



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ananda v Republic (Criminal Appeal E033 of 2023)  
[2025] KEHC 9646 (KLR) (1 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 9646 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL E033 OF 2023**

**PJO OTIENO, J**

**JULY 1, 2025**

**BETWEEN**

**RHUFUS WERE ANANDA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the conviction and sentencing of Hon. G.Ollimo(RM)  
in Butere PMC SO Case No. E019 of 2022 delivered on 31st May, 2023)*

**JUDGMENT**

1. The Appellant was arraigned before the Resident Magistrate at Butere, in Sexual Offences Case No. E019 of 2022, charged with the offence of defilement contrary to section 8(1)(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on the 3<sup>rd</sup> day of May, 2022 in Butere sub county within Kakamega County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of EW a child aged 13 years.
2. In the alternative, the Appellant was charged with the offence of indecent act with a child contrary to section 11(1) of *Sexual Offences Act* No. 3 of 2006. The particulars of the alternative offence stand to be that on the 3<sup>rd</sup> day of May, 2022 in Butere sub county within Kakamega County, the Appellant intentionally and unlawfully touched the vagina of EW a child aged 13 years.
3. The Appellant pleaded not guilty to the charge and the case proceeded to full trial with the prosecution calling a total of four (4) witnesses. After the Appellant was called to his defence he elected to give his defence on oath and closed the case without calling any other witness.
4. The court conducted voire dire examination on the victim called as PW1, got satisfied on her ability to tell the truth and led her to give unsworn evidence. The witness testified and told the court that



- she was in fifth grade and that she knew the Appellant since she used to frequent her grandmother's homestead where she lived with the grandmother.
5. She narrated that on 3<sup>rd</sup> May, 2022 her grandmother asked her to collect firewood and she went to gather some around the church where the Appellant spotted her. He asked her to go to his place but she declined and started crying. The Appellant then held her by force, carried her on his shoulders and took her to his house where he made her lie on the bed and in the words of the victim, "akatoa kitu yake ya kukojolea akaweka kwa yangu akanifanyia tabia mbaya". After he finished, PW1 recounted that he left to buy omena and flour and when he returned he prepared a meal which they shared. After they finished the meal, she stated, "alinifanyia tabia mbaya tena". She stated that when defiling her the Appellant threatened her by telling her, "ukilia nitakuchinja". She spent the night at his home and in the morning, he gave her Kshs. 10/ and asked her to lie to her grandmother that she was at the hospital. He gave her a book to go with it to the hospital and he also gave her two mandazis. She stated that she went to the hospital and the doctor asked her to come with her grandmother. She returned to the hospital with her grandmother after lying to her that she had spent the night at the hospital. Her grandmother then asked the doctor if she had spent the night at the hospital and the doctor informed her, that was not true. She then opened up about what had happened and was treated and later reported the incident with the police.
  6. PW2, the victim's grandmother testified that she knew the Appellant as the caretaker for one of the villagers. On 3<sup>rd</sup> May, 2022, she returned home from a safari only to find PW1 missing and was told that she had gone to collect firewood. She tried to locate PW1 at around 3 p.m. in vain and when it started raining she aborted her mission. The next day, PW1 emerged from behind the house with her clothes soiled in blood and she was walking with difficulties. She also had a book and two mandazis which she asked her where she had gotten from and she responded, "mzee mwingine amenipatia." She reported the incident with the police and PW1 was later treated at the hospital. The Appellant was arrested on 4<sup>th</sup> May, 2022 though she was not present at the time of arrest.
  7. PW3 a Clinical Officer at the Butere Sub County Hospital gave evidence that on 5/5/2022 she received PW1 who was 13 years of age and who had a history of bleeding from the vagina. On examining her she noted that she had multiple bruises on both labia majora and minora and the hymen was not present though it was not freshly broken with PW1 informing her that she had been defiled more than five times before the incident. The victim further had pus cells and red blood cells in her urine and epithelial cells were seen in high vaginal swab.
  8. The Appellant was also examined and lab investigations revealed pus cells in his urine.
  9. PW4 recounted that on 5/5/2022 she was at the Butere Police Station when she received a complaint of defilement and escorted the Appellant and the victim to hospital. She stated that she established that the complainant was working for one Risper Swaka in the kitchen when she came across the Appellant who defiled her.
  10. The evidence of PW4 marked the close of the prosecution case with the court ruling that a prima facie case had been established and the Appellant was put on Defence.
  11. The Appellant was the only defence witness. He gave sworn testimony denied the charges and asserted that he was innocent and accused the complainant's mother of framing him on account of envy on the basis that he had bought a piece of land in the village, next to the complainant's home.
  12. By its judgment delivered on 31<sup>st</sup> May, 2023, the trial court found the Appellant guilty as charged, convicted him for the main count and sentenced to serve a thirty (30) years' imprisonment.



