



REPUBLIC OF KENYA



**KENYA LAW**  
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**Hiribae v Republic (Criminal Appeal E037 of 2023)  
[2025] KEHC 15173 (KLR) (22 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15173 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARSEN  
CRIMINAL APPEAL E037 OF 2023  
JN NJAGI, J  
OCTOBER 22, 2025**

**BETWEEN**

**JOHN KOMORA HIRIBAE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from original conviction and sentence by Hon. A. P. Ndege, PM, in Hola Principal Magistrate's Court Sexual Offence Case No. E012 of 2018 delivered on 4/8/ 2020)*

**JUDGMENT**

1. The appellant was convicted of the offence of defilement contrary to section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No.3 of 2006 and sentenced to serve 18 years imprisonment. The particulars of the offence were that on unknown dates between the month of August 2018 and September, 2018 in Tana North Sub County within Tana River County he intentionally caused his penis to penetrate the vagina of F.S. (herein referred to as the complainant/victim), a child aged 16 years.
2. Aggrieved by the conviction and the sentence of the trial court, the Appellant lodged an appeal on the following amended grounds of appeal:
  1. That the learned trial magistrate erred in law and in fact by failing to find that the elements of the charge of defilement were not proved beyond reasonable doubt.
  2. That the learned trial magistrate erred in law and fact by convicting him of the offence despite contradictions and inconsistencies in the prosecution evidence.
  3. That the learned trial magistrate erred in law and in fact in failing to consider his defence.
  4. That the learned trial magistrate erred in law and fact by imposing a sentence that was harsh and excessive.



### **Case for prosecution**

3. The complainant who was PW1 in the case told the trial court that she was at the material time aged 16 years and was in school. That she started a relationship with the appellant in the year 2016 or thereabouts. They would occasionally engage in sex. That on a certain date in the month of August 2018, she was coming from school when she met with the appellant. They entered into the bush and had sex. That at another time, her father found her and the appellant having sex. He took them to the appellant's parents. The appellant was warned to stop the affair with her but he did not heed. Later she was in school when she felt unwell. She went to hospital where she was examined and found to be pregnant. On the 29/9/2018 she was at a neighbor's home when the appellant picked her and took her to the house of his friend where they engaged in sex till midnight after which he escorted her home. Her mother confronted her on the disappearance from home. She escaped from home between 30/9/2018 to 3/10/2018. She was hiding in the bush. Her father then received information that she was pregnant. He took her to Bura police station and reported.
4. The complainant's father PW2 testified that his daughter was aged 16 years. That she had a love affair with the appellant which disturbed her education. He informed the appellant's parents about it and he was warned. That at one time he found them together at 10 pm. He took them to the parents of the appellant. The appellant continued with the affair. He transferred his daughter to another school in order to end the relationship. On 4/10/2018 he learnt that his daughter was pregnant. He made a report at Bura police station.
5. PW3 was the complainant's mother. She told the court that she learnt in 2018 that the complainant had a love affair with the appellant. That she found the two of them together on the way on three occasions. That at times the girl used to return home late at night. That she would often escape from home to have sex with the appellant. That the appellant at times took lunch at her house. She warned him of his relationship with the complainant but he would not listen.
6. The case was investigated by PC Solomon Karanja, PW4, of Bura Police Station. His evidence was that the father to the complainant PW2 went to the police station and reported that his daughter had been defiled by the appellant. They went to his home and took the minor as well as the appellant. The girl said that she had been in relationship with the appellant since 2015. He took the complainant to hospital and she was found to be pregnant.
7. A Clinical officer PW5 from Bura Sub County Hospital testified that the complainant went to their hospital with a complaint that she had been defiled by a person known to her, the last time being 3 days before she was taken to hospital. On examination, she was found with a creamy vaginal discharge and her hymen was broken. A pregnancy test was done that showed that she was pregnant. Her age was assessed at 16 years. He formed the opinion that the girl had been defiled. During the hearing the clinical officer produced the treatment notes, the P.3 form and age assessment report as exhibits, P.Exh. 1-3 respectively.

### **Defence case**

8. When placed to his defence, the appellant DW1 stated in a sworn statement that in the months of August and September 2018 he was at his sister's place at Hola. That he returned to Bura on 28/9/2018. That on 4/10/2018 a vehicle went to his place. He was asked to board the vehicle. He was handcuffed. He was surprised when he was referred to as John Komora Hiribae which was not his name. He was taken to Bura Police Station and later taken to Hola court. He said that he did not know the complainant and only came see her in court during the hearing. He denied defiling her.



