



REPUBLIC OF KENYA



**Murianki alias Kajogi v Republic (Criminal Appeal E019 of 2024)
[2025] KEHC 14441 (KLR) (30 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 14441 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CRIMINAL APPEAL E019 OF 2024
RL KORIR, J
SEPTEMBER 30, 2025**

BETWEEN

ISAIAH KIRIGA MURIANKI ALIAS KAJOGI APPELLANT

AND

REPUBLIC RESPONDENT

*(From the original conviction and sentence in Criminal Case No. S.O E024 of 2022 at Marimanti
Principal Magistrate's Court delivered by Hon. J.M Gacheru (R.M) dated 9th November 2023)*

JUDGMENT

1. The Appellant was charged with defilement contrary to Section 8(1) as read with 8(2) of the [Sexual Offences Act](#) No.3 of 2006. The particulars of the offence were that on the 21st day of September 2022 at xxxxx village of xxxx Location Chiakariga Sub-County within Tharaka Nithi County he intentionally caused his penis to penetrate the vagina of D. N. G a child aged 9 years.
2. In the alternative, the appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) No.3 of 2006.
The particulars of the offence were that on the 21st day of September 2022 at xxxxx village xxxxx Location Chiakariga Sub-County within Tharaka Nithi County he intentionally touched the vagina of D.N. G a child aged 9 years with his penis.
3. At the conclusion of the trial, he was convicted of the main charge and sentenced to serve imprisonment for life.
4. The Appellant was aggrieved with the conviction and sentence and appealed to this court. In his homemade Petition dated 11th December 2023, he listed 6 grounds of appeal which I have paraphrased as follows:-



- i. That the Prosecution did not discharge its burden of proof.
 - ii. That the trial court relied on evidence which was inconsistent and contradictory
 - iii. That the Prosecution witnesses lacked credibility.
 - iv. That the prosecution ailed to call crucial witnesses.
 - v. That the sentence was harsh and excessive and disregarded his mitigation
5. As a first Appellate court, I have a duty to rehear the case albeit without the benefit of hearing and seeing witnesses testify. This duty was set out by the court of Appeal in the case of Pandya vs. Republic (1957) EA 336 where the Court of Appeal stated:-

“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 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusion. It must itself make its own finding. 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 advantage of hearing and seeing the witnesses.”

6. I now set out the case that was before the trial court in the succeeding paragraphs.

Prosecution Case

7. The victim of the offence was one D.N. The court conducted a voir dire examination and decided that the child was of sufficient intelligence to give unsworn testimony. D.N. (PW1) told the court that she was 10 years old and in class three at xxxxx Primary School. She narrated that she was in her grandmother’s house on 21st September 2022 when the accused whom she knew as Kajogi went in and found her sleeping with her grandmother. That he picked her up and took her to a hill where he put his thing into “her thing”. He kept her there the whole night and returned her to the grandmother’s house in the morning. She reported to her grandmother what had happened and she in turn informed her aunt K who alerted her mother LG and who in turn took her to hospital and to the police.
8. PW2 was FK a, the victim’s aunt. She testified that she was informed by the grandmother about the defilement. She observed that PW1 was not walking properly as she took her (PW1) to her mother’s house from where she was taken to hospital.
9. PW2 stated in cross-examination that the accused was her neighbour in Rungu where he had been employed by one Rukungi. She also responded to the accused in cross-examination that he (accused) used to live with PW1’s grandmother where he was employed to do farm work.
10. LG (PW3) was the victim’s mother. She testified that PW1 was born on 23rd November, 2013 and exhibited her Clinic Card (MFI-1). PW3 told the court that grandmother Karambu was her mother-in-law and that PW1 had gone to sleep there. She said that she was alerted by her sister (PW2) and she went and took (PW1) to hospital where the doctor confirmed that she had been defiled. She displayed the P3 Form (MFI-2) that was given.



