



**Koech v Republic (Criminal Appeal E036 of 2024)  
[2025] KEHC 13566 (KLR) (24 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13566 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARSEN  
CRIMINAL APPEAL E036 OF 2024  
JN NJAGI, J  
SEPTEMBER 24, 2025**

**BETWEEN**

**VINCENT KIPCHIRCHIR KOECH ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence by Hon.  
F.M.Mulama, RM, in Lamu Senior Principal Magistrate's Court  
Sexual Offence Case No. E001 of 2024 delivered on 15/7/2024)*

**JUDGMENT**

1. The Appellant herein was convicted for 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 particulars of the offence were that on the 28<sup>th</sup> day of December, 2023 at around 1600hrs at Jua Kali area of Hindi location within Lamu County he intentionally and unlawfully caused his penis to penetrate the vagina of M.M.M (herein referred to as the complainant), a child aged 15 years.
2. The appellant was sentenced to serve 25 years imprisonment. He was aggrieved by the conviction and the sentence and lodged this appeal. The grounds of appeal are that;
  - (1) The trial court erred in law and fact in failing to read the mischief of the mother of the complainant who testified before the complainant testified.
  - (2) The trial court erred by in law and fact in failing to consider the alibi raised by the Appellant.
  - (3) The trial court erred by in law and fact in failing to consider the evidence of DW2 which supported the alibi defence of the Appellant.



- (4) The trial court erred by in law and fact in failing to consider the disparity in time by PW1, PW5 and DW2 before convicting the Appellant.
3. The case for the prosecution before the trial court was that the complainant (PW2 in the case) was at the material time aged 15 years and was a form 2 student. She was living with her mother, PW2. The appellant was operating a butchery near their home. That on the material day, the Appellant went to the stall shop of a neighbour and bought 3 packets of simsim. He took one packet as the other two were not ready. He left with the arrangement that the other 2 packets would be delivered to him by the complainant when they were ready. When the two packets were ready, the complainant took them to the Appellant. She found him at his butchery. He went to his house to pick the money to pay for the packets. While in his house he called the complainant to pick the money. On getting there the appellant told her to sit on the bed. She did so. He started to caress her. He undressed her and he undressed himself. They then engaged in sex.
4. Meanwhile the mother to the complainant, PW1, was informed that the complainant had gone to deliver simsim to the Appellant and she had delayed in returning back. PW1 took a chapati rolling rod and proceeded to the house of the Appellant. A girl called J.W. PW4 followed PW2 from behind. They found the Appellant coming out of his house. They peeped inside the house and saw the complainant naked and trying to put on her trousers. Her mother PW1 entered into the house and struck her with the chapati rolling stick. The complainant managed to snatch the rod from her and threw it away. PW1 locked the complainant in the house. She took the stick and went to the butchery of the Appellant. She found the Appellant in the butchery and attacked him with the said stick. The Appellant was injured on the face. The complainant managed to escape out of the house of the Appellant and went into hiding.
5. PW4 gave similar to that of the complainant's mother. PW2. PN PW5 who operates a stall at the place saw the complainant coming out of the Appellant's house after the complainant's mother went to the house of the appellant.
6. The complainant's mother went and made a report at Hindi police station. PC Sikoyo went to the scene of the incident with other police officers. He retrieved the stick that PW1 had attacked the complainant and the appellant with. They arrested the appellant. He was taken for treatment at Hindi dispensary. The complainant resurfaced on 30/12/2023. She was taken for examination at Hindi dispensary. She was examined by a clinical officer who found her with a missing hymen but there were no abnormalities except a vaginal discharge with a foul smell. The clinical officer completed a P3 form and Post Rape Care form. After investigations were complete, PC Sikoyo charged the Appellant with the offence of defilement. During the hearing he produced the complainant's birth certificate, the chapati rolling stick and note of Ksh.500/= that the Appellant had given the complainant as exhibits, P.Exh. 1, 3 and 5 respectively. A clinical officer from Hindi Dispensary PW3 produced the treatment notes, the P3 form and the Post Rape Care form as exhibits, P.Exh. 6, 7 and 8 respectively.
7. In his defence, the Appellant stated in a sworn statement that he on the material day went and bought simsim from a certain lady. That the lady told him that the same would be delivered to him. He took one packet and went back to his work. That after some time, the complainant took the remaining packets of simsim to him at his place of work. That she did not return immediately as she was on phone as she waited for him to give her the money for the purchase. He gave her Ksh.500/= and she said she will bring the balance. She left using the back door. That after about 20 minutes, he heard foot-steps at the back door. He went to check and found the mother to the complainant at the back door. She attacked him with a knife on the face while accusing him of being with her daughter. He went to make



a report at the police station. She followed him there while shouting and holding a chapati rolling stick. He denied that he defiled the complainant.

8. The Appellant called one witness, S.O, DW2 who told the trial court that he was a neighbor to the appellant. That the appellant was operating a butchery and he used to clean the butchery for him for pay. That on the material day he was outside his house when the mother to the complainant went there and asked him to show her the house for the Appellant. He showed her and she entered into the house. She found the complainant inside the appellant's house and started to beat her. He went into the Appellant's butchery where he found the appellant and told him what was happening in his house. The complainant's mother then entered into the butchery and attacked the appellant with a chapati rolling rod. She injured him and he started bleeding. She headed towards the police station and the appellant followed her there.

### **Submissions**

9. The appeal was canvassed by way of written submissions of counsel appearing for the Appellant and those of the Principal prosecution counsel on behalf of the state. Counsel for the Appellant submitted that the complainant gave unsworn evidence despite being of the age of 16 years at the time that she testified in court. That there was disparity in the evidence of the prosecution witnesses, PW1 and PW2 and the defence witness, DW2 as to the time the offence was committed. That the complainant was not a credible witness.
10. The Appellant submitted that the trial court failed to consider the Appellant's defence of alibi which was corroborated by his witness, DW2. It was submitted that the burden of proving the falsity of the alibi defence of the Appellant lay on the respondent as was stated in the case of *Karanja v Republic* (1983) KLR 501. The appellant urged this court to allow the appeal.
11. The Respondent on the other hand submitted that the case against the appellant was proved beyond reasonable doubt. That the age of the complainant was proved by the complainant and her mother and was confirmed by the birth certificate. That penetration was proved by the evidence of the complainant herself who gave evidence that the Appellant inserted his penis into her vagina. That her evidence was corroborated by her mother who found her naked in the appellant's house. That there was no mistaken identity on the appellant by PW1 and PW2 as he was a person well known to them. In addition that the defence of the Appellant was a mere denial that did not cast doubt on the prosecution case.

### **Analysis and Determination**

12. This being a first appeal, this court is mandated to analyze and re-evaluate the evidence afresh in line with the holding in the case of *Odhiambo v Republic Cr App No 280 of 2004* (2005) 1 KLR where the Court of Appeal held that: -

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour.”

13. The same principles were re-stated by the Court of Appeal in the case of *Kiilu & another v Republic* [2005]1 KLR 174, thus:

An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.



It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

14. The elements of the offence of defilement that the prosecution is required to prove beyond reasonable doubt are: proof of the age of the victim, proof of penetration and identity of the perpetrator, see the *Charles Wamukoya Karani vs. Republic*, Criminal Appeal No. 72 of 2013.
15. Starting with the element of the age of the complainant, the law is that the age of a person can be proved in various ways. In the case of *Mwalongo Chichoro Mwajembe -Vs- Republic*, Msa Cr.App. No. 24 of 2015 (UR), the Court of Appeal held as follows:

“ ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.”
16. The complainant in this case together with her mother said that she was aged 15 years at the time the offence was said to have been committed. This evidence was corroborated by the evidence contained in the complainant's birth certificate that showed that she was born on the 15<sup>th</sup> May 2008. The offence was reported to have been committed on 28<sup>th</sup> December 2023, which placed the complainant's age at 15 years and 7 months. The age of the complainant was thus proved at 15 years.
17. On the element of penetration, Section 2 of the *Sexual Offences Act* defines the same as:

“ the partial or complete insertion of the genital organs of a person into the genital organs of another person.”
18. The prosecution had the duty to establish that the complainant was partially or fully sexually penetrated by the Appellant.
19. Penetration can be proved by way of medical evidence, by oral or circumstantial evidence. In the case of *Kassim Ali v Republic* (2021) eKLR the Court of appeal stated that;

