



REPUBLIC OF KENYA



**Ogise v Republic (Criminal Appeal E025 of 2022)
[2025] KEHC 10460 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10460 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL APPEAL E025 OF 2022**

**WA OKWANY, J
JULY 17, 2025**

BETWEEN

JUSTUS RATEMO OGISE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgment and Sentence at the Principal Magistrate's Court in Keroka, PMCCR No. E003 of 2020 delivered by Hon. B.M. Kimtai, Principal Magistrate on 1st September 2022)

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to Section 8[1] as read with Section 8[3] of the Sexual Offences. The particulars of the charge were that on 19th October 2020 at [particulars withheld] Sub-location in Masaba South Sub-County within Kisii County intentionally and unlawfully caused his genital organ namely; penis, to penetrate the genital organ namely; vagina, of C.M.M. [particulars withheld], a child aged 13 years.
2. The Appellant also faced the alternative charge of committing an indecent act with a child contrary to Section 11 [1] of the *Sexual Offences Act*. The particulars of the charge were that on 19th October 2020 at [particulars withheld] Sub-location in Masaba South Sub-County within Kisii County intentionally and unlawfully touched the genital organ namely vagina of C.M.M. [particulars withheld], a child aged 13 years with his penis.
3. The Appellant pleaded not guilty to both charges and a trial was conducted in which the Prosecution presented the evidence of six [6] witnesses.



The Prosecution's Case

4. Thirteen-year-old C.M.M. [particulars withheld] [PW1] recounted that on the evening of 19th October 2020, the Appellant, whom she knew as her aunt's boyfriend and by the nickname "College" lured her from her home, dragged her into a nearby maize plantation and toward a V-shaped avocado tree. The Appellant then tore her clothes, removed her underwear and, after wrestling her to the ground and muffling her screams, forced sexual contact upon her before she managed to flee barefoot and half-clothed. She immediately informed her mother, JK [particulars withheld] [PW3], who took her first to the area chief and then to Gesusu Hospital the same night. Danson Nyabunde [PW2], a clinical officer, examined the child on 21st October 2020 and found bruises on her external genitalia, a torn hymen, cervical injuries, and spermatozoa in vaginal secretions, confirming penetration.
5. The appellant was arrested on 25th October 2020. When examined the same day, PW2 noted healing bruises on his penis and a urethral discharge consistent with recent forceful intercourse. PW3 and GM [particulars withheld] [PW4] [the victim's mother and father respectively] testified that they searched for their daughter, recovered her torn dress, shoe and panty at the avocado tree, and reported the assault to Ramasha Police Station.
6. No. 256178 P.C. Kemunto [PW5], the first responding officer, received the report on 20th October, seized the clothing exhibits and obtained a P3 medical form; No. 117286 P.C. Andrew Kimtai [PW6] later produced the seized dress, shoe and panty in court along with the chain-of-custody report.

The Appellant's/Defence Case

7. When placed on his defence, the Appellant [DW1] denied the defilement allegation and testified that he had on the material day gone to Nyamesocho and that upon returning home, he was informed that the victim had seen him. He stated that he was not in Kilgoris at the time of the alleged offence.
8. At the close of the case, the trial court found that collectively, the evidence from the victim, her parents, the medical officer and the police established that the Appellant had violently defiled the 13-year-old complainant on 19th October 2020. The Appellant was consequently convicted on the charge of defilement and sentenced to serve thirty [30] years imprisonment.

The Appeal

9. Dissatisfied with the judgment and sentence of the trial court, the Appellant filed a Petition of Appeal in which he listed several grounds namely; that the Prosecution failed to prove the charge to the required standard as the conviction was based on fabricated evidence, hearsay reports, shoddy medical evidence that did not prove the charge; that the conviction was based on mere suspicion and that the sentence of 30 years' imprisonment was manifestly excessive and harsh.
10. The Appeal was canvassed by way of written submissions which I have considered.
11. The duty of a first appellate court was restated in the case of *Kariuki Karanja v R* [1986] KLR 190 where the Court of Appeal held thus: -

“On a first appeal from a conviction by a judge or a magistrate, the appellant is entitled to have the Appellate Court's own consideration and view of the evidence as a whole and its own decision thereon. The Court has a duty to rehear the case and reconsider the materials before the Judge or Magistrate with such materials as it may have been decided to admit.”



Analysis and Determination

12. I have carefully considered the Record of Appeal and the parties' rival submissions. I find that the following issues arise for the court's determination: -
- [i] Whether the offence of defilement was proved to the required standard.
 - [ii] Whether the sentence imposed by the trial court was harsh and excessive.
- i. Defilement
13. Section 8 of the *Sexual Offences Act* [the Act] stipulates as follows: -
8. Defilement
- 1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - 2. A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
 - 3. A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
14. The ingredients of the offence of defilement are: -
- a. Age of the minor
 - b. Proof of penetration
 - c. Positive Identification of the perpetrator
- [See the case of Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013 [2015] eKLR].
15. In Francis Omuroni v Uganda, Court of Appeal Criminal Appeal No. 2 of 2000, it was held follows regarding proof of age in defilement cases:-
- “In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense”
16. I find that the age of the victim was not contested. Indeed, the Investigating Officer produced the victim's Birth Certificate [P.Exh6] which indicated that she was born on 17th November 2007. This means that the victim was 12 years old and 11 months at the time the offence was committed. I am satisfied that the ingredient of minority age of the victim was proved beyond reasonable doubt.

