



REPUBLIC OF KENYA



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**Njogu v Republic (Criminal Appeal 36 of 2017)
[2025] KECA 1576 (KLR) (3 October 2025) (Judgment)**

Neutral citation: [2025] KECA 1576 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 36 OF 2017
W KARANJA, J MOHAMMED & LK KIMARU, JJA
OCTOBER 3, 2025**

BETWEEN

WILLIAMSON KARIMI NJOGU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the judgment of the High Court of Kenya at Kerugoya
(Limo, J.) dated 25th October, 2016, in Criminal Appeal No. 31 of 2015)*

JUDGMENT

1. The appellant, Williamson Karimi Njogu, was arraigned before the Principal Magistrate's Court at Wang'uru, on 5th September, 2014, where he was charged with the offence of defilement contrary to Section 8(1) and (4) of the *Sexual Offences Act*. The particulars of the charge alleged that on 27th August 2014, in Kirinyaga County, the appellant intentionally caused his penis to penetrate the vagina of RMK, a child aged 16 years. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on the same date and place, the appellant intentionally touched the breasts and thighs and vagina of RMK, a child aged 16 years, with his penis.
2. The appellant pleaded not guilty to the charges. A brief summary of the facts according to the prosecution is as follows: The complainant, who testified as PW1, told the court that she was employed as a house help at the appellant's house on 1st July, 2014. It was her evidence that on 27th August, 2014, at 8.30 a.m., she was at the appellant's house together with the appellant and his daughter, L. The appellant gave his daughter Kshs.100 and sent her to buy fruits. He then asked her to serve him tea. PW1 stated that she did as instructed and she approached the appellant to serve him, the appellant grabbed her by the shoulders. She pleaded with him to let her go. She recalled that the appellant slapped her. He then stuffed a shirt inside her mouth and dragged her to the bedroom. PW1 stated that she tried



- to scream but the appellant stuffed a blanket in her mouth. He removed her trouser and underwear and had sex with her. He afterwards left the house. PW1 testified that she ran out of the house and reported the incident to one Mama W (PW3) who took her to Kimbimbi AP Post where they reported the sexual assault.
3. PW3, JWN (Mama W), told the court that she was at the market on 27th August, 2014, when the complainant came to her while crying. The complainant told her that the appellant, her employer, had defiled her. She stated that the appellant's wife was at the hospital and that he had sent away his daughter to buy some fruits. PW3 reported the incident to the in-charge, EWG (PW2). PW2 testified that she took the complainant to the area chief and afterwards to Kimbimbi Sub-District Hospital. They then reported the incident at Wang'uru Police Station, where they were issued with a P3 form.
 4. The complainant was examined by PW4, Dr. Kennedy Nyaga, on 27th August, 2014. PW4 stated that the complainant was 17 years of age. No tears, bleeding or lacerations were noted on her external genitalia. Her hymen was broken and there was presence of a clear vaginal discharge. PW4 conducted a vaginal swab and no spermatozoa was detected. He stated that the only finding was that of a broken hymen which was not conclusive. It was his opinion that the hymen may have been broken earlier, as there was no bleeding noted on the vagina.
 5. PW5, PC Lukas Tokali Mwakunyi was the investigating officer in this case. It was his testimony that on 28th August, 2014, at about 10.00 a.m., he was at Wangu'ru Police Station, when PW2 came to the station accompanied by the complainant. They reported that the complainant was defiled on 27th August, 2014, at her employer's house. The complainant informed him that the appellant sent his children away, and that as she was serving him tea, he grabbed her and took her to the bedroom, where he defiled her. The complainant told him that she tried to scream, but the appellant gagged her. The complainant immediately fled from the homestead after the incident. She reported the matter to the in-charge who escorted her to Kimbimbi AP Post where the initial report was made. PW5 testified that the appellant surrendered himself to the police when he found out there were impending charges against him.
 6. The appellant was placed on his defence. He gave a sworn statement and called five witnesses. It was his testimony that the complainant worked for him as a house help, and that she was employed by his wife. He stated that he worked in Nyeri, but came home to Kimbimbi on the weekends. He stated that on 27th August 2014, he was at home, as his wife had been hospitalized. He left the house at about 6.45 a.m., accompanied by his two children and his mother-in-law, and they proceeded to Karira Mission Hospital, where his wife was admitted. He testified that his car broke down on the way, and they were forced to use public means to get to the hospital. They left the hospital at about 8.40 a.m. He stated that he released his mother-in-law and children to go back home, while he went to the garage to fix his car. He stated that he was with the mechanic the whole morning. At 1.00 p.m., the mechanic gave him a list of required spare parts, and he proceeded to Kerugoya to purchase them. At about 3.00 p.m., he left Kerugoya with the spare parts and took them to the mechanic. He left the car with the mechanic, and requested him to take it to his house once he was done with the repairs.
 7. The appellant testified that he went back to his work station in Nyeri. It was his evidence that he did not interact with the complainant on the material date. The appellant produced a receipt dated 27th August 2014, that he received from the garage, as well as medical documents that indicated that his wife was admitted at the hospital at the time. He denied the allegations of sexual assault made by the complainant. It was his evidence that he had neighbours and that the compound was guarded by security guards.



