



**Kula v Republic (Criminal Appeal E073 of 2024)
[2025] KEHC 14886 (KLR) (23 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14886 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E073 OF 2024
KW KIARIE, J
OCTOBER 23, 2025**

BETWEEN

JACOB WAMBUA KULA APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O. Case No. E039 of 2020 of the Senior Principal Magistrate's Court at Makindu by Hon. B.N. Irevi—Senior Principal Magistrate)

JUDGMENT

1. Jacob Wambua Kula, the appellant herein, was convicted of the offence of defilement of a girl contrary to section 8 (3) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of the offence were that on the 12th day of February 2023, at Kibwezi sub-county, within Makueni County, he intentionally caused his penis to penetrate the vagina of K.K. N., a child aged fourteen years.
3. The appellant was sentenced to serve 15 years' imprisonment in person. He was aggrieved and filed this appeal. He raised the following grounds of appeal:
 - a. The learned trial magistrate erred both in law and fact by convicting the appellant on evidence that lacked probative value and hence did not meet the minimum threshold in criminal offence to uphold a conviction.
 - b. The learned trial magistrate erred in both law and fact by relying on evidence that was.
 - c. The learned trial magistrate erred in both law and fact by shifting the burden of proof to the appellant and misdirected himself on the evidence and arrived at the wrong conclusion.



- d. The trial court erred both in fact and law by failing to consider my mitigation grounds and that some key prosecution witnesses did not testify before the court.
- 4 The state opposed the appeal. It was contended that the prosecution proved the case to the required standards and that the sentence that was imposed was appropriate.
5. This is a first appellate court. As expected, I have analyzed and reevaluated all the evidence presented before the lower court, and I have drawn my own conclusions, bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno vs the Republic* [1972] EA 32.
- 6 Section 8(1) of the *Sexual Offences Act* defines defilement in the following terms:
- A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- An offence of defilement, therefore, is established against an accused person when the prosecution has proved the following ingredients:
- a. That there was penetration of the complainant's genitalia;
 - b. That the accused was the perpetrator; and
 - c. The age of the complainant was below eighteen years.

These ingredients were restated in *Fappyton Mutuku Nguu vs Republic* [2012] eKLR as follows:

Going by this definition of defilement, I agree with Mr. Mwenda on the issues which the court needs to determine. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.

These are the ingredients that the prosecution must prove against an accused person.

7. K.K. N. (PW1), the complainant in this case, stated her age was 14 years when she testified on 13 July 2023. A copy of her birth certificate indicates that she was born on March 13, 2009. Her clinic card also confirms this date. As of 12 February 2023, she was 13 years and 11 months old. Her age was therefore proven to the required standards.
8. In her evidence, K.K.N. (PW1) testified that while she was sleeping, she felt somebody in bed next to her. He pushed the person who ran away. She felt some liquid on her buttocks. She reported to her father, who called a lady neighbour who examined her before reporting to the police.
9. The complainant was examined by Dr Abdulaziz Ali Ahmed Ali (PW5) at Kambu Hospital. The findings showed that both the external genitalia and the anal orifice were normal. The only positive finding that led him to conclude there was penetration was a foul-smelling, whitish discharge from her vagina. This, even to a layperson, cannot be a basis to conclude penetration. The learned trial magistrate erred in accepting this evidence without scrutinising it.
10. It is clear from the complainant's evidence and that of the doctor that neither her vagina nor anus was penetrated. Secondly, the complainant's evidence does not indicate that she identified the person in their bedroom. She claimed to have seen and recognised him as he fled. When a person is feeling, you only see his back. Had there been penetration, I would have examined this issue further. For now, addressing it would be an academic exercise that adds no value to the case.



11. The appellant's conviction was not based on any evidence. The same is quashed and the sentence set aside. The appellant is set at liberty unless otherwise lawfully held.

DELIVERED AND SIGNED AT MAKUENI, THIS 23RD DAY OF OCTOBER 2025

KIARIE WAWERU KIARIE

JUDGE

