



REPUBLIC OF KENYA



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**Kimanthi v Republic (Criminal Appeal E015 of 2025)
[2025] KEHC 14370 (KLR) (7 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14370 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E015 OF 2025**

NIO ADAGI, J

OCTOBER 7, 2025

**BEING AN APPEAL FROM THE CONVICTION
AND SENTENCE IN CRIMINAL CASE NO. E055
OF 2021 AT SENIOR PRINCIPAL MAGISTRATE 'S
COURT AT KITHIMANI DELIVERED ON 1/12/2024**

BETWEEN

JOHANA MUTISO KIMANTHI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence in Criminal Case No. E055 of 2021 at Senior Principal Magistrate 's Court at Kithimani delivered on 1/12/2024)

JUDGMENT

Introduction

1. The Appellant Johana Mutiso Kimanthi was on the main charge, charged with Defilement contrary to Section 8 (1) as read with Section 8(3) of the *Sexual Offences Act* No.3 of 2006. The particulars are that on 20/10/2021 at Kathangathini village in Yatta Sub-County within Machakos County, he unlawfully and intentionally caused his penis to penetrate the vagina of F.K.M a child aged 12 years.
2. 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* No. 3 of 2006.

The particulars are that on 20/10/2022 at Kathangathini village in Yatta Sub-County within Machakos County, he unlawfully and intentionally touched the vagina of F.K.M a child aged 12 years with his penis.



3. The Appellant pleaded not guilty. The case proceeded to full trial with the prosecution calling seven witnesses. The Appellant gave sworn statement.

Prosecution's case

4. VMM (PW1) testified that on 20/10/2021 she returned home and found her child F.K.M having been defiled by Johana (the Appellant). She immediately notified the village elder who relayed the information to the police who visited the scene where the complainant had gone to fetch water. The complainant led them to the scene and later they went to the Appellant's home and arrested him. They were taken to Matuu hospital where the complainant was examined as the Appellant stayed in custody. She disclosed that the doctor confirmed defilement and she identified to court the complainant's Birth Certificate indicating the complainant was born on 10/9/2009 and the P3 form together with the lab report and the PRC form all dated 21/10/2021.
5. F.K.M (PW2) complainant testified that on 20/10/2021 she was fetching water when Johana the Appellant went held her hand and led her to S's farm where he took off her pant and defiled her. She testified that he lay on her and inserted his part that he uses to urinate into her private parts. That she pulled herself up and ran home and told her grandmother what had happened. They went back but did not find the Appellant and informed her mother when she returned home who then called the village elder who alerted the police. The complainant informed court that she led the police to arrest the Appellant and she was taken to hospital where she was examined and treated.
6. AK (PW3) testified that on 20/10/2021 her grandchild F.K.M who had gone to fetch water returned home and informed her that she had been grabbed by the Appellant and dragged her to the bushes where he defiled her. She explained that she took steps and the Appellant was brought to Kithimani and the Complainant taken for medical examination and treatment.
7. MM (PW4) the village elder testified that on 20/10/2021 at about 2000hrs, he was called by V and informed that a child had been defiled. He called the Assistant Chief and informed him of the same and later called police officers who picked the Appellant and the complainant and took them to Matuu for processing. He confirmed he knew the Appellant who was an employee in V's home.
8. Peter Mwaniki (PW5) a clinical officer based at Masinga Level4 Hospital and based at Matuu Level 4 Hospital at the time of testifying referred to the P3 Form dated 21/10/2021 relating to F.K.M aged 12 years testified that the complainant had a history of being defiled by someone known to her on 20/10/2021 at around 1700hrs and on examination noted she had fresh bruises on the vagina, hymen intact but reddening of the skin, no bleeding or vaginal discharge noted. In conclusion, the clinical officer noted attempted defilement due to the bruises at the vaginal walls. The officer produced the P3 Form, PRC Form and lab results as exhibits.
9. No. 113XXXX PC Emma Wangari Maina (PW6) based at Matuu police station and the I.O testified that on 21/10/2021 at around 0800hrs when she reported for duty, she found this case of defilement reported and minuted to her for investigations and Johana Mutiso the suspect was in custody together with the complainant held as a child in need of care and protection. The Officer testified that she took the suspect and victim to Matuu Level 4 Hospital where they were both examined, treated and discharged. She produced the Complainant's Birth Certificate as an exhibit.
10. No. 1060LLLP1XXXX PC Caroline Wanja (PW7) based at Matuu police station testified that on 20/10/2021 together with her colleagues were on mobile patrol when she received a phone call from the Deputy OCS Cip Mbijiwe who informed her that he had received a report from the headman Kathangathini village one Mwangangi that there was an incident of defilement. She testified that they



