



**Nyakweba v Republic (Criminal Appeal E066 of 2024)  
[2025] KEHC 15129 (KLR) (28 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15129 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CRIMINAL APPEAL E066 OF 2024  
JK NG'ARNG'AR, J  
OCTOBER 28, 2025**

**BETWEEN**

**BRIAN NYAKWEBA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the conviction and sentence of the Chief Magistrate's Court at Etago (M. Nyaga, PM) delivered on 13th March 2024 and 25th March 2024 respectively in Criminal Case (SO) No. E024 of 2023)*

**JUDGMENT**

1. Brian Nyakweba, the appellant herein, was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act*. The particulars of the offence were that on 12<sup>th</sup> December 2022 at Etago sub-county within Kisii County, the appellant intentionally caused his penis to penetrate the anus of G.M. a child aged 11 years. When the appellant was arraigned before the trial court, he pleaded not guilty to the offence. After a full trial, the appellant was convicted and sentenced to 35 years imprisonment.
2. The appellant is aggrieved by those findings. He filed his undated petition of appeal. He raised six grounds disputing the findings of the trial court. In summary, he complained that since the investigations were shoddy, with fabricated evidence, coupled with an infraction of his rights set out in Articles 49 (1) (f) and 50 (2) (h) of *the Constitution*, he was improperly convicted and sentenced. He prayed that his appeal be allowed.
3. The appeal was canvassed by way of written submissions. The appellant filed written submissions dated 15<sup>th</sup> August 2025. Summarizing the evidence at trial, the appellant submitted that the evidence was incredible as crucial witnesses were not called to testify. Because of that, he suggested that he had been framed for committing the offence. He submitted that since the witnesses failed to congruently testify



- as to exact age of the complainant, his age was not proved to the required standard. He also challenged the evidence of the complainant stating that it was not believable.
4. The appellant maintained that his defence was cogent but was improperly rejected. He complained that though he requested for witness statements, he was never furnished with them. Resultantly, his right to a fair trial was violated. Further, the circumstances leading to his arrest were not clear. Analyzing the evidence of the prosecution witnesses, he stated that there lacked corroboration casting doubt whether he committed the offence. He prayed that his appeal be allowed.
  5. The appeal was opposed by the respondent. It filed written submissions dated 5<sup>th</sup> September 2025 through Prosecution Counsel Kebaso Mike and a notice of enhancement of similar date seeking to enhance the sentence to life imprisonment pursuant section 8 (2) of the *Sexual Offences Act*. He submitted that all the ingredients to the offence of defilement were proved to the required standard of proof. On sentence, he urged this court to set aside the sentence meted out and substitute it to that of life. It prayed that the appeal be dismissed and its notice of enhancement be allowed.
  6. I have considered the submissions, examined the record of appeal and analyzed the law. As a first appellate court, I am duty bound to re-consider, re-value and re-analyse the evidence that was before the trial court in order to determine whether, on the basis of those facts, the decision of the trial court is justified. [See *Okeno vs. Republic* (1972) EA 32].
  7. According to the record before me, PW1 NNM the complainant's mother testified that her complainant son was 12 years old. She produced his birth certificate confirming that he was born on 1<sup>st</sup> August 2012. She also recognized the appellant as an area resident. On 12<sup>th</sup> December 2022 at 5:00 p.m., PW1 had gone to Etago welfare. On return to her house, she found big open shoes outside her closed door. He then heard the complainant make noise.
  8. On opening the door, PW1 found that the appellant had removed his trouser and brown boxer. PW1 found that the appellant sodomizing the complainant on the bed. She also saw that the appellant was carrying a machete that he used to threaten the complainant. PW1 raised an alarm. This caught the attention of her neighbours. The appellant was then rescued by community police as he was about to be lynched. The appellant was escorted to the police station while the complainant was rushed to hospital.
  9. PW2 G.M. the complainant herein testified that he was a class 7 pupil at (particulars withheld). He testified that he according to his birth certificate, he was born on 1<sup>st</sup> August 2022. His evidence was that on the fateful day, he was eating while watching the TV alone. The appellant then entered the house and grabbed him. The appellant then saw a machete under the table. He took it and threatened to kill him in case he screamed.
  10. PW2 recalled that the appellant then put him on the seat, removed his clothes and the complainant's clothes and used his penis to "do bad things" to the complainant in his anus. The appellant was caught red handed by PW1. PW2 recalled that PW1 asked the appellant what he was doing. Instead, the appellant dressed up prompting PW1 to scream. PW2 was taken to a hospital in Etago whereafter the incident was reported at the police station. He testified that it was the first time the appellant had sodomized him. PW2 recognized the appellant as a student from his school.
  11. PW3 Douglas Abel Moturi, a clinician from Etago sub-county hospital testified that the complainant visited their facility on 12<sup>th</sup> December 2022. On examination, it observed that there was a small anal fissure and tenderness on his anus. He produced the P3 form filled on 13<sup>th</sup> December 2022 by his colleague Maureen Obaba and the treatment notes dated 12<sup>th</sup> December 2022.



