



**JOK v Republic (Criminal Appeal E104 of 2024)  
[2025] KEHC 16823 (KLR) (17 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16823 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL E104 OF 2024  
AC BETT, J  
NOVEMBER 17, 2025**

**BETWEEN**

**JOK ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgement of Hon. G. Ollimo (SRM) in Butere Sexual Offence Case No. E060 of 2021 delivered on 20th September 2023)*

**JUDGMENT**

1. The Appellant was charged with the offence of defilement contrary to Section 8(1) (4) of the [Sexual Offences Act](#). The particulars of the said offence were that the Appellant, on diverse dates of 31<sup>st</sup> and 7<sup>th</sup> of August 2021, at (particulars withheld), Kakamega County, intentionally caused his penis to penetrate the vagina of VAO, a girl aged 17 years.
2. The Appellant was tried, convicted, and sentenced to serve 15 years' imprisonment. Aggrieved with the trial court's finding, he filed the instant Appeal in which he set out five grounds of appeal as follows:-
  - a. That the learned trial Magistrate erred in law and facts by failing to consider that the ingredients forming the offence were not proved to the required standard.
  - b. That the trial court erred in law and in fact in not weighing the conflicting evidence in the prosecution case that was/is consequential to conviction.
  - c. That the trial court erred in law and in fact in not appreciating the Appellant's cogent defence that overwhelmed the prosecution case.
  - d. That the learned trial Magistrate erred in law and facts by failing to deal with contradictions and inconsistencies in prosecution evidence.



- e. That more grounds to be adduced after perusal of court proceedings.
3. The background of the case is that the prosecution had called five witnesses to prove its case. PW1 was VAO who stated she was 17 years old and had dropped out of school in Form 2. She testified that the Appellant, whom she knew as Baba, although he's a grandfather to her father, asked her to go to his house on the 10<sup>th</sup> of July 2021, and further asked her to engage in sexual intercourse with him, but she declined. She stated that later on, she met the Appellant and he persisted in his plea that she had sexual intercourse with him, and despite declining the third time on 31<sup>st</sup> July 2021, she came across him and he gave her Kshs. 500/= and asked her to go to his house at night, and she obliged. She said that she proceeded to his house at 10 p.m., where they had unprotected sex. She recalled that subsequently she had sex with the Appellant in his house and on another date at Kanungo lodging. She said that when her father learned about their secret love affair with the Appellant, he reported to the authorities, and the Appellant was arrested.
  4. PW2 was the Complainant's father, who said he had an ancestral relationship with the Appellant. He recalled that in April 2021, PW1 had completely lost interest in her studies, and he later learned from the Appellant's third wife that the Appellant had a secret love affair with her. He said that he conducted independent investigations and, upon establishing the veracity of the allegations, reported the matter to the village elder, who escalated the matter to the police after inquiry.
  5. PW3 was the Village Elder who corroborated PW2's evidence and said that when he summoned the Appellant to a village baraza, the Appellant was interrogated and admitted that he had had sexual intercourse with the Complainant.irate villagers threatened to lynch him, but he escorted him to the police station.
  6. PW4 was Odilia Maluka, a Clinical Officer who stated that on 9<sup>th</sup> September 2021, she received PW1 at their facility in Kwhisero Sub-County Hospital. She noted that the Complainant presented with a history of defilement by persons known to her and had stated that one of the perpetrators defiled her on 17<sup>th</sup> August 2021 and later on 31<sup>st</sup> August 2021. On examination, she had normal external genitalia. She had no hymen, although it was not freshly torn, and no pain. She stated further that there were leukocytes and pus cells in the urine when investigations were undertaken. She concluded that the Complainant had been defiled.
  7. PW5 was the Investigating Officer, who testified that the case was investigated by her colleague, PC Hilda Kemboi, who was on maternity leave. She stated that investigations established that PW1 was 17 years old student. She also produced the Complainant's Birth Certificate, which shows that she was born on 12<sup>th</sup> June 2004.
  8. In his defence, the Appellant chose to give an unsworn statement and did not call any witnesses. He stated that during his arrest, he was not found with the Complainant. He further said that her parents were merely relying on hearsay evidence, and maintained his innocence contending that the case was a frame up. That is a summary of the case before the lower court.
  9. The appeal was canvassed through written submissions.

### **Appellant's Submissions**

10. The Appellant submitted that penetration was not proved beyond reasonable doubt and relied on the case of PKW v. Republic [2012] eKLR. He asserted that absence of the hymen was not sufficient proof of penetration and so the only evidence was the sole evidence of the Complainant.



11. It was the Appellant’s argument that the trial court needed to analyse the Complainant’s evidence to determine whether she was a truthful and reliable witness. He quoted the South African case of Estate Kaluza Braener 1926 AD 243 at 266 – 267 which held as follows:-

“ A crafty witness may simulate an honest demeanor and the judge has often but little before him to enable him to penetrate the armor of a witness who tells a plausible story. The superior court must exercise its duty and interrogate the reliability of the complainant and the evidence by the other witnesses and any defence available.”