13. He felt dissatisfied with the judgment of the trial court and lodged a petition of appeal seeking to have his conviction quashed and sentence set aside.
14. The appeal is premised on the grounds that; the learned Magistrate grossly erred in both law and facts in convicting him on evidence which did not meet the required standard; that the conviction was based on evidence that was contradictory, inconsistent, uncorroborated, fabricated, afterthought and malicious in nature thus failed to prove the offence beyond reasonable doubt, otherwise based on shoddy investigations, ignored the plausible offered by the defence and that the discretion on sentencing was exercised wrongly by imposition of the maximum term.
15. Even though the court directed that the matter be canvassed by way of written submissions, only the Respondent's submissions are on the record.
16. In the submissions, the Respondent identifies three issues for determination be; a) whether the offence was proved beyond reasonable doubt; b) whether there were any material contradictions and inconsistencies in the evidence; and, c) whether the sentence was proper.
17. On whether the offence was proved beyond reasonable doubt, they submit that the element of age was proved through the production of the Birth Certificate which showed that the victim was born on 20<sup>th</sup> May, 2009 and the incident happened on 3<sup>rd</sup> May, 2022 when the victim was 13 years.
18. On the element of penetration, it is submitted that PW1 narrated in detail how she had gone to fetch firewood and the Appellant carried her to his house, laid her on the bed, removed his penis and did "tabia mbaya" to her. It is added that her evidence is corroborated by PW2 who stated that when PW1 returned home her clothes had been soiled in blood and she was walking with difficulties. There was further corroboration by PW3 who stated that on examining the minor she noted that she had multiple bruises on both labia majora and minora, the hymen was absent, she had pus cells and red blood cells in her urine as well as epithelial cells upon a high vaginal swab.
19. On the third element of identification of the Appellant the Respondent asserts that identification was by way of recognition since she was known by the victim who in her evidence referred to him by name, Anyole.
20. On the defense case, it is submitted that the Appellant never denied but confirmed that he was a resident of the area and had purchased land near the homestead of the victim.
21. Whether there were any contradictions and inconsistencies, it is argued, that there were never any material contradictions in the evidence in this matter and that if there were any, then the same were minor and do not go to the root of the prosecution's case.
22. On whether the sentence was proper, the Respondent contends that the sentence prescribed under the *Sexual Offences Act* for defilement of a child between the age of twelve and fifteen years is not less than twenty (20) years imprisonment thus in imposing a sentence of 30 years imprisonment the trial court properly applied its discretion. The prosecution counsel thus prayed that the appeal be dismissed in its entirety.

### **Issues, Analysis and Determination**

23. The court has, on its duty as a first appellate court proceeding by way of a retrial, considered the grounds of appeal, the proceedings of the lower court including the judgment as well as the submissions by the Respondent and discerns the following issues for determination: -
  - a. Whether the offence of defilement was proved beyond reasonable doubt?



- b. Whether the evidence of the prosecution witnesses was marred with any material contradictions and inconsistencies?
- c. Whether the sentence was manifestly harsh and excessive to merit intervention on appeal?