12. PW5 PC Josephat Mose from Nyamarambe police station was the assigned investigating officer in this case. He recalled that on 12<sup>th</sup> December 2022, members of the public brought the appellant to the station with claims that he had defiled the complainant. He interrogated witnesses, recorded their statements, preserved the evidence and preferred the charges against the appellant.
13. At the close of the evidence of the prosecution, the trial court formed the opinion that the appellant had a case to answer. He was placed on his defence. His unsworn testimony was that he was about his business when he met PW1 who remarked that he had significantly grown. He was then arrested the following day by two old men and escorted to Etago police station. He was then charged with the offence to which he denied committing.
14. The constituent elements to a charge of defilement are the age of the complainant, penetration and the positive identification of the perpetrator. On the complainant's age, the complainant's birth certificate was adduced in evidence. It confirms that he was born on 1<sup>st</sup> August 2012. Thus, at the time of the offence, that is 12<sup>th</sup> December 2022, the complainant was 10 years 4 months old. That conclusively proved that he was a minor.
15. On penetration, PW2 the complainant, testified that he was assaulted in his anus by the appellant. He was caught red handed by PW1. PW3 a clinical officer observed that the minor had a small anal fissure and tenderness on the anus. I find that the said evidence proved that penetration was proved in line with section 2 of the *Sexual Offences Act*.
16. Lastly is the identity of the perpetrator. PW2 testified that he was home alone on 12<sup>th</sup> December 2022 when the appellant visited him. The appellant then grabbed him and, in the process, saw a machete under the table. He picked it up and threatened to kill PW2 if he screamed. He then proceeded to undress the complainant and himself and inserted his penis into the complainant's anus and sexually assaulted him. He was then caught red handed by PW1 who raised an alarm. Member of the public arrested the appellant on that very same day.
17. PW2 was observed by medical officers the same day corroborating that he had been sodomized. The offence also took place during the day. Law enforcement officers also swiftly as the appellant was arrested on the date the offence took place while the complaint was examined in hospital. On account of fact that investigations took place shortly thereafter, I find that they were not shoddy. I find no doubt that the appellant was the perpetrator of the offence.
18. On whether there were contradictions in the evidence of the prosecution, I am not persuaded with this argument. I find that the prosecution witnesses corroborated each other's evidence. On whether the evidence was fabricated, I find that the appellant did not put it to the witnesses during cross examination. It was an afterthought and is accordingly dismissed. The appellant also complained that he was not furnished with witness statements. From the record, I note that on 9<sup>th</sup> June 2023, the appellant sought to be supplied with witness statements. However, when the matter was mentioned on 13<sup>th</sup> July 2023 and subsequent days, the appellant failed to raise this issue. I therefore find that those allegations are untrue and I dismiss them.
19. The upshot of my above analysis is that the appeal on conviction lacks merit. It is hereby dismissed. On sentence, the trial court meted out a sentence of 35 years imprisonment. That sentence is unlawful in light of the mandatory dictates of section 8 (2) of the *Sexual Offences Act*. The mandatory nature of the sentence therein was also upheld by the binding decisions of the Supreme Court in the cases of Republic vs. Joshua Gichuki Mwangi, Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR) and Republic vs. Manyeso [2025] KESC 16 (KLR). The Supreme Court clarified that courts lack discretion under that provision.



20. The respondent filed its notice of enhancement dated 5<sup>th</sup> September 2025. It urged this court to give a life sentence in line with section 8 (2). The appellant nonetheless proceeded to prosecute his appeal. Taking into account the notice of enhancement and the decisions of the Supreme Court, this court sets aside the sentence of 35 years imprisonment and substitutes the same with that of life imprisonment.

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

