



**AM v Republic (Criminal Case E014 of 2024)  
[2025] KEHC 12986 (KLR) (Crim) (18 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12986 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ISIOLO  
CRIMINAL  
CRIMINAL CASE E014 OF 2024  
SC CHIRCHIR, J  
SEPTEMBER 18, 2025**

**BETWEEN**

**AM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal against the Judgment of Hon. L.Mutai (CM) in  
Isiolo chief magistrate’s court sexual offences case No. E009 of 2021)*

**JUDGMENT**

1. This is an appeal against the decision of the Chief Magistrate’s Court at Isiolo in which the appellant was convicted of the offence of defilement contrary to section 8(1) as read with Section 8(3) of the [Sexual offences Act](#) No. 3 of 2006 (The Act), and sentenced to a prison term of 14 years. The particulars of the charge are that on the 26<sup>th</sup> July, 2020 at [particulars withheld] in Isiolo County intentionally caused his penis to penetrate the vagina of M.K, a child aged 13 years.

**Petition of Appeal**

2. The appellant was aggrieved by the decision and moved to this court on Appeal. On his amended , and undated grounds of appeal he has pleaded as follows:
  - a). That the trial Magistrate erred in law and fact by not noticing that the prosecution did not prove its case beyond any shadow of a doubt.
  - b). That the trial Magistrate erred in law and fact by relying on adequate, shallow, fabricated , contradictory and speculative evidence.



- c). That the prosecution failed by not availing vital witnesses to shed more light and which omission amounted to a miscarriage of justice.
3. The appeal was prosecuted by way of written submissions.

### **Appellant's submission**

3. On the first ground the Appellant submits that the entire charge was fabricated. He states that it is questionable for instance that the complainant's abnormal walking style which must have resulted from the defilement went unnoticed for long, by those who ought to have noted. He further states that the particulars of the P3 form did not link the incident to the appellant.
4. He also cast doubts on the integrity of the DNA test, based on the fact that the test was done one month after the sampling. He also questions why the results of the test was only availed after one year.
5. It is also submitted that there was contradiction between the testimony of PW2, PW3 and PW5 on the date that the complainant visited the hospital. It is the appellant's final submission that the prosecution failed to call the complainant's grandmother who was her alleged guardian at the time as her testimony would have corroborated the complainant's.

### **Respondent's submissions.**

6. It is the respondent's first submission that, all the ingredients of the offence were proved. In particular, the respondent submits that the testimony of the complainant and the DNA test results done on the complainant's child born out of defilement, was sufficient prove of penetration.
7. On the identity of the perpetrator, it is submitted that from the testimony of the complainant, PW2 and the appellant, it emerged that both the complainant and the appellant knew each other well.
8. In response to their failure to call the complainant's grandmother, the respondent submits they were not obliged to call many witnesses, and that the available witnesses' testimonies sufficiently proved the main elements of the offence.
9. On whether there was contradictions on the prosecution's evidence the respondent state that what were present were discrepancies as opposed to contradiction and the said discrepancies were minor and did not otherwise affect the overwhelming evidence presented by the prosecution.
10. Both parties have relied on various authorities which I have perused.

### **Analysis and Determination**

11. This being the first Appeal, the mandate of this court is to review the evidence carry out its own evaluation and arrive at its own conclusion, while putting into consideration the fact that the trial court had the advantage of hearing witnesses and observing their demeanor (see : [\*Gitobu Imanyara & 2 others v Attorney General\* \[2016\] KECA 557 \(KLR\)](#))
12. I will proceed to consider the grounds of appeal in the order in which they have been presented.

### **Whether the Prosecution's Case was Proved Beyond Reasonable Doubt.**

13. In this regard, the appellant has argued that the prosecution's case was not proved beyond any shadow of doubt. However contrary to the Appellant's assertion, the legal threshold of proof in criminal cases is beyond reasonable doubt (see the English case of [\*Woolmington -vrs- DPP\* \[1935\] AC 462.](#) ), not beyond any shadow of a doubt.



14. The distinction between the above two standards was explained by Lord Denning in the case of *Miller – vs- Ministry of Pensions* ( 1947) 2 All ER 372 when he held :

“ that degree is well settled. It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the cause of justice. If the evidence is too strong against a man as to leave only a remote possibility in favour which can be dismissed with the sentence of course it is possible, but in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice.” (Emphasis added)

15. The offence of defilement consists of three ingredients all of which must be proved beyond reasonable doubt if the prosecution is to secure a conviction. These are: identity of the perpetrator, penetration and the age of the victim.

#### **a) Identity of the Perpetrator**

16. The complainant referred to the appellant as her uncle ,an assertion which the appellant did not challenge during cross- examination. PW2 also told the court that she knew the appellant before the incident , as he was married to the her cousin. This assertion remained firm at cross- examination. Finally, in his defence, the appellant affirmed his prior knowledge of the complainant, when he told the court that he “was attending to the complainant’s grandmother’ when he was arrested by the police.
17. It is evident that therefore that complainant and the appellant knew each other well. It was a case of identification by way or recognition, which mode of identification has been acclaimed by the courts as being more assuring and reliable . In the case of *Anjononi & others –vs- Republic* [1980] KLR 59 the Court of Appeal had this to say about this mode of recognition:

“Recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

#### **b) Penetration**

18. According to the complainant, the appellant defiled her on 26.7.2020, when she was on her way home, after the appellant had purportedly rescued her from, some three men who had wanted to rape her. He took her to a quarry and asked her to remove her cloths he pushed his penis inside her vagina. A while later, the 2<sup>nd</sup> incident took place. She was going to buy credit when she met the appellant. He caused her to follow him to [particulars withheld], where he penetrated he penetrated her vagina.
19. The complainant was 13 years old when the incident took place and 15 years when she testified. She was at an age where she understood the sexual act. Therefore she need not have given a detailed account of what transpired so as for the court to form an opinion on whether penetration took place. I have also noted that her testimony was hardly shaken during cross -examination. Further the trial court had the benefit of observing her demeanour and made the decision to believe her. Therefore I have no reason to depart from the findings of the trial court in this regard.
20. Finally, a child identified as P.M was born out of the act of defilement. A paternity test , conducted on the samples collected from the appellant, the child and complainant did confirm that the appellant was the father of PM ( see P.Exb, 4(B)). A positive result of a paternity test is a conclusive proof that



the father of the child did engage in sexual intercourse with the victim of defilement. This was aptly put by Justice Gikonyo in the case of *WLN v Republic* [2021] KEHC 5311 (KLR) as follows:

“DNA testing provides a scientific proof of biological parenthood of a person. In cases of defilement, the fact that the victim became pregnant as a result of sexual intercourse with a child is proof of penetration and identity of the culprit. Except, it is a different thing altogether if the pregnancy was conceived through other modern fertilization and conception methods. Of great evidentiary importance, however, is that in criminal cases, defilement or rape, DNA result that proves a person to be the biological father of a child conceived through defilement is proof of penetration by the person so found to be the biological father of the child”

21. The appellant has questioned the integrity of the DNA test. He has questioned for instance, as to why it took a month to be done. He argues that, the fact that report was done on 29.9.22 meant that the test was on the date appearing in the report. The exhibit memo indicates that the blood samples were obtained on 29.08.22. The report is however signed on 29.9.22. On the face of the report, there is nothing to suggest that the test was done the same day that the report was written. I have perused the testimony of the Government Analyst (PW4) and I observe that she was not interrogated on whether the test was done on the date of receiving the samples or on the date of report. However the following sequence of her testimony suggest that the analyst did the analysis on 30.08.22. Her testimony went as follows:

“On 30/8/22 I received blood samples in container (A) for Alexander Murithi and blood sample marked (M) for M K ,and 3<sup>rd</sup> blood sample in a container marked (P) for the child. Force Number 91xxx PC Bernard Omoit submitted the sample together with the exhibit memo asking us to analyse. The sample and determine the DNA of the child. I did the analysis and profile generated are well tabulated in my report.....”

22. Further, the appellant ought to have questioned the Government analyst to get clarity on the date of the test . From the record it is evident that the Appellant never cross- examined the analyst at all in that regard despite the fact that he was given a chance to. To submit that the test was carried out on the date of the report is speculative. The Appellant also had the liberty to ask the trial court for a second DNA test if he doubted the authenticity of the first one. To resort to acquiescence at trial only to raise the issue on appeal is devoid of sincerity. I am satisfied with the authenticity of the test result.
23. Am satisfied that based on the complainant’s own testimony and the DNA test, penetration was proved.

### **c) Age of the Victim**

24. The complainant was 13 years at the time of defilement . I have taken notice of the fact that her age was not contested during trial and is not also an issue on this Appeal.
25. In conclusion on this issue, I am satisfied that all the ingredients of defilement were proved beyond reasonable doubt. Ground 1 of the appeal is therefore unmerited.

### **Whether the Prosecution’s Case was Marred by Contradictions and Gaps and Inconsistencies**

26. On whether the evidence was speculative inadequate shallow or inadequate my answer is in the negative based on my conclusion on ground 1 of the appeal.



27. On the contradictions, I agree with the respondent that what the appellant has called contradictions, are not. There are gaps and inconstancies but not contradictions. The appellant questions for instance how it could have been true that the complainant reported to the grandmother that she was saved from some potential rapist, yet that report did not apparently prompt the grandmother to question her further; that if her hymen was broken for the first time on the day of the incident, she must have developed unusual walking style, yet there was no indication that such strange walking style was noticed. Finally, he asserts that the date of 2<sup>nd</sup> alleged defilement was fabricated to “suit the date as given in the birth notification”.
28. Save for the 1<sup>st</sup> issue the last two are actually speculations by the appellant himself. There was no evidence either from the complainants or PW2 that she had an unusual walking style. The 3<sup>rd</sup> issue was the appellant’s own conclusion, based on the gaps in the evidence.
29. However, overall, the issues did not amount to contradiction. There are gaps but which gaps were so minor, that they did not displace the prosecution’s evidence at all. This ground of appeal is unmerited.

**Whether the Prosecution Failed to Call Vital Witnesses.**

30. The appellant has singled out the complainant’s grandmother. In her testimony the complainant told the court that the Appellant lied to her grandmother that he had rescued her from some potential rapists. Thus the relevance of the grandmother’s testimony would have been to only confirm that the complainant was seen together with the appellant on that day, and nothing more. Her evidence therefore would have been circumstantial. In the light of direct evidence of the complainant and documentary evidence by way of DNA report, the grandmother’s testimonies would have been unnecessary in any event. Further Section 124 of the *Evidence Act* places a duty on the prosecution to only avail such number of witness as are sufficient to prove their case. Superfluity of the witnesses is uncalled for. This complain is without merit and it is equally dismissed.
31. Though the preamble to the memorandum of appeal states that the appeal is against conviction and sentence, the issue of sentence is neither a ground of appeal nor the submissions. consequently the court has not addressed itself to it.
32. In conclusion, I do not find any merit in the appeal. It is hereby dismissed.

**DATED, SIGNED AND DELIVERED AT ISIOLO THIS , 18<sup>TH</sup> DAY OF SEPTEMBER, 2025.**

**S. CHIRCHIR**

**JUDGE**

In the presence of:

Roba Katelo – Court Assistant

A M - the Appellant

Mr. B. Ngetich – for the Respondent.