rushed there and found a group of people gathered among them were the complainant and her mother who informed the officers that the complainant had been defiled by the Appellant as she went to the well to fetch water. The Appellant grabbed her hand and dragged her under a tree near the well and proceeded to take off her underwear, removed his trouser and inserted his genital organ into the genital organ of the complainant. She explained that after the ordeal, the minor ran home and informed her grandmother who informed the village head and together with members of the community they traced the accused and arrested him culminating in this case.

Trial court's judgment

11. Upon considering the evidence adduced, the trial court found and held that the charge of Defilement Contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No.3 of 2006 had not been proved beyond reasonable by the prosecution. However, with regard to the alternative charge of Committing an Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act* No.3 of 2006, the prosecution proved its case against the Appellant beyond reasonable doubt and convicted him on the alternative charge under Section 215 of the Criminal Procedure Code and sentenced him to 10 years imprisonment on 01/02/2024.
12. Being aggrieved by the said judgement, the Appellant filed a Petition of appeal dated 14/02/2025 initially raising the following grounds:-
 - i. That the learned trial magistrate erred in both law and facts on whereby the prosecution did not discharge their duty of proving the case beyond reasonable doubt as enshrined in section 107 of the *evidence act* cap 80 law of Kenya.
 - ii. That the learned trial magistrate erred in both law and facts on whereby the main ingredients of the offence were not proved as law requires i.e (i) age ((ii) identification
 - iii. That the learned trial magistrate misapprehended section 124 of the *evidence act* on whereby the victim was not truthful.
 - iv. That the learned trial magistrate erred in both law and facts on whereby the entire prosecution case was gravely marred with gross inconsistencies and contradictions.
13. The Appellant in ground (v) stated tat he would adduce more grounds during hearing herein. The Appellant later filed undated Amended grounds of appeal which were listed as follows:
 - i. That, the learned trial magistrate erred in both law and facts on whereby the prosecution case was not proved beyond reasonable doubt.
 - ii. That, there was no sufficient evidence to link the appellant to the offence of indecent act against complainant.
 - iii. That, the learned trial magistrate erred in both law and facts on failing to observe that the complainant was not truthful witness.
 - iv. That, the evidence on record was inconsistent, hearsay and a fabrication against appellant.
 - v. That, the medical evidence did not support the offence for which the appellant was convicted of.
 - vi. That, the appellant was not granted fair trial for he did not understand the language used by the court under provision of Article 50 of *the constitution* of Kenya 2010.
14. The Appellant prays that his appeal be allowed, conviction quashed and the sentence set aside.



15. The appeal was canvassed through written submissions. Both parties have filed their respective submissions.

Summary of the Appellant's Submissions

16. The Appellant submitted that in its judgment dated 01/02/2024, the trial court emphatically narrated and reiterated the evidence adduced in support of the provision of the offence the Appellant was charged with, arriving at the finding that although there was no proof of the offence of defilement, the Appellant was guilty of the alternative charge and proceeded to convict and sentence the Appellant to 10 years' imprisonment sentence. In so doing, the trial court did not provide an analysis of the elements of the offence of committing an indecent act with a child, to establish whether the threshold for the said offence had been met beyond any reasonable doubt, but merely proceeded under the assumption that since there was no evidence of commission of the principal offence charged then the lesser offence must have committed
17. With respect to the evidence of the Appellant, the Court simply commented that;
- “the accused acknowledges that he was herding when this unfortunate incident happened and though claims to be framed admit to have interacted with the children. The accused has placed himself at the scene of crime and admits presence of children”.
18. On whether the prosecution case was proved beyond any reasonable doubt, the Appellant submitted that the prosecution did not prove its case beyond reasonable doubt to amount to conviction and sentence especially on the key elements of the offence which did not materialize to the instant case whereby the Appellant's conviction was not secure and safe and ought to be dismissed/quashed and the imposed sentence be set aside. The Appellant relied on the case of *Woolmington-VS-DPP (1935) AC 462*. *Miller-V-minister of Pension (1947) ALL ER373* on the issue of burden of proof it was held that; -
- “The prove beyond reasonable doubt is not possible doubt, a speculative, imaginably or forced doubt but one which is abiding verdict of guilty, after considering the evidence in totality to place the accused at the scene as the person who committed the offence. ”
19. That the foregoing assertion is reinforced by the holding of the court in *Gerald Ndoho Munjuna-vs-Republic (2016) eKLR* where the Court expressed itself on the legal standard that; -
- “To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilty beyond reasonable doubt is basis to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty”.
20. Reliance was also placed on the Canadian Supreme Court in *R-vs-Lifchus* where it was held that; -
- “The accused enters these proceedings presumed to be innocent. The presumed to be innocent. That presumption innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty.....



Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond reasonable doubt. On the other hand, you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high... ..

In short, it based upon the evidence before the court you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt. "

21. The Appellant also cited the case of Philip Ndirangu-VS-Republic (2016) Eklr
22. On whether the ingredients of offence of committing an indecent act with a child were proved beyond reasonable doubt, the Appellant submitted that Section 2(1) of the *Sexual Offences Act* describes an "Indecent Act" as follows: -

“Indecent Act means an unlawful intentional act which causes: -

Any contact between any part of the body of a person with the genital organ, breasts or buttocks of another, but does not include an act that causes penetration; exposure or display of any pornographic material to any person against his or her will. "
23. The offence of committing an indecent act with a child is therefore rooted on three main ingredients, being the age of the victim, body contact between the accused person and the genitalia, breasts or buttocks of the victim as stated in the law, and that the accused committed the act intentionally.
24. The Appellant submitted that from the totality of the evidence produced at the trial court, there is no doubt that there was no penetration on the complainant by the Appellant, which was the basis upon which the principal charge of defilement against him was dismissed. The same is confirmed in the P3 form and further by learned trial magistrate on court's judgment when stated that;

“The medical officer noted fresh bruises on the vagina, hymen intact but reddening of the skin, no bleeding or vaginal discharge noted. He produced as exhibits as P3 form, PRC form and lab results relating to the subject in conclusion opining Attempted defilement due to bruises at the vaginal walls.”
25. That flowing from the foregoing, the prosecution, therefore, bore the burden of proving that the appellant intentionally caused contact between any part of his body with the genitalia, breasts or buttocks of the complainant.
26. The Appellant submitted that the evidence of PW1, PW2 and PW3, the complainant's mother, complainant and her grandmother, were that the Appellant forcefully defiled her. The actions of the Appellant as clearly described by the complainant indicate that he caused his penis to penetrate inside her vagina. That PW5 Peter Mwaniki, the clinical officer orally testified that there was treatment history of defilement by someone known to her. However, he proceeded to the evidence in P3 form which indicated that the complainant's private parts were intact which makes PW2 the victim testimony that she was forcefully defiled by Appellant collapse and carry no evidential weight.
27. The Appellant referred to the trial court's judgment where it was rightly observed that there was no penetration on the complainant, but thereafter the trial court proceeded to arrive at a finding that



the sum total of the complainant's evidence was that indecent acts were committed against her by the Appellant by putting his penis at her vaginal area.

28. The Appellant contended that throughout her testimony, the complainant described an act of penetration, not contact of the Appellant's penis with her genitalia, breasts or buttocks. It therefore follows that the trial court ought not to have assumed that once it finds no evidence of commission of the principal charge of defilement then the lesser charge of committing an indecent act with a child must have been committed.
29. To this proposition, the Appellant referred this court to the decision of his lordship Justice A.C Mrima (J) In Criminal Appeal No. 3 of 2019 H.C Migori, which was relied upon in Abdi Ismail Moulid -Vs- Republic (2019) eKLR. The court expressed itself as follows: -

“As to whether there was any contact between any body part of the appellant with the genital organ, breasts or buttocks of the complainant which act however did not cause any penetration, I must say that I have re-read the proceedings severally and did not see anywhere where the complainant alleged that the appellant touched her genital organ, breasts or buttocks. The complainant talked of the appellant having sex with her twice, an allegation which the trial court rejected for lack of proof and no appeal was lodged against the finding. The complainant was not led to describe how the sexual act unfolded and which part of her body was touched by which part of the appellant. With such state of evidence, I do not see how the offence of committing an indecent act with a child was proved. A trial court should not assume that once it finds no evidence or commission or the principal charge or defilement then the lesser charge or committing an indecent act with a child must have been committed. Every offence has the same threshold of being proved beyond any reasonable doubt. ”

