Njogu v Republic (Criminal Appeal E021 of 2025)
[2025] KEHC 14507 (KLR) (15 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14507 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E021 OF 2025

DKN MAGARE, J

OCTOBER 15, 2025

BETWEEN

CHARLES KINYUA NJOGU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment of the trial court by Hon. E. Kanyiri, Principal Magistrate, given on 12.10.2023 in Karatina PMCSO No. E010 of 2022.

2. The Appellant was charged with defilement contrary to Section 8(1) & (3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on diverse dates between 26th April 2022 and 8th May 2022 at Nyana Location of Mathira West sub-county within Nyeri County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of AM, a child aged 16 years.

3. The appellant was charged with alternative count of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, 2006. The particulars of the offence were that on the diverse dates between 26th April 2022 and 8th May 2022 at Nyana Location of Mathira West sub-county within Nyeri County, he wilfully and unlawfully caused his penis to come into contact with the vagina of AM, a child aged 16 years.

4. The Appellant was arraigned and denied the charges. A plea of not guilty was consequently recorded. The trial court heard a total of 6 prosecution witnesses. A new court continued the hearing. The appellant sought to recall PW1 but the court denied the request vide a short ruling. Unfortunately, the court did not consider the merit of the request save to say that to do so was to re-victimize the witness. The court shall revert to this later. The court found the appellant guilty and sentenced him to 10 years' imprisonment.

5. The Appellant, aggrieved, lodged this appeal. The Petition of Appeal dated 21st March 2025 raised the following grounds:

    a. The learned trial magistrate erred in failing to note that the age of the complainant was not proved as required by law.

    b. The learned trial magistrate erred in law and fact in failing to note that the prosecution evidence was riddled with material contradictions, inconsistencies and uncorroborated evidence.

Evidence

6. At trial, PW1, a minor was subjected to voire dire. The minor was not a child of tender years and voire dire was superfluous. She testified that she was 16 years and in Form 2. It was her evidence that she lived with her mother and sisters, J and M. It was her stated case that on 26.4.22, the Appellant went to her home on a motorbike on a pretext that one J had called her. She boarded the motorbike and they went with the Appellant. She knew she was going to J. She stated on arrival they started having sex.

7. There was a long sofa set on which she sat and the Appellant removed her clothes before removing his. They had sex. He threatened her with a knife should she scream or tell her mother or anyone about the sex. They remained in the Appellant's home and they had sex for each and every day of the 2 weeks stay. She never left as she feared he could kill her. On 8.5.2022, she left his house after J and M came. The police also came and the Appellant ran away. She was arrested and stayed for a day. Later she was taken to hospital. She had known the Appellant since 2019. The court noted that the child does not seem to say the truth.

8. On cross examination, it was her case that J was her friend and class mate. The Appellant told her J was at his place but she was in fact not there. She used to wear the same clothes every day. She did not wash the Appellant's clothes. The Appellant, according to her, would lock her in with a padlock till he came back and would take her to the toilet at night only while threatening her with a knife. She stated that she did not wash clothes. Further that the uncle did not find her washing clothes. This piece of evidence will be crucial shortly. On re-examination, however, she stated that she was washing her clothes.

9. PW2 was JJGM. She was a sister to PW1. She was home with PW1 on 26.4.2022 at 6 pm. Later, she realized PW1 was not at home. She looked for her including in the bedroom but she was not home. They later realized through one Mange that PW1 was at the Appellant. On 8.5.2022, she accompanied five other people to PW1. She saw PW1 inside the Appellant's house on arrival.

10. On cross examination, it was her confirmed case that Mange saw PW1 washing the Appellant's clothes on Facebook. They called mum to come and she came with the police. The Appellant ran away on seeing the police. She stated that PW1 was washing the appellant's clothes outside the door of the house. She stated on seeing their sister, the appellant did not do much. He only ran away when the police came. They found PW1 to be okay in the house and had machine shaved her hair. The complainant told the witness that she was suffering in the appellant's house. She also stated that G saw the complainant washing clothes at the appellant's house.

