



**SNK v Republic (Criminal Appeal E001 of 2025)
[2025] KEHC 13687 (KLR) (30 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13687 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E001 OF 2025
JN NJAGI, J
SEPTEMBER 30, 2025**

BETWEEN

SNK APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from original conviction and sentence by Hon. M. M. Wachira,
PM, in Lamu PM's Court Sexual Offence Case No. 9 of 2019 delivered on 24/6/2021)*

JUDGMENT

1. The appellant 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 and sentenced to serve 20 years imprisonment. The particulars of the offence were that on 29th September, 2018 at [Particulars Withheld], Lamu West Sub County within Lamu County, he intentionally caused his penis to penetrate the vagina of SCR (herein referred to as the complainant), a child aged 14 years.
2. Aggrieved by the sentence and the conviction of the trial court, the Appellant lodged an appeal on the following amended grounds of appeal:
 1. That the learned trial magistrate erred both in law and fact by failing to consider that the prosecution case was never proved beyond reasonable doubt.
 2. That the learned trial magistrate erred both in law and in fact by failing to consider the controversies and inconsistency in the evidence tendered by the prosecution.
 3. That the learned trial magistrate erred both in law and fact by failing to consider that both the conviction and sentence were against the weight of the evidence adduced by the prosecution.



4. That the learned trial magistrate erred in law and fact by failing to adequately consider his defense.
3. The prosecution called 5 witnesses in the case at the close of which the court found the Appellant to have a case to answer. The Appellant defended himself and did not call any witness

Case for the prosecution

4. The complainant who was PW1 in the case testified that she was on the material day at the home of her sister called M. That at 6pm her sister sent her to the shop to buy a match box. She met the appellant on the way. He held her by her hand and took her to the bush. He made her lie down and removed her panties. He lay on top of her and inserted his penis into her vagina. She felt pain. She started to bleed from the vagina. The Appellant told her not to tell anybody what had happened. She wore her clothes. She proceeded to the shop and went to M's place. She told M what had transpired but she did not take any action. She took a shower and washed her panties. Later her teacher suspected that she was pregnant and informed her mother. She was taken to hospital and confirmed to be pregnant.
5. The complainant's mother, PW2 told the court that the teacher to the complainant went to her and told her that the complainant was pregnant and that she had revealed to her, the teacher, that she had been defiled by the Appellant. She took her daughter to Mokowe Police Post and made a report. She was taken to hospital and confirmed to be pregnant. The Appellant fled the area but he was later arrested and charged.
6. The complainant's mother who stated that the complainant was at the time aged 14 years. she produced the Child Health Care Card as exhibit, P.Exh.1. It indicated that the complainant was born on 12/7/2004. She said that the Appellant was her neighbor.
7. The complainant was examined by a clinical officer PW2 at Mokowe Health Center on the 2/6/22019. Nothing significant was found on her genitalia but an ultra sound examination revealed that she was 19 weeks pregnant.
8. PC Kelvin Macharia PW5 testified that he took over investigations from the initial investigating officer Cpl Marara upon the said officer being transferred from Mokowe police station. A P3 form, ultra sound form, a child birth card and a birth certificate were in the investigation file. The file also indicated that Cpl Marara had filed an exhibit memo and taken the Appellant, the complainant and the complainant's baby to the government chemist Mombasa for DNA profiling. During the hearing PW5 produced the birth certificate and the exhibit memo as exhibits, P.Exh.5 and 6 respectively. The birth certificate indicated that it was issued on 4/6/2019 which was 4 months after the report was made to the police.
9. The Government Analyst, PW4, told the court that on 4/9/2019 his office received exhibit Memo in CR.C.71/55/2019 from Mokowe Police Post in Lamu. They were requested to ascertain the parents of the minor. The samples taken were saliva swabs belonging to the appellant and the complainant, PW1. He examined the 3 exhibits memo using DNA profiling and found by 99.99% that the appellant was the biological father of the minor born by PW1. During the hearing PW4 produced his report in court as exhibit, P.Exh. 8.

Defence Case

10. When placed to his defence, the Appellant stated in a sworn statement that he is a fisherman. That on the 30/5/2019 he was in the ocean fishing when he was arrested by two people who were on motor cycles. He was taken to the residential quarters of one Cpl Marara. Cpl Marara alleged that he had conned him of Ksh.3000/= that he had sent him to buy him fish. Cpl Marara said that he will be



charged with theft of the money. He was placed in the cells. On the following day he was taken to Lamu police station and he was charged with defiling the complainant herein of which he knew nothing about. It was his evidence that the charges were false. That there was a conflict between his family and that of the mother to the complainant, PW2, due to a land boundary dispute. That the chief and the assistant chief resolved the issue in his family's favour but PW2's family promised to revenge.

