



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nyongesa v Republic (Criminal Appeal E074 of 2024)  
[2025] KEHC 10693 (KLR) (22 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10693 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CRIMINAL APPEAL E074 OF 2024**

**RK LIMO, J**

**JULY 22, 2025**

**BETWEEN**

**OSCAR NYONGESA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. Oscar Nyongesa, the appellant herein was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* vide Kitale CMC SO Case No.E096 of 2022. The particulars of the offence are that on 12/3/2022 at [Particulars Withheld] Village in Kapomboi Location in Kwanza Sub-county within Trans-Nzoia County intentionally caused his genital organ namely penis to penetrate the genital organ namely vagina of SM a child aged 15 years.
2. The appellant also faced an alternative count of Indecent Act with a child contrary to section 11(1) of *Sexual Offences Act* No.3 of 2006. He was however convicted of the main count after trial so the alternative count is not relevant to this appeal.
3. Before I delve into the grounds of appeal in this appeal, I will first lay out a summary of the evidence tendered at the trial.
4. The complainant (PW1) testified that she was a Class 7 pupil at Webuye primary school and had known the appellant as a neighbour since her childhood. She stated that on 12/3/2022 as she was from the shops to buy an exercise book in the evening, she met the appellant on the way dressed in a white coat. She stated that the appellant grabbed her by her throat while carrying a bottle of changaa and panga. She stated that it was getting dark but she knew him well even by voice. She stated that the appellant handed her a bottle of changaa to carry. She stated that the appellant brandishing a panga forced her to follow him into a thicket where he removed her clothes and defiled her while grabbing her throat.



She stated that the appellant defiled her until 10pm and escorted her home warning her not to disclose to anyone what had transpired or he would kill her.

5. The child stated that when she reached home she was afraid and did not tell her mother what had happened. She further testified that the appellant kept defiling her until 7/5/2022 when the pain in her private parts and stomach proved too much she decided to confide to her mother who in turn reported to Kapkoi police station.
6. She stated that she was treated at Kwanza Sub-county hospital and later recorded her statement at Kapkoi police station.
7. SW (PW2) the mother to the complainant confirmed that the appellant was a neighbour to them. She recalled that on 7/5/2022 her daughter, the complainant in this case reported to her that she had been defiled while heading back home from buying exercise books. She further confirmed that she reported the incident at Kapkoi police station upon which she took her daughter for medical examination and treatment at Kwanza hospital. She stated that she also took her to Kitale County Hospital for age assessment and identified the age assessment report given to her. She stated that her daughter was traumatized as a result of the defilement. She insisted under cross-examination that the appellant defiled her daughter in the forest until 2200 hours after which he escorted her back home.
8. Brian Simiyu Wanjala (PW3) a Clinical Officer from Kwanza Sub-county Hospital testified that the complainant was taken to the facility for treatment under OP 2047/2022. He stated that the complainant gave a history of being defiled by a person known to her and complained of lower abdominal pains. He stated that the minor appeared anxious and disoriented. He stated that upon examination he found her majora and minora normal with no tears in the vagina but that her hymen was broken. The Clinical Officer concluded that the minor was defiled given that her hymen was broken. According to him penetration was positive.
9. Phares Silali (PW4), a Community Oral Health Officer at Kitale County Hospital, testified and tendered the age assessment report of the complainant as PExhibit 2. The complainant was assessed to be aged 15 years.
10. PC(W) Ruth Kimani (PW5) a police officer then attached to Kapkoi Police Gender Desk, testified that on 7/5/2022 a reportee named Sarah (PW2) reported that her child the complainant herein (PW1) had been defiled by a neighbour. She stated that a report was booked and issued them with a P3 Form and escorted the minor for age assessment and that upon conclusion of the investigations she asked for the arrest of the appellant.
11. When placed on his defence, the appellant testified in 2021 he was involved in political campaigns and that he was charged with the offence of robbery after he squandered campaign money. He stated that he was arrested and sentenced for 7 years. He stated that after he was released he was charged with defilement. He denied committing the offence but conceded that the complainant was a neighbour.
12. The trial court evaluated the evidence tendered and found that the prosecution's case had been proved and convicted the appellant sentencing him to serve 20 years imprisonment.
13. The appellant felt aggrieved and filed this appeal raising the following grounds namely;
  - i. That the sentence imposed was manifestly harsh, excessive and disproportionate.
  - ii. That there were contradictions and inconsistencies in the prosecution's case which made conviction unsafe.
  - iii. That ingredients of defilement were not proved.