11. PW3 was MMM, PW1's mother. She came home from the farm on 26.4.2022 at around 7 pm and found PW1 not at home. She could not find her at neighbors and relatives. She knew the Appellant as he had twice come to her home for funeral rites. Later, she sent J and M together with DM and JM to the Appellant. This was after she heard that the Appellant was married.

12. On cross examination, it was her case that she did not know if the Appellant married PW1. It was her further case that the Appellant knew her home and knew that PW1 was in school. She stated that when

the daughters came, the appellant welcomed them. She did not know whether the complainant was kidnapped or married. She changed her mind and stated that the complainant was not born in 2016 but 20006.

13. PW4 was Dr. Stephen Nderitu, the Clinical Officer who examined PW1. He testified that the complainant ran away from home and stayed with the appellant for two weeks. It was his case that the hymen was broken. There were no visible physical injuries but there was discharge and panty had brown stain. He relied on the PRC and P3 form. PW1 had a smelling vaginal discharge white in colour. He tested pregnancy and was positive. On cross examination, it was his case that the hymen was absent. He stated that the complainant indicated that she ran away from home. The absence of the hymen was not fresh.

14. PW5 was No. 51XXXX Corporal Joseph Weru then attached to Kiamariga Police Station. He was the investigating officer. It was his case that the investigations led to a reasonable conclusion that the Appellant was culpable hence his arrest and prosecution. He stated that the appellant lied to the complainant that he was marrying her. Upon learning of the incident, the mother informed the Chief who in turn informed the police. The appellant was charged with the offence. The complainant was born on 4.6.2006. The appellant allegedly informed the witness that they agreed to get married.

15. On cross examination, it was his case that PW3 reported the disappearance of PW1 at the police station. PW3 and the area chief subsequently found PW1 in the Appellant's house. The complainant informed him that the complainant and appellant agreed to marry. He did not know how the complainant was found. He denied that this was a plot to frame him. The investigating officer did not ask the age of the appellant. He was 18 years of age. The investigating officer did not have anything to show the complainant was school going.

16. PW6 was Benard Mwai, the Senior Assistant Chief, Kahiga Sub-location. On 29.4.2022, he was informed of the incident of PW1 who was missing. PW3 also informed him that PW1 was traced in the Appellant's house. He knew the Appellant well. On cross examination, he testified that he went to the Appellant on 29.4.2022 and saw PW1 coming from the Appellant's house. He stated that he sat and waited and saw the complainant coming out of the appellant's house. He informed the mother who reported to the police but he was not there when the reporting was done.

17. On being placed on his defence, the appellant sought to recall PW1, which the court declined. The appellant then proceeded and tendered sworn evidence though the language is not indicated. He testified that on 15.5.2022, PW1, who was his lover came home and found police. PW1 had visited him until 1 pm. PW1's sisters advised him to run away. He was living with his sister who was a school going child. He went to the police station and was arrested. PW1 was bigger than him. He did not know PW1 was under 18 years. Her attitude and behavior were of grown up. He did not know she was in school. He married her because he had a small child who needed care. He wondered how the girl could be 16 yet she is bigger than him and her attitude is that of an adult.

18. On cross examination, it was his case that he went to pick PW1 on 26.4.2022 and she came to his house with two bags. He asked for an identity card but she said she will get one with the husband's name. When he questioned the elder sisters, they told him that the complainant was not school going.

Submissions

19. The Appellant filed submissions together with an amended Petition of Appeal both dated 8.9.2025. The amendments were an ambush to the Respondent as I find no evidence that they were served. An amendment cannot be introduced through final submissions.

20. It was submitted that PW1 was not a credible witness. He quoted Ndungu Kimani v Republic (1979) eKLR. He submitted that he did not know PW1 to be under 18 years. He relied inter alia on Francis Omuroni v Uganda Criminal Appeal No. 2 of 2000.

21. The Respondent filed submissions dated 7.8.2025. 1t was submitted that the key ingredients of defilement were proved beyond reasonable doubt and the trial court was correct in the conviction.

22. It was also submitted on the issue of sentence that this court was not entitled to alter the sentence unless the trial court was shown to have relied on wrong principles or overlooked material factors. This was supported inter alia by the case of Shadrack Kipkoech Kogo v Republic CA No. 253 of 2003.

