



**Nyaga v Republic (Criminal Appeal E131 of 2024)  
[2025] KEHC 15113 (KLR) (24 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15113 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL APPEAL E131 OF 2024  
JN NJAGI, J  
OCTOBER 24, 2025**

**BETWEEN**

**HARUN MURIUKI NYAGA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from original conviction and sentence by Hon. G. Mutemi, RM, in Malindi Chief Magistrate's Court Sexual Offence Case No. E026 of 2024 delivered on 10/9/2024)*

**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 15 years imprisonment. The particulars of the offence were that on the 3<sup>rd</sup> day of March 2024 at T village in W location in Malindi Sub County within Kilifi County he unlawfully and intentionally caused his penis to penetrate the vagina of L. M. (herein referred to as the complainant), a child aged 17 years.
2. Aggrieved by the conviction and the sentence of the trial court, the Appellant lodged the instant appeal on the following grounds:
  1. That the learned trial magistrate erred in law and fact by failing to find that the evidence of PW1, 2, and 3 was marred with inconsistencies and contradictions.
  2. That the learned trial magistrate erred in law and fact by failing to find that the evidence adduced by the victim, PW1 contradicted section 124 of the *Evidence Act*.
  3. That the learned trial magistrate erred in law and facts by failing to find the prosecution had not discharged the burden of proof to the required standard threshold as required by sections 107(1) and 109 of the *Evidence act*.



4. That the learned trial magistrate erred in law by imposing a sentence upon the appellant that is harsh and excessive.
5. The learned trial magistrate erred in law and facts by failing to consider the appellant's defence.
3. The case for the prosecution is that the complainant was living with her mother, PW3 at the above stated village. That the appellant was living in the same plot with complainant's aunt PW2 in the same village. The complainant used to see him at her aunt's house whenever she visited. He used to sell eggs.
4. It was the evidence of the complainant that on the material day at around 6 pm the complainant was sent by her mother to the shop to buy some items. That on the way back from the shop, she passed by the house of her aunt PW2. That the appellant saw her and called her. He told her that he wanted to send her to the shop. He asked her to get into his house to pick the money. She entered into his house. On doing so he locked the door. He laid her on the bed and removed her underwear. He took off his clothes. He defiled her and he then put her clothes back on her. He took his eggs and went out of the house. He left her in his house.
5. It was further evidence of the complainant that a boy who lives within found her in the house and alerted the landlord who went there and called her aunt. Her aunt PW2 was informed of the incident. She went to the place and found the complainant inside the house of the appellant. She told her that she had been raped by the person who sells eggs.
6. Meanwhile the complainant's mother went to check on her when she delayed in going back. She passed by the house of her sister PW2 and found a crowd gathered. She saw the complainant seated on a seat outside the house of her aunt. She was informed that she had been defiled by Muriuki who is his sister's neighbor. She and her sister took the complainant to Watamu police station. She was issued with a P3 form. PC Rukia PW 4 investigated the case and escorted her to hospital. She was examined and found to be pregnant. She had a normal external genitalia with a missing hymen. A clinical officer at the said place PW 4 completed her P3 form.
7. After investigations were complete the appellant was arrested and charged with the offence. During the hearing of the case in court, the clinical officer PW 4 produced the treatment notes and the P3 form as exhibits, P,Exh. 1 and 2 respectively.
8. In his defence the appellant stated in a sworn statement that he was living at Watamu. That on the material day he left Watamu town at around 11 am and went to Malindi town. He worked in Malindi up to 5pm when he returned to Watamu. He arrived there past 8pm. He went to his house. That while there he heard the voice of his landlord saying, "he is here". He entered into his house with 2 men. They started to beat him and took his belongings. One lady said that they take him to the police station. They went outside. Members of the public attacked him and started to beat him. He was taken to the police station and then to hospital for treatment. On the following Monday, he was told that he had defiled a girl. He was charged with the offence. It was his evidence that he did not know the complainant and did not know how she came to be locked in his house as he was not there on that day.