30. As regards whether the complainant was a truthful prosecution's witness, the Appellant submitted that, the complainant described an act of penetration in unequivocal terms. In fact, she stated that the Appellant had defiled her and at the same time started her evidence in chief by saying that:-

“ She was fetching water alone when Johana came to the dam held her by her hand led me to Sara's took off my pant and defiled me”

31. However, based on the medical examination conducted, the trial court arrived at the determination that these assertions were not true. The Appellant cited the decision in the Supreme Court of India Jagir Singh-Vs- State of Puniab, where the court held that; -

“ A criminal trial is not like a fairy tale where in, one is free to give flight to one's imagination and fantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged— in arriving at the conclusion about the guilty of the accused charged with the commission of a crime the court has to judge the evidence by the yard stick of probabilities, its intrinsic worth and the animus of witness. Every case in the trial analysis would have to depend upon its own facts. ”

32. The Appellant argued that nevertheless, and contrary to the oral testimony of PW2, the complainant; the evidence of PW5 the medical officer, was that on examination, the complainant's Hymen was intact. In summary, the evidence of PW2, mostly when she said that the Appellant inserted in her private part his part he uses to urinate meaning forceful penetrating. PW1's and PW3's evidence was a classic hearsay for they were not there when alleged offence committed. They were told about the incident by the complainant. PW4 the village manager was informed about the same matter by PW1,



- who in turn called police officer who arrested the Appellant which was another case of hearsay evidence. The Appellant maintained that their oral testimonies were not supported by the finding in the P3 form which make no reference to hymen absence or proof of an indecent act.
33. The Appellant further contended that the prosecution's case was marred with glaring inconsistencies, coupled with the likelihood of the complaint being untruthful in her statements made in evidence as her oral testimony was a coached one, which was a circle of the classic hearsay that was expanding upwards and consistently up-to the court. That the evidence of PW2 did not come within a mile of the test laid down in the case of *Kyafi Vs Woro* (1967) GLR 463 AT 467 where the court held: -
- “It must be observed that the questions of impressiveness, or convincingness are products of credibility and veracity, a court becomes convinced or unconvinced, impressed or unimpressed with oral evidence according to the opinions it forms of the veracity of witnesses. However, a court has to test its impression as to the veracity or truthfulness of oral testimony of a witness against the whole of the evidence of that witness and other evidence on record.”
34. It was also submitted that the learned trial magistrate misdirected himself on convicting the Appellant on the alternative charge of an indecent act without conducting a thorough evaluation of the evidence adduced by the parties. That it is trite that in cases concerning sexual offences, trial courts have to consider the nature of the evidence in consonant with the proviso under Section 124 of the [Evidence Act](#). Reliance was placed on the strength of the authority in *Mohamed V R 120081 KLR* and *Jacob Odhiambo V R* which observed that the court must satisfy the criteria that the victim told the truth and must record the reasons for such believe. In trials of this nature offences of sexual acts are usually committed in total privacy and secrecy. Even so, the prosecution duty is to prove directly or circumstantially that the victim has been defiled or indecently touched.
35. Also cited by the Appellant is the case from the South African Court in *S V Trainor 120031 1 SACR (SCA)* where the court stated: -
- “A conspectus of the evidence is required evidence that is reliable should be weighed alongside such as may be found, to be false independently, verifiable evidence, if any should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of the evidence must of necessity be evaluated as most corroborative evidence if any.”
36. Similarly, in *Vokere V R [2014] SCCA 41 Domah J* held: -
- “Judicial appreciation of evidence is a scientific rationalization off acts in their coherent whole, not a forensic dissection of every detail removed from its coherent whole.”
37. The Appellant asserted that a closer look at the testimonies of PW2 and PW5 shows no corroboration to proof of the element of penetration by the Appellant against the victim (PW2). All that the evidence does is to show that PW2 went to fetch water. However as confirmed from Appellant testimony that he saw children but not a child (victim) as stage managed by trial magistrate on his Judgement. Also, Appellant during cross-examination by state counsel affirmed that where he was herding there was no dam as PW2 said that Johana came to dam held her by her hand.
38. The Appellant stated that the flipside of the coin is that, this means the trial magistrate ignored vital leads or even crucial witness like PW5 whose crucial evidence had something to do with disapproving the testimony of PW2. That there are parts of PW2's narrative that are not reliable which distorted the



cogency of her testimony. The Appellant states that he believed that PW2 had reason to exaggerate and embellish evidence to the distance of directing Appellant's guilty of an offence he didn't do.