23. It was submitted that the sentence meted upon the Appellant was below the minimum sentence under Section 8(3) of the *Sexual Offences Act* being 10 years instead of the statutory 15 years and the court ought not to interfere with it in the circumstances.

Analysis

24. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 as follows:-

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

25. Therefore, this court will not interfere with the exercise of judicial discretion by the court below unless it is satisfied that its decision is clearly wrong. In the case of Mbogo and Another vs. Shah [1968] EA 93 the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

26. The Appellant was charged with defilement contrary to Section 8(1) & (2) of the *Sexual Offences Act* No. 3 of 2006. I note this to be in error as PW1 was said to be 16 years old. I reproduce Section 8 (1)-(4) of the *Sexual Offences Act* as follows:

> Defilement
>
> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

27. It is trite that this court dealing with the instant appeal is entitled to consider the evidence in the trial court as a whole as being submitted afresh to be subjected to exhaustive examination to guide the court towards its own decision on the evidence. In Kiilu & Another vs. Republic [2005]1 KLR 174, the Court of Appeal stated as follows:-

1. 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.

2. 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.

28. The issue for this court's determination is whether the prosecution proved the offence of defilement as against the Appellant beyond reasonable doubt.

29. Proof beyond reasonable doubt does not impose a standard of proof beyond the shadow of a doubt, where the evidence tendered is so strong as to leave only a remote possibility in favour of the accused person, which can be dismissed with the sentence "of course it is possible, but not in the least probable", then it can be said in law that the case is proved beyond reasonable doubt. It was held by the Court of Appeal in Moses Nato Raphael vs. Republic [2015] eKLR as doth:

> " What then amounts to "reasonable doubt"? This issue was addressed by Lord Denning in Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 where he stated:-
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> > 'That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.'"

30. The parameters that were to be proved in cases like the instant case were settled in the case of George Opondo Olunga vs Republic [2016] eKLR that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and proof of the identification of the perpetrator.

31. The first glaring error in this matter arose at the stage of determining whether a prima facie case was established. The court went all the way to find the evidence well corroborated and credible. It also found the appellant lured the complainant. This is in spite of the evidence on record. I will let the court speak for itself:

> " The complainant testified she was lured by the accused and later defiled. The testimony of the complainant is corroborated by other prosecution witnesses in all material aspects. Considering the evidence tendered I am satisfied that the prosecution has established a prima facie case for purpose of finding the accused with a case to answer..."

32. This was at page 5 of the ruling on the case to answer. With this kind of ruling, there is no way the court can walk back from its findings. In short, corroborated evidence had met threshold of proof beyond reasonable doubt, in the court's own words, "in all material aspects." Such a ruling takes away the right to fair hearing. It is akin to finding the appellant guilty before the defence hearing. Once the court finds that evidence is corroborated, it leaves no room to consider the defence evidence.

33. Further PW1, complainant, testified that she knew the Appellant first in 2019. The Appellant came to her home on 26.4.2022. She left with the Appellant to his home. According to her, they had sex on 26.4.2022 and they continued so having sex on daily basis until the day she was taken out of the Appellant's home on 8.5.2022, after two weeks of stay. The Act of penetration was not a disputed fact and the Appellant's case was that PW1 was his lover and he had taken her into his home for marriage. The medical report also supported there having been vaginal sex.

34. Identification was by recognition and was equally not a disputed fact. The only disputed fact was the age. The Appellant maintained that he did not know PW1 to be a school going pupil. Further, that he deduced from the behavour and attitude of PW1 that PW1 was not under 18 years.

35. The story put forth by the Appellant in his defence was not unreasonable. The allegations that PW1 was said to be a school going student in Form 2 was not borne out of evidnece. The prosecution did not bother to adduce any material in support of this fact. On the other hand, there was no way to tell that the Appellant knew PW1 to be a student as no such evidence was produced.

