



**Njagi v Republic (Criminal Appeal E061 of 2024)  
[2025] KEHC 3006 (KLR) (Crim) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 3006 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL APPEAL E061 OF 2024  
AB MWAMUYE, J  
FEBRUARY 13, 2025**

**BETWEEN**

**JASPER MOGENDI NJAGI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the original conviction and sentence by Hon.  
E. Mutunga in Makadara CM Sexual Offence Case No. 261 of 2021)*

**JUDGMENT**

1. The Appellant, Jasper Mogendi Njagi, was charged with the offence of defilement contrary to Section 8 (1), as read together with Section 8(1) (4) of the [Sexual Offences Act](#) No. 3 of 2006. The Appellant was equally charged with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#).
2. It was alleged that on 3<sup>rd</sup> October, 2021 at around 0730hrs in Kasarani sub county within Nairobi County, the Appellant intentionally and unlawfully caused his penis to touch and penetrate the vagina of FM a female child of seventeen (17) years.
3. The Appellant pleaded ‘not guilty’ to both counts and the matter proceeded for Trial. The prosecution called a total of seven witnesses in support of their case against the Appellant. At the close of prosecution’s case, the Trial Court was satisfied that the prosecution had established a prima facie case against the Appellant; and consequently, put the Appellant on his defence.
4. The Appellant took the stand and gave his testimony under oath but did not call any other witnesses. At the close of the Appellant’s case, the Trial Court convicted the Appellant of sexual assault contrary



to Section 8(1) as read with Section 8 (4), of the *Sexual Offences Act*. After hearing the Appellant in mitigation, the Trial Court sentenced the Appellant to a term of twelve (12) years imprisonment.

5. Being dissatisfied with both the conviction and sentence, the Appellant filed a Petition of Appeal that espoused the following grounds of appeal, verbatim:
  - a. That the Hon. Trial Magistrate erred in both law and in fact by finding that the key ingredients of the offence were established against the appellant herein while in fact they were not;
  - b. That the Hon. Trial Magistrate Trial Magistrate erred both in law and in fact by failing to find that the inherent contradictions and inconsistencies on record not only impugned on the credibility of the various witnesses but also vitiated on the overall burden of prove;
  - c. That the Hon. Trial Magistrate erred in law and in fact by failing to freshly, exhaustively, comprehensively and deliberately analyze, weigh and consider the strong defence case which exonerated the appellant from any wrong doing;
  - d. That, the learned Trial Magistrate failed and erred in law and fact by convicting me having not considered Article 50 of the Kenyan Constitution 2010;
  - e. That the Hon. Trial Magistrate erred both in law and in fact by failing to find that the inherent contradictions and inconsistencies on record not only impugned on the credibility of the various witnesses but also vitiated on the overall burden of prove;
  - f. That the Trial Magistrate erred in law and in fact by failing to freshly, exhaustively, comprehensively and deliberately analyze, weigh and consider the strong defence case which exonerated the Appellant from any wrong doing;
  - g. That the learned Trial Magistrate erred in law by failing to observe that the case for the prosecution was not proven beyond reasonable doubt as required by law;
  - h. That the learned Trial Magistrate erred both in law and facts by failing to appreciate the inconsistencies and contradictions in the prosecution and went ahead and gives opinionated judgment and conviction;
  - i. That the learned Trial Magistrate erred in law and fact by convicting me with uncorroborated evidence from the prosecution.
6. The parties filed and exchanged written submissions in the Appeal. The Appellant's written submissions were dated 15<sup>th</sup> November, 2024 while those of the Respondent were dated 18<sup>th</sup> December 2024.
7. The Appellant's written submissions dated 15<sup>th</sup> November, 2024 framed his submissions to analyze the three issues for determination in this appeal namely:
  1. Whether the learned Magistrate erred in both law and fact in finding that the prosecution had discharged its duty of proving existence of all the ingredients of the case of defilement which key of them is identification
  2. Whether the learned Magistrate erred in both law and fact in finding that the prosecution had discharged its duty of proving existence of all the ingredients of the case of defilement which key of them is Penetration
  3. Whether there were inconsistencies and contradictions with the prosecution's case.



8. The Respondent on the other hand in its written submissions dated 18<sup>th</sup> December, 2024 espouses the following issues for determination in this appeal:
  1. Whether there was proof of penetration;
  2. Whether the age of the child was proved and;
  3. Whether there was positive identification of the assailant?
9. From the outset, it is important to note that while the parties have worded their issues for determination differently, there is significant overlap and concurrence on some of the issues for determination.
10. Furthermore, and more significantly, the Respondent has conceded the following issues for determination, any of which would be determinative of the appeal in favour of the Appellant.
11. Whether there was proof of penetration – The Appellant submitted that PW4, Peninah Angwenyi testified that the complainant’s hymen had an old tear at 3’Oclock position which is not proof of penetration as the complainant was examined on the very same day of the alleged offense. He further submitted that as regards the evidence on the anal examination, there was no spermatozoa in the anus and no DNA to ascertain that the Appellant was the assailant.
12. On the same issue of penetration, the Respondent submitted that from the medical certificate and testimony of the clinical officer there is proof of penetration since the complainant had reddening and fresh tear abrasions on her outer genitalia, hymen had old tears and anal area had fresh multiple abrasions as corroborated by medical evidence.
13. Whether there was positive identification of the Appellant- on this issue, the Appellant submits that that PW3 neither gives the description of the man who allegedly grabbed her by hand and defiled her nor the clothes he was wearing. He further states that since the complainant did not know him before, there should have been a proper identification parade carried out by the police to identify the assailant in accordance with the police standing orders. The Respondent on the other hand stated that the Appellant was positively identified at the construction site by the complainant in a parade which was corroborated by PW6 and PW7. In addition, the Respondent submitted that the complainant was able to identify the appellant as the one who defiled her on the dock.