Submissions

11. The appeal was canvassed by way of written submissions. The appellant submitted that *voire dire* examination was not properly conducted to ascertain whether the witness understood the meaning of taking an oath which was an important aspect of the trial. He relied on the cases of *Patrick Wamuyu Wanjiru v Republic* and *Joseph Opondo vs Republic*.
12. It was also his submission that the evidence presented by the prosecution witnesses was full of inconsistencies. That the charge sheet indicated the age of the complainant as 14 years while the P3 form showed it as 13 years. That the age indicated in the birth certificate was 15 years.
13. It was submitted that the evidence of the clinical officer PW3 was that the P3 form was filled on 3/6/2016 yet the offence was alleged to have been committed on 29/9/ 2018. That the witness said that he had worked with the clinical officer who filled the P3 form at King Fahd Hospital. The question then was whether the P3 form was filled at the said hospital or at Mokowe Health Centre.
14. It was further submitted that the P3 form and the DNA report did not bear the stamp of the institutions where they were prepared. Therefore, that the documents are not credible.
15. The Appellant submitted that the prosecution did not call any evidence to challenge his alibi and more particularly the evidence of a lady called M who was included in the prosecution's list of witnesses but was not availed to testify.
16. It was submitted that the charge was defective in that it indicated the name of the minor defiled as SCR while the birth certificate produced in the case indicated the complainant as SN.
17. It was submitted that the trial court did not consider the appellant's mitigation and principles of sentencing when it sentenced him to 20 years imprisonment. The Appellant urged the court to allow the appeal.
18. The Respondent on the other hand submitted that the prosecution had proved its case beyond reasonable doubt. That all the ingredients of defilement of the age of the complainant, penetration and identification were all proved. That the age of the complainant was proved via the complainant's child health card and birth certificate which proved that the complainant was a minor of 14 years of age.
19. It was submitted that penetration was proved by the evidence of the complainant herself and the evidence of the clinical officer PW3 who confirmed that the complainant was 19 weeks pregnant. That the fact of being pregnant led to the conclusion that the complainant was defiled.
20. On identification, the respondent submitted that the complainant told the court that the Appellant was well known to her as he was their neighbor. That the DNA report proved that the Appellant was the father of the minor born of the complainant which was sufficient proof that the appellant defiled the complainant.
21. It was submitted that the defence tendered by the Appellant did not cast doubt on the evidence for the prosecution. That there was no reason for the prosecution witnesses to lie against the Appellant. That the government analyst had signed his report which had the government analyst's letter head and had a reference number. That the lack of a stamp on the document did not make it a fake document.



22. It was submitted that the sentence meted on the Appellant is the one prescribed by the law for defiling a child of 14 years of age. The respondent urged the court to dismiss the appeal.

Analysis and determination

23. This being a first appeal, the court has a duty to re-evaluate and re-consider the evidence on record and come to its own conclusion. The court should also appreciate the fact that unlike the trial court it did not have the advantage of seeing and hearing the witnesses. These 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."

24. I have considered the grounds of appeal, the record of the trial court and the submissions tendered by both the Appellant and the prosecution counsel. It is my duty as a first appellate court to appraise myself of the evidence adduced at the trial court, re-evaluate it and draw my own independent conclusions on the issues raised in the appeal.
25. 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.
26. The trial court in its judgment found that the age of the complainant was proved by production of the complainant's birth certificate. That the DNA report showed that the Appellant was the biological father of the child born to the complainant. That that evidence corroborated the evidence of the complainant that the Appellant inserted his penis into her vagina as a result of which she conceived. That there was no truth in the Appellant's defence that the charges were fabricated due to a land dispute with the complainant's mother.
27. 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."

28. The mother to the complainant PW2 stated that the complainant was born on 12/7/2004 and therefore that at the time of defilement she was aged 14 years. She produced the complainant's Health Care Card as exhibit that showed that she was born on the afore mentioned date. The investigating officer PW5 produced the complainant's birth certificate as exhibit confirming that she was born on the said date which placed her age at the material time at 14 years.



