



**N’Tuiti v Republic (Criminal Appeal E016 of 2024)  
[2025] KEHC 6621 (KLR) (Crim) (22 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6621 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ISIOLO  
CRIMINAL  
CRIMINAL APPEAL E016 OF 2024  
SC CHIRCHIR, J  
MAY 22, 2025**

**BETWEEN**

**DAVID BARAKA N’TUITI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon. L. Mutai (CM) delivered on 3rd January 2024 at the chief Magistrate’s court at Isiolo, in Sexual offences case No. E023 of 2023)*

**JUDGMENT**

1. Daniel Baraka N’ tuiti (The Appellant), was charged with defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offence [Act No. 3 of 2009](#) (The Act).
2. The particulars were that on the 2nd day of October, 2023 at Isiolo North Sub- County within Isiolo County, intentionally penetrated his penis to vagina of L.N a child aged 16 years. He faced an alternative charge of having an indecent act with a child contrary to Section 11 of the Act. He was convicted of the Main Charge and sentenced to 15 years in prison.
3. He was aggrieved by the outcome and filed the present Appeal.

**Petition of Appeal**

4. The Appellant has presented the following grounds:
  - a. That the learned trial magistrate erred in law and fact by failing to find that the clinical report does not support the allegation on defilement.



- b. That the learned trial magistrate erred in law and fact by failing to consider the defence of the appellant .
  - c. That the learned trial magistrate erred in law and fact by failing to note that the sentence is harsh and excessive in the circumstances of this case.
  - d. That the learned trial magistrate erred in law and fact by failing to consider the defense of the appellant in this case.
5. The appeal proceeded by way of written submissions.

### **Appellant's Submissions**

6. The Appellant submits that though there was evidence that the complainants hymen was broken, a broken hymen is not always proof of penetration, and thus, there was no evidence to prove that penetration took place.
7. The Appellant also faults the trial magistrate for failings to consider his defence.
8. Finally, the appellant submit that the sentence was harsh and excessive, that the trial court did not take into account his mitigation, and that the sentence was unconstitutional in any event

### **Respondent's submissions**

9. It is the respondent's submission that the complainant's age was proved to be 15 years. On penetration, it is submitted that the complainant's evidence was corroborated by the evidence of PW3, the clinical officer. It is further submitted that the trial magistrate duly complied with the provisions of Section 124 of the *Evidence Act*.
10. On the identity of the perpetrator it is submitted that the Appellant did admit that he took the complainant to his house and it was only he and her who were inside the family home at the time.

### **Analysis and determination**

11. An appeal to the High court from the subordinate court is by way of a retrial. Consequently, this court is mandated to review the evidence, re-evaluate it and arrive at its own findings. However due allowance must be made for the fact that trial court had the advantage of hearing the witnesses first hand and assessing their demeanor (See *Gitobu Imanyara & 2 Others Vs AG (2016) e KLR.*)
12. I have considered the petition of appeal, the trial record and the rival submissions. In my view the following issues arise for determination;
  - a). Whether the offence of defilement was proved.
  - b). Whether the Appellant's defence was considered.
  - c). Whether the sentence was both excessive and illegal.
13. It is well settled that to secure a conviction in a charge of defilement, the prosecution must prove the age of the victim, the identity of the perpetrator and penetration.



### **The Age of the victim**

14. The complainant's Birth certificate was produced (PEXB.1). It shows that the complainant was born on 20/10/2008. It follows that at the time of the incident on 2/10/2023, she was 18 days short of 16 years.

For purpose of section 8 of the Act however, she was 15 years old. Thus, the age of the victim was proved.

### **Identity of the Perpetrator**

15. This issue has not risen in this Appeal. It suffices to state that the Appellant by his admission told the court that he took the complaint to his house.

### **Penetration**

16. Penetration has been contested by the Appellant. He states that the medical evidence did not prove defilement.
17. The testimony of the complainant (PW1) and the Clinical Officer (PW3), is relevant in his regard. The complainant told the court that on 2/10/2023, she was on her way home when two men, who were riding on a motor bike, blocked her. They used a cloth to cover her mouth to prevent her from screaming. She was half conscious, she stated, but she remembered being pushed through a blue gate. One of the men left and accused was remained behind. Inside the compound were two houses. she was taken into the smaller one. The Accused threw her on the bed and blocked her face using a pillow. He undressed her. He removed her inner wear; unzipped her dress and removed her bra. She was defiled as she resisted.
18. She further stated that after the ordeal, she left the house and walked to the bigger house and knocked, but there was no one. The accused came out and offered her a lift, and she agreed. She told the court: "She had no choice", but as they rode he was still trying to grab her. In the process the motor bike hit a stone and she was thrown off. The accused rode off but came back and almost ran over her.
19. She went to a nearby church and borrowed a cellphone from a pastor. She called her uncle (PW3).  
At cross examination she stated that the accused penetrated her without use of protection.
20. PW3 told the court that when he examined the complainant, he found that her hymen was broken, though the breakage was old, she had a whitish from her vagina, no spermatozoa was noted, and there were epithelial cells. At cross-examination, he stated that he could not tell when the complainant last had sexual intercourse.
21. It is trite law that penetration can be established through the complainant's testimony and though desirable, corroboration by medical evidence is not mandatory. This was the observation, which was correctly made by the trial court while relying on the decision in *Bassita Vs Uganda S.C Criminal Appeal No. 35 of 1995*. The above position has been restated in many other decisions. In *Kassim Ali vs Republic [2006] eKLR* the Court of Appeal observed as follows: "So, the absence of medical examination to support the fact of rape or defilement is not decisive as the fact of rape or defilement can be proved by oral evidence of a victim of rape or circumstantial".
22. The trial magistrate further noted that the complainant's testimony on this element of penetration was not challenged in cross examination. She further stated that she observed, and concluded, that the complainant was genuine, that she was truthful and candid. Matters of observation of the demeanor



of witnesses and hearing them is the preserve of the trial court. They have that advantage which this court does not. I therefore have no reason to fault the trial magistrate's observation.

23. I have noted that the complainant used the term "accused penetrated me", on cross-examination. The complainant was a teenager. Unlike a child of tender years, she understood what was happening. The used phrase therefore is satisfactory to prove penetration.
23. Further as was held in Bassita's Case (Supra) Sexual Intercourse can be proved by direct or circumstantial evidence. The circumstances are that the Appellant admitted to have taken the complainant to his house. He told the court that he was willing to offer her Kshs. 200.
24. I have further taken note of the fact that description of the layout of the Accused's home by the complainant tallied with that of the Appellant.. It cannot be that the complainant spoke the truth in respect to the layout of the accused's home, only to lie about what transpired there
25. The line of cross-examination of the complainant by the defence counsel, as informed by the complainant's responses, was also instructive. The complainant answered: "It is not true the accused stopped and made some advances on me"-----it is not true the accused was willing to pay for the sex rendered but declined". This last statement suggest that the Appellant had offered to pay for sex.
26. The above line of cross-examination also seemed to betray the Appellant's misconception that if he could get the complainant to admit to consensual sex, he would be free.

In the end I am satisfied that penetration was proved.

Whether the Appellant's defence was considered

27. Contrary to the Appellant's assertion, his defence was considered. It is only that the trial court did not find his defence plausible. The trial magistrate stated; "The defence evidence does not cast doubt on the prosecution's case as it is a mere denial". I have also considered his defence. whereas he denied the act of defilement he corroborated the complainant's testimony in other respects. Thus, corroboration affirms the credibility of the complainant's testimony on the fact of defilement too.
28. I am satisfied that the Appellant's was rightly convicted. His appeal in this regard is dismissed.

#### **Whether the sentence was excessive**

29. The complainant was 15 years and 11 months, and the Appellant was correctly charged under sub section (1) and (3) of Section 8 of the Act. Under Section 8(3) the prescribed minimum and indeed mandatory sentence is 20 years. The trial court gave him a lesser sentence of 15 years. His complaint therefore that the sentence was excessive is unfounded.
30. His Appeal on sentence is also without merit.
31. In conclusion, I do not find merit in the entire appeal. The same is hereby dismissed.

**DATED SIGNED AND DELIVERED AT ISIOLO, THIS 22ND DAY OF MAY 2025.**

**S. CHIRCHIR**

**JUDGE.**

In the presence of:

Roba Katelo- Court Assistant.

David Baraka- The Appellant