39. On whether the Appellant was granted fair trial, the Appellant submitted that it is clear from proceedings that he was not able to understand the language of the court. Reliance was placed on Article 50(2) (m) of *the Constitution* which guarantees a fair trial to include the right "to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial. "
40. The Appellant refers to the record and submits that the same shows that only during plea taking and hearing with PW1 is when there was Kamba interpretation the language Appellant could understand. The proceedings were conducted in English language which was translated to Kiswahili. Curiously, after the Appellant was put on his defence, while tendering his defence, for the third time in the proceedings a Kamba Interpreter was availed. Curiously, this was the third time the court recognized the need for an interpreter.
41. The Appellant submitted that this court hoists high the Constitutional requirement for a fair trial which includes the right of the accused to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial. The Appellant invited this court to study the entire record and satisfy itself that indeed the trial court did not comply with this Constitutional requirement. The appeal court must consider whether the misdirection, viewed either on its own or cumulatively together with any other misdirection, is so material as to affect the judgment, in the sense that it justifies interference by the court of appeal bearing in mind that what *the Constitution* demands is that the accused be given a fair trial.
42. Reliance was placed on the case of Joseph Ndungu Kagiri Vs Republic, while addressing the question of a fair trial, the High court Judge rendered himself as follows: -

“In the Kenyan criminal jurisprudence, the accused is placed in a somewhat advantageous position. The criminal justice administration system in Kenya places the right to a fair trial at a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the accused is entitled to fairness and true investigation and the court is expected to play a balanced role in the trial of an accused person. The court is the custodian of the law and ought to ensure that these constitutional safe guards are jealously protected and upheld at all times. The trial should be judicious, fair, transparent and expeditious but must ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 50 of *the Constitution* of Kenya 2010. The Right to a Fair Trial is one of the cornerstones of a just society. ”
43. The Appellant referred to the herein above cited case of Supreme Court of India where the it stated: -

“” Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracize injustice, prejudice, dishonesty and favouritism.

And again: - "Decidedly, there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused...”.
44. The Appellant argued that the right to a fair hearing is among the fundamental rights and freedoms that may not be limited.



45. On this ground, it is the Appellant's view that the trial at the lower court was not conducted in a manner that can be said to be consistent with the Constitution and the conviction cannot be allowed to stand.

46. The Appellant concluded that the burden of proof, subject to Section 111 of the Evidence Act, rests with prosecution throughout. The Appellant is entitled, for example, to remain mute, so it was a serious misdirection by trial magistrate when stated the following: -

“The accused has placed himself at the scene of crime and admits presence of children. ”

47. The rule that the prosecution may obtain a criminal conviction only when the evidence proves the Accused's guilt beyond reasonable doubt is basic to our law. The Appellant asked this court to acquit him and quash the conviction and set aside the sentence.

Summary of the Respondent's Submissions

48. The Respondent submitted that that there were no contradictions nor inconsistencies and even if they were, they are minor and do not go to the root of the Prosecution case hence this court should ignore them. The minor inconsistencies (if any) were satisfactorily explained and this shows that the prosecution witnesses were truthful. The minor inconsistencies (if any) do not prejudice the Appellant.

49. As regards whether the case was proved beyond reasonable doubt, the Respondent referred to Section 8(1) of the Sexual Offences Act which provides:

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

50. Reference was also made to Section 1 1(1) of the Sexual Offences Act which provides:

“Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.”

51. Indecent act under the Act is defined as:

“means any unlawful intentional act which causes—(a)any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration”

52. 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”

53. To prove the offence of defilement, the Prosecution needed to prove the following ingredients:

- a. penetration
- b. age
- c. identity of perpetrator

54. On penetration the Respondent submitted that, PW2 victim states she went to fetch water when the Appellant came to the dam held her hand and took her to a farm where he lay on her. She states the



Appellant inserted his thing into mine. She stated that "he inserted his thing into mine. He inserted into me his part that he uses to urinate. He inserted it in my private part" referring to the penis and vagina respectively. She pulled herself up and ran home and told her grandmother. That PW5 the clinical officer testified that the victim PW2 was brought the next day after the reported date of defilement. He testified on examination there were fresh bruises on vagina, hymen intact but reddening of skin. The conclusion was attempted defilement due to bruises at the vaginal walls. All reports were produced as evidence before the court.

55. The Respondent agrees with the sentiments of the trial court in the judgment at page 5 of the judgment that:-

“According to the interpretation of Section 2 the slightest and brief arousal penetration is sufficient to complete the crime. The law does not envisage absolute penetration into the genital nor the release of the spermatozoa or semen of the male organ for the act of penetration to be complete.”