8. The appellant's daughter, LW, aged 13 years old, testified as DW2. She stated that the complainant was employed at their home. It was her evidence that her mother was admitted at the hospital on 26th July 2014, as she was set to deliver a child. The following day, DW2 left the house at about 7.00 a.m. with her father, grandmother and brother, and they went to see her mother at the hospital. She stated that they travelled in her father's vehicle, which developed mechanical problems on the way. They used public means to get to the hospital. It was her testimony that when they left the hospital, the appellant informed them that he wanted to see a mechanic. DW2 proceeded home with her brother and grandmother. She stated that they did not find the complainant at the house. DW2's grandmother, TWN, gave evidence as DW3. She gave a similar account of events of the material date as narrated by DW2.
9. DW4, AM, was the appellant's wife. She confirmed that she had employed the complainant as her house help. It was her evidence that she was went to hospital on 25th August, 2014, as she was set a deliver a child. She delivered the following day, and stated that the appellant, her children and her mother, came to visit her at the hospital on 27th August, 2014. DW5, MKN, worked a security guard at Karira Mission Hospital. It was his evidence that the appellant came to the hospital on the material date of 27th August 2014 at 8.15 a.m., and left at about 8.30 a.m. The mechanic, SM, gave evidence as DW6. He told the court that the appellant was at his garage on the material date, from about 10.00 a.m., and that he left at about 4.00 p.m.
10. At the conclusion of the trial, the appellant was acquitted in the main charge of defilement, but was convicted in the alternative charge. The learned magistrate found the complainant to be a truthful witness, and that her testimony was credible, and was corroborated by the evidence of PW3. The trial magistrate determined that the appellant's defence was unbelievable, and did not displace the prosecution's evidence against him. The trial magistrate held that the mechanic's evidence was to the effect that he was contacted by the appellant at about 10.00 a.m., and since the offence was said to have occurred at 8.00 a.m., the appellant had ample time and opportunity to commit the offence. The trial court determined that though the medical evidence did not support the charge of defilement, the prosecution had proved its case as against the appellant in the alternative charge of committing an indecent act with a child. The appellant, upon conviction, was sentenced to serve a custodial sentence of ten (10) years.
11. The appellant, aggrieved by this decision, filed an appeal before the High Court at Kerugoya. In his amended petition of appeal, the appellant averred that the charge sheet was fatally defective, as the appellant's age was different from what emerged from the evidence on record, and that the alternative charge only depicted the punitive provision of the law. He submitted that the alternative charge did not disclose any offence since they omitted the word "unlawful". The appellant faulted the trial court for convicting him in the alternative charge, which was unsupported by the evidence on record. He took issue with his conviction, stating that the prosecution did not prove its case against him beyond reasonable doubt, and that the complainant was not a truthful witness. He was aggrieved that the trial court failed to take into consideration his alibi defence. The appellant reiterated that the trial magistrate took into account irrelevant factors, and applied wrong principles, in awarding a sentence that was excessive in the circumstances.
12. The first appellate court, upon re-evaluating the record of the trial court, and the evidence tendered before it, determined that the prosecution had sufficiently proved its case against the appellant, in the main charge of defilement. The learned Judge found that the medical evidence adduced by PW4 was inconsistent with the findings made on the treatment notes, which supported the complainant's evidence of penetration. The learned Judge noted that a court can find a conviction based on the



evidence of a complainant alone, if the complainant is deemed a truthful and credible witness, in light of the proviso to Section 124 of the *Evidence Act*.

