



**JOO v Republic (Criminal Appeal E056 of 2023)  
[2025] KEHC 15618 (KLR) (31 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15618 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL APPEAL E056 OF 2023  
DK KEMEL, J  
OCTOBER 31, 2025**

**BETWEEN**

**JOO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Arising from the judgment of Hon. Eric Malesi (P.M) delivered on 6th November 2023 at Madiany Principal Magistrates Court in Criminal cases No. E009 of 2022)*

**JUDGMENT**

1. The Appellant herein JOO was charged at the trial court with the offence of defilement contrary to section 8(1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 21<sup>st</sup> August 2022 at around 2000hrs at [Particulars withheld] village, Siger sub-location, Rarieda Sub-County within Siaya County intentionally caused his penis to penetrate the vagina of GE a child aged 15 years.
2. The Appellant was likewise charged with an 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 particulars of the offence were that on 21<sup>st</sup> August 2022 at around 2000hrs at [Particulars withheld] village, Siger sub-location, Rarieda Sub-County within Siaya County intentionally touched the vagina of GE a child aged 15 years with his penis.
3. Upon a full trial, the Appellant was convicted and sentenced to 30 years’ imprisonment on the main count.
4. Aggrieved, the Appellant appealed on both the conviction and sentence vide his Amended Petition dated 30/11/2023 wherein he raised the following summarized grounds of appeal:



- i. That the trial magistrate failed to appreciate the elements of the charge facing the Appellant and therefore reached a bad and unreasoned decision.
- ii. That the trial magistrate misdirected himself on several material facts which led him to arrive at a wrong decision.
- iii. That the trial magistrate erred in law and fact in failing to take into consideration the previous historical sexual conduct of the victim.
- iv. That the trial magistrate erred in law and fact in failing to take into consideration the cogent, persuasive, logical and rational defence of the Appellant.
- v. That the trial magistrate erred in law and fact in failing to appreciate that some of the key witnesses were not called by the prosecution.
- vi. That the learned trial magistrate erred in law and fact when he relied on the evidence of a single victim witness on the basis of section 124 of the *Evidence Act* without stating reasons thereof.
- vii. That the judgement was full of speculation and imagination.
- viii. That the sentence imposed was excessive, harsh and vindictive yet the age of the victim was not established while the Appellant was a first offender.

The Appellant therefore prayed that the appeal be allowed and the conviction be quashed and the sentence set aside and that he be acquitted of the charge.

5. This being a first appeal, this Court must reconsider and re-evaluate the evidence adduced before the trial Court so to arrive at its independent findings and conclusion. (See *Okeno vs. Republic* [1972] EA 32). In doing so, this court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial court and, therefore, it ought to make due allowance in that respect as was held in *Ajode v. Republic* [2004] KLR 81.
6. In determining this appeal, I have to bear in mind that under Section 107 of the *Evidence Act* (Cap 80), the burden of proof is always on the prosecution to prove the allegations levelled against the Appellant and that the standard is one of beyond any reasonable doubt as was held in *Woolmington Vs DPP* [1935] AC 462 and *Sawe versus Republic* [2003]eKLR.
7. The prosecution called a total of six witnesses in support of its case.
8. GE (PW1) testified on oath that she was a grade seven student at [Particulars withheld] Primary School and was then aged 16 years. That at the time of the incident she was 15 years, having been born in the year 2006. That she had lived with the Appellant from the age of 5 years and that she had known him as an adoptive father. That the Appellant runs a children's home known as [Particulars withheld] where she had known it as home over the years and that the Appellant likewise runs a church. That on that material day, she was alone watching TV and that the Appellant's wife was at their shop and the other children who are biological children of the Appellant were at another shop at the shopping centre. That while she was at the sitting room watching TV, the Appellant came into the house and went into his bedroom and then called her into the bedroom and locked the room from inside. That he then undressed her and covered her mouth and then penetrated her vagina using his penis. That she felt pain. That after being released, she informed the Appellant's daughter who warned her not to tell the Appellant's wife. That she went to bed early that evening and did not have dinner. That the following day, she went to school and was still in pain and decided to confide in her teacher one madam S who took her to the head teacher and together they called the chief. That she was then taken to hospital then to Aram police station. She identified the following documents which were marked as follows:



birth certificate as PMFI 1; treatment notes as PMFI 2; P3 Form as PMFI 3; PRC form as PMFI 4 and lab request as PMFI 5. On cross-examination, she stated inter alia; that she got attracted to boys at the age of four years and that her first boyfriend was a footballer; that the Appellant used to go and preach in Uganda but on that day, he was at home; that she did not carry her clothes to the police station

9. PAO (PW2) testified that she is a teacher at [Particulars withheld] Primary school where the complainant studied. She stated that one day the complainant confided in her that her father had had sexual intercourse with her. That she handed the case to the headteacher of the school as she was new in the school and did not know the parent to the complainant. She testified further that she used to teach the complainant's class and noticed that she was always crying even as she taught in class.