9. The appellant called one witness in his case, his father, DW2 who told the court that on 4/10/2018 he saw a white vehicle stop and one police officer came out. The appellant was in the midst of other children. The complainant then alighted and pointed at the appellant. He later learnt that the appellant was being accused of defiling a primary school girl who was said to be pregnant. He went and saw the appellant in the cells. The police wanted them to reconcile but since it was a defilement case, there was no possibility of reconciliation. He told the court that the complainant's parents wanted his son to marry the girl but he did not agree as she did not have any identification. That the complainant was later married off in Garissa where she now lives with her husband. It was his evidence that there was no concern about the girl's education as she has not been taken to school since the encounter.

### **Submissions**

10. The appeal was canvassed by way of written submissions. The appellant submitted that the case was not proved beyond any reasonable doubt. That the age of the complainant was not proved through credible evidence such as production of a birth certificate. That the age assessment report produced in the case was not credible in proving the age of the complainant.
11. The appellant submitted that there was no evidence to prove that he penetrated the complainant. That there was no DNA report produced proving that he was the father of the child born to the complainant.
12. It was submitted that the complainant was not a credible witness. That she told the court that the appellant started an affair with him in 2015 but neither she nor her father reported the defilement to the police.
13. It was submitted that the trial court convicted him despite contradictions and discrepancies in the prosecution evidence. That the medical evidence adduced in the case did not show that the complainant was penetrated. That the trial court failed to consider his alibi. Therefore, that the conviction was not safe.
14. The appellant submitted that he is not the person named in the charge sheet.
15. The Respondent on the other hand submitted that the prosecution had proved its case beyond reasonable doubt. That all the ingredients of defilement proof of the age of the complainant, penetration and identification were all proved. That the age of the complainant was proved via the Age Assessment Report produced by the clinical officer PW5 that proved that the complainant was a minor of 16 years. That penetration was proved by the evidence of PW5 who confirmed that the hymen had been broken and that the complainant was pregnant and had a UTI as a result of the penetration. That the father to the complainant, PW2, had numerous times seen the appellant in the company of the complainant. That the complainant would run away from home to go to the appellant and that at one instance he found the two of them having sex in his house.
16. On identification, counsel for the respondent submitted that the complainant positively identified the appellant as she had been in a sexual relationship with him since 2015.
17. It was submitted that the defence raised by the appellant was an afterthought as the same was not brought up during prosecution case.

### **Analysis and determination**

18. This being a first appeal, the court has a duty to re-evaluate and re-consider the evidence on record and come to its own conclusion. The court should also appreciate the fact that unlike the trial court it



did not have the advantage of seeing and hearing the witnesses. These principles were re-stated by the Court of Appeal in the case of *Kiilu & another v Republic* [2005]1 KLR 174, thus:

An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.

It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

19. The appellant was facing a criminal charge. Proof in a criminal trial is that of beyond reasonable doubt. Lord Denning in *Miller v Ministry of Pensions* (1947) 2 All ER, 372 stated as follows on the standard of proof in criminal cases:

"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 beyond reasonable doubt, but nothing short of that will suffice."

20. The offence of defilement is premised under Section 8 of the *Sexual Offences Act* No. 3 of 2006. The law states as follows: -

8.

Defilement

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

21. Thus, for the Offence of defilement to stand, three ingredients must be proven. These ingredients were outlined in the case of *George Opondo Olunga v Republic* [2016] eKLR, as the age of the victim, positive identification or recognition of the offender, and penetration.

22. I have considered the grounds of appeal, the record of the trial court and the submissions of the appellant and those of the respondent. The issues for my determination are as follows: -

1. Whether the offence of defilement was proven to the required legal standard.
2. Whether the sentence was legal and appropriate.

23. On the question of age, it is trite that the age of a person can be proved in various ways including by way of documentary evidence, by oral evidence of the parents or the child if the child is old enough to know her age or even by observation of the court. In the case of *Mwalongo Chichoro Mwajembe v Republic*, Msa Cr.App. No. 24 of 2015 (UR), the Court of Appeal held as follows:

"... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism



card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.”

24. It was the victim's testimony that she was at the time aged 16 years. Her father PW2 similarly said that she was aged 16 years. An age assessment report was produced that indicated that the complainant was aged 16 years.
25. I have examined the assessment report. The same states as follows:

I have this 10/10/2016 conducted medical assessment for F.S. and found to be approximately 16 years.
26. The report is accompanied by medical notes that indicate that the examining officer had examined the victim's dental formula and found her to have 32 teeth; breasts that were not fully formed and pubic hair not well formed. The officer accordingly formed an opinion that the victim was approximately aged 16 years.