He urged that when interrogated alongside other evidence, the Complainant’s lacked credibility.
12. The Appellant further relied on the case of Morris Gikundi Kamande v. Republic [2015] eKLR and argued that the failure by the Complainant to name all the persons who had defiled her in her first reports despite claiming that she knew them well raised further doubts to her testimony.
13. The Appellant also pointed out the contradiction as to the dates when the Complainant was defiled. He insisted that he was being framed and more so in view of the fact that the prosecution failed to call the Appellant’s 3<sup>rd</sup> wife as a witness yet it was alleged to be her who had reported the purported affair between him and the Complainant.
14. In regard to the Complainant’s age, the Appellant submitted that her age was in doubt as the Birth Certificate showed that she was born on 12<sup>th</sup> June 2004 while the incidents happened on diverse dates between 31<sup>st</sup> July 2021 and 7<sup>th</sup> August 2021. It was his assertion that since the Complainant told the court that she was 18 years old, the benefit of doubt concerning her age ought to have been given to him.
15. Finally, the Appellant submitted that his sentence should have run from the date of his arrest on 8<sup>th</sup> September 2021 and not from the date of sentence on 20<sup>th</sup> September 2023.

### **Respondent’s Submissions**

16. The Respondent opposed the appeal and submitted that cogent evidence was led to prove that the Complainant was 17 years and 2 months old by August 2021. They also submitted that all the ingredients of the offence were proven to the required standard. Regarding the sentence, they submitted that it was lawful and urged the court to dismiss the appeal.

### **Analysis and Determination**

17. This being the first appeal the court’s duty is to re-evaluate the evidence that was placed before the trial court and come up with its own independent findings while bearing in mind that it did not have the opportunity to observe and hear the witnesses when they testified. See Okeno v. Republic [1972] eKLR.
18. I have considered the grounds of appeal, the evidence and the submissions by both parties. The issues that are raised by the appeal are:-
  - a. Whether the elements of defilement were proved beyond reasonable doubt.
  - b. Whether there were material contradictions in the prosecution’s case.
  - c. Whether the minimum mandatory sentence was constitutional.



19. Section 8 (1) and (4) of the *Sexual Offences Act* provide:-

“ 8 (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

8 (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”

20. Based on the aforesaid provisions of the law, the key ingredients of the offence of defilement have been well established to be:-

- a. The age of the victim;
- b. An act that causes penetration to the victim; and
- c. Whether there is positive identification of the assailant.

21. Proof of age is critical in sexual offences matters. In *Hadson Ali Mwachongo v. Republic* [2016] KECA 521 (KLR), the court stated as follows:-

“The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim.”

22. The element of proof of age is important because the Act categorizes the gravity of the offences on the basis of age as was held in *Alfayo Gombe Okello v. Republic* [2010] KECA 319 (KLR) when the Court of Appeal held that:-

“In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)...”

23. There are several ways in which age can be proven in defilement cases. One of the methods of proof of age is by a birth certificate which if unchallenged is the most conclusive proof of age. The prosecution produced the Complainant's Birth Certificate No. 100728 which reflects the Complainant's date of birth as 12<sup>th</sup> June 2004. When computed, it means that as at 12<sup>th</sup> June 2021, the Appellant turned 17 years. It therefore means that at the time of the offence the victim was aged above 17 years and below 18 years. This position is buttressed by the position of the Court of Appeal in the case of *Hadson Ali Mwachongo v. Republic* (supra) when it rendered itself thus:-

“We are of a different mind for the following reasons. Section 2 of the *Interpretation and General Provisions Act* defines Act defines “year” to mean a year reckoned according to the British Calendar. Under the British Calendar Act, 1751, a year means a period of 365 or 366 days. Thus a person who is, for example, 10 years and 6 months is deemed to be 10 years old and not 11 years old. That approach entails not taking into account the period above the prescribed age so long as it does not amount to a year. Back to the *Sexual Offences Act*, a victim who is days or months above 11 years will be treated as 11 years old so long as he or



she has not attained 12 years of age. On the same reasoning, the victim in this case who was 15 years, 6 months and 13 days old must be treated to be 15 rather than 16 years old.”

24. Taking into account the proposition from the Court of Appeal above, the court is satisfied that the ingredient of age was well proven.
25. The second ingredient is penetration. Section 2 of the [Sexual Offences Act](#) defines penetration as:-

“The partial or complete insertion of the genital organs of a person into the genital organs of another person.”
26. The victim narrated how the Appellant seduced her and finally succeeded in luring her into his house where he had sex with her on two separate occasions. She also stated that on another date, she had sex with the Appellant in a lodging at Kanungo.
27. The evidence was that the victim was subjected to a medical examination on 9<sup>th</sup> September 2021. The Clinical Officer who produced the P3 form testified that there was no hymen. He noted that the hymen was not freshly broken.
28. A laboratory test carried out on the victim revealed the presence of leucocyte cells. According to the Clinical Officer, she made a conclusion that the victim had been defiled.
29. There was cogent evidence from the victim that penetration occurred. She succinctly described the acts of intercourse as she saw