10. JO (PW3) testified that she is the head teacher at [Particulars withheld] Primary school. She confirmed knowing PW2 as a teacher at her school while Pw1 was her pupil. She stated that she received information from PW2 that pw1 had confided in her that she had been defiled by her guardian. She summoned PW1 and dismissed Pw2. That PW1 informed her that the previous night she had been defiled by her guardian. That she knew the complainant's guardian. She passed the information to the assistant chief who came and that the complainant informed the chief on what had happened. That the chief took the complainant to the local dispensary.

On cross examination, she stated that the chief and complainant left the school compound and that the complainant did not return as she only went back to sit for her exams.

11. Moses Owino Ombewa (PW4) testified that he was the assistant chief of West Asembo location. He stated that on 22/08/2022 he received a call from PW3 informing him that there was a matter which needed his attention and so he rushed to the school and upon arrival, the complainant was called and who reported to him about a case of defilement by her guardian. That the head teacher (PW3) handed the child over to him and that he took her to Rambugu dispensary and later to Bondo Sub County Hospital. That he retained the minor for the night and that the following day, he took her to Ndori police station and later to Aram police station where he was issued with a P3 form which he returned to Rambugu dispensary and that the clinician duly filled it.

On cross examination, he stated inter alia; that he knew the Appellant as he comes from his area and who is a pastor; that the complainant alleges to have been defiled at 8 PM; that he could not tell if the Appellant was at his home on the date of the incident; that he handled the minor alone but it would have been ideal if he was accompanied by a female teacher.

12. Gilbert Omondi Ambila (PW5) was the clinical officer who attended to the complainant at Bondo Sub County Hospital. That he found that the outside genitalia was normal and that the hymen was broken and that there were traces of blood in her labia. That HVS test showed bloody appearance, red blood cells, and epithelial cells with no spermatozoa. That urinalysis test showed traces of leucocytes and which were bloody. That a pregnancy was negative. That there was evidence of penetration. He produced the documents as follows: treatment note (PMFI 2) as p exhibit 2; P3 form dated 25/08/2022 (PMFI 3) as exhibit 3; PRC form as Exhibit 4 and lab request as Exhibit 5.

13. Number xxxxxx PC(W) Martha Gesare (PW6) was the investigation officer in the matter. She stated that on 23/08/2022 she was requested by the OCS Aram police station to investigate a defilement report that had been made vide OB xx/23/08/2022. That she interrogated the minor then issued her with a P3 form. She proceeded to record statements of witnesses and had the Appellant arrested. She obtained the complainant's birth certificated and produced the same as P Exhibit 1. On cross examination, she stated inter alia; that the minor was born on 05/10/2006; that the victim was a child in need of care and protection; that she did not accompany the complainant to hospital; that she did not trace the physical location of the Appellant when the offence took place; that the Appellant informed



her that he was in Uganda preaching when the incident took place; that she did not visit the home of the accused.

14. The trial court later established that a prima facie case had been made out by the prosecution and thus placed the Appellant on his defense. The Appellant opted to tender a sworn testimony.
15. JOO (DW1) stated that he was a pastor and that on the material day, he was in Uganda preaching and that he returned on 21/08/2022 at 9.30 pm. He produced a photograph of himself preaching as Exhibits 1 and 2. In a nutshell, he stated that he was not at home at the time of the alleged incident.
16. The appeal was canvassed by way of written submissions and that both parties have complied. Both parties duly highlighted on those submissions on 23/9/2025.
17. The Appellant submitted that the prosecution failed to prove their case against him beyond reasonable doubt and claimed that key witnesses were not called by the prosecution. He further submitted that his alibi defense was not challenged. He placed reliance on several cases including *Nguka vs Republic* (1985) KLR 412, *HKK vs Republic* (Criminal Appeal No. E028 of 2022) (2024) KEHC 5039 (KLR), *Waka Evans Amira vs Republic* (2021) eKLR among others. He thus prayed that the appeal be allowed, lower court verdict be set aside and that he be set free.
18. The Respondent on the other hand submitted that all the elements of defilement have been proved beyond reasonable doubt. That the court should uphold the trial courts verdict and affirm the sentence.
19. I have given due consideration to the record of appeal, rival submissions and all the authorities relied on by the parties. I find the issue for determination is whether the Respondent proved its case against the Appellant beyond any reasonable doubt.
20. It is noted that the Appellant was charged with an offence of defilement. It is necessary to reproduce the relevant provisions regarding the offence for purposes of contextualizing the same. Section 8(1), (2), (3) and (4) of the *Sexual Offences Act* No. 3 of 2006 stipulates as follows:

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- (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 ages of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.
21. The burden of proof lies on the prosecution and that it never shifts to the Appellant herein. Under Section 107 of the *Evidence Act* (Cap 80), the burden of proof is on the prosecution to prove the allegations levelled against the Appellant. This being a criminal case, the standard of proof is beyond any reasonable doubt. The prosecution was therefore under obligation to prove all the essential elements of the offence against the Appellant herein beyond any reasonable doubt, and that if there was any doubt, then the same must be resolved in favor of the Appellant. This was the holding by the House of Lords in the leading Judgment in that area in the case of *Woolmington v Director of Public*



Prosecutions [1935] AC 462 where the Court held that the burden of proof in criminal cases is always on the prosecution to prove the defendant's guilt beyond any reasonable doubt.

22. The prosecution must prove three ingredients of the offence namely, the age of the complainant (must be a minor), penetration (partial or complete) and the identity of the perpetrator.
23. As regards the age of the complainant, PW6 produced the complainant's birth certificate indicating that she was born on 05/10/2006. The incident is alleged to have occurred on 21/08/2022 which then indicates that the complainant was aged 15 years 10 months and was below the age of 18 years as provided for under section 2 of the Children's Act and thus a minor at the time of the incident. I find that this element was sufficiently proved by the prosecution.
24. As regards the aspect of penetration, section 2 of the *Sexual Offences Act* defines the same as the complete or partial insertion of the genital organs of a person into the genital organs of another person. It was the evidence of the complainant that on the material date, she was watching TV when the Appellant called her to his bedroom, locked the room from inside, removed her clothes and his clothes too, covered her mouth and threatened to throw her out of the home if she screamed or told anyone. That he then penetrated her vagina with his penis. That she felt pain. The clinical officer (PW5) also testified that the vaginal examination showed blood clots and that the hymen was broken and who concluded that there was penetration. The clinical officer produced the P3 form, PRC form and Lab request form as exhibits. The evidence of the complainant's class teacher (PW2) is that she always cried while in class after the incident and that the head teacher (PW3) confirmed that the complainant stopped coming to school and only came to sit for her exams.
25. In the case of *Bassita Hussein v Uganda*, Supreme Court Criminal Appeal No. 35 of 1995 the court held that:

“the act of sexual intercourse or penetration may be proved by direct and circumstantial evidence. Usually, the sexual intercourse is proved by the victim's own evidence and corroborated by medical evidence or other evidence”

From the foregoing evidence of the victim and the clinical officer, it is clear that the prosecution proved this ingredient beyond any reasonable doubt.

26. As regards the identity of the perpetrator, it came out clearly that the Appellant had taken in the complainant when she was aged 5 years old and had lived with her for about 13 years and hence the complainant and Appellant were not strangers to each other as they lived in the same house. The Complainant was quite categorical that it was non-other than the Appellant who defiled her on the day in question and that the Appellant had taken advantage of the absence of all the other family members to commit the heinous act. the complainant later informed one of the daughters of the Appellant about the ordeal but who directed her not to inform the Appellant's wife. The complainant also testified that the Appellant had been in the habit of indecently fondling her in the past. The complainant immediately after the incident informed her class teacher who in turn alerted the headteacher who in turn alerted the assistant chief. The assistant chief (PW4) escorted the complainant to the nearby health centre where she was examined and that he later took her to the police station where the report was made and that he later allowed her to seek refuge in his home in company of his daughter for some days. The Appellant denied involvement and maintained that he was away in Uganda conducting preaching and only arrived home at 9.00 pm after the alleged incident. The Appellant therefore relied on his alibi defence. It is noted that the Appellant did not lodge his alibi warning in good time so as to enable the prosecution interrogate and investigate the same and therefore the same was made quite late in the



day namely during his defence hearing. In the case of *Waka Evans Amira v Republic* (2021) eKLR the court gave guidance on handling the defence of alibi as follows:

“It is settled that the prosecution bore the burden of proving the charge against the appellant at the trial court, beyond reasonable doubt. However, in relying on an alibi defence, the entirety of the prosecution evidence, direct and circumstantial evidence must be appraised to establish whether the Appellant was elsewhere and not at the scene of the crime. The conduct of the Appellant should not escape the scrutiny of the court.”

Also, in *Kiarie v R* [1984] KLR, the Court of Appeal laid down the following principle:

“an alibi raises a specific defence and an accused person who puts an alibi as an answer to a charge does not in Law thereby assume any burden of proving that answers and its sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.

