



REPUBLIC OF KENYA



**KENYA LAW**  
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**Abuga v Republic (Criminal Appeal E096 of 2024)  
[2025] KEHC 15175 (KLR) (28 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15175 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CRIMINAL APPEAL E096 OF 2024  
JK NG'ARNG'AR, J  
OCTOBER 28, 2025**

**BETWEEN**

**INNOCENT NYANG'AU ABUGA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the conviction and sentence of the Chief Magistrate's Court at Ogembo (C.N. Sindani, PM) delivered on 13th September 2024 in Criminal Case (SO) No. E076 of 2022)*

**JUDGMENT**

1. The appellant Innocent Nyang'au Abuga, was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the [Sexual Offences Act](#). The particulars of the offence were that on diverse dates on 24<sup>th</sup> July 2022 and 25<sup>th</sup> July 2022 at Nyakegogi sub-location, Itumbe location, Sameta sub-county within Kisii County, the appellant intentionally caused his penis to penetrate the vagina of E.N.M., a child aged 12 years.
2. The appellant was alternatively 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 offence were that on diverse dates on 24<sup>th</sup> July 2022 and 25<sup>th</sup> July 2022 at Nyakegogi sub-location, Itumbe location, Sameta sub-county within Kisii County, the appellant intentionally touched the vagina of E.N.M., a child aged 12 years.
3. The appellant was arraigned before the trial court. He entered a plea of 'not guilty' to both counts. After a full trial, the appellant was convicted on the main charge of defilement. He was sentenced to 20 years imprisonment.
4. The appellant is aggrieved by those findings. He filed an undated petition of appeal raising 8 grounds impugning the findings of the trial magistrate. In summary, the appellant complained that he was



convicted of the offence of defilement on the basis of insufficient and unreliable evidence and shoddy investigations. He lamented that the trial court failed to consider that he was unrepresented. In his view, the prosecution failed to discharge its burden of proof beyond reasonable doubt. Finally, he challenged the sentence meted out stating that it was harsh, punitive and excessive. For those reasons, the appellant prayed that this appeal be allowed, the conviction be quashed and the sentence be set aside. Alternatively, he urged this court to review the sentence downwards.

5. The appeal was canvassed by way of written submissions. The appellant filed written submissions dated 12<sup>th</sup> August 2025. He submitted that the charge sheet was defective because defilement could not be alleged to occur on diverse dates. This is because that led to ambiguity on when the offence exactly occurred. Challenging the medical evidence, he submitted that no linkage was placed between PW4's evidence and the appellant as the perpetrator. Be that as it may, that evidence in general was inconclusive, inconsistent, contradictory and based on shoddy investigations. The appellant further submitted that he was not given an opportunity by the trial magistrate to have legal representation. This infringed upon his right to a fair trial. Finally, the appellant urged this court to interfere with the sentence meted out as it had the jurisdiction to do so.
6. The respondent opposed the appeal. Prosecution Counsel Lereiya Fridah Sepetian filed written submissions dated 20<sup>th</sup> August 2025. She submitted that all the ingredients to the offence of defilement were proved beyond reasonable doubt. Thus, the conviction was safe. Lastly, it was submitted that the sentence meted out was appropriate and lawful. The respondent confronted the appellant's grounds of appeal stating that they were of no basis and for dismissal. For those reasons, the respondent urged this court to dismiss this appeal.
7. I have considered the submissions, examined the record of appeal and analyzed the law. This being a first appeal the Court must re-evaluate the evidence and make its own findings. See [Bethwel Wilson Kibor vs. Republic [2009] KECA 143 (KLR)]. The prosecution called four witnesses in a bid to persuade the trial court why the appellant ought to be convicted.
8. From the evidence on record, PW1 E.N. the complainant herein testified that she was a class 7 pupil at [Particulars Withheld] Primary School and was 12 years of age at the time of the offence. Her mother PW2 CK produced the complainant's birth certificate confirming that she was born on 14<sup>th</sup> August 2009. This court therefore confirms that the age of the complainant was proved beyond reasonable doubt.
9. PW1's evidence was that on 24<sup>th</sup> July 2022, she was heading home from church when she met the appellant. PW1 knew him very well as they were congregants of the same church. He stayed near the church. PW1 asked the appellant to give him drinking water to which the appellant informed her to go to his house and collect it from there. The appellant followed her. He then locked the door to the house. He asked the complainant not to scream. He took her to the bedroom, undressed her and himself and defiled her. He was wearing a condom. Though PW1 tried to stop her, she was overpowered.
10. PW1 testified that she returned home at 10:00 p.m. where she used to stay with her grandmother and mother PW2. On her part, PW2 testified that after church on 24<sup>th</sup> July 2022, the complainant disappeared from home for two days. She found her at the appellant's house on Tuesday morning. She however did not see her on that day. She had not met the appellant before that day but testified that she found out later that the complainant had sexual intercourse with the appellant.
11. PW3 the investigating officer testified that on 26<sup>th</sup> July 2022, the complainant was sent to hospital with a P3 form. She gathered evidence, recorded witness statements and charged the appellant with the present offence. The complainant was sent to Gucha sub-county Hospital where she was seen by



PW4 clinician Agnes. Her observations were that the complainant's private parts had discharge and the hymen was freshly torn. Her conclusion was that there was penetration.

12. The above evidence of PW4 proves indeed that penetration was proved in line with section 2 of the *Sexual Offences Act*. Was the appellant the perpetrator of the offence however? According to PW1, it was the appellant, whom he knew very well, that defiled her. She testified that she returned home at 10:00 p.m. Interestingly, PW2 testified that she found the complainant at the appellant's house two days later.
13. Section 124 of the *Evidence Act* provides that the evidence of a single identifying witness shall not sustain a conviction except in sexual offences where the minor who is a victim is telling the truth. In this case, I find sharp contrasting evidence between PW1 and PW2 insofar as the fact that PW1 testified that she returned the same day while PW2 suggested that she did not return home but was seen at the appellant's house. Secondly, PW1 stated that she returned at 10:00 p.m. while her mother testified that she was seen in the morning at the appellant's house.
14. In my view, I do not think that PW1 was being truthful in light of those contradictions. I find that as rightly stated by the appellant, those contradictions were so grave as to question the safety of the conviction. I therefore doubt whether the appellant was the culprit that caused penetration to the minor. In addition, when the appellant was put on his defence, he testified that he was just working. Though he knew the complainant, the evidence was fabricated. He denied that she was at his home, that he ever took her to school or had any sexual relations with her. Furthermore, it was his evidence that's they were only just friends.
15. The upshot of my above findings is that I am not persuaded that the appellant was the perpetrator of the offence. All the crucial ingredients were not proved beyond reasonable doubt. Accordingly, this appeal must succeed. I hereby quash the conviction and set aside the sentence. The appellant shall forthwith be released from custody unless otherwise lawfully held.

It is so ordered.

**JUDGEMENT DELIVERED, DATED AND SIGNED VIRTUALLY THIS 28<sup>TH</sup> DAY OF OCTOBER, 2025.**

.....

**HON JULIUS K. NG'ARNG'AR**

**JUDGE**

Judgement delivered in the presence of:

Siele/Kipchirchir (Court Assistants)

Appellant present

Koime for the Respondent