36. Further, it was common ground that for the time spent with the Appellant, PW1 was staying in the pretext of marriage. This fact, even though did not speak of consent on the part of PW1, spoke volumes in support of the Defence by the Appellant that he believed PW1 not to be in school and was of majority age. Inasmuch as PW1 testified that she went to the house of the Appellant after the Appellant lied to her that J was there and had called her, the evidence of PW1 in this regard was not credible. As a fact the bull and cock story of being threatened with a knife is not true. The evidence of every other witness was that she eloped and went to the appellant's house. Though she stated that she did not wash the appellant's clothes, this was contrary to the evidence she posted on Facebook® of the appellant's clothes. PW1 was also a false storyteller that the Appellant had threatened her with death and that he kept her indoors locking the doors and only opening for her to go to the latrine at night. There was reliable contrary evidence that PW1 was putting up at the Appellant including washing clothes for the Appellant. This was corroborated by the Assistant Chief, PW6 that he kept vigil until the complainant came out of the house. At that point, according to the chief, the appellant had run away. If he was being held against her will then the evidence of the chief is incorrect. She had no reason to lie either way.

37. On the aspect of age, age is such a crucial component in sexual offences that it points to the extent of punishment for the offenders. This was also the position of the court in Kaingu Kasomo vs. Republic, Criminal Appeal No. 504 of 2010 (UR), where the Court of Appeal stated doth:

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

38. Consequently, age herein was proved by the production of the birth certificate. The birth certificate stated that PW1 was born on 4.1.2006 and so was 16 and 3 months old. The Appellant's case on this was that PW1 presented herself as an adult and not schooling. Further, that PW1 was bigger than him in physical appearance. The Respondent did not cross examine the Appellant on this fact and I deem it to be unrebutted. I say so also because the trial court and the prosecution had the benefit of seeing PW1 alongside the Appellant. The Appellant submitted based on Section 8(5) of the *Sexual Offences Act* as a defence against the Prosecution's case.

39. The full tenor of Section 8(5) of the *Sexual Offences Act* on which the Appellant sought to rely provides as follows:

> It is a defence to a charge under this section if -
>
> a. It is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
>
> b. The accused reasonably believed that the child was over the age of eighteen years.
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> (6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

40. The rasion d'etre for examining the conduct of the parties is because an accused cannot benefit from the section, when the defilement is of violent nature. This is based on the fact that it is the child who is supposed to mislead the appellant. The test is that, 'such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged offence.' Where violence is used, then it vitiates the misleading part.

41. From the testimony, it came out that the mother and sisters were aware of the escapades. It appears something else triggered the fall out. The appellant was about 29 years old. He perceived the complainant to be over 18 years. On the other hand the complainant kept telling different stories. She told the investigating officer that they had agreed to be married. She told the court that the appellant had a knife. This was not borne out of evidence. She told the examining doctor a different story. The PRC is available written evidence. She told the medics and it is recorded as follows:

> The survivor escaped from home and went to cohabit with a male adult in his home. Had intercourse several times.

42. One other aspect that PW4 exaggerated was the result of the pregnancy test. The PRC showed that the same was negative. The P3 did not have pregnancy. The history given is that of eloping. The story of kidnapping was thus imaginary.

43. Once a person had actually been deceived into believing a certain state of things, it must be shown that this belief was reasonably held. On the defence under section 8(5) of the *Sexual Offences Act*, I am guided that a person was more likely to be deceived into believing that a child was over the age of 18 years if the said child was in the age bracket of 16 to 18 years old, and that the closer to 18 years the child was, the more likely the deception, and the more likely the belief that he or she was over the age of 18 years. Further, it was also germane to point out that a child need not deceive by way of actively telling a lie that she was over the age of 18 years. Section 8(5) of the *Sexual Offences Act* envisions the appellant to be in a position, where it is irrelevant to enquire. This was the position of the Court of Appeal in Wambui v Republic (Criminal Appeal 102 of 2016) [2019] KECA 906 (KLR) (22 March 2019) (Judgment) as follows:

> Section 8(5) of the *Sexual Offences Act* stated that it was a defence to a charge of defilement if the child deceived the accused person into believing that she was over the age of 18 years and the accused reasonably believed that she was over 18 years. Section 8(5) was a curious provision in so far as it was set in conjunctive as opposed to disjunctive terms which would seem to be more logical. Once a person had actually been deceived into believing a certain state of things, it added little to require that his belief be reasonably held.
>
> A reading of section 8(6) of the *Sexual Offences Act* seemed to add a qualification to subsection (5)(b) that separated it from the belief proceeding from deception in subsection (5)(a). Therefore, the elements constituting the defence should be read disjunctively if the two sub-sections were to make sense. Further, it stood to reason that a person was more likely to be deceived into believing that a child was over the age of 18 years if the said child was in the age bracket of 16 to 18 years old, and that the closer to 18 years the child was, the more likely the deception, and the more likely the belief that he or she was over the age of 18 years.
>
> The burden of proving that deception or belief fell upon the appellant, but the burden was on a balance of probabilities to be assessed on the basis of the appellant's subjective view of the facts. Thus, whereas indeed the complainant was still in school in Form 4, that alone would not rule out a reasonable belief that she would be over 18 years old. It was also germane to point out that a child need not deceive by way of actively telling a lie that she was over the age of 18 years. Had the two lower courts properly directed their minds to the appellant's defence and the totality of the circumstances of the case, they would in all likelihood have arrived at a different conclusion on it. It was a non-direction that they did not do so, rendering the conviction unsafe.

44. This provision also requires the court to consider the defence, the circumstances including the steps which the accused took to ascertain the age of the complainant. PW1's case was that the Appellant was known to her since 2015. This was corroborated by PW3, PW1's mother who testified that the Appellant had visited her home twice during funeral rites and she knew him before. No wonder she testified that the Appellant came for her in the pretext that he was taking her to one J whom she described as her friend. It was then discernible that the said J would have been a common friend to the Appellant and PW1. J was never mentioned at large, or called to shed light on the duo's relationship.

45. Needless to say, PW1 led the Appellant into believing that she was not schooling and she was being married. For this, no evidence was produced to support the fact that she was in Form 2 and that the fact was within knowledge of the appellant. It was enough and it was not controverted that the complainant was bigger than the appellant. When asked about the identity card, she lied that she is waiting to gift the husband the privilege of having his name in the identity card.

46. Not a report book or any evidence of recent schooling at the said school. In the case of Paul Munyoki vs Republic [2021] eKLR, the Court of Appeal held that:

> " ...Where the defence is raised, the court will have to consider the defence, the circumstances including the steps which the accused took to ascertain the age of the complainant. When an accused opts to rely on the defence under Section 5 & 6 of *Sexual Offences Act* the evidential burden shifts on that accused person to satisfy the above conditions attached to the defence. He has to demonstrate that, it is the child who deceived him to believe that she was eighteen or over, that he believed that the child was over eighteen years and that when all the circumstances are considered it will lead to the conclusion that the belief on the part of the accused was reasonable. What this provision is stating is that the accused who wishes to rely on the defence must lay that basis during the trial. This would give the prosecution an opportunity to interrogate the defence and an opportunity to respond."
>
> Evidence on record does not suggest that PW1 deceived the appellant into believing that she was over the age of eighteen years. He did not state what reasonably made him believe that PW1 was over the age of eighteen years. He appreciated that the victim was small bodied, a fact that should have raised his antennas up and he would have declined to accept the victim.

47. I am unable to find reason to sustain the conviction. The defence raised by the Appellant was credible and remained unshaken. Having found that the Appellant ought to have been acquitted in the first place, I find no utility in venturing into the path of the sentence imposed. I set the Appellant free. In the end this appeal succeeds. I quash the conviction, set aside the sentence and order that the Appellant be and is hereby set free unless lawfully held.

Determination

48. I make the following final orders:-

    a. This appeal is allowed, the conviction is quashed, and the sentence is set aside. In lieu thereof, I substitute with an order that the Appellant be and is hereby set free unless otherwise lawfully held.

DELIVERED, DATED and SIGNED at NYERI on this 15th day of October, 2025. Judgment delivered physically and through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Pro se Appellant

Mr. Kimani for the Respondent

Court Assistant – Michael