



**Nyanjage alias Japolo v Republic (Criminal Appeal E050 of 2024)  
[2025] KEHC 5348 (KLR) (2 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5348 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL APPEAL E050 OF 2024**

**DK KEMEL, J**

**MAY 2, 2025**

**BETWEEN**

**MOSES ODENY NYANJAGE ALIAS JAPOLO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. E. Malesi delivered on 27th  
September 2024 in Madiany Sexual Offences Case No. E010 of 2024)*

**JUDGMENT**

1. The Appellant herein Moses Odeny Nyanjage alias Japolo was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offence *Act No. 3 of 2006*. The particulars are that on the 28<sup>th</sup> day of April 2024 at around 1300hrs at Siaya County intentionally and unlawfully caused his penis to penetrate the vagina of EAO a child aged 16 years.
2. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, No. 3 of 2006. The particulars are that on the 28<sup>th</sup> day of April 2024 at around 1300hrs at Rarieda Sub County within Siaya County intentionally touched the vagina of EAO a child aged 16 years with his penis.
3. The Appellant denied the charge and the matter proceeded to a full trial where the prosecution called 8 witnesses in support of its case while the Appellant was the only defence witness.
4. At the end of the trial, the trial court convicted the Appellant on the main charge and sentenced him to serve 15 years' imprisonment.
5. Aggrieved, the Appellant filed a petition of appeal dated 11/10/2024 wherein he raised the following grounds of appeal:



- i. That the learned trial magistrate erred in law and in fact in making a finding that the Appellant had defiled the minor despite overwhelming evidence pointing to the contrary.
- ii. That the learned trial magistrate erred in law and in fact in failing to make a finding that the late reporting of the alleged incident casts doubt as to the alleged occurrence of the offence.
- iii. That the trial magistrate erred in law and in fact in failing to find that the medical evidence as adduced did not conclusively find that an offence had been committed.
- iv. That the learned trial magistrate erred in law and fact in failing to make a finding that there was no medical and or forensic evidence pointing to the Appellant as regards the offence.
- v. The learned trial magistrate was biased in his finding by wholly relying on the evidence of the prosecution witnesses to convict the Appellant.
- vi. That the learned trial magistrate erred in law and in fact in failing to appreciate that the evidence of the prosecution was unreliable, inconsistent, contradictory, thus wholly unreliable to sustain a conviction.
- vii. That the learned trial magistrate erred in law and fact in wholly ignoring the submissions of the Appellant and the cited case laws in arriving at his judgment.
- viii. That the learned trial magistrate erred in law and in fact in failing to consider the Appellant's mitigation and thus imposing an extremely harsh sentence upon the Appellant.

The Appellant thus proposed that the appeal be allowed, the conviction and sentence set aside and the Appellant be set free.

6. This being a first appeal, this Court must re-consider and re-evaluate the evidence adduced before the trial court to arrive at its independent findings and conclusions (See Okeno vs. Republic [1972] EA 32. In doing so, this court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to make due allowance in that respect as was held in Ajode v. Republic [2004] KLR 81.
7. The facts of the case may be summarized as follows. EA (PW1) a minor aged 16 years and a form one student at [Particulars withheld] Secondary school stayed with her brother at [Particulars withheld] during school days and stayed with her mother in Bondo during school holidays. The minor had complained of non-stop headaches for the entire 2023. Owing to this, her mother (PW5) had sought the services of the Appellant (a pastor) whom she believed would pray for her daughter and be healed. In April 2024, the Appellant went to PW1's home where she stayed with her mother. The mother briefed the Appellant about Pw1's condition and that the Appellant asked them to buy a blue and red candle and carry them to church on 28/4/2024.
8. That on the said day 28/04/2024, PW1 went to the Appellant's church in the company of her two siblings (PW2) and her young brother. They reached the church premises at 10.00 am and they prayed until 1.00 pm. Other church members left the church compound but the Appellant informed PW1 not to leave but to follow him to a certain house where he would pray for her. She went to the said house as her siblings waited outside. PW1 testified to have suddenly fallen unconscious and upon waking up, she felt pain in her vagina which was wet. She also noticed that the church gown she wore had been raised up and that her under pants were on one leg. She testified further that the Appellant warned her not to tell anybody of what had happened, not even her mother. That if she disclosed the ordeal to anybody, the demon spirits would come back to her. She then left with her siblings and went back home uttering no word to anybody. The following day she went back to school as the holiday was over.