29. The Appellant submitted that the P3 form indicated the age of the complainant as 13 years. I have considered the issue. It is Part 1 of the P3 form that was filled by the police that noted the age of the complainant at 13 years. I would think that Part 1 of the P3 form was filled in the initial stages of the investigation before the police obtained the Health Card of the complainant that indicated her actual date of birth. I therefore do not find the discrepancy to be of any importance in face of the Hospital card indicating the actual date of birth of the complainant. The age of the complainant was further confirmed by the birth certificate, P.Exh.5. I therefore find the age of the complainant to have been proved at 14 years.
30. Moving on to the issue of penetration, the same is defined in section 2 of the *Sexual Offences Act* as the partial or complete insertion of the genital organs of a person into the genital organs of another person. In the case of *Kassim v Republic*, the Court of Appeal stated that defilement can be proved by the oral evidence of the victim or by way of circumstantial evidence. In addition, section 124 of the *Evidence Act* provides that in sexual offences involving minors the court may convict on the sole evidence of the minor if the court is satisfied that the minor is telling the truth and records reasons for believing the evidence.
31. The trial magistrate in his judgment found that an ultra sound examination was conducted on the complainant on 11/2/2019 that showed that the complainant was 19 weeks pregnant. That this meant that conception occurred around September 2019. That after the baby was born a DNA test was conducted on the baby that revealed that the Appellant was 99.99% the biological father to the baby. That this corroborated the evidence of the complainant that the Appellant penetrated her on the material date that led to the conception. I have no reason to differ with this finding of the trial court. The fact that the Appellant was the biological father of the complainant's baby proved that the complainant was telling the truth that the Appellant had defiled her on 29/9/2018 that led to conception. Complete penetration on the complainant by the Appellant by the use of his penis was therefore sufficiently proved as required by the law.
32. On identification, the mother to the complainant PW2 said that the Appellant was their neighbor for many years. The complainant testified that she met the Appellant on the way at 6 pm who led her to the bush where he inserted his penis into her vagina.
33. It is clear that the Appellant was a person well known to the complainant as he was her neighbour. The incident occurred during the day. The complainant's evidence on identification was therefore by way of recognition and not identification of a stranger. There was therefore no possibility of mistaken identity on the Appellant. The allegation that the appellant was arrested on mistaken identity cannot be true. Both the complainant and her mother knew the accused very well as a neighbour. He never disputed the name stated in the charge sheet when the witnesses testified in court. His denial of the name at the defence stage can only be an afterthought. There cannot be any truth that he never knew the complainant who is his neighbour. More so his nephew is married to the complainant's sister. I find that the Appellant was sufficiently identified by the complainant as the perpetrator.
34. The Appellant challenged the authenticity of the DNA report and P3 form on the ground that they did not bear the stamp of the respective institutions where they were prepared. The trial court in its judgment observed that the DNA report was made on the official letter head of the Government Chemist's office and for that reason there was no need of it being stamped. Moreso, that the officer who prepared the report is the one who produced it in court. Though it was important to stamp the two documents, I do not think that failure to do so made the documents inadmissible in court.
35. The Appellant submitted that the complainant's sister called M did not testify in the case. The investigating officer PW5 explained that the intended witness left the area and he was unable to trace



her. As earlier observed, M was married to the Appellant's nephew. That would explain why she was unwilling to testify in the case. This is further confirmed by the fact that she did not take any action when the complainant reported to her that the Appellant had defiled her. In any case, M did not witness anything concerning the defilement on the complainant. Her evidence could only be to confirm whether the complainant informed her of the defilement immediately after the same took place. I do not think that her failure to testify was fatal to the case.

36. The Appellant alleged that the charges were fabricated due to a dispute between his family and that of the complainant's mother PW2 over a boundary dispute. The trial court dismissed the defence on the ground that the complainant's mother had little input in the case as she only came to know of the defilement after she was informed that her daughter was pregnant. Indeed, the complainant's mother learnt of the defilement from the complainant's teacher. It then cannot be true that she is the one who fabricated the case due to differences with the appellant's family. In any case PW2 denied in cross-examination that she had any grudge against the Appellant and the appellant did not question her as to whether there was any boundary dispute between their families. The appellant did not question the complainant herself on the issue yet she is the one who came up with the issue of the appellant having defiled her. There cannot be any truth that the case was a fabrication. The DNA report dislodged any allegation that the case was a fabrication.
37. The Appellant alleged that voir dire examination was not properly conducted. I have gone through the record of the trial court on the same. It is apparent that the trial court examined the complainant before testifying in court. The complainant answered the questions put to her by the court from which the court formed the opinion that she understood the meaning of an oath and the court ordered that she gives sworn evidence. I do not find any basis on the argument that voir dire examination was not properly conducted.
38. In view of the foregoing, I find the appellant to have been convicted on solid evidence and the conviction is thereby upheld.
39. On sentence, the Appellant was sentenced to the minimum sentence for defiling a girl of the age of between 12 and 15 years. The sentence is similarly upheld.
40. The end result is that I do not find any merit in the appeal and the same is hereby dismissed.

READ, DELIVERED AND SIGNED AT GARSEN THIS 30TH DAY OF SEPTEMBER 2025.

J. N. NJAGI

JUDGE

In the presence of:

Miss Mkongo for Respondent

Appellant present in person at GK Prison Voi

Court Assistant – Ms. Rahma