### **Whether the offence of defilement was proved beyond reasonable doubt?**

24. To sustain a conviction against an accused person for the offence of defilement, it is now settled law that the prosecution has to prove three elements; the age of the victim, penetration of the genitalia and positive identification of the perpetrator to be the Appellant.
25. Even though the best evidence to prove the age of a victim is a Birth Certificate, other documents like Baptismal Card, Age Assessment Report or oral evidence by a parent or guardian also suffice.
26. Here PW4 produced the complainant's Birth Certificate as PEXH1 which captured the date of birth as 20<sup>th</sup> May, 2009. Because the incident occurred on 3<sup>rd</sup> May, 2022, it means the victim was 13 years of age at the time. The court finds that the minor was sufficiently demonstrated to have been aged 13 years as at the date of the incident.
27. On the element of penetration, penetration is defined under Section 2 of the *Sexual Offences Act* as the partial or complete insertion of the genital organ of a person into the genital organs of another person.
28. The victim narrated how the Appellant spotted her when collecting firewood and called for her but she declined and started crying. She detailed that the Appellant then held her by force, carried her on his shoulders and took her to his house where he made her lie on the bed and in the words of the victim, "akatoa kitu yake ya kukojolea akaweka kwa yangu akanifanyia tabia mbaya". After he finished, PW1 recounted that he left to buy omena and flour and when he returned he prepared a meal which they shared. After they finished the meal, she stated, "alinifanyia tabia mbaya tena". She added that when defiling her the Appellant threatened her by telling her, "ukilia nitakuchinja".
29. Though the element of penetration can be proved by the evidence of the victim alone by dint of section 124 of the *Evidence Act*, Cap 80, the evidence of PW1 was corroborated by the medical evidence of PW3 who stated that on examining the victim she noted that she had multiple bruises on both labia majora and minora, the hymen was absent, she had pus cells and red blood cells in her urine and she also had epithelial cells upon a high vaginal swab. The court finds the evidence of PW1 and PW3 to have sufficiently proved the element of penetration beyond reasonable doubt.
30. On the element of identification, it was the evidence of PW1 that she knew the Appellant as Anyole and that he used to frequent her grandmother's homestead. The victim lived with her grandmother. The Appellant further confirmed that he had bought land next to the victim's grandmother's homestead. Identification was therefore by way of recognition and was adequately proved.
31. The court therefore find that the prosecution proved all the elements of the offence of defilement against the Appellant beyond reasonable doubt.
32. On whether the evidence led by the prosecution was marred with contradictions and inconsistencies, the court has carefully analyzed the evidence but failed to find any material inconsistency as to vitiate the conviction.

### **Whether the sentence was manifestly harsh and excessive?**

33. The principles upon which an appellate court would interfere with the sentence imposed by the trial court stands well settled by innumerable decisions of the High Court as well as the Court of Appeal. It



may however suffice to cite the decision of the Court of Appeal in *Bernard Kimani Gacheru v Republic* [2002] eKLR. In the matter the court said: -

“It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

34. The Appellant was charged under Section 8(3) of the *Sexual Offences Act* No. 3 of 2006 which prescribes punishment for defilement of a child aged between 12-15 years to be imprisonment for a term of not less than twenty years. That term is the lowest minimum the court can go.
35. In imposing a jail term as a criminal penalty, the court is bound by the dictates of Article 50(2)(p) of the *Constitution* of Kenya, 2010. The provision accords an accused person the right to benefit of the least severe of the prescribed punishments for an offence. The right to a fair trial according to Article 25 of the *Constitution* is one of the rights that can not be limited. The Appellant therefore retained the right to benefit from the least severe sentence provided under Section 8(3) of the *Sexual Offences Act*. In imposing a term longer than the minimum, the trial court erred and denied the Appellant his constitutionally ordained benefit.
36. Accordingly, for the reasons set out above, this appeal partially succeeds in that the sentence of thirty years' imprisonment imposed on the Appellant is set aside and in its place substituted a sentence of twenty (20) years' imprisonment.
37. Right of appeal within fourteen (14) days.

**DATED AND SIGNED THIS 12<sup>TH</sup> DAY OF JUNE, 2025.**

**PATRICK J O OTIENO**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 1<sup>ST</sup> DAY OF JULY, 2025.**

**S. MBUNGI**

**JUDGE**

In the presence of:

Ms. Osoro for the DPP on-line

Appellant present on-line

Court Assistant: Ang'ong'a