- She continued to suffer in silence until one day she decided to write a letter to her class teacher(PW3) explaining what had happened to her during the holiday. The said later marked PMFI-2 was given to the class prefect who handed it over to the class teacher.
9. B.A (PW2) testified that the Appellant and PW1 stayed in the said house within the church compound for almost two hours, at which point she heard PW1 scream. That when PW1 came out of the house where she was with the pastor, her church gown was wet from behind and that PW1 was crying, uttering no word to anybody. That PW1 went home and slept and did not have dinner that night.
  10. Victor Omondi Otieno (PW3) testified to having received the said letter from the class prefect on 06/06/2024 and, upon reading the contents thereof, he handed the same to the school principal (PW4) who then summoned the minor (PW1). AR (PW4) stated that he is the school principal of [Particulars withheld] Secondary School and indeed when he read the contents of the letter he summoned PW1 who narrated the contents of the letter that during the school holidays she was taken for prayers where after she was defiled by the pastor after the service. That he summoned the mother to PW1 and together they took PW1 to hospital. That he then reported the matter to the police.
  11. RA (PW5) the mother to the minor testified that she had been advised to seek spiritual help from the Appellant but did not know that the Appellant well as she did not know his real names. That on the said date she did not accompany her daughter for the prayers as she was feeling unwell.
  12. Melvin Asol (PW6) the clinical officer from Madiany Sub County Hospital, produced the treatment notes as P Exhibit 3, P3 form exhibit 4, PRC form as Exhibit5 and lab request form as Exhibit 6. He testified that the hymen was broken, no tears, no lacerations. There was also a whitish discharge which to a child signified an infection and indeed she tested positive for gonorrhoea. That the patient was seen 40 days after the incident.
  13. Victor Ondera (PW7) a clinical officer from Madiany Sub County Hospital produced P exhibit 7 and exhibit 8 being treatment notes and lab results for the Appellant which showed that he suffered from urinary tract infection (UTI). That the UTI is transmitted through sex and poor hygiene.
  14. No. 119049 PC (W) Jackline Nyaga (PW8) the investigating officer testified that she is based at Aram police station. She stated that the matter was reported on 10/06/2024. She produced birth certificate of the minor as P Exhibit 1; the letter which had been authored by the complainant and handed to her by PW6 as P Exhibit 2. That she accompanied the Appellant to the hospital for examination as the complainant had already been examined. That she later went to the scene of crime on 12/06/2024.
  15. The trial court later established that a prima facie case had been made against the Appellant and who was thus placed on his defence. He opted to tender a sworn testimony.
  16. In his defence the Appellant Moses Odeny Nyanjage alia Japolo stated that indeed on the 28/04/2024, PW1, PW2 and their young brother attended church service but that their mother was absent. That prayers were made in church and at the end of the service at 1.00 pm, he did not offer any special service to PW1. That on 10/06/2024, he was called to go pray for PW1 in her school at Lieta. That she was accompanied by PW5 and her adult daughter, and upon entering the principal's office, PW1 came in with the police, and that he was arrested. He maintained that the mother of the girl had earlier sought to have a relationship with him but that he had declined and she thus brought up these charges against him.
  17. The appeal was canvassed by way of written submissions. Both parties duly complied.
  18. I have considered the record of appeal and the submissions and find the issue for determination is whether the Respondent proved its case against the Appellant beyond reasonable doubt.



19. It is noted that the Appellant had been charged with an offence of defilement under Section 8(1) as read with 8(4) which provides thus:

- (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 sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

20. There are three elements to be proved in a case of defilement namely; the age of the minor; proof of penetration, and the identity of the perpetrator.

21. On the element of age, PW1 testified that she was 16 years. The investigating officer (PW8) produced the minor's birth certificate as P exhibit 1 which confirmed the same as she was born on 27/1/2008 while the incident took place on 28/4/2024 and hence she was aged sixteen years three months and one day old. The age of the complainant fell within the description ascribed in section 2 of the Children Act that describes any person below the age of 18 years to be a child. In the case of Omuroni *versus Uganda Criminal Appeal No. 2 of 2000*, the court held that a birth certificate or a baptism card was prima facie proof of age and that it was sufficient as proof of age. (See also Mwalango Chichoro vs. Republic MSA C. Appeal no. 24 of 2015). I find that this ingredient was proved by the prosecution beyond reasonable doubt.