- iv. That the trial court did not consider judicial sentencing policy when meting out the sentence.
14. In his written submission, the appellant submits that the prosecution failed to prove the very ingredient in the case and points out that penetration was not proved. He submits that the medical evidence revealed that the vagina had no tears.
15. He submits that it was wrong for the doctor to conclude that penetration was positive on account of absence of the hymen. He submits that hymen may be broken by other factors other than sexual intercourse or defilement.
16. He submits that he was not accorded fair trial because he was not given legal aid in form of legal representation and therefore in his view the trial was a nullity.
17. On sentence, the appellant contends that the sentence was harsh and should be quashed.
18. The respondent has opposed this appeal vide written submissions dated 28/3/25 by learned counsel Mark Mugun. The State has given an overview of the evidence tendered during trial and contends that the State proved its case to the required standard.
19. The respondent points out that all the necessary ingredients of the offence to wit, age, proof of penetration and positive identification of the assailant were proved.
20. On age, the State submits that age assessment report was tendered as Pexhibit 2 by PW4 on behalf of Dr. Muyira and that the age of the complainant was proved to be 15 years at the time of the incident.
21. On identification, the respondent submits that the appellant was well known by the complainant as a neighbour and that PW2 confirmed the fact.
22. On the element of penetration, the State submits that the complainant was presented to hospital complaining of lower abdominal pains. It contends that the absence of tears or injury to the labia could have been due to the fact that the complainant was taken to hospital 2 months after the incident. It submits that penetration was well established through medical examination and opinion by the medical officer via P3 Form (Pexhibit 3).
23. The respondent further submits that the alibi raised by appellant that he was in custody at the material time is unsupported and is an afterthought.
24. On sentence, the State submits that the offence under which he was charged attracts a minimum sentence of 20 years and cites section 8(3) of [Sexual Offences Act](#). To buttress the contention. It submits that the law provides for minimum sentence and the Supreme Court has held that in such situations the hands of the courts are tied by statute.
25. This is a first appeal and this court is mandated to re-evaluate the evidence tendered with a view of reaching own conclusions. The appellant was charged with defilement contrary to section 8(1) as read with 8(3) of [Sexual Offences Act](#). The statute creates the offence under section 2. The statute defines what constitutes defilement and as correctly pointed out by the respondent, for an offence of defilement to be sustained the following ingredients must be established and proved beyond reasonable doubt by the prosecution. The same are;
  - i. Age
  - ii. Penetration
  - iii. Identification of the offender



26. In this appeal, the appellant has raised 2 issues namely;

- a. That penetration was not proved and
- b. That sentence meted out was harsh and excessive.

27.

(a) Penetration

The Statute under section 2 defines penetration as partial or full penetration. The appellant's major issue is that the medical findings noted that there were no tears on the vaginal walls and that the majora and minora were normal.

28. The definition given by section 2 of the Act however does not specify that penetration includes tears on the vagina or any other bruises. The State contends that the same may have healed but that is not the point. What is significant is the finding that there was penetration. The complainant gave a vivid account that she was defiled by the appellant when she was coming from the shops. So while the hymen of a female child may be broken by other factors like sports, the breakage of the hymen of the victim in this instance was caused by a male organ belonging to the appellant. The child knew him well because he was a neighbour and there are no reasons advanced to show that the appellant was being framed for whatever reason.

29. All he said in defence was that he did not defile the minor and that he was in prison for a robbery case where he was sentenced to serve 7 years in 2021. However he never tendered any evidence to substantiate the same or explain how he managed to get out of prison only one year after he had been sentenced to 7 years in 2021.

30. This court finds that the appellant's defence was considered but the same was outweighed by the overwhelming evidence tendered by the State.

31. The age of the complainant was proved by both the age assessment report (PExhibit 2) and P3 Form (PExhibit 3). The appellant in this appeal has not contested that fact.

32. This court finds that all the ingredients of the offence were proved beyond reasonable doubt and conviction was safe contrary to the appellant's contention.

33. On sentence, as correctly pointed out by the respondent section 8(3) of *Sexual Offences Act* prescribes a minimum sentence of 20 years. The trial court imposed the minimum sentence because the minor was aged 15 years of age which age is within the bracket prescribed under section 8(3). The Supreme Court in the case of *Francis Kariuki Muratetu & Anor v Republic & Others (Amicus Curiae)*, gave directions that the minimum sentence prescribed by Statutes in cases other than murder under section 204 *Penal Code* are binding to courts and there is no latitude to impose any other sentence but the prescribed sentence.

34. In short this court finds no merit in this appeal. The same is disallowed. The conviction and sentence are upheld.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 22ND DAY OF JULY, 2025.**

**HON JUSTICE R.K. LIMO**

**KITALE HIGH COURT**

Judgment delivered in open court



In the presence of  
Mr Mugun for the State  
The appellant in person  
Duke/Chemosop- Court assistants.

