



**Nyangweso v Republic (Criminal Appeal E067 of 2024)
[2025] KEHC 15174 (KLR) (22 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15174 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E067 OF 2024
JN NJAGI, J
OCTOBER 22, 2025**

BETWEEN

PETER ALUSIOLA NYANGWESO APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant was convicted for the offence of defilement contrary to section 8(1) as read with Section 8(4) of the *akn ke act 2006 3 Sexual Offences Act* No.3 of 2006 and sentenced to serve 20 years imprisonment. The particulars of the offence were that between July 2023 and 12th September 2023 at Kafulani village in Kayafungo location of Kaloleni sub county within Kilifi county of Coast region he intentionally caused his penis to penetrate the vagina of A.K.J. (herein referred to as the complainant victim), a child aged 16 years.
2. Aggrieved by the sentence and the conviction of the trial court, the Appellant lodged an appeal on the following grounds of appeal:
 1. That the learned trial magistrate erred in law and fact by convicting the appellant without considering that the medical evidence did not prove the case of defilement beyond reasonable doubt.
 2. That the learned trial magistrate erred in law and fact by failing to find that the prosecution evidence was marred by massive contradictions and discrepancies.
 3. That the learned trial magistrate erred in law and fact by failing to find that the case against the appellant was poorly investigated which led to miscarriage of justice.
 4. That the learned magistrate erred in law and fact by failing to comply with Section 329 of the CPC as mitigation is part of the trial process.



3. The case for prosecution is that the complainant was at the material time aged 16 years and was a primary school pupil in class 8. That the appellant was the pastor of a church that the complainant was attending at her village. The appellant was holding night services every night. The appellant then approached the complainant and started to seduce her. He gave her his phone number. Sometimes in the month of July 2023 she sent him an SMS. He told her that he was in an incomplete house behind her home. He asked her to go there. She went there. He took her to the shade of a tree. He spread a kikoi lesa on the ground and undressed her. He undressed himself. He inserted his penis into her vagina. On another day they had sexual intercourse under the same tree. On the third occasion they had sexual intercourse in a cassava plantation. She later told her cousin who informed her aunt. She was interrogated. Her aunt informed her father who reported the matter at Gotani police station. She was taken to Mariakani hospital where she was examined and found to be pregnant.
4. An aunt to the complainant PW 4 told the trial court that she was a member of the appellant's church. That sometimes in the month of August 2023 their church was holding a night prayer. That after the prayers she was outside her home when she saw the appellant go behind her house. She then saw the complainant go to where the appellant was. They then proceeded to a cassava plantation and engaged in sexual intercourse. She went and asked them as to who was at the cassava plantation. The appellant answered her that he was resting there. The complainant picked her panty and left. She later interrogated the complainant who confirmed having sexual intercourse with the appellant.
5. The case was investigated by PC Kimanzi PW5 of Gotani police station. He testified that the father to the complainant went to the police station on 11 9 2023 and reported that his daughter had been defiled by a pastor. He later presented the girl at the police station together with her birth certificate. He interrogated her and she said that she had had sex with the pastor on several occasions. He took her to hospital where she was examined and was found with normal genitalia with a missing hymen. A pregnancy test was done that came out positive. A P3 form was completed by a clinical PW3 at Mariakani sub county hospital. The investigating officer arrested the pastor, the appellant and charged her with the offence. During the hearing the complainant produced her birth certificate as exhibit, P.Exh.1. The clinical officer PW3 produced the P. 3 form, treatment notes, GBV client form, the laboratory request form and the obstetric scan report as exhibits, P. Exh.2 - 6 respectively.
6. When placed to his defence the appellant stated in a sworn statement that he was a pastor at Mwijo village. He started the church there in February 2023. The complainant was a member of her church and used to attend night services. That Naom PW4 was also a member of his church. That on the alleged date of the incident he went for a meeting at 8pm until 10 pm when he went home after prayers. That two weeks after he relocated to live at Mwijo policemen went with the complainant and arrested him. He denied that he defiled her.

Submissions

7. The appeal was canvassed through written submissions of counsel for the appellant. The prosecution counsel did not make any submissions in the case.
8. Counsel for the appellant faulted the trial court for not conducting a voir dire examination on the complainant. He submitted that though the age of the complainant was not disputed, the prosecution failed to prove the elements of penetration and identity of the appellant.
9. It was submitted that the medical evidence was presented by a clinical officer who did not conduct examination on the complainant. That there was no evidence that the appellant had anything to do with her loss of hymen or her pregnancy.