22. On the element of penetration, PW1 testified that when she followed the Appellant to his prayer room, he poured something on her head whereupon she felt dizzy and lost consciousness. Upon waking up, she felt pain in her vagina and wetness. She noticed that her under pant was also on one leg. That the Appellant informed her that she had had sex with her so that the demons would not come back to her.

It was the testimony of the clinical officer (PW6) who examined PW1 that on examination, the hymen was broken and that the minor was infected with Gonorrhoea. He testified further that STIs manifest more quickly in women than men, so it was possible that the Appellant infected the complainant with gonorrhoea as he had been found to have urinary tract infection (UTI). The evidence of the clinical officer and the documents produced as exhibits confirmed that indeed penetration of the complainant's sexual organ occurred. I am therefore convinced that penetration was sufficiently proved by the Respondent beyond reasonable doubt.

23. Lastly, on the identification of the assailant, PW1 testified that the Appellant came to their home and that her mother informed him about PW1's frequent headaches. The Appellant (DW1) likewise confirmed knowing the complainant, her twin sister and mother. He starts his defense statement by recognizing the complainant and her siblings, confirming that they attended his church on the material date of 28/04/2024. This was therefore not a case of identification but one of recognition as they knew each other. In the case of Reuben Taabu Anjononi & 2 others vs Republic (1980) eKLR by the Court of Appeal in Nairobi held that:

“.... recognition not identification of assailants is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant...”

The complainant followed the instructions of the Appellant who took her to a secluded room ostensibly for prayers only for the Appellant to defile her and later warned her not to reveal the incident to anybody lest the evil spirits would come back to torment her with headaches. The incident took



place during the day as the complainant's siblings waited for her outside the church premises. The Appellant's defence claim that the charges were brought up as a result of rebuffing the complainant's mother's insistence that they have a relationship is preposterous and not believable since it is highly unlikely that the complainant's mother could use her vulnerable daughter as a victim of defilement so as to get at the Appellant for refusing to have a relationship with her. The Appellant's claim is further unbelievable in that under African customs, it is unheard of and a taboo for a woman to approach a man for a relationship. It is clear that the Appellant was placed at the scene of crime and that he was the perpetrator. I am satisfied that the identification of the Appellant as the perpetrator was quite proper and that the Respondent proved this ingredient beyond reasonable doubt.

23. After an analysis of the entire evidence, I am satisfied that the Respondent proved its case against the Appellant beyond any reasonable doubt. Hence, the finding on conviction by the learned trial magistrate was quite sound and must be upheld.
24. As regards the sentence, the Appellant claimed that the sentence was excessive. Section 8(4) of the *Sexual Offences Act* No. 3 of 2006 provides for a sentence of not less than 15 years' imprisonment. It is trite that sentences are usually at the discretion of the trial magistrate or trial judge. It is trite law and based on the doctrine of stare decisis that an appellate court will not normally disturb the sentence imposed by the trial court unless the same is illegal, unlawful, or outrightly excessive in the circumstances.
25. This position was stated succinctly by the Court of Appeal for East Africa in the case of *Ogola S/O Owuor Vs Regina* (1954) 21 270 as follows: -

“The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in *James V R.*, (1950) 18 E.A.C.A 147: "It is evident that the Judge has acted upon some wrong principle or overlooked some material factor.”

To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: *R. V Sher Shewky*, (1912) C.C.A. 28 T.L.R. 364.”

26. *Ogola s/o Owuor's* case has been accepted and followed by the Court of Appeal and the High Court on matters of sentence for many years. What was stated there still remains good law to date.
27. In the instant case the trial magistrate imposed a sentence of 15 years' imprisonment which is in tandem with the above stipulated provision. Again, pursuant to the Supreme Court's decision in *Petition No. 18 of 2023 Republic Vs Joshua Gichuki Mwangi & 4 Others* [2023] eKLR, all sentences under section 8 of the *Sexual Offences Act* No.3 of 2006 remain lawful and valid as long as the same has not been invalidated or quashed. It is noted that the Appellant posted bail soon after taking plea and hence the provisions of section 333(2) of the *Criminal Procedure Code* regarding the period spent in custody does not arise.
28. The upshot of the foregoing observations is that the Appellant's appeal on both conviction and sentence lacks merit. The same is dismissed.

Orders accordingly.

**DATED AND DELIVERED AT SIAYA THIS 2<sup>ND</sup> DAY OF MAY, 2025.**

**D.KEMEI**



**JUDGE**

In the presence of:

Moses Odeny Nyanjange.....Appellant

Siwulo .....for Appellant

Soita.....for Respondent

Okumu.....Court Assistant

