



**Ndati v Republic (Criminal Appeal E023 of 2024)
[2025] KEHC 6134 (KLR) (16 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6134 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E023 OF 2024
AN ONGERI, J
MAY 16, 2025**

BETWEEN

PATRICK KITHEKA NDATI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the conviction and sentence of Hon. A. M. Obura
(CM) in Voi SO Case No. E034 of 2023 delivered on 23rd April 2024)*

JUDGMENT

1. The Appellant was sentenced to 15 years imprisonment for the offence of Defilement contrary to Section 8 (1) as read with Section 8(4) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of the charge were that on 28/10/2023, at 1400hrs in Voi Sub-County within Taita Taveta County, the Appellant intentionally caused his male genital (organ) Penis to penetrate the female genital organ (Vagina) of PMM, a child aged 17 years.
3. The Appellant pleaded not guilty to the charge and the prosecution called six (6) witnesses in support of the prosecution case.
4. The prosecution evidence in brief is that on the material day at around 1p.m. to 2p.m, the Complainant PMM went to Jerusalem Church Mwandau where she was joined by her friend Plaintiff Witness 2 (PW2) to practice a dance in preparation for service the following day.
5. While at the Church, the Appellant who was the church pastor sent his children to go and fetch water and he remained with the Complainant.
6. The Appellant then lured the Complainant into the bedroom and defiled the complainant.



7. Plaintiff Witness 3 (PW3), the mother of the Complainant and Plaintiff Witness 4 (PW4) the grandmother of the Complainant learnt about the incident and they reported to the village elder, the Assistant Chief and to the Police at Tausa police Station.
8. The Complainant was escorted to Moi County Referral Hospital and the Appellant was arrested and charged with the offence.
9. The Doctor who examined the Complainant (PW5) confirmed that the Complainant had been defiled.
10. In Defence, the Appellant said that the Complainant went to his Church Jerusalem Church where he is the Pastor but he told them there was no practice that day.
11. He said they left him relaxing with his children. The following day they did not attend church.
12. The Appellant said he went for a church mission and returned after on 16/11/2023 and upon his return he learnt that a Police Report had been looking for him. He was arrested the following day at 8a.m.
13. The trial court found the Appellant guilty as charged and convicted him and sentenced him to 15 years imprisonment.
14. The Appellant has Appealed on the following grounds:
 - i. That the learned trial magistrate erred both in law and fact by failing to appreciate that the critical elements of defilement were not proved as required in law occasioning a prejudice.
 - ii. That the learned trial magistrate erred in law and fact by again failing to appreciate that the medical evidence and other adduced did not corroborate the charges as drawn.
 - iii. That the learned trial magistrate further erred in both law and fact in failing to appreciate that there was a grudge over the church issues with the victim and her family occasioning a prejudice.
 - iv. That further the learned trial magistrate erred in both law and fact in failing to appreciate that the prosecution did not prove its case as against the Appellant as required in law occasioning a miscarriage of justice.
 - v. That the Appellant wishes to be present during the hearing and determination of this Appeal and prays to be supplied with the record of trial proceedings and the Judgment to enable him prepare for the hearing of the Appeal.
15. The parties filed written submissions as follows;
16. The appellant, Patrick Kitheka Ndati, submitted that he was convicted of defilement under Section 8(1) as read with Section 8(4) of the [Sexual Offences Act](#) No. 3 of 2006 and sentenced to 15 years imprisonment.
17. He appeals the conviction and sentence, arguing that the trial court erred in law and fact by failing to properly evaluate the evidence, which he contends was contradictory, inconsistent, and fabricated.
18. The appellant challenges the charge sheet as defective, noting it lacks his arrest date and incorrectly states his residence as Taita Taveta County instead of Makueni County.
19. He claims the prosecution's case was built on rumors, hearsay, and malice, alleging the complainant's family framed him due to his strict pastoral discipline, particularly after he suspended the complainant and another girl from church for misconduct involving sexual activity with boys.



20. The key discrepancies highlighted include;
 - i. Inconsistencies in Complainant's Testimony: The complainant (PW1) initially claimed the appellant grabbed her in the presence of her friend (PW2) but later admitted under cross-examination that they were sent home and did not return. This undermines the prosecution's timeline of events.
 - ii. Lack of Corroboration: No witnesses, including the appellant's children allegedly present, were called to corroborate the defilement claim. The complainant's friend (PW2) gave contradictory accounts of witnessing the act, raising doubts about her credibility.
 - iii. Medical Evidence: The medical report (P3 form) indicated no physical injuries, fresh trauma, or spermatozoa, and the hymen was described as "long broken," suggesting prior sexual activity unrelated to the appellant. The examination occurred 13 days post-alleged incident, further weakening the evidence.
 - iv. Delay in Reporting: The alleged defilement occurred on 28th October 2023 but was reported to police on 14th November 2023, with no plausible explanation for the delay. The appellant argues this gap indicates fabrication.
 - v. Procedural Irregularities: The appellant was detained for three days before arraignment, violating constitutional safeguards under Article 49(1)(f) of *the Constitution*. The charge sheet also omitted the word "unlawfully," rendering it defective.
 - vi. Grudge Motive: Evidence showed the complainant's family held a grudge against the appellant for disciplining the girls. PW3 (the mother) admitted she never witnessed the offence and relied on rumors.
21. The appellant cites jurisprudence emphasizing the presumption of innocence (*Gachango Nganga v Republic*), the necessity of corroboration in sexual offences (*Orengo v Republic*), and the dangers of relying on circumstantial evidence (*Tepper v Republic*). He argues the trial magistrate failed to resolve contradictions and improperly relied on tainted testimony.
22. The appellant seeks quashing of the conviction, setting aside of the sentence, and immediate release, asserting the prosecution failed to prove its case beyond reasonable doubt.
23. The prosecution's submissions detail a case where the appellant was charged with defilement and, in the alternative, committing an indecent act with a child.
24. The particulars of the charges state that on October 28, 2023, in Voi Sub-county, the appellant intentionally caused his penis to penetrate the vagina of PMM, a child aged 17 years. The alternative charge specifies intentionally touching the child's vagina with his penis on the same date and location.
25. Following the trial, the appellant was found guilty on May 14, 2024, and sentenced to 15 years of imprisonment.
26. The prosecution presented evidence from six witnesses and argued that they successfully proved the appellant committed the offense.
27. The Prosecution submitted that the complainant's testimony was clear and corroborated by an eyewitness, PW2.
28. Further, that the medical evidence presented to the trial court confirmed penetration.



29. Citing the case of *G. O. A VS - R (2018) EKLR*, the prosecution contends they met the required ingredients for proving defilement: the victim's age (17 years, supported by a birth certificate), penetration (confirmed by medical evidence), and identification of the perpetrator (the complainant identified the appellant, whom she knew).
30. The prosecution asserts that the appellant's grounds of appeal are without merit, as no contradictions in the witnesses' testimonies were presented during the trial.
31. The prosecution maintained that the trial court acted within the law in finding the appellant guilty and that the 15-year sentence is legal according to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act*. Consequently, the prosecution requests the court to dismiss the appellant's appeal and uphold the trial court's sentence.
32. This being a first Appeal, the duty of the first Appellate Court is to re-evaluate the evidence and the law presented before the trial court and to arrive at its own independent conclusions.
33. This is a crucial role that ensures a fair and just outcome for the parties involved in the appeal.
34. The Court of Appeal in *Okeno v. Republic [1972] EA 32* clearly outlined this duty, stating that;

“A first appellate court must itself weigh conflicting evidence and draw its own conclusions... It is its duty to rehear the case on the record and to reconsider the materials before the trial judge. The appellate court must then make its own findings of fact and law, bearing in mind however that it has not had the advantage of seeing and hearing the witnesses.”
35. This principle has been consistently upheld in numerous subsequent Kenyan cases. For instance, in *Selle & Another v. Associated Motor Boat Company Ltd & Others [1968] EA 123*, the court reiterated that;

“an appeal from the High Court is by way of rehearing on points of law and fact... the Court of Appeal is not bound to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the evidence itself on the face of it bears no sufficient weight to support the findings.”
36. Therefore, when faced with a first appeal, the appellate court undertakes a comprehensive review of the trial court's decision, scrutinizing the evidence, the legal principles applied, and the overall fairness of the judgment. It is not simply a review of errors of law but a complete reconsideration of the case.
37. The issues for determination in this Appeal are as follows:
 - i. Whether the Appellant was positively identified.
 - ii. Whether penetration was proved.
 - iii. Whether the age of the Complainant was proved.
 - iv. Whether the sentence was excessive.
38. The Appellant, Patrick Kitheka Ndati, was convicted by the trial court for the offence of Defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No. 3 of 2006 and sentenced to 15 years imprisonment.
39. This appeal challenges both the conviction and the sentence.



- 40. Upon careful consideration of the evidence presented at trial and the submissions made by both the Appellant and the Prosecution, this court finds no merit in the Appellant's appeal for the following reasons;
- 41. Regarding the identification of the Appellant, the Complainant's testimony clearly identified him as the perpetrator, and this identification was supported by the evidence of Plaintiff Witness 2, who stated she witnessed the incident. Furthermore, the Appellant was well-known to the Complainant and Plaintiff Witness 2 as the pastor of their church.
- 42. I find that the Appellant was positively identified, the evidence of the Complainant was corroborated by that of Plaintiff Witness 2 (PW2) who said she witnessed the incident.
- 43. The Appellant was the Church Pastor of Jerusalem Church where the children were attending Church and they knew the Appellant well.
- 44. On the issue of penetration, the medical evidence provided by Plaintiff Witness 5, Dr. Joto Nyawa, corroborated the Complainant's account. Dr. Nyawa's examination confirmed that the Complainant's hymen was broken.
- 45. The age of the Complainant was also sufficiently proved through the production of a Birth Certificate, which established that she was 17 years old at the time of the offence.
- 46. Finally, concerning the sentence, the 15-year imprisonment term is within the legal limits prescribed by Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* for the offence of defilement.
- 47. In light of the foregoing, this court finds that the conviction herein is safe and the sentence is lawful.
- 48. I dismiss the Appeal and uphold the conviction and Sentence.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT VOI HIGH COURT THIS 16TH DAY OF MAY, 2025.

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A. N. ONGERI
JUDGE

In the presence of:

Court Assistants: Maina/Millicent

..... for the Appellant

..... for the Respondent