### **Analysis and Determination**

14. This being the first appellate court, it is our duty as well set out in the case of *Okeno vs Republic* (1972) E.A 32 which states as follows:

“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 vs Republic* [1957] E.A. 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weight conflicting evidence and draw its own conclusions. (*Shantilal M. Rulwala vs Republic* [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 had the advantage of hearing and seeing the witnesses.”



15. Further in the case of Mark Oiruri Mose vs Republic [2013] eKLR Criminal Appeal No. 295 of 2012 the court of appeal stated:

“It has been said over and over again that the first appellate Court has the duty to revisit the evidence tendered before the Trial Court afresh, analyze it, evaluate 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 to give allowance for that.”

16. In view of the above, I have considered the grounds of appeal against the record of appeal and the submissions of both parties. I take the view that the at the Trial the prosecution was required to establish the following:
- a. The age of the victim;
  - b. That there was penetration; and
  - c. That the Appellant was properly identified and linked to the offences.

**i. The age of the victim**

17. From the record of the Trial Court, I am satisfied that there was no error in the identification of the victim complainant as a seventeen-year-old minor. The production of her birth certificate was sufficient proof and, in any case, not in dispute in this Appeal.

**ii. Whether the element of penetration was established**

18. On whether there was penetration, penetration is proved though the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case must be sufficient to determine whether penetration occurred.
19. The complainant testified that she was going to church and upon reaching near school, the Appellant took her by the hand to an unfinished building, removed her tight and panty together with his trouser and proceeded to put his penis in her vagina and anus. She further stated that after the act, the Appellant gave her Kes. 20.00 and told her to go buy some tea but should come back for more money on Saturday.
20. The medical report corroborated the evidence adduced by the complainant during Trial. The P3 form produced by PW4, Peninah Angwenyi showed that upon examination, PW1 had an old tear at 3'clock position of her hymen and also had multiple fresh abrasions and reduced muscle tone on her anus. During cross-examination, PW4 testified that she did not find any spermatozoa in the vagina or anal region of the complainant but explained the reason for that to be either the man wore a condom, did not ejaculate or cannot ejaculate.
21. I find that based on the medical evidence produced during Trial, penetration was proved beyond a reasonable doubt.



### iii. Whether the Appellant was properly identified

22. On the question of whether the Appellant was properly identified and linked to the offences I will rely on the case of *Republic v Turnbull* [1970] 3 ALL E.R. 549 as quoted with approval by the Court of Appeal in the case of *Michael Ng'ang'a Kinyanjui v Republic* where Lord Widgery, C.J. held:

“... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witnesses ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance...”

23. FM testified that she was confronted by the Appellant in the morning while on her way to church. She describes in detail how the accused took her by her hand to an abandoned building, removed her tight and panty and his trouser as well then proceeded to insert his penis in her vagina. She further stated that after the act, the Appellant gave her twenty shillings to buy tea and informed her to come for more money on Saturday. She also testified that he inserted his penis from the front but she bit him and the second time he penetrated from behind. It is my view that they were together long enough for her to recognize her assailant. She later picked him out when they went to the construction site where the Appellant worked. The testimony was corroborated by the investigating officer, PW6 who testified that he went to the scene with the complainant where there was ongoing construction. He further stated that all the workers on site came up and the Appellant was identified as the assailant thus they proceeded to arrest him. I find that identification of the Appellant was proved to the required standard and there is no merit in the Appellant's complaint in that regard.

24. It is also my view that the contradictions pointed out were not so material as to vitiate the conviction.

25. That being said, and for the reasons set out above, I am satisfied that the prosecution's evidence met the threshold of proving the case beyond reasonable doubt; and that the Trial Court did not err in law and in fact in convicting the Appellant. Accordingly, the appeal on conviction is dismissed.

26. The appeal on sentence is equally dismissed. I am satisfied that the Trial Court did take into account the period the appellant was held in custody. I therefore order that the sentence imposed of twelve (12) years should run from the date the Appellant was arraigned in court on October 6<sup>th</sup>, 2021.

**DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 13<sup>TH</sup> DAY OF FEBRUARY, 2025.**

.....

**BAHATI MWAMUYE**

**JUDGE**