56. That fresh bruises were seen on the victim's vagina and the hymen was intact but reddening of the skin was noted. The evidence of PW2 is corroborated by the evidence of PW5. The Respondent stated that PW5 however concluded that the evidence as presented to him, conclusion was attempted defilement. In the statement of "attempted defilement" gave the impression that the victim was not defiled. Hence the offence of indecent act was preferred by the trial court and convicted the Appellant on the said charge. Further the hymen was said to be intact but from the definition of Section 2 of the *Sexual Offences Act*, penetration is not a requirement to prove penetration. It can be partial or complete insertion. Partial insertion can cause the fresh bruises on the vagina and reddening of the skin. The Respondent submitted that the Prosecution did indeed prove penetration in this case. However, the evidence as well could point to indecent assault due to the aversions of PW5. The Respondent submitted that the Prosecution discharged its duty and proved beyond reasonable doubt the ingredients of indecent assault as the Appellant was convicted of.

57. As regards the age, the Respondent submitted that PW1 produced the victim birth certificate which shows the date of birth as 10/9/2009. At the time of the incident the victim was aged 12 years old. PW5 stated the victim was 12 years old. Age was proved.

58. On identity, the Respondent submitted that the victim PW2 told her grandmother what happened and identified the Appellant as the perpetrator. During her evidence she referred to the Appellant by his name "Johana" she was able to identify him. He was someone well known to her. The incident happened during the day this lighting was adequate. PW 1 confirms that the Appellant was their neighbour. PW3 testified that the Appellant was an employee at her co-wife home. Identification was by recognition which was the best form of identification.

59. The Respondent asserts that the Appellant contends that the learned trial magistrate misapprehended Section 124 of the *Evidence Act* on whereby the victim was not truthful.

60. Section 124 of the *Evidence Act* provides that:

“Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:



Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

61. It is the Respondent's submission that the PW2 victim was truthful and honest as to the events of the day. Further the evidence of PW5 corroborates PW2 the evidence was safe for the Trial Court to rely on in convicting the Appellant. The Respondent urged this court to reject that ground of appeal.
62. In submitting on the Appellant's defence, the Respondent stated that the Appellant tendered sworn evidence in which he denied the incident and denied defiling the victim. It was submitted that the defence was an afterthought. That the trial court did take into account the Appellant's defence and was correct in dismissing it.
63. The Respondent agrees with the trial court that the defence does not shake the prosecution case which the trial court found water tight. It is further submitted that the defence was not strong enough to rebut the prosecution evidence as against the Appellant. That the trial court was right in rejecting the Appellant's defence.
64. On sentence, the Respondent submitted that the Appellant was sentenced to 10 years imprisonment. That the Appellant in mitigation stated that he was not present and that he was in Mombasa. The prosecution submitted that the Appellant was a 1st offender. The Respondent referred to Section 11(1) on the applicable sentence for the offence of Indecent Act with a child which is imprisonment for term of not less than 10 years and observed that the Appellant was properly sentenced. Reliance was placed on Republic v Joshua Gichuki Mwangi SC Petition No. E018 of 2023 which held that the minimum mandatory sentences in the *Sexual Offences Act* were constitutional. The Respondent urged this court to uphold the sentence of the

Appellant as per the prescribed trial court.

65. In the end the Respondent submitted that the appeal lacks merit and urged the honourable court to dismiss it in its entirety.

Analysis and determination

66. In determining this appeal, this court is fully aware of its duty as the first appellate court as espoused in the case of Okeno Vs R (1972) EA 32 where the court 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 the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion”.
67. Having carefully and cautiously considered and analysed the trial court's record, the grounds of appeal and the Parties' rival submissions on the appeal, the issue for determination for this court is whether the Appellant has made a case for this court to interfere with the conviction and sentence imposed by the trial court.
68. It must be appreciated that under Section 107(1) of the *Evidence Act*, the burden of proof is on the prosecution to establish every element in a criminal charge beyond reasonable doubt. This was well buttressed in the principle in the cases of Woolmington v DPP (1935) AC 462 and Miller v Minister of Pensions 2 ALL 372-273.