10. It was submitted that identification occurred in darkness and the same was not proved to the required standard.
11. It was submitted that the prosecution failed to call a crucial witness in the name of Lydia Neema who found the complainant after the incident. That this inferred that had her evidence been called it would have been adverse to the prosecution case.
12. Counsel for the appellant faulted the trial court for imposing a sentence of 10 years instead of the prescribed minimum of 15 years. He faulted the court for not adequately considering the mitigation by the appellant.

Analysis and determination

13. This being a first appeal, the court has a duty to re-evaluate and re-consider the evidence on record and come to its own conclusion. The court should also appreciate the fact that unlike the trial court it did not have the advantage of seeing and hearing the witnesses. These principles were re-stated by the Court of Appeal in the case of *Kiilu & another v Republic* [2005]1 KLR 174, thus:

An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.

It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

14. The elements of the offence of defilement that the prosecution is required to prove beyond reasonable doubt are: proof of the age of the victim, proof of penetration and identity of the perpetrator, see the *Charles Wamukoya Karani vs. Republic*, Criminal Appeal No. 72 of 2013.
15. The age of the complainant herein is not in dispute. The complainant produced her birth certificate that showed that she was born on 23 4 2007. She was therefore aged 16 years in August 2023. The age of the complainant was thus proved.
16. On the element of penetration, Section 2 of the *akn ke act 2006 3 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.”
17. The medical evidence in this case showed no more than that the complainant was pregnant. There was no medical evidence linking the appellant with the offence. However, lack of medical evidence to support a charge of defilement is not fatal to the case as defilement may be proved by oral evidence of the victim or by circumstantial evidence, see of *Kassim Ali v Republic* (2021) eKLR. Additionally, section 124 of the *akn ke act 1963 46 Evidence Act* allows the court in sexual offences involving children to convict on the sole evidence of the child if the court is satisfied that the child is telling the truth. The court is required to record reasons for so believing.



18. In this case the complainant narrated to the trial court how she engaged in sexual intercourse with the appellant at night on three occasions - twice under a tree and once in a cassava plantation. The appellant never challenged this evidence in cross-examination by suggesting that the incidents never took place. The fact that an ultra sound scan taken on 12 9 2023 showed that the complainant was 7 weeks pregnant corroborated her evidence that she had been defiled. The trial court believed the evidence of the complainant that the appellant defiled her. The appellant was a person well known to the complainant. Though the incidents took lace at night, the complainant knew whom she was dealing with.
19. The evidence of the complainant that she engaged in a sexual intercourse with the appellant in a cassava planation was corroborated by her aunt, PW4 who saw the appellant in the act of defiling the complainant. There was moonlight at the time PW4 witnessed the incident. There was no reason for PW4 to lie on her own pastor when there was no bad blood between them. Her evidence was credible.
20. The appellant stated in his grounds of appeal that the prosecution evidence was riddled with massive contradictions and discrepancies. His counsel however never pointed out any of these in his submissions. The appellant further alleged that the prosecution did not call crucial witnesses. I find that the prosecution called sufficient witnesses who were able to prove the case against the appellant.
21. In view of the foregoing, I find the appellant to have been convicted on solid evidence and the conviction is thereby upheld.
22. On the sentence of 10 years imprisonment imposed on the appellant, the jurisprudence of the courts at the time was that courts had the discretion to impose sentences lower than the minimum sentences stipulated by section 8 of the *akn ke act 2006 3 Sexual Offences Act*. This continued until 12 7 2024 when the Supreme in the case of Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR) delivered on 12th July 2024 held that where the law provides for minimum sentences, courts have no discretion to impose anything less than the minimum sentence. The sentence meted out by the trial court was lawful before the Supreme Court ruled otherwise. I thereby uphold the sentence of 10 years meted out on the appellant.
23. The upshot is that the appeal herein is bereft of merit and is dismissed in its entirety.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 22ND OCTOBER 2025.

J. N. NJAGI

JUDGE

In the presence of:

Miss Wambua for Republic

Appellant - present in person at GK Prison Malindi

Court Assistant – Ms Rahma