11. The Clinical Officer who examined the victim was Lilian Wahu (PW4). She testified that she examined her on 3rd October 2022. That the victim was earlier treated at Tunyai Health Centre. That she was still in pain at the time of examination, which also showed a broken hymen and reddish vaginal walls. She concluded that there was penetration. PW4 produced Treatment Notes (Exh-3), PRC Form (Exh-4) and P3 Form (EXH-2).
12. No.58574 PC Jotham Mureithi of Tunyai Police Station was the Investigating Officer. He stated that a report was made on 23rd September 2022 by the complainant's parents. He noticed that PW1 had difficulty walking and he escorted them to Tunyai Health Centre then to Marimanti Level 4 hospital. That he was given the Clinic Immunization Card, which recorded the date of birth as 23rd November 2013, which placed the complainant's age at 9 years at the time of the offence.
13. PW5 also testified that the accused was arrested by police officers at Marimanti. He stated in cross-examination that the accused had escaped after the commission of the offence.

The Defence Case

14. The trial court ruled that the prosecution had established a prima facie case and put the accused on his defence.
15. The Accused (DW1) gave sworn testimony and did not call any witnesses. He told the court that he was Isaiah Kiriga Muriangi, lived in Rungu and was a farmer. That he was in Gaitu between 20th September and 26th September 2022. He stated that he was called and arrested and taken to the police station without being informed of the reason for his arrest. DW1 further stated that he knew the complainant and alleged that there was a land dispute between her family and his family.
16. In Cross-examination, the accused stated that he had gone to Silio Kirima's home where he was previously employed in Gaitu to ask for his money. He stated that the said Silio was deceased, as were his (DW1's) parents. Cross-examined on his allegations of a grudge based on a land dispute, DW1 stated that the chief and assistant chief that he had reported the case to were both deceased.

Submissions

17. Parties filed submissions as per the directions of the court. The Appellant's and Respondent's submissions were dated 8th April, 2025 and 17th March, 2025 respectively.
18. The Appellant submitted that the prosecution case was full of inconsistencies and critical witnesses, being the complainant's grandmother and aunt, were not called to testify. That he was incapable of defiling the complainant since he was impotent and that the case was a frame up because he had refused to lease 3 acres of land to the complainant's mother.
19. The Appellant further submitted that the trial court did not consider that he was away at 'Baite in the home of Silio Kirima'. He stated that the trial court did not send him for medical examination, which would have shown that he was impotent.
20. The Respondent submitted that the three elements of the offence being penetration, age of the victim and identity of the perpetrator were proven beyond reasonable doubt. On penetration, the Respondent submitted that the evidence of PW1, PW2 and PW4 was credible. That PW1 testified how she had been taken to the hill and defiled till morning and she felt a lot of pain. That PW2 observed that the complainant walked with difficulty and PW4 the medical practitioner, upon conducting an examination, concluded that there was penetration.



21. On age, the Respondent submitted that the complainant was 9 years at the time and this was proved by production of her Clinic Card.
22. With respect to the identity of the perpetrator, the Respondent submitted that he was well known to PW1, PW2 and PW3, as he was their neighbour and also a previous employee of PW1's grandmother.
23. The Respondents further submitted that the trial court considered the defence case and the mitigation of the Appellant before sentencing him. They urge the court to dismiss the Appeal.

Analysis and Determination

24. I have considered the trial record, the grounds of appeal and the respective submissions of the parties. The primary issue in this appeal is whether the ingredients of the offence were proven to the required standard. Other issues are whether the Appellant's sentence was proper and; whether it was necessary for the trial court to order a medical examination on the Appellant. These issues are necessarily intertwined with the ingredients of the offence, which I analyze in the succeeding paragraphs.