13. The Learned Judge further found that the complainant's evidence was corroborated by that of PW2 and PW3, and the said witnesses had no reason to testify falsehood against the appellant. He determined that the appellant's alibi defence was not relevant as the offence took place at about 8.30 a.m., while the appellant's mechanic testified that the appellant contacted him at 10.00 a.m. Consequently, the learned Judge quashed the appellant's conviction and sentence in the alternative charge, and convicted him of the offence of defilement under Section 8(1) and (4) of the *Sexual Offences Act*. The appellant was sentenced to serve an enhanced term of fifteen (15) years imprisonment.
14. The appellant is now before us seeking to overturn the decision of the High Court, and has proffered eight (8) grounds of appeal. The appellant was aggrieved that the learned Judge erred in law by: invoking powers not provided under Section 354(3)(iii) of the Criminal Procedure Code, and thereby wrongly convicting the appellant of the main charge of defilement; convicting the appellant of the main charge of defilement suo moto, in the absence of a cross appeal by the respondent; convicting the appellant on the main charge of defilement without giving the appellant a warning, or a chance to be heard; sentencing the appellant to serve fifteen years imprisonment in the absence of a cross appeal; finding that penetration was proved, in total disregard of the medical evidence on record, and the appellant's alibi defence; and for sentencing the appellant to a mandatory sentence of fifteen years, which was unconstitutional, and constituted a violation of the appellant's right to a fair trial.
15. The appeal was canvassed by way of written submissions. It was highlighted orally in plenary hearing. Counsel for appellant, Mr. Wahome, submitted that in the absence of a cross-appeal by the respondent, the learned Judge lacked jurisdiction to convict and sentence the appellant on the main charge of defilement. He was of the view that Section 354(3)(iii) of the Criminal Procedure Code, invoked by the learned Judge, did not grant him the power to convict the appellant on the main charge, but rather to enhance a sentence in the event of a cross appeal, or a notice of enhancement of sentence by the State. Counsel urged that in the absence of a cross appeal, the appellant was condemned unheard by the first appellate court.
16. It was Mr. Wahome's further submission that the offence of defilement was not established by the prosecution beyond reasonable doubt. He asserted that the medical evidence ruled out penetration, as no tears, bloodstains, lacerations or sperms were noted upon examination of the complainant. Counsel urged that the trial magistrate did not invoke the proviso to Section 124 of the *Evidence Act*, and the learned Judge erred in making such a finding. He maintained that the two courts below erred in disregarding the appellant's alibi defence which was corroborated by the evidence of his witnesses. With respect to the sentence, counsel submitted that a mandatory sentence takes away the discretion of judicial officers in sentencing, and therefore impedes the right to fair trial. Counsel invited us to set aside the conviction by the first appellate court, and in the alternative, set aside the custodial sentence of fifteen years, and substitute the same with a sentence of five years, considering the circumstances of the case.
17. Learned prosecution counsel, Mr. Mwangi, on his part, submitted that Section 354(3)(iii) of the Criminal Procedure Code gives the court power to alter a finding, maintain a sentence with or without altering the finding, or reduce or increase a sentence. He submitted that the first appellate court had the duty to re-evaluate the evidence tendered before the trial court, and come to its own logical conclusion, which it did. He was of the view that the authorities cited by the appellant were not applicable in this case, as the appeal was not limited to the sentence, but was on both conviction and sentence. He explained that the respondent, in its written submissions before the superior court, urged the said court to invoke its powers under Section 354(3)(iii) of the Criminal Procedure Code, and that the appellant



extensively responded to the said submissions, in his response to the written submissions filed by the respondent, dated 23rd September, 2016. He submitted that the learned Judge did not act suo moto, but rather on the written submissions presented by the parties.

18. Counsel for the respondent submitted that the prosecution established, beyond any reasonable doubt, that the appellant defiled the complainant. He maintained that the medical evidence did not rule out penetration, and that the complainant's evidence, in light of the provisions of Section 124 of the Evidence Act, was enough to convict the appellant. He asserted that the complainant's age was sufficiently proved by her birth certificate which was produced in evidence. It was his submission that the appellant was positively identified as the perpetrator, and that his alibi defence was properly dismissed by the two courts below. Regarding the sentence, learned prosecution counsel submitted that recent jurisprudence on the question of mandatory minimum sentences contained in the Sexual Offences Act was to the effect that the same are constitutional. In the end, counsel urged us to dismiss the appellant's appeal in its entirety.
19. This is a second appeal. The mandate of this court on a second appeal was aptly stated in the case of *Igiro v Republic* (Criminal Appeal 41 of 2022) [2023] KECA 926 (KLR) (28 July 2023) (Judgment), where this court expressed itself in the following terms;

