



REPUBLIC OF KENYA



**KENYA LAW**  
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**Sichanga v Republic (Criminal Appeal E077 of 2023)  
[2025] KEHC 2132 (KLR) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2132 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CRIMINAL APPEAL E077 OF 2023  
AC MRIMA, J  
FEBRUARY 13, 2025**

**BETWEEN**

**JAMES OLANDO SICHANGA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Appellant herein, James Olando Sichanga , was charged, tried and convicted of the offence of Defilement contrary to section 8(1)(2) of the *Sexual Offences Act*. The particulars were that on 6<sup>th</sup> November 2022 within Trans Nzoia County intentionally and unlawfully caused your penis to penetrate the genital organ named [sic] vagina of EB, a child aged 15 years. He further faced an alternative charge of indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The Appellant denied both charges.
2. The prosecution called five witnesses and at the close of the prosecution case, the trial Court found that the prosecution had established a prima facie case against the Appellant and put him on his defence. The Appellant gave sworn defence and did not call any witness.
3. The Learned Trial Magistrate found the Appellant guilty of the offence of defilement and upon conviction, he was sentenced serve 15 years in prison.
4. Aggrieved by the conviction and sentence, the Appellant filed this appeal and preferred the following amended grounds: -
  - i. That, the trial magistrate erred in law and fact by failing to note this case was full of contradictions and inconsistencies.
  - ii. That, the trial magistrate erred in law and fact by failing to summon crucial evidence.
  - iii. That, the trial magistrate erred in law and fact by failing to exercise its powers during sentencing



- iv. That, the trial magistrate erred in law and fact by failing to consider the provisions of sentencing policy guidelines.
5. The appeal was canvassed by way of written submissions where both parties duly complied and exchanged their respective submissions.
6. The Appellant submitted that there were contradictions in the witness statements and that the prosecution failed to call crucial key witnesses. The Appellant prayed that the appeal be allowed, conviction quashed, sentence be set aside and the appellant be set at liberty.
7. The Respondent in their submission submitted that the prosecution had proved its case against the Appellant beyond reasonable doubt and as such he was rightly convicted and that the appeal ought to be dismissed.
8. Having carefully considered the grounds of appeal, the entire body of evidence presented before the trial Court, the written submissions and the judgment of the learned trial Magistrate, this Court is alive to its role as the first appellate Court. Its duty is to re-consider and to re-evaluate the evidence adduced before the trial Court so as to reach its own independent determination whether or not to uphold the conviction and the sentence. The role was expounded by the Court of Appeal in *Okeno vs. Republic* (1972) EA 32 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) EA. (33G) and the appellate court's own decision on the evidence. The 1st appellate court must itself weigh convicting evidence and draw its own conclusion. (*Shantilal M Ruwala Vs R* (1957) EA 570). It is not the function of a 1st appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; 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 vs Sunday Post* [1958] EA 424.

9. As the appeal is in respect of the conviction and sentence on the offence of defilement, this Court will ascertain if the offence was proved as required in law. In *Charles Wamukoya Karani v R* CR Appeal No. 72 of 2013 the Court identified the ingredients of the offence of defilement as follows: -

..... That the critical ingredients forming the offence of defilement are: age of the complainant, proof of penetration and positive identification of the assailant.

10. Going forward, I will deal with each of the ingredients in seriatim.

**Age of the victim:**

11. The age of the victim is a crucial one since it determines the sentence on conviction. In *Francis Omuroni v Uganda*, the Court of Appeal CR Case No. 2 of 2000 held inter alia that: -

.... Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense.



12. The gist of proof of age and the distinct bearing and its useful guide is to be found in *Moses Nato Raphael v R* {2015} eKLR where the Court had the following to say: -

.... On the challenge posed by the uncertainty in the complainants age, this Court had occasion to deal with similar issue in *Tumaini Maasai Mwanya v R Mombasa CRA No. 364 of 2010* where the Court held that proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims statutory categories of age. As long as there is evidence that the victim is below 18 years, the offence of defilement will be established. The age, which is actually, the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child's age cannot therefore assist the appellant to avoid criminal culpability....

13. In the instant appeal, the age of the victim was proved by an Age Assessment Report which was produced by PW5, an officer from the Dental Department at the Kitale County Referral Hospital. He stated that upon examination, the victim's age was assessed at 15 years. There being no challenge to the report, this Court affirms the age as such. Therefore, the victim was a minor in law.

### **Penetration:**

14. Section 2 of the *Sexual Offences Act*, 'penetration' means: -

the partial or competent insertion of the genital organs of a person into the genital organs of another person.

15. Buttrussing the above, in *Mark Oiruri Mose vs R (2013) eKLR*, the Court of Appeal stated thus: -

.... Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.... (emphasis added).

16. Later the Court of Appeal, differently constituted, in *Erick Onyango Ondeng -vs- Republic (2014) eKLR* held as such on the aspect of penetration: -

.... In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.

17. In *Remigious Kiwanuka v Uganda SC Crim Appeal No. 41 of 1995* the Court stated that 'proof of penetration is normally established by the victim's evidence, medical evidence and any other cogent evidence.'

18. In her testimony, the complainant/victim, who testified as PW1, stated that she was forcefully taken by the Appellant to his home where she spent the night and twice engaged in sex that night. She described how the Appellant undressed her clothes and also undressed himself and engaged in sexual intercourse. In the morning, PW1 accompanied the Appellant to harvest his maize in his farm for the whole day and later returned to her home where she was confronted by her mother, PW2, who took her and reported the matter to the police. Upon being referred to the Chepchoina Health Centre, PW1 was examined by PW3 [a Clinical officer] on 8<sup>th</sup> November 2022, two days post the intercourse. On examination, PW1's vagina appeared normal with white discharge. Hymen was torn and old looking. Urine had pus



cells and epithelial and she had urinary tract infection. PW3 testified that there was adequate medical evidence to prove penetration.

19. Going by the evidence by PW1, PW2 and PW3, this Court finds no difficulty in affirming that penetration was proved.

**Identification of the assailant:**

20. The third element which is as critical as the first two deals with identification of the assailant being at a crime scene as the defiler of the victim.
21. The Court's duty on identification was set out in *Roria v R* {1967} EA 583 and also in *Abdalla Bin Wendo v R* {1953} 20 EACA 166 among many other decisions. In *Simiyu & Another v R IKLR* 192 the Court of Appeal laid down the following guidelines: -

.... In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of the description are matters of the highest importance of which evidence ought always to be given first of all by a person or persons who gave the description and purport to identify the accused and then by the person or persons to whom the description was given....

22. In her testimony, PW1 identified the assailant as a person well known to him. She not only spent the night with him, but the entire following day where they harvested maize in his farm. When confronted by PW2, PW1 readily gave the name of the Appellant as the person whom she had been with since the day before. PW1 confirmed as much before the police. However, PW1 was a single eye-witness.
23. The law relating to identification by a single witness is by now well settled. The Court of Appeal in *Peter Mwangi Wanjiku v Republic* [2020] eKLR addressed the aspect of single identifying witness as follows: -

13. Section 143 of the *Evidence Act* provides that a court can convict on the evidence of a single witness. The said section reads, "No particular number of witnesses shall in the absence of any provision of law to the contrary be required for the proof of any fact." Nonetheless, this does not remove the obligation of the trial court to test the evidence of a single witness. As was held in *Mailanyi vs Republic* [1986] KLR 198:

1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.
2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light, available conditions and whether the witness was able to make a true impression and description.
3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.
4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.



14. It is clear from the record of appeal that the trial magistrate was alive to his obligation to carefully test the evidence of Solomon. The issue is whether this was actually done. In *Mailanyi v Republic* (supra), the Court emphasized that:
- What is being tested is primarily the impression received by the single witness at the time of the incident. Of course if there was no light at all, identification would have been impossible. As the strength of light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. ....
- There is a second line of enquiry which ought to be made, and that is whether the complainant was able to give some description or identification of his or her assailants to those who came to the complainant's aid or to the police.
24. In *R -vs- Turnbull & Others* (1973) 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court stated thus: -
- ... 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 witness 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? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.
25. In *Wamunga vs Republic* (1989) KLR 426 the Court of Appeal stated as under: -
- .... It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.
26. In *Anil Phukan vs. State of Assam* (1993) AIR 1462 the Court held as follows: -
- .... A conviction can be based on the testimony of a single-eye witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone.
27. The record has it that PW1 was a credible witness and her testimony was not shaken. She knew the Appellant not only as a neighbour, but also someone who even worked with PW2 in harvesting maize. Further, the trial Court did not make any adverse findings on PW1's evidence.
- In his defence, the Appellant denied committing the offence and averred that there was no evidence on the commission of the alleged offence. He further stated that he was being framed by the PW2 for having refused to offset a hospital bill for her.



28. The incident as narrated by PW1 was simple, clear and straight-forward. This Court is not slightly persuaded that PW1 was mistaken on whom she dealt with. She knew the Appellant by name and he was familiar with him as well. The defence did not in any way cast any aspersions on the prosecution's evidence or at all.
29. By taking into the above caution and parameters, this Court finds that indeed the identification of the Appellant by way of recognition was not in error. The defence is unbelievable and did not cast any doubt on the prosecution's case. The Court finds and hold that the Appellant was the one who had sex with PW1.
30. The Appellant also raised the issue of other witnesses not called to buttress the prosecution's case. The Court's attention is drawn to Keter versus Republic [2007] 1EA135 where it was categorical stated thus: -

... 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.
31. On the lack of spermatozoa in PW1's vagina, this Court states that even without the presence of spermatozoa in a victim's vagina, it is still possible to prove sexual activity. The lack thereof in this matter did not water down the case.
32. On the overall analysis of the evidence and the law, this Court finds and hold that the Appellant was, rightly so, found guilty of the offence of defilement and convicted accordingly.
33. The appeal on conviction, hence, fails.
36. As regards sentence, the question is whether there is any lawful reason to interfere with the discretion of the trial Court in passing sentence. The Appellant was sentenced to 15 years imprisonment. Under Section 8(3) any 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. The Appellant was, hence, handed down a lesser sentence. However, at the time the sentence was passed, the legal jurisprudence then prevailing allowed a Court to exercise discretion in sentencing. Even though that position has now changed, this Court was not moved for enhancement of the sentence imposed. This Court shall, therefore, not interfere with the sentence.
37. The appeal on sentence is equally disallowed.

**Disposition:**

38. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 and subsequently elected into the Judicial Service Commission thereby mostly being away from the station. Apologies galore.
39. In the end, the whole appeal is found and held to be without merit and is hereby dismissed.
40. It is so ordered.

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

**A. C. MRIMA**  
**JUDGE**



Judgment delivered virtually in the presence of:

James Olando Sichanga, the Appellant.

Mr. Mugun, Learned Prosecutor instructed by the Director of Public Prosecutions for the Respondent/State.

Chemosop/Duke – Court Assistants.