Penetration

17. Section 2 of the *Sexual Offences Act* defines penetration as follows: -
- “penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;



18. The victim testified as follows on the circumstances under which she was defiled: -

“...He got hold of me and tried pushing me towards a maize plantation. I told him I would scream and he told me to be silent...he placed my head in the v-shape and started removing his clothes. I then managed to free myself from the avocado tree v-shaped and started running away. He pursued me without his clothes. He got hold of me and returned me to that spot.... He held me then placed my head on the v-shaped avocado tree. He then removed my pantie, he then tried to have sex with me but I was resistant then he wrestled me down. He then folded my dress up and placed it on my arms. By sex I mean he took his penis [the one for urinating] and inserted on my vagina [pointing]. He closed my mouth. When he left me it was already at night, I did not carry my shoes and panty. I ran home and informed my mother....”

19. I find that the complainant [PW1] gave a clear and consistent narrative of the incident, detailing how the Appellant forced himself upon her and penetrated her genitalia. Her account was not only direct and unwavering but was also corroborated by medical evidence presented by PW2, the clinical officer, who confirmed the presence of bruises on the external genitalia, a torn hymen, cervical injuries, and spermatozoa in vaginal secretions. It is my finding that the findings, by the clinical officer, are consistent with recent and forceful vaginal penetration.

20. I further find that the presence of injuries on the Appellant’s penis and urethral discharge noted by the same medical officer, on examination, reinforces the likelihood of recent sexual activity and lends credence to the complainant’s version of events. Accordingly, I am satisfied that the Prosecution proved penetration beyond reasonable doubt.

Positive Identification

21. The complainant testified that she was familiar with the Appellant. She referred to him by his nickname “College” and identified him as her aunt’s boyfriend. This evidence was not challenged during cross-examination as the Appellant acknowledged being known by the said name. It is instructive to note that the incident occurred during the early evening and lasted long enough to afford the complainant a clear opportunity to recognize her assailant. It is my finding that the identification was therefore that of a known person, which is considered more reliable than identification of a stranger. [See *Turnbull and others* [1979] 3 All ER 549 and *Wamunga v Republic* [1989] KLR 424].

22. I find that the Appellant was properly and positively identified as the person who committed the offence.

23. I have considered the Appellant’s testimony when placed on his defence and I find that it consisted of mere denial that did not displace the compelling evidence presented by the Prosecution. The Appellant stated that he was away in Kilgoris at the time of the offence. This implied that his testimony was in the nature of alibi evidence. I however note that he did not call any witness to corroborate his alibi evidence. While the court is alive to the principle that the legal burden of proof in a criminal trial rests on the Prosecution, evidentiary burden shifts to an accused person when they are placed on their defence and called upon to counter the Prosecution’s case against them.

24. It is also trite that alibi evidence should be introduced early in a criminal trial so as to enable the Prosecution look into the same with a view to verifying it so as to discharge the accused. This requirement stems from the principle that the burden of proving the existence of alibi, as a defence,



rests on the Prosecution as it has the effect of disproving the charge by creating doubt in the mind of the court. In *R v Sukha Singh S/o Wazer Singh & Others* {1939} 6 EACA 145 it was held thus: -

“If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there is naturally a doubt as to whether he has not been preparing it in the internal and secondly, if he brings it forward at the earliest possible moment it will give the prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness, proceedings will be stopped.”

25. I find that, since the Appellant raised the defence of alibi too late in the trial coupled with the fact that no witnesses showed up to corroborate it, the said alibi defence was unsubstantiated and an afterthought.
26. In light of the foregoing, I find that the Prosecution sufficiently proved all the three elements of the offence of defilement, to wit, age, penetration, and positive identification beyond reasonable doubt. The trial court’s finding of guilt was therefore sound and well-founded in both fact and law.
 - ii. Whether the sentence imposed by the trial court was harsh and excessive
27. Section 8[3] of the *Sexual Offences Act* provides a mandatory minimum sentence of twenty [20] years imprisonment for a person convicted of defilement of a child between the ages of twelve and fifteen years. In this case, the Appellant was sentenced to serve thirty [30] years imprisonment, which is above the statutory minimum sentence.
28. Sentencing remains a discretionary function of the trial court, but such discretion must be exercised judiciously and guided by law. In *Wanjema v Republic* [1971] EA 493, it was held that:

“An appellate court should not interfere with the sentence unless it is manifestly excessive in the circumstances or the trial court overlooked some material factor.”
29. In the present case, the trial court imposed a sentence of 30 years. I note that even though the said sentence is above the statutory minimum sentence, it is within the range provided by law. Having regard to the aggravating factors surrounding this case, namely; the tender age of the victim, the violent nature of the act, and the breach of trust, the Appellant, who was well-known to the family and in a quasi-familial role, I find that the sentence imposed by the trial court was not manifestly excessive. The trial court was well within its discretion to impose a sentence above the minimum threshold, particularly in light of the trauma inflicted on the victim and the circumstances under which the offence was committed.
30. In the end, I find that the Appellant has not demonstrated that there was any error in principle or any material factor overlooked by the trial court in arriving at the sentence. I therefore find no justification to interfere with the sentence imposed by the trial court.

Conclusion

31. Upon re-evaluating the evidence afresh and considering both the law and applicable principles of sentencing, I find that the Prosecution proved its case against the Appellant beyond reasonable doubt. The conviction was safe and the sentence appropriate in the circumstances of the case. I therefore dismiss the appeal and uphold both the conviction and sentence, but with a rider that the sentence shall be computed to take into account the period, if any, that the Appellant spent in custody while awaiting his trial in accordance with the requirement of Section 333 [2] of the *Criminal Procedure Code*.



32. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA
MICROSOFT TEAMS THIS 17TH DAY OF JULY 2025.**

W. A. OKWANY

JUDGE