“Being a second appeal our mandate is limited by section 361(1) (a) of the Criminal Procedure Code to consider issues of law only but not matters of fact that have been tried by the first court and re- evaluated on first appeal and concurrent findings arrived at, unless it is demonstrated that the two courts below considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision.”
20. In that regard, we are required to respect and uphold the concurrent finding of the trial court and the first appellate court on matters of fact unless the findings are not based on the evidence on record or the decision is bad in law for being based on misapprehension of the evidence that was adduced before the trial court.
21. We have considered the petition of appeal and the grounds in support of the appeal, the submissions made before us and the proceedings of the trial court. The issue that emerged for our determination is whether the conviction of the appellant on the charge brought against him was proper; whether the substitution of conviction of the appellant and the enhancement of his sentence by the first appellate court was legal and finally what orders are to issue in respect of this appeal.
22. In respect of the first issue, the complainant in this case was a girl aged 16 years. She had been employed by the appellant's wife as a house help. According to the evidence adduced before the trial court, on 25th August, 2014, the appellant's wife, AM who testified as DW4, was admitted in hospital in anticipation of her giving birth to a child. She gave birth to the child on 26th of August, 2014. The complainant who testified as PW1 stated that on 27th August, 2014, at about 8.30am, she was in the appellant's house together with one of his daughter's called L. She later testified as DW2. The complainant testified that the appellant sent the daughter to buy fruits. He then asked her to serve him with tea. When she reached near him, the appellant grabbed her, gagged her and dragged her to the bedroom, removed her trouser and underwear before having sexual intercourse with her. After the sexual assault, the appellant left the home.
23. The complainant ran out of the house and reported the incident to PW3, a lady working in a nearby market. The complaint was escalated to Kimbimbi AP Post and later to Wanguru Police station. The complainant was taken to hospital where she was examined by PW4 who noted nothing



remarkable, although the initial medical treatment papers indicated that the complainant had been sexually assaulted. PW4 produced the P3 form as an exhibit in the case. When the appellant was put on his defence, he denied that he had sexually assaulted the complainant. He gave an alibi defence to the effect that he was elsewhere when the incident occurred. The four defence witnesses that were called all testified that the appellant was with them at the material time it was alleged that he had sexually assaulted and defiled the complainant.

24. As noted above, whereas the trial court discounted medical evidence and found the appellant guilty of the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, on appeal, the first appellate court set aside the conviction and instead convicted the appellant for the more serious charge of defilement under section 8(1) of the *Sexual Offences Act*.
25. Was there evidence to support his conviction? In our considered view, the issue that the two lower Courts had to grapple with is the timelines when the defilement is said to have occurred. According to the complainant she was sexually assaulted at 8.30am. The appellant in his defence stated, among others, that he was with the defence witnesses between 8.30am and 10.00am. Both the trial court and the first appellate court believed the complainant and accepted her evidence as truthful and credible. Her evidence was accepted pursuant to the proviso of section 124 of the *Evidence Act*.
26. Our assessment of the evidence leads us to the same conclusion as both the trial court and the first appellate court. It is clear to us that the appellant sexually assaulted the complainant before he set out to create an alibi which, upon assessment of the evidence, was found to be incredible. The complainant's conduct immediately after the sexual assault was telling. She went to PW3 crying and reported that she had been sexually assaulted by the appellant. She did not stop there. She went and made a report to the police and was referred to the hospital where she was medically examined on the same day. This is not an act of someone who was contriving to create evidence against the appellant but someone who was seeking justice to be done. We agree with both the trial court and the first appellate court that indeed the appellant sexually assaulted her. She was a child within the meaning ascribed to the term by Section 2 of the *Children Act*. Her birth certificate was produced in evidence which confirmed that she was 16 years at the time of the sexual assault.
27. The issue that was argued with vigour by Mr. Wahome for the appellant was in regard as to whether the High court, in exercise of its appellate jurisdiction under section 354(iii) (b) & (d) of the Criminal Procedure Code can substitute a lesser charge to a more serious one and thereafter enhance the sentence where the prosecution filed no cross-appeal or a notice of enhancement of sentence. According to Mr. Wahome, the first appellate court acted without jurisdiction when it purported to enhance the conviction of the appellant from a lesser to a more serious charge and thereafter increase the custodial sentence imposed on the appellant.
28. On his part, Mr. Mwangi for the prosecution submitted that, although the prosecution had not filed a cross-appeal or given a notice of enhancement of sentence, in its submissions before the first appellate court, it had made submissions to the effect that the appellant's conviction on the lesser charge of committing an indecent act was not in consonance with evidence that was adduced which clearly showed that the appellant had sexually assaulted and defiled the complainant. Mr. Mwangi, argued that the first appellate court had properly exercised its jurisdiction in substituting the appellant's conviction from the lesser to the more serious charge that was discernible from the evidence adduced before the trial court.



29. Section 354(3) of the Criminal Procedure Code provides thus:

- “(3) The Court may then, if considers that there is no sufficient ground for interfering, dismiss the appeal or may-
- a. in an appeal from a conviction-
 - i. reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or
 - ii. alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or
 - iii. with or without reduction or increase and with or without altering the finding, alter the nature of the sentence;
 - b. in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence;
 - (c) ...”