In view of the fact that the age of a child may be proved by oral evidence of the child if the child is of sufficient age to know his/her age and may also be proved by the oral evidence of the parents of the child, the evidence of the complainant and that of her father that the complainant was aged 16 years coupled with the age assessment report proved to the required standard that the complainant was of the age of 16 years.
27. On the element of penetration, the same is defined in section 2 of the *Sexual Offences Act* as follows:

“the partial or complete insertion of the genital organs of a person into the genital organs of another person.”
28. The trial magistrate in his judgment held that there was no sufficient medical evidence to support penetration. However, that penetration was proved by the impressive oral evidence of the victim which was corroborated by the evidence of her parents that the appellant was in a love relationship with the victim and that he had visited the victim severally prior to the pregnancy. That these were opportunities for the appellant to commit the offence. The magistrate further said that he did not find any other fact or evidence to make him disbelieve the evidence of the complainant.
29. The medical evidence tendered by the clinical officer PW5 was, in my view, not sufficient to prove penetration. There was no evidence that the hymen was recently broken. There were no bruises on the genitalia. However, the fact that the victim was found to be pregnant when examined at the hospital was evidence that she had been penetrated.
30. Section 124 of the *Evidence Act* allows a court in sexual offence cases involving children to convict on the sole evidence of a child victim if the court is satisfied that the child is telling the truth. The court is required to give reasons for so believing.
31. The trial court in this case found the victim to be a credible witness and believed her evidence that she had engaged in sexual intercourse with the appellant. I have on my part examined the evidence adduced before the trial court. I have no reason to differ with the finding of the trial magistrate that the complainant was a credible witness. It was clear that the complainant was in a love relationship with the appellant. This was corroborated by her parents PW2 and PW3. Her Father PW2 testified that he even took the appellant and the complainant to the appellant's parents after he found the two of them together. He also + had to transfer the complainant to another school in an attempt to end



her association with the appellant. The complainant gave evidence of the three occasions when she had sex with the appellant - on a certain date in the month of August 2018 when they engaged in sex in the bush, on the date they were caught by her father having sex and on 29/9/2018 when she had sex with him at his friend's house.

32. Whereas the appellant denied knowing the appellant, his father said that the complainant is their neighbor about 100m away from their home and that she was well known to the appellant. The appellant was therefore lying that he was not known to the complainant. His defence that he was not the person known as John Komora Hiribae is of no consequence as he was physically known to the prosecution witnesses. He is the same person the witnesses were referring to.
33. Whereas the complainant gave evidence that she had sex with the appellant on a certain date in the month of August 2018 and on 29/9/2018, counsel representing the appellant during the hearing never questioned the complainant on the appellant having been away at Hola during that period. The defence that the appellant was in Hola in the months of August and September 2018 must have been an afterthought.
34. The appellant said that the parents of the complainant had a dispute with his father. The complainant's parents were never asked about there being such a dispute when they testified in court. The appellant's father also never mentioned such a dispute when he testified in court. The issue must therefore have been a fabrication. Penetration was therefore proved against the appellant.
35. Upon considering the evidence in its entirety, I find that the trial magistrate was correct in finding the appellant guilty of the offence of defilement. The conviction is thereby upheld.

#### **Sentence**

36. The appellant was found guilty of defiling a child of the age 16 years contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act*. The latter section provides for a sentence of not less than 15 years where an accused is found guilty of defiling a child of between the age of 16 and 18 years. The appellant was sentenced to serve 18 years. The trial magistrate in passing the said sentence said that the offence was prevalent in the area of her jurisdiction and therefore that a deterrent sentence was deserved. I am however of the view that even the minimum sentence of 15 years was deterrent enough. The trial court did not justify an additional sentence of 3 years above the minimum sentence. I find the sentence of 18 years to be excessive.
37. The upshot is that the conviction of the appellant is upheld but the sentence of 18 years is set aside and substituted with one of fifteen (15) years' imprisonment.

**DELIVERED, DATED AND SIGNED AT GARSEN THIS 22<sup>ND</sup> DAY OF OCTOBER 2025.**

**J.N. NJAGI**

**JUDGE**

In the presence of:

Mr. Oluoch for Republic

Appellant – present in person at G.K. Prison Manyani

Court Assistant – Ms Rahma