The age of the victim

25. The Appellant was charged under Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, which provides:-
 - (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.
26. It is critical to prove the age of the victim for two reasons. Firstly, because by its definition, defilement occurs only if the victim was a child as defined by Section 2 of the Children's Act, and secondly; because the penalty is graduated according to the age of the child victim. In the case of Leonard Njuguna vs. Republic (2020) eKLR the court observed that:-

“It is trite that in sexual offences the age of the complainant is relevant for two purposes. Firstly, it is meant to prove that the complainant was below 18 years establishing the offence of defilement, and secondly, it establishes the age of the complainant for purposes of sentencing.”
27. Jurisprudence abound on how age is proved. In the case of In the case of Edwin Nyambaso Onsongo vs Republic (2016) eKLR, in which the court cited the case of Mwolongu Chichoro Mwanjembe Vs Republic, Mombasa Criminal Appeal No.24 Of 2015 (UR) the Court of Appeal held that:-

“... 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.....”
28. Rule 4 of the Sexual Offences Rules of Court 2014 provides that:-

When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document.



29. The Complainant testified that she was 10 years old and in class three at Muthitwa Primary School. Her mother LG (PW3) testified that the complainant was 10 years old. That she was born on 23rd November 2013. She displayed the Clinic Card (MFI-2). The Clinic Immunization card was subsequently produced by the Investigating officer as Prosecution Exhibit 1.
30. I observe that the Complainant gave unsworn testimony when she testified on her age. Her testimony was however corroborated by the testimony of her mother (PW3). I have looked at the Clinic Immunization Card (Prosecution Exhibit 1). It shows that the Complainant's date of birth was 23rd November, 2013.
31. From the evidence above, I am satisfied that the Complainant was born on 23rd November, 2013. She was therefore 8 years and 10 months or two months shy of 9 years. I observe that the charge sheet indicated that she was 9 years. In law, a person attains the higher age at the next birthday. In this case, therefore the Complainant was 8 and not 9 years old at the time of the offence. Since the penalty is the same for both ages, I do not find the error in stating 9 instead of 8 years in the charge sheet material.
32. It is my finding therefore that the age of the Complainant was proven beyond reasonable doubt. She was a child aged 8 years.

Penetration

33. Section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of the genital organs of a person into the genital organs of another person.
34. Penetration is proved by the evidence of the complainant corroborated by medical evidence. This was the holding in the celebrated case of *Bassita vs Uganda S. C Criminal Appeal Number 35 of 1995*, the Supreme Court held that:-

“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victim's own evidence and corroborated by the medical evidence or other evidence.....”
35. In this case, the victim testified as follows. “The accused came and found that I was asleep together with my grandmother. It was around 7pm. The accused came into the house. He picked me up. He took me up a hill. The accused removed my panty. He also removed his trouser. He put his ‘thing’ into my ‘thing’. I use my thing to pass urine. The accused did this from 11.00pm to morning. I felt a lot of pain. In the morning the accused took me back to my grandmother's house.....”
36. The evidence of the complainant was credible. She narrated how the accused put his ‘thing’ (understood to mean penis) into her thing (understood to mean vagina). The trial court noted on the record that she touched her private parts to indicate where she was penetrated.
37. The complainant was taken to Marimanti Level 4 Hospital where she was examined by Clinical Officer Lilian Wahu (PW4) who filled the P3 form. PW4 testified that the victim had been treated at Tunyai Health Centre earlier. That the hymen was broken, vaginal walls were reddish. That she concluded that there was penetration. PW4 produced the treatment notes (Exh.3), and PRC Form (Exh.4).
39. I have considered the evidence of PW4 and looked at the exhibits. The PRC Form noted that the hymen was broken and vaginal wall was reddish. The clinical officer concluded that there was evidence of penetration. The P3 Form contained the same observation and conclusion that there was penetration. I find the medical evidence above corroborative of the testimony of the victim that she was penetrated by the Appellant.



40. It is my finding therefore that the element of penetration was proved to the required legal standard.
41. The Appellant submitted that he was not examined for the results of such medical examination to link him to the offence.

Section 36(i) of the Sexual Offence Act provides:

“36(1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.”