Again, in the English decision of *REP Vs. JOHNSON* 46 CR APP.R 55[1961] 3 ALL ER 969 it was held as follows:

“Though an alibi is commonly called a defence, it is to be distinguished from a statutory defence such as insanity or diminished responsibility and is analogous to a defence such as self defence or provocation. A prisoner who has put forward an alibi as an answer to a charge does not assume any burden of proving that answer and it is a misdirection to refer to any burden as resting on the prisoner in such a case”.

Again, in *Uganda Vs Sebyala & Others* [1969] EA 204, the Court of Appeal Uganda adopted the decision of Georges CJ in *Tanzania Cr. Appeal No. 12 D68* as follows:

“the accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution’s case is not strong then an alibi which is not particularly strong it may very well raise doubts.”

27. The Appellant alleged that at the time the offence is alleged to have occurred, he was in Uganda preaching. He produced photographs showing him holding a microphone. The photographs do not however show the place nor time it was taken. He further produced word document print outs of what the Appellant called mobile money transactions carried out at around the same time the offence is alleged to have occurred. The transactions are not in chronological order and the balances after each transaction. The standard of proving such transactions is that the Appellant should have provided a statement from the said mobile money service provider. I do not find this evidence satisfactory to support the alibi. Indeed, the photographs and the money transactions (Mpesa) did not show that the Appellant was in Uganda and not elsewhere. Even though it is not the duty of the Appellant to prove his innocence, the evidence of the complainant was water tight and squarely placed the Appellant at the scene of crime. There was no evidence to the effect that the Appellant and the complainant had any disagreements. In fact, the complainant had always considered the Appellant as her father having lived with him in his household together with his children and therefore it was highly unlikely that she could frame him up. I am satisfied that the complainant’s evidence was quite credible. In deed the learned trial magistrate warned himself as provided for under Section 124 of the *Evidence Act* and went ahead to find that the Complainant spoke the truth. I am also satisfied that the identity of the Appellant as



the perpetrator of the crime was not in doubt. In the case of *Reuben Taabu Anjononi & 2 others vs Republic* (1980) eKLR by the Court of Appeal in Nairobi held that:

“... recognition not identification of assailants is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant...”

The identification of the Appellant was by way of recognition. The Appellant therefore was placed at the scene of crime and was properly identified as the perpetrator.

28. From the totality of the evidence, I find that the prosecution had proved its case against the Appellant beyond reasonable doubt. Consequently, the finding on conviction by the learned trial magistrate was quite sound and must be upheld.

29. On the issue on sentence, the trial court imposed a sentence of thirty (30) years' imprisonment. The law provides under section 8(3) of the *Sexual Offences Act* as follows:

“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.”

30. The provision uses the term not less than meaning that the trial magistrate has the discretion to impose a sentence that is in excess from that stated in the Act.

31. In the case of *Benard Kimani Gacheru v. Republic* Criminal Appeal No. 188 of 2000 where the Court of Appeal stated as follows:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

32. The position was stated succinctly by the Court of Appeal for East Africa in the case of *Ogola s/o Owour Vs Regina* (1954) 21 270 as follows: -

“The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in *James V R.*, (1950) 18 E.A.C.A 147:

“It is evident that the Judge has acted upon some wrong principle or overlooked some material factor.”

To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: *R. V Sher shewky*, (1912) C.C.A. 28 T.L.R. 364.



33. It is noted that the Appellant was a first offender and thus deserved the minimum sentence possible in law. It is also noted that the Appellant took advantage of the young minor who looked up to him as a father or guardian and who was expected to protect her. The Appellant instead turned into a monster and a predator. The complainant has been psychologically scared for the rest of her life after the Appellant stole her innocence. The Appellant therefore deserved a custodial sentence so as to undergo a comprehensive custodial rehabilitation before being allowed back to the society. It is unfortunate that the Appellant who purported to be a pastor and or preacher and a man of the collar turned out to be one preaching water while at the same time taking wine. The Appellant's conduct is one that must be detested by the community. It is also noted that the Appellant managed to post bail and therefore, the application of Section 333(2) of the Criminal Procedure Code does not apply in the circumstances. I find that the Appellant deserved to serve a sentence of twenty (20) years' imprisonment for the offence. To that extent, the sentence of thirty years was therefore excessive and ought to be interfered with.
34. In the result, the appeal on conviction lacks merit and is dismissed while the appeal on sentence partially succeeds to the extent that the sentence of thirty years' imprisonment is hereby set aside and substituted with a sentence of twenty years' imprisonment from the date of conviction.

**DATED AND DELIVERED AT SIAYA THIS 31<sup>ST</sup> DAY OF OCTOBER 2025.**

**D. KEMEI**

**JUDGE**

In the presence of:

JOO ..... Appellant.

Otongo ..... for Appellant.

M/s Kerubo ..... for Respondent.

Maureen ..... Court Assistant.

