt from eth radio that the complainant got pregnant when the Appellant defiled her. DW3 said that she does not know whether the Appellant defiled the complainant or not.  
The Appeal was canvassed by way of written submissions.
15. The Appellant's submissions added nine amended grounds of Appeal and submitted that the complainant was not taken for age assessment and her real age was not ascertained and this occasioned injustice hence prejudicial to the Appellant. In regard to penetration the Appellant argued that a broken hymen was not full proof of pentation since hymen can degenerate or be broken through vigorous exercise bicycle riding and swimming and horse raising. He submitted further that the fact the victim said that he did tabia mbaya to her does not really mean that there was defilement.



16. The Appellant also claimed that the prosecution's case had material contradiction and discrepancies as to whether the complainant conceived or not and that weaken and destroyed the inference of the Appellants guilt.
17. The Appellant also faulted the trial magistrate for failing to put on record in the proceedings as to whether he was satisfied that the victim was telling the truth or not he cited the holding in Mohamed vs. Republic 2008 KLR and Jacob Odhiambo Mumbo and Republic where it was held that the court must believe and satisfied that the victim is telling the truth and secondly that it must record the truth.
18. Further submission by the Appellant was that the prosecution failed to summon crucial witnesses to testify such as the cousin to the complainant, the Assistant Chief, two police officers and two of the Appellants daughters.
19. The Appellant argued that failure to send him for medical examination prejudice him and he felt discriminated. That there was no DNA carried out under Section 36(1) Sexual Offences Act to link him with the pregnancy.
20. The Appellant also claim that the sentiments that PW4 alluded to in her testimony contravene Article 49 (c) and (d) of the Constitution as the same was obtained through cohesion and torcher.
21. The Appellant also faulted the trial magistrate for sentencing him for 25 years imprisonment despite the fact that prosecution had failed or prove the case against him.
22. Finally, the Appellant submitted that the trial magistrate failed to evaluate his sworn strong alibi defence that was not demolished by the prosecution in compliance of Section 212 of the Criminal Procedure Code to call evidence to rebut the defence.
23. The respondent submissions are that the ingredients of the offence of defilement was proved beyond reasonable doubt and the Appeal should be dismissed.

### **Analysis and Determination**

24. In a first appeal, the duty of the court was stated in Mark Oiruri Mose vs. R (2013) eKLR thus;
 

.... the Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.”
25. Having considered the grounds of Appeal, and revisited the evidence tendered before the trial court afresh as well as the submissions by the rival parties, the issues for determination are:-
  - i. Whether the ingredients of the offence of defilement were proved beyond reasonable doubt.
  - ii. Whether the Appellant was convicted based on materials contradictions and discrepancies
  - iii. Whether the trial magistrate gave reason why she believed the complainant evidence under Section 124 of the Evidence Act.
  - iv. Whether the trial magistrate erred by not considering that the Appellant was not subject to medical examination.
  - v. Whether the Appellant was convicted based on confession
  - vi. Whether the Appellants defence of Alibi was considered



- vii. Whether the sentence was harsh and excessive.
26. The complainants testified and gave her age as fifteen years as at the time she was in court having been born in June 2008 and her teacher PW2 informed the court that the complaint was by then a pupil in Class 8. The Clinical Officer PW3 produced a P3 Form and PRC Form indicating that the Complainant was aged between 13 and 15 years as at the time she was being examined. The Appellant did not challenge the age of the Complainant during cross examination and he cannot do it at this stage.
27. On whether or not there was penetration the complainant said that her uncle the Appellant herein defiled her when she was having a bath in the bathroom and on another occasion he called her to his house and defiled her on his bed that when she screamed the Appellant used a piece of cloth to cover her mouth. When the Complainant reported the matter to the teacher a report was made to the Chief who referred them to Masaba Police Station and she was later escorted to hospital where she was examined and it was established that she had conceived as a result of the defilement and she had an infection it was also found that her hymen was broken and PW3 produced P3 Form and PRC Form confirming that the complainant was defiled. There was therefore proof of penetration by the prosecution evidences.
28. Whether the Appellant was identified as the perpetrator it was not in dispute that the Appellant is an uncle to the complainant and they therefore knew each other very well. When the complainant testified she said that she was telling the truth that the Appellant had defiled her twice and had also defiled his own daughter who also got pregnant there is nothing in the complainant's testimony or in PW4 testimony to show that there was a reason to why they could have fabricated him and therefore this court finds that the evidence of identification of the Appellant as the perpetrator was proved beyond reasonable doubt.
29. The Appellant raised the defence of Alibi claiming that on the year 2020 he was in Naivasha working and left in July 2021 when he was arrested with this offence. He did not raise this Alibi by the investigating officer at the time of arrest neither did he cross examine PW4 she told him that he could not recall where he was in 2019. He did not make reference to his whereabouts in 2020. The Appellant witness DW2 Joseph Nchagwa said that the Appellant was in Mombasa in 2020 and not Naivasha as the Appellant claimed. DW3 a neighbor to the Appellant also said that the Appellant went to live in Mombasa and when he returned he began to work in a hotel in Masaba. The evidence of the Appellants as to his whereabouts is not consistent with evidence of his witnesses who said he was in Mombasa during undisclosed period of time.
30. As to whether the sentence was harsh and excessive Section 8 (3) of the Sexual Offence Act provided for a sentence of imprisonment for a term not less than 20 years and it was therefore lawful. The trial magistrate while sentencing the Appellant said that although he was a first offender he took advantage of the fact that the complainant's father was deceased and defiled. The trial magistrates noted that the Complainants was the Appellants niece and that he defied her severally the trial magistrate therefore called for a deterrent sentence of 25 years. That was an exercise of the trial courts discretion which I don't see the reason to interfere with. This court has however noted although the Appellant was granted bond of 200,000/= with a surety or cash bail of 100,000/= the record shows that he was not able to secure his release during trial and therefore he is sentence will run from 9<sup>th</sup> of November, 2021 when he was arrested.
31. The appeal lacks merit and is dismissed.

**DELIVERED, DATED AND SIGNED AT MIGORI BY TEAMS / ONLINE THIS 13<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**A. ONGINJO**



**JUDGE**

Judgment delivered in the presence of:

