



REPUBLIC OF KENYA



**Juma v Republic (Criminal Appeal E012 of 2024)  
[2025] KEHC 7240 (KLR) (20 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 7240 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CRIMINAL APPEAL E012 OF 2024  
A. ONG'INJO, J  
MARCH 20, 2025**

**BETWEEN**

**GILBERT OMONDI JUMA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the Judgment of Hon. C. N. C Oruo  
(Principal Magistrate) delivered on 11th March 2024 in RONGO  
PMC S.O. Case No. E008 of 2023, Republic Vs Gilbert Omondi Juma)*

**JUDGMENT**

1. The Appellant was convicted and sentenced to serve 20 years imprisonment for the offence of defilement contrary to Section 8(1) as read with Section 8 (3) of the [Sexual Offences Act](#) in Count 1 and 7 years imprisonment for the offence of kidnapping contrary to Section 255 as read with Section 257 of the [Penal Code](#) in Count 2.
2. The particulars to the offence in Count 1 were that the Appellant on diverse dates between 22<sup>nd</sup> day of February and March 2023 at West Kamagambo Location in Rongo Sub-County of Migori County the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of J. M. V a child aged 14 years.
3. The particulars to count 2 were that Gilbert Omondi Juma on diverse dates between 22<sup>nd</sup> day of February and March 2023 at West Kamagambo Location in Rongo Sub-County of Migori County kidnapped J. M. V a child aged 14 years from lawful guardianship of BAA.
4. The Appellant was aggrieved by the conviction and sentence and he preferred the appeal herein vide Petition of Appeal filed on 13<sup>th</sup> March 2024 on the following grounds :-
  - a. That the plea as taken was not unequivocal.



- b. That the Learned Trial Magistrate disregarded all the open discrepancies in the particulars of the offence as captured by the prosecution.
  - c. That the sentence meted out is overly harsh inspite of being a 1<sup>st</sup> offender,
5. Reasons wherefore the Appellant prayed that the appeal be allowed, conviction quashed and sentence set aside.
6. The Prosecution's case was that the Complainant PW1 was a student at [particulars withheld] Primary School in Grade 7 and she knew the Appellant as he was their neighbor. That on 18/2/2023 she visited a friend by the name Angel in Kitere who lives with the aunt and that the friend requested her to spend the night at their place. PW1 stated that she wanted to go back home but the friend requested her to leave at 1:00p.m. That on her way home she met the Appellant at a place called Nyalgunga and they walked together.
7. That the Appellant requested her to accompany him to his house but she refused and the Appellant insisted that he had a something that he wanted to give to the Complainant. That on reach the house the Appellant locked her in the house till 6:00p.m. That the Appellant came back at 8:00p.m and she insisted on going back home but the Appellant refused and she agreed to spend the night at the Appellant's place. PW1 further stated that the Appellant left on Monday to work and left her there till 6:00p.m. That the following day on Tuesday when the Complainant went to her home the mother came and found her at door and the he enquired where she was but the Complainant didn't answer. That on Wednesday they went to her aunt's place at Rapogi but she didn't explain to her aunt where she came from.
8. PW1 confirmed to the court that the Appellant was his boyfriend and that they went to the Appellant's house and spent there. The Complainant further confirmed that during the time she spent at the Appellant's house they had sex.
9. PW2 BAA was the complainant's mother who confirmed that PW1 was her daughter and she produced a birth certificate dated 1/5/2009 as Exhibit P 1. PW2 stated that her daughter went missing for three days between 21 – 24 / 3/ 2023 and she returned on Tuesday at 9:00p.m That the mother went to school and reported the matter and the teacher informed her that they would help her to search for her. PW2 stated that she found PW1 next to the toilet but she didn't inform the mother where she was and neither didn't she reply to grandmother.
10. PW2 took the Complainant to the sister to speak to her but the following day the Complainant left and went to the uncle's house and she never returned. When she called the school the teachers told her to go and report the matter at Rongo Police Station. That later on a strange number called her and informed that the number belonged to Evaline Juma. That when she called the same number the following day it was picked by a man who promised to bring back the Complainant. The Complainant was not seen for two days and PW2 agreed to send the money to the man. That the police tracked the number and it was at Kombewa and they went to Kombewa Police Station where the incident was reported. That the area Chief knew the Appellant but he could not be traced. That the Appellant's mother was arrested and she informed the police that the Appellant had taken the Complainant to her as his wife and both the Appellant and Complainant were arrested and taken to the police station. That the Complainant was taken to Rongo Sub County Hospital for examination.
11. PW3 Pope Ochieng, the Clinical officer at Rongo Sub County Hospital filled the P3 form and Filter Card in respect to the Complainant. On examination he found that there was no tears or stains on the Complainant's clothes. On physical examination of the Complainant's genitalia it was found that her hymen was absent which confirmed that there was penetration. PW3 observed normal labia majora,



normal external vagina, no bruises/tender skin. That there was presence of blood discharge from the vagina (she was in her menses by then). On Laboratory examination, the urine RBC was seen, pus and epithelial cells which meant that she was infected with UTI/STI. PW3 formed the opinion that the Complainant was defiled by a person known to her and he produced the exhibits P 1- 6.

12. PW4 P. C. Esther Kemunto was the Investigating Officer in this case attached to Kamagambo Police Station. That she received information from one Beatrice who informed her that she knew where the Complainant was and that she had gone missing on 22/2/2023. That they had circulated a signal country wide and PW4 referred Beatrice to Kitere Police Station where the Appellant was arrested.
13. When placed on defense the Appellant gave sworn statement and said that he was 18 years old and he was a casual labourer. He said he did not know the Complainant. He said he could not make any statement about the charges as he had no relationship with the Complainant.
14. The Appellant said in cross examination that he was born on 11<sup>th</sup> November 2007 and he had applied for identity card. He said he did not live with the Complainant and did not defile her.

### **This Appeal was canvassed by way of written submissions.**

15. In the Appellant's written submissions are dated 3<sup>rd</sup> December 2024 and the Appellant submitted that he was convicted based on circumstantial evidence which was unreliable, unfavourable and malicious. He also submitted that the Complainant's demeanor ought to have been considered by the Trial court as she failed to attend court on several occasions and when she attended she was stood down and it was only on the 4<sup>th</sup> time that she gave her testimony. He said the Complainant's evidence did not qualify to convict him.
16. In regard to the age of the Complainant the Appellant submitted that the same was obtained on 8<sup>th</sup> February 2023 for purposes of framing him as it was issued just a few days before his arrest on 24<sup>th</sup> March 2023.
17. The Appellant further submitted that there were contradictions in the Prosecution's evidence which the Trial Magistrate failed to analyze.
18. The Respondent's on the other hand filed written submissions dated 28/11/2024. The prosecution also submitted that the elements constituting the offence of defilement were proved beyond all reasonable doubt by production of the Complainant's birth certificate Exhibit P1 which shows she was born on the 1/5/2009 to confirm the Complainant was 14 years at the time she was defiled.
19. It was also submitted penetration was proved by the evidence of the victim which was corroborated by the evidence of PW3 who produced P3 form which confirmed the Complainant was defiled and her hymen was broken.
20. On identification of the perpetrator it was submitted that the Complainant knew the Appellant before and recognized him at the time of the incident.

The court was urged to dismiss the appeal.

### **Analysis and Determination**

21. 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.”

22. 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 whether the ingredients of the offence of defilement were proved beyond reasonable doubt.

Section 8 (1) as read with 8(3) of the *Sexual Offences Act* provides:

“(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.....

..... (4) 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.”

23. The key ingredients of the offence of defilement are age of the victim, proof of penetration and identification of the assailant.
24. From the evidence of PW1 she said she was 14 years and was a Grade 7 student at [particulars withheld] Primary School. PW2 the Complainant’s mother identified the Certificate of Birth as Exhibit P1 showing that the Complainant was born on 1.5.2009 and was 14 years old. PW4 the Investigating Officer produced the said Certificate of Birth as exhibit and the Complainant was therefore proved to be a child in accordance with provisions of the Children’s Act.
25. In the Court of Appeal case of Edwin Nyambogo Onsongo Vs Republic [2016] eKLR it was stated as follows on proof of age.

“... 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.”

26. On the issue of penetration, PW1 testified that when she was coming from her friend Angel’s a place she met the Appellant who was her boyfriend and he told her to go to his house. That when they arrived at the Appellant’s house he locked her in the house and returned at 8.00pm. That she spent the night at the Appellant’s place and on Monday he again left her in the house till 6.00pm. That on Tuesday she went home. PW1 said that during the time she was at the Appellant’s place they had sexual intercourse. The Complainant was stood down when the court said she was not willing to testify. She resumed her testimony on 17<sup>th</sup> September 2023 and said she had sex for the first time with the Appellant at Kanga where she spent 2 nights. She also said that after she lied to her mother, aunt and Pastor as to where she had been the Appellant took her to his home in Seme and she stayed there for 3 weeks during which time the Appellant introduced her as his wife and she communicated with her mother using the Appellant’s father’s phone. PW1 said that it is the Appellant’s aunt who returned her to Rongo.
27. PW3 the Clinical officer at Rongo Sub-County Hospital examined the Complainant of the alleged defilement and found that her hymen was broken and lab tests on urine revealed RBC, pus and epithelial cells which were signs of infection. PW3 concluded that the Complainant had been defiled. He filled PRC and P3 forms which he produced EX P2,3 and 4 respectively. From the evidence of



PW1, the evidence of her mother PW2, the evidence of PW3 and the evidence of PW4 the Investigating Officer there was proof of the element of penetration.

28. On the 3<sup>rd</sup> element of identification of the perpetrator, the Complainant said the Appellant was her boyfriend and that she first spent 2 nights with him in his house in Kanga where he worked in the mines and he was their neighbor. The Appellant took the Complainant to his home in Seme where he introduced her as his wife and that it was through the Appellant's father's phone that PW1 communicated with her mother. Police tracked the number that PW1 used to communicate and it was traced in Kombewa and Evaline Juma was arrested. By the time Evaline the mother to the Appellant was arrested the Complainant had returned back to Rongo where the Appellant lived. PW4 said they laid ambush and on arrest of the Appellant the minor was found in his custody at Kokach village where he lived with her as a wife. Having been found with the minor it goes without saying that the Appellant was the perpetrator. The Appellant's defense that he did not know the Complainant and that he did not defile her were mere denials. They were neighbours; he cohabited with her for 2 days in Kanga before taking her to his home in Seme where she remained for 3 weeks before the Appellant's aunt returned her to Kanga and on arrest of Appellant the Complainant was found in his custody. The perpetrator was therefore identified positively as the Appellant.

29. The Appellant faulted the Trial Magistrate for passing a harsh and excessive sentence on him despite the fact that he was a 1<sup>st</sup> offender.

Section 8 (1) as read with 8(3) of the [Sexual Offences Act](#) provides:

“(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.....

..... (4) 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.”

Section 255 as read with Section 257 of the [Penal Code](#) provides :-

“ Any person who takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound mind, out of the keeping of a lawful guardian of the minor or person of unsound mind, without the consent of the guardian, is said to kidnap the minor or person from lawful guardianship

The ingredients of kidnapping are as follows:

- a. The taking away or enticing of a minor or a person of unsound mind out of the keeping of a lawful guardian.
- b. Without the consent of the guardian
- c. The minor if male, be under the age of fourteen years and if female, be under the age of sixteen years.”

30. The Appellant was sentenced to serve 20 and 7 years respectively as per the law.

31. The Appellant claimed that he had just turned 18 years and that he was therefore a minor by the time he committed the offence was committed. There was however no evidence that he was a minor at the time he committed the offence and in any case he was said to have been a casual labourer at the mines in Kanga and could not have been working if indeed he was a minor.



32. Based on the re-evaluation of the evidence on record in the trial Court, analysis of the grounds of appeal as against the submissions of the rival parties this court finds that this appeal lacks merit on conviction and sentence and the same is dismissed save that the Appellant's sentence should commence from 27<sup>th</sup> March 2023 when he was 1<sup>st</sup> arraigned in court pursuant to Section 333(2) of the [Criminal Procedure Code](#) as it is evident that he was not released on bond during trial.

Right of Appeal 14 days.

**DATED, SIGNED AND DELIVERED THIS 20<sup>TH</sup> DAY OF MARCH, 2025**

.....

**HON. JUSTICE A. ONGINJO**

**JUDGE**

In the presence of: -

Mr. Oimbo holding brief for Mr. Koima for Respondent

Appellant – No appearance

