



**Kifalu v Republic (Criminal Appeal E093 of 2023)  
[2025] KEHC 13103 (KLR) (19 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13103 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL APPEAL E093 OF 2023  
M THANDE, J  
SEPTEMBER 19, 2025**

**BETWEEN**

**SAMSON CHARO KIFALU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Appellant herein, was convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* (SOA) in Kaloleni Sexual Offences Case No. 46 of 2021 and sentenced to 10 years imprisonment. The particulars of the offence are that on diverse dates between 19.7.2020 and 25.11.21 at [Particulars Withheld] village, Chanagande location, Kaloleni sub-county within Kilifi county, intentionally and unlawfully caused his penis to penetrate the vagina of N. C. G. (the Complainant), a child aged 16 years.
2. Being aggrieved by the decision of the trial Magistrate, the Appellant has appealed to this Court against both the conviction and sentence. The summarized grounds of appeal are that the trial Magistrate erred in failing to that the prosecution prove its case to the required standard. The Appellant further prayed that without prejudice to his Appeal, that his sentence be reviewed downwards pursuant to Sections 216, 329 and 333(2) of the criminal procedure Code. The Appellant urged that the Appeal be allowed.
3. As a first appellate Court, I have subjected the evidence adduced before the trial Magistrate to a fresh analysis and evaluation while giving due allowance for the fact that unlike the trial court, I neither saw nor heard the witnesses. See *Okeno v. Republic* [1972] EA 32.
4. The Respondent filed submissions in opposition to the Appeal. However, the submissions are erroneous as they refer to a charge of defilement of a child of 12 years under Section 8(1) as read with Section 8(3) of the SOA. Further, the submissions do not relate to the instant Appeal at all and are accordingly, disregarded.



5. To sustain a conviction for the offense of defilement, 3 ingredients must be established by the prosecution. This was set out in *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013 where the Court stated:

The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.

6. This Court is required to determine whether in the court below, it was demonstrated that the Complainant was below 18 years of age. Secondly, that there was penetration of the Complainant's genitalia. Lastly, that the evidence identified the Appellant as the perpetrator.
7. As regards age, PW1 Mwangolo Chigulu, a Senior Clinical Officer at Marakani County Hospital stated that age assessment was conducted which confirmed that the Complainant was 16 years old. The Complainant herself stated that she is 16 years old, as did her mother FC, PW3. The ingredient of age was thus established.
8. On penetration and identification, the Appellant did admit in his defence that he had sex with the Complainant. He stated that he and the Complainant had agreed to get married. When he expressed his intentions to the Complainant's parents, they told him to wait until she completes her schooling. From the evidence on record, this is not a case where the Complainant had deceived the Appellant that she was over the age of 18 years. He did not also state that he reasonably believed that the Complainant was above the age of 18 years. The Appellant was very much aware that the Complainant was still a child. Indeed, his father's brother DW2 stated that "We all knew that the complainant was a minor and a student in school. We knew she was in primary school." Similarly, DW3, the Appellant's father stated that they had agreed to pay dowry in installments as the Complainant continued with her education.
9. In his submissions, the Appellant relied on the defence in Section 8(5) of the SOA provides:
  - (5) It is a defence to a charge under this section if—
    - a. it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
    - b. the accused reasonably believed that the child was over the age of eighteen years.
  - (6) The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

10. For this defence to be available to an accused person, it must be raised at trial to enable the prosecution respond and the trial court pronounce itself on the same. From the record, it is evident that the Appellant did not raise this defence at trial. In the premises, the defence is not available at the appellate stage as an appeal can only lie where there has been a decision made by the lower court. This was the holding in *Kipkorir v Republic* (Criminal Appeal E056 of 2022) [2024] KECA 745 (KLR) (21 June 2024) (Judgment) where the Court of Appeal stated:

We are of the considered opinion that this court sitting as a second appellate court can only entertain matters that were considered by the court being appealed from. An appeal can only lie where there has been a decision made by a lower court. If an issue was not brought



up before the lower court, and therefore not determined, then any decision made by the appellate court would not be considered a judgment on an appeal.

11. The Appellant has asked that the period spent in custody during trial be taken into account. Section 333(2) of the Criminal Procedure Code provides as follows:

Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

12. The proviso to Section 333(2) of the Criminal Procedure Code obligates the court to take into account the period an accused spent in custody pending trial.

13. In the case of *Bethwel Wilson Kibor v Republic* [2009] eKLR, the Court of Appeal had this to say about the said proviso:

The incident took place way back in 1999. The appellant was promptly arrested and taken to court. There were long adjournments due to transfers and/or changes of trial Judges resulting in long incarcerations of the appellant. By proviso to section 333(2) of Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J. who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody.

The appellant told us that as at 22nd September, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence.

14. Flowing from the above authority, it is clear that a trial court must take into account the period spent in custody pending trial, and state so, when imposing sentence.

15. When imposing sentence, there is no mention by the trial court that the period the Applicant had spent in custody pending trial, was taken into account when sentencing him. This is a serious omission on the part of the trial court, as it amounts to non-compliance with an express statutory provision.

16. In the end, after reevaluating the evidence, my finding is that the Appellant was properly convicted and the conviction is accordingly upheld. As regards the sentence, the same is reviewed to run from 23.12.21 when the Appellant was arrested.

**DATED, SIGNED AND DELIVERED IN MALINDI THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2025**

.....

**M. THANDE**

**JUDGE**