### **Submissions**

9. The appellant submitted that the case against him was not proved beyond reasonable doubt. That there was no direct evidence that he committed the offence as alleged.
10. It was submitted that the complainant stated in her evidence that she did not know the complainant. Therefore, that the appellant was not identified as the perpetrator. That a DNA was not conducted



to ascertain that he was the father of the complainant's child. The appellant urged the court to allow the appeal.

11. The respondent did not file submissions in the case.

### **Analysis and determination**

12. This being a first appeal, this court is mandated to analyze and re-evaluate the evidence afresh in line with the holding in the case of *Odhiambo v Republic Cr App No 280 of 2004 (2005) 1 KLR* where the Court of Appeal held that: -

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour.”

13. The ingredients of the offence of defilement are: proof of the age of the victim, proof of penetration and proper identification of the perpetrator, see *George Opondo Olunga vs. Republic [2016] eKLR*.

Starting with the age of the victim in this matter, it is trite that the age of a person can be proved in various ways as was stated by the Court of Appeal in *Edwin Nyambogo Onsongo vs. Republic (2016) eKLR* that:

“... 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.”

14. The complainant in this case told the trial court that she was born in the year 2006 and that she was of the age of 17 years at the time she testified in court. She produced her birth certificate as exhibit, P.Exh.3 that showed that she was born on 21/4/2006 that placed her age at the time at 17 years. The age of the complainant was therefore proved at 17 years.

15. On the element of penetration, Section 2 of the *Sexual Offences Act* defines the same as:

“the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

16. The law is that defilement can be proved by way of medical evidence, by way of oral evidence or by circumstantial evidence, see *Kassim Ali v Republic (2021) eKLR*. Additionally, 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.

17. The medical evidence in this case was insufficient to support the charge of defilement as there was no such incriminating evidence to link the appellant with the offence. That leaves the aspect of oral and circumstantial evidence.

18. The complainant testified that the appellant was living in the same plot with her aunt. That she often used to see him at her aunt's house. She however did not know his name and had never talked to him. That on the material day she passed by her aunt's house when the appellant called her to his house on



pretext that he wanted to send her to the shop to buy him something. That on getting to the house he locked the door and placed her on the bed. He removed her panty and proceeded to defile her. That after he finished he left her in the house and went away. Some people locked the door from outside.

19. The evidence that the complainant was on the material day in the house of the appellant was corroborated by her aunt PW2 who testified that she was told by a lady called Charity about the incident and she went to the house of the appellant. She found the complainant inside the house of the appellant.
20. The trial magistrate in her judgment stated that she was convinced that the complainant was telling the truth that she was defiled by the appellant on the material day. I have on my part considered the evidence adduced before the trial court. It is clear from the evidence that the appellant was a person well known to the complainant as he was living in the same plot with her aunt PW2. I have no reason to differ with the finding of the trial court that the complainant was telling the truth that she was defiled by the appellant. There was no reason for the complainant's aunt to lie that she found the complainant inside the appellant's house. The complainant could not have taken herself to the house of the appellant so as to fabricate the case against him. She only used to see him at her aunt's place and had no grudge against him. The complainant's aunt confirmed that the appellant was known to the complainant. The evidence of the appellant that he did not know the complainant was a lie.
21. The appellant contended in his defence that he was in Malindi on the material day and that he got back to his house on that day past 8 pm. This being a defence of alibi, the law is that the appellant ought to have raised the defence earlier so as to enable the police to investigate it. He did not question the complainant on such kind of defence when he cross-examined her during the hearing. The conclusion that can be drawn from this is that the defence was an afterthought.
22. The appellant contended in his grounds of appeal that the evidence of the prosecution was marred with inconsistencies and discrepancies. He however never pointed out any of these.
23. Upon considering the whole evidence in its entirety, I find that the prosecution had proved beyond reasonable doubt the charge of defilement against the appellant. The appellant was convicted on solid grounds and therefore the conviction is upheld.
24. The upshot is that I do not find any merit in the appeal and the same is dismissed.

**DELIVERED, DATED AND SIGNED AT GARSEN THIS 24<sup>TH</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 Malindi.

Court Assistant - Jumaa