“...the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence.”
20. The clinical officer who examined the complainant found her with missing hymen but there was no evidence that it was freshly broken. There was thus no medical evidence to support the evidence of the complainant that she was penetrated by the Appellant on the material day. The question then turns on whether there was sufficient oral or circumstantial evidence to support the defilement.
21. The complainant gave evidence that she took simsim to the Appellant who thereupon called her to his house to collect money for the purchase. That upon getting there, he told her to sit on the bed. When she did so, he undressed her and forcibly inserted his penis into her vagina.
22. The complainant's mother PW1, and a girl called JR PW4 confirmed that they went to the house of the Appellant in search of the complainant whereupon they found the complainant in the house of the Appellant. That she was naked and she was struggling to put on her pair of trousers. The



complainant indeed confirmed that her mother found her naked in the house of the complainant and that she was indeed struggling to put on her pair of trousers when her mother arrived. PW5 also saw the complainant coming out of the appellant's house. Even the witness for the Appellant, DW2 confirmed that the complainant's mother found the complainant inside the Appellant's house. The complainant stated in her evidence that the Appellant met with her mother at the door of his house as he went out to find out what was happening outside. In view of all this evidence, I have no doubt that the trial court was right in finding that the complainant was found naked in the appellant's house. The Appellant was found by the prosecution witnesses in the same house. The fact that the complainant was found naked in the house supported her evidence that she had been engaging in sex with the Appellant before they were confronted by her mother. The Appellant's defence was a mere denial. There was no truth that the Appellant was at his butchery when the complainant's mother arrived at the place. The Appellant went to his butchery after the complainant's mother started to beat the complainant. The evidence of his witness, DW2 that the Appellant was at his butchery all that time cannot be true. His evidence does not explain what the complainant was doing in the house of the complainant in the absence of the appellant or how she got into his house. Considering the evidence of the prosecution witnesses in its totality, they cannot have been lying against the appellant. They were credible witnesses. Penetration of the complainant by the Appellant was thereby proved. PW5

23. The appellant was a neighbour to the complainant and the prosecution witnesses. There was no issue of mistaken identity. The Appellant's defence was a mere denial. I find the trial court to have rightly dismissed the defence.
24. The Appellant raised the issue that he was convicted on the basis of unsworn evidence of the complainant. However, this was not one of the issues raised in his grounds of appeal. The complainant having been aged 16 years she was not a child of tender years and there was therefore no need of voir dire examination being conducted on her. Even then, in the case of *Mwangi v Republic* (2006) 2 KLR 94 it was held that it is trite that the court will not base a conviction on unsworn uncorroborated evidence, but where such evidence is corroborated by other evidence, then such a conviction would be safe. In this case the evidence of the complainant that she was defiled by the Appellant on the material day was corroborated by the evidence of her mother PW2 and that of PW4 who found her naked in the house of the Appellant. The two witnesses found the Appellant at the door of his house at the time that they found the complainant inside the house of the Appellant. The Appellant came out of his house when he heard PW2 calling the complainant. There was thereby sufficient corroboration in the case and the conviction of the Appellant was safe.
25. The upshot is that I do not find merit in the appeal on conviction. The conviction on the Appellant is thereby upheld.

### **Sentence**

26. The Appellant was charged under section 8(3) of the *Sexual Offences Act* that provides for a minimum sentence of 20 years for the offence of defiling a child aged between 12 and 15 years. The trial court sentenced the appellant to serve 25 years imprisonment. The court did not give a candid reason for imposing a sentence of 25 years. I am of the view that the minimum sentence of 20 years would have been sufficient in the circumstances of the case. Consequently, the sentence of 25 years imprisonment is set aside and substituted with one of 20 years imprisonment.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT GARSEN THIS 24<sup>TH</sup> DAY OF SEPTEMBER 2025.**

**J.N. NJAGI**



## **JUDGE**

In the presence of

Mr. Komora for Appellant

Miss Mkongo for Respondent

Appellant – Present

Court Assistant - Rahma