69. This being a criminal case, the prosecution bore the burden of proving the case beyond any reasonable doubt.
70. I will summarize the grounds of appeal into two and determine each as follows :-
- a. Whether the trial court was right in convicting and sentencing the Appellant on Alternative charge of Indecent Act with a child contrary to Section 11 as read with Section 11(1) of the *Sexual Offences Act*.
 - b. Whether the Appellants Constitutional right to a fair hearing was infringed.
- a. Whether the trial court was right in convicting and sentencing the Appellant on an Alternative charge of Indecent Act with a child contrary to Section 11 as read with Section 11(1) of the *Sexual Offences Act*.**
71. In his judgment, the trial court cited Criminal Appeal No. 22 of 2018 Daniel Maina Wambugu v Republic (2018) eKLR where Hon. Justice Reuben Nyakundi sitting at Kajiado observed the factors which must be proved beyond reasonable doubt to sustain a conviction in a defilement case being:-
- i. Penetration of the male offender into the genitalia of the female victim;
 - ii. Age of the Child;
 - iii. Evidence of positive identification of the accused person as the perpetrator
72. The trial court proceeded to analyse each of the factors stated above and, in the end, based on the evidence of PW5, Peter Mwaniki a clinical officer who examined and treated the Victim that fresh bruises on the vagina were noted, hymen was intact but reddening of the skin, no bleeding or vaginal discharge was noted. In conclusion PW5 opined that there was an attempted defilement due to bruises at the vaginal walls. From the foregoing and in finality, the trial magistrate found and hold that the prosecution failed to prove the charge of Defilement Contrary to Section 8(1) as read with Section 8(3) of the *sexual Offences Act* No.3 of 2006 against the Appellant beyond reasonable doubt. The trial magistrate further found and held that the Alternative charge of Committing an Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act* No.3 of 2006, was proved by the prosecution against the Appellant beyond reasonable doubt and convicted him on the alternative charge under Section 215 of the Criminal Procedure Code and sentenced him to 10 years imprisonment on 01/02/2024.
73. As stated earlier, Section 2(1) of the *Sexual Offences Act* describes an "Indecent Act" as follows: -
 "Indecent Act means an unlawful intentional act which causes: -
 Any contact between any part of the body of a person with the genital organ, breasts or buttocks of another, but does not include an act that causes penetration; exposure or display of any pornographic material to any person against his or her will. "
74. The offence of committing an indecent act with a child is therefore rooted on three main ingredients, being the age of the victim, body contact between the accused person and the genitalia, breasts or buttocks of the victim as stated in the law, and that the accused committed the act intentionally.
75. The question that needs an answer is whether the ingredients of offence of committing an indecent act with a child were proved beyond reasonable doubt by the prosecution. A careful perusal at the trial court's proceedings reveals that the complainant in her testimony described an act of penetration



to have been done to her by the Appellant, not contact of the Appellant's penis with her genitalia, breasts or buttocks. The findings of the Clinical officer who ruled out penetration as alleged by the complainant. By insisting that penetration did occur, this rules out the offence of Committing Indecent Act with a child which does not include an act that causes penetration.

76. I have observed that the trial court did not analyse in its judgment whether each of the factors of proving the offence of committing indecent act with a child were proved by the prosecution against the Appellant beyond reasonable doubt. What I establish to have been analysed in the judgment by the trial court are the ingredients of defilement and not those of committing and indecent act with a child. It is my considered view therefore that the trial court ought not to have assumed that once it found no evidence of commission of the principal charge of defilement then automatically the lesser charge of committing an indecent act with a child must have been committed.
77. I am guided by the decision of Justice A.C Mrima (J) In Criminal Appeal No. 3 of 2019 H.C Migori, which was relied upon in Abdi Ismail Moulid -Vs-Republic (2019) eKLR. The court expressed itself as follows: -
- “.....As to whether there was any contact between any body part of the appellant with the genital organ, breasts or buttocks of the complainant which act however did not cause any penetration, I must say that I have re-read the proceedings severally and did not see anywhere
78. The burden of proof, subject to Section 111 of the *Evidence Act*, rests with prosecution throughout. An accused person is entitled to remain silent and say nothing in his/her defence. The trial magistrate stated in his judgement that; in his defence, the accused acknowledges that he was herding when the unfortunate incident happened and though the Appellant claims to be framed admits to have interacted with children. The Appellant placed himself at the scene of crime and admitted presence of children. This was a serious misdirection by trial magistrate since the Appellant did not mention the complainant to have been among the children that the Appellant interacted with. There is a clear doubt whether the Appellant interacted with the complainant herein and or sexually assaulted her.
79. Whereas the trial magistrate appreciated the prosecution's duty to prove its case beyond any reasonable doubt, the magistrate nevertheless wholly relied on the Appellant's defence without giving any cogent reasons for so doing.
80. To my mind, the defence raised by the Appellant raises reasonable doubts on the prosecution case. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.
81. From the totality of the evidence, I find that this is a case where Appellant ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case does not require many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right.
82. In the case of Michael Mumo Nzioka v Republic [2019] eKLR, , the court cited with approval the holding in Elizabeth Waithiigeni Gatimu vs. Republic [2015] eKLR where Mativo, J (as he then was) stated that:

“To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only



rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty...Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.”