42. In expounding Section 36(1) of the *Sexual Offences Act*, the Court of Appeal in the case of Robert Mutungi Mumbi vs Republic (2015) eKLR, held that: -

“Section 36 (1) of the Act empowers the Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly, that provision is not couched in mandatory terms. Decisions of this court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved.”

43. In this case, there was evidence that the victim (PW1) was defiled. Whereas it may have been good to link the DNA in the spermatozoa to the accused by subjecting him to DNA testing, failure to do so was not fatal as there was other identifying evidence linking him to the defilement. The Appellant’s complaint that he was not medically examined therefore would not exonerate him from the offence if there was other identifying evidence.

Identification of the Accused

44. There is no conviction for a criminal offence without the positive identification of the alleged offender. Care must however be taken to rule out the possibility of mistaken identity. As stated in Cleophas Wamunga vs. Republic(1989) eKLR :-

“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant wholly depends or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification.”

45. In this case the identifying evidence was given by several witnesses. The victim (PW1) told the court that she was sleeping in her grandmother’s house when the accused entered the house and took her away to a hill “where he put his thing into her thing”. She referred to him by the name Kajogi. That he returned her to her grandmother’s house in the morning. PW2 did not witness the incident. She however testified that the accused had been employed as a farm worker by the victim’s grandmother.
46. The testimony above shows that the accused was not a stranger to PW1. He was a person known to her. This may explain why she accepted to leave the grandmother’s house with him when he went for her.



47. The arrest of the accused also provided corroborative circumstances. The Investigating officer testified that the accused escaped to a place called Karacho after the commission of the offence and was arrested by police officers at Marimanti after a number of days. That he vanished from his employer's home. The act of disappearance, to the mind of the court, denotes a guilty conscience.
48. I have tested the evidence of identification as the offence was committed at night. PW1 stated that there was electricity in her grandmother's house. She was therefore able to recognize the Appellant. Besides they spent a whole night together in the hills and he only returned her home in the morning. I am satisfied that there was no chance of a mistaken identity the complainant recognized the Appellant as a person whom she knew and even referred to him by name. It is my finding that the accused was properly identified as the defiler.

The Appellant's defence

49. One of the Appellant's grounds of appeal was that his defence was disregarded. He submitted that the victim's mother PW3 wanted him to sell to her 3 acres of land which he refused to do. That soon thereafter she concocted a frame up. He further submitted that on the material date he was away as he had gone to get his money from one Silio Kirima at a place called Baite and upon his return on 26th September, he was given casual work by PW1's grandmother.
50. I have considered the Appellant's defence. The Appellant stated that he was incapable of penetrative sex and that the case was a frame up because he had a land case with the victim's family.
51. I find the Appellant's defence unconvincing. His assertion that he was incapable of penetrative sex, flies in the face of the medical evidence that the victim was penetrated. Further, he did not demonstrate the existence of the land dispute he alleged existed between him and the complainant's mother. His alibi was also false. His defence was weak and incoherent and did not cast doubt on the prosecution case which I have found proven beyond reasonable doubt.

Whether the sentence was appropriate

52. The Appellant contends that the sentence was harsh and excessive. That might well be the case. He was however sentenced under Section 8(1) of the *Sexual Offences Act*, which provides a mandatory life sentence. In the case of Republic Vs. Julius Kitsao Manyeso, Petition No. E013 of 2024, the Supreme Court held that life imprisonment sentence remains a lawful sentence under Section 8 of the *Sexual Offences Act*. It was a valid sentence until such time that it is declared unconstitutional through a proper petition or until such time that the law was amended by the legislature.
53. In the end, I have come to the conclusion that the charge against the Appellant was proven to the required legal standard. I uphold both conviction and sentence. The Appeal is dismissed.

Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED AT CHUKA THIS 30TH DAY OF SEPTEMBER, 2025.

.....

R. LAGAT-KORIR

JUDGE

Judgment delivered in the presence of the Appellant acting in person. Ms Rukunga for the Respondent, and Muriuki (Court Assistant).