30. We agree with Mr. Wahome for the appellant that section 354 of the Criminal Procedure Code cannot be read outside the parameters of the fair trial provisions under Article 49 & 50 of *the Constitution*, especially Article 50(2)(h) that required the appellant to be provided with evidence in advance that the prosecution intended to rely in regards to persons who are under criminal investigation and who are being tried for a criminal offence. The prosecution cannot introduce a plea before an appellate court that may result in the enhancement of a sentence of an appellant by ambush without giving legal notice in form of a cross appeal or a notice of enhancement of sentence.

31. The High Court indeed, in exercise of its appellate jurisdiction, has the mandate to substitute a lesser charge with a more serious charge provided it does not result in the enhancement of the appellant’s sentence. The sentence can only be enhanced if a cross-appeal is filed, a notice of enhancement of sentence by the prosecution filed or failure to the above, a warning issued by the court that there may be possibility that the sentence would be enhanced if the appeal against conviction fails.

32. This Court has in several decisions pointed out that an appellate court lacks jurisdiction to enhance a sentence of an appellant where there is no cross-appeal, notice of enhancing the sentence or a warning issued by the appellate court before the appeal is heard. Some of the decisions include: *Mutia v. Republic* (Criminal Appeal E081 of 2023) [2024] KECA 684 KLR where the Court held that:

“The appellant is aggrieved by the enhancement of the sentence by the first appellate court, an issue that we consider to be a matter of law and hence open for our analysis. As rightly admitted by counsel for the respondent, it is trite that enhancement of a sentence handed out should only be done when the appellant has been given adequate notice of that possibility, so that he is informed of the consequences of proceedings with the appeal” (See also *JJW V. Republic* [2013] eKLR and *Francis Odingi v. Republic* [2011]).



33. In *MGK v. Republic* [2020] eKLR, this Court held that:

“20. Further the case of *Sammy Omboke & another v. R.* [2019] eKLR, discussed the jurisdiction of the first appellate court on enhancement of sentence by holding thus:

“In the instant appeal, there was no cross-appeal by the prosecution for enhancement of sentence before the High Court nor was there a warning to the appellant by court that the sentence meted upon then (sic) should be enhanced and there was no notice of enhancement. Guided by the judicial pronouncements of this Court above, we find that the learned judge erred in enhancing the sentence meted out on the appellants. In the absence of a cross-appeal and notice and or warning the judge had no jurisdiction to enhance the sentence.”

21. It was admitted before us by the respondent that the State had not filed any cross-appeal against sentence nor had they served any notice of enhancement on the appellant. In the circumstances, the trial court having properly exercised its discretion in sentencing the appellant, and imposed a sentence that was double the minimum of 10 years provided for that offence, it was not open to the learned judge to review the sentence upwards.”

34. Whereas we appreciate the conundrum the first appellate court faced when it properly, in our considered view, substituted the charge from the lesser to the more serious one of defilement, in light of the minimum sentences prescribed under the *Sexual Offences Act*, we agree with the appellant that his fair trial rights could not be circumscribed by having his custodial sentence enhanced in the absence of a cross-appeal, notice of enhancement of sentence by the prosecution or a warning issued by the court of the possibility of an enhancement should the appellant opt to proceed with the appeal.

35. We agree with Mr. Wahome for the appellant that the first appellate court wrongly exercised its sentencing discretion by enhancing the sentence of the appellant when the prerequisite mentioned above had not been fulfilled. Mr. Mwangi for the prosecution conceded that other than mentioning the issue in the submissions made during the hearing of the first appeal, he did not file a cross-appeal, or give notice of enhancement of sentence. The prosecution did not prompt the first appellate court to issue a warning to the appellant of the possibility of having his sentence enhanced in the event that his appeal against conviction was to be unsuccessful.

36. It is clear from the foregoing that the appeal is partially successful.

The appeal against conviction by the first appellate court to the more serious charge of the defilement under section 8(1) of the *Sexual Offences Act* fails. It is hereby dismissed

37. The appeal on sentence succeeds. The sentence of 15 years’ imprisonment imposed by the first appellate is hereby set aside and substituted by a sentence of 10 years’ imprisonment that was imposed by the trial court. That sentence shall run from the day the appellant was convicted by the trial court.

DATED AND DELIVERED AT NYERI THIS 3RD DAY OF OCTOBER, 2025.

W. KARANJA

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**JUDGE OF APPEAL
JAMILA MOHAMMED**

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**JUDGE OF APPEAL
L. KIMARU**

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

