



**Kitsao v Republic (Criminal Appeal E052 of 2023)
[2025] KEHC 15598 (KLR) (31 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15598 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E052 OF 2023
M THANDE, J
OCTOBER 31, 2025**

BETWEEN

THOMAS JEFA KITSAO APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant herein, was convicted in Kaloleni Sexual Offences Case No. E011 of 2023, of the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* and sentenced to 20 years imprisonment. The particulars of the offence are that on 23.12.22 at [Particulars withheld] village, Kaloleni subcounty within Kilifi county, intentionally and unlawfully caused his penis to penetrate the vagina of MKK, a child aged 15 years.
2. Being aggrieved by the decision of the trial Magistrate, the Appellant has appealed to this Court against both the conviction and sentence. His grounds are that the trial Magistrate erred by first, failing to consider that the prosecution did not prove its case beyond reasonable doubt. Second, that the burden of proof was shifted to the Appellant. Lastly that the Appellant's defence was not considered.
3. As a first appellate Court, I have subjected the evidence adduced before the trial Magistrate to a fresh analysis and evaluation while giving due allowance for the fact that unlike the trial court, I neither saw nor heard the witnesses. See *Okeno v. Republic* [1972] EA 32.
4. To sustain a conviction for the offense of defilement, 3 ingredients must be established by the prosecution. This was set out in *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013 where the Court stated:

The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.



5. This Court is required to determine whether in the court below, it was demonstrated that the Complainant was below 18 years of age. Secondly, that there was penetration of the Complainant's genitalia. Lastly, that the evidence identified the Appellant as the perpetrator.
6. The age of the Complainant was proved by means of her birth certificate which indicates that she was born on 1.1.09. On 23.12.22, when the offence is alleged to have been committed, the Complainant was 13 years old. Although the Complainant was in fact 13 and not 15 years old as indicated in the charge sheet, the offence still falls within the age bracket of Section 8(3) of the SOA under which the Appellant was charged. Section 8(3) provides that a person who commits an offence of defilement with a child between the age of 12 and 15 years is liable upon conviction to imprisonment for a term of not less than twenty years. In any event, the age of the Complainant was not challenged by the Appellant.
7. As regards penetration, the Complainant testified that on 23.12.22 at 7pm, she was at home cooking when the Appellant came and informed her that her uncle wanted to talk to her on phone. Since he did not have airtime, he asked her to go to his house for money to buy airtime. As she reached out for the money, the Appellant grabbed her, covered her mouth and pulled her into his house and onto his bed. She was unable to scream. He undressed her and also undressed. He then penetrated her vagina with his penis.
8. PW4, Mwangolo Chigulu a senior clinical officer at Mariakani Sub County Hospital produced the PRC and P3 forms, lab and scan reports as well as the treatment notes of the Complainant who he examined on 14.3.23. He stated that the labia was normal with no hymen and had loose vaginal sphincter muscles. A pregnancy test was done and it was positive. He confirmed that there was penetration. PW4's evidence corroborated the Complainant's testimony that she was defiled, as a result of which she got pregnant. In the premises, I find that the Complainant's pregnancy was as a result of penetrative sexual intercourse. Accordingly, the ingredient of penetration is not in question.
9. On identification, it is not disputed that the Appellant is an uncle to the Complainant. The Complainant recounted how the Appellant lured her into his house ostensibly to collect money to buy airtime and while there, grabbed her and defiled her. As a result, she fell pregnant. She was also emphatic that she had never had sexual intercourse with anyone else before nor since. In his defence, the Appellant denied committing the offence and further denied responsibility for the for the Complainant's pregnancy.
10. The Appellant takes issue with the fact that when the Complainant reported the matter to her grandmother, the family opted to seek help of a witchdoctor to cleanse her instead of taking the complainant to hospital.
11. The record shows that a witchdoctor was indeed consulted and cleansing was done on the Complainant when the matter was reported to her grandmother. The record however shows that the Complainant was eventually examined on 14.3.23, about 3 months after the defilement took place and she was found to be pregnant. This is sufficient proof of penetrative sexual intercourse. As such, nothing much turns on the Appellant's assertion that the Complainant's family resorted to witchcraft initially rather than taking her to hospital. The delay does not negate the fact of penetration.
12. As regards the Appellant's defence, the trial Magistrate in her judgment found the Appellant's defence to be a mere denial and further found the Complainant's testimony to be more believable as she vividly remembered the events of the material date. She also found no evidence that the Complainant was in multiple sexual relationships.
13. Contrary to the Appellant's contention, the trial Magistrate did thoroughly consider the Appellant's defence but found that the same did not shake the prosecution evidence. I therefore find the



Appellant's claim that his defence was not considered, to be without basis. Further, his claim that the Complainant implicated him because he had on 2 occasions found her with a man was not supported by evidence. He did not name the man he allegedly found the Complainant with. The ground is rejected.

14. It is noted from the record that the Complainant was the only witness to the alleged offence. The proviso to Section 124 of the *Evidence Act* allows the court to receive evidence of an alleged victim of a sexual offence, notwithstanding that it is the only available evidence and to record the reasons for believing the evidence. It provides as follows:

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.

15. Where the testimony of a victim of sexual offence is found to be truthful, the same need not be corroborated. The Court must however give reasons for believing such testimony. In the case of *Mohamed vs. Republic* [2006] 2 KLR 138 the Court of Appeal stated:

It is now settled that the courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful.

16. In her judgment, the trial Magistrate stated that she found the Complainant truthful and that she vividly recalled what happened on the material day. She found the defence by the Appellant and his witness that he was in the shop up to 8pm not believable.
17. In the end, I find that the prosecution proved its case beyond reasonable doubt. All 3 ingredients of the offence were proved. Accordingly, the Appellant was properly convicted and sentenced. The Appeal is dismissed and both the conviction and sentence are upheld.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 31ST DAY OF OCTOBER 2025

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M. THANDE

JUDGE