83. It is my finding that the trial court misinterpreted the Appellant’s defence and thereby arrived at an erroneous decision.
84. From the above it is my finding that the trial court erred in law and in fact in convicting and sentencing the Appellant on the Alternative charge of Committing an indecent act which a child which was not proved beyond reasonable doubt against the Appellant by the prosecution.

b. Whether the Appellants Constitutional right to a fair hearing was infringed.

85. The Appellant submitted that it is clear from the proceedings that he was not able to understand the language of the court. Reliance was placed on Article 50(2) (m) of *the Constitution* which guarantees a fair trial to include the right "to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial. "
86. The Appellant refers to the record and submits that the same shows that only during plea taking and hearing with PWI is when there was Kamba interpretation, the language the Appellant could understand. The proceedings were conducted in English language which was translated to Kiswahili. That after the Appellant was put on his defence, while tendering his defence, for the third time in the proceedings a Kamba Interpreter was availed. This was the third time the court recognized the need for an interpreter.
87. The Appellant submitted that this court hoists high the Constitutional requirement for a fair trial which includes the right of the accused to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial. The Appellant invited this court to study the entire record and satisfy itself that indeed the trial court did not comply with this Constitutional requirement. The appeal court must consider whether the misdirection, viewed either on its own or cumulatively together with any other misdirection, is so material as to affect the judgment, in the sense that it justifies interference by the court of appeal bearing in mind that what *the Constitution* demands is that the accused be given a fair trial.
88. I must confirm that when this appeal came before me for directions on 6th May 2025, the Appellant indicated that he understood Kikamba language well and requested to be provided with a Kamba interpreter which request the court honoured.



89. The above coupled with the Appellants allegation that there were instances where he was not accorded a Kamba interpreter before the trial court pushed me into examining the trial court's record to confirm the allegations.

Although, I have not come across instances where the Appellant requested for an interpreter and the trial court declined his request, I note that indeed a Kamba interpreter was only availed when the Appellant took plea, when PW1 testified and when the Appellant was tendering his defence case.

90. Article 50(2)(m) correctly interpreted means that an accused person should be able at all stages of the trial to understand the case against him or have the case explained to him in a language that he understands. The sole purpose of doing so is to ensure that an accused at all stages of the trial understands the case against him and avails the accused person sufficient time and facilities to enable him prepare his defence and challenge the prosecution's evidence at the opportune time both in cross-examination and in his defence.

91. The Constitutional dictate to a fair trial cannot be met if the accused cannot understand the language of the court. If this goal is not met, it means that the court shall be misinterpreting the letter and spirit of the supreme law of the land thereby belittling *the Constitution* and the very purpose for which it was intended. Courts must therefore be very keen in ensuring that this provision is adequately given regard to so as to ensure that the rights of an accused person are not violated.

92. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial includes the grant of fair and proper opportunities to the person concerned, and understanding the nature of the case against him and understanding the language of the court. This must be ensured and observed as it is a constitutional, as well as a human right. Under no circumstances can a person's right to fair trial be jeopardized.

93. From the forgoing, it is my finding that the Appellant was not accorded a fair hearing by failure to avail to him an interpreter who would have assisted in interpreting the court proceedings to the Appellant at all times.

Disposition

94. In the end, the appeal succeeds and it is hereby ordered that:

- a. The conviction of the Appellant was unsafe and it is hereby quashed;
- b. The sentence against Appellant is set aside;
- c. Unless otherwise lawfully held, it is ordered that the Appellant shall be set at liberty.

95. It is hereby so ordered.

JUDGMENT WRITTEN, DATED & SIGNED AT MACHAKOS THIS 7TH OCTOBER 2025

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 7TH OCTOBER 2025

In the presence of :

In person.....for Appellant

Agatha.....for Respondent



Milly Grace.....Court Assistant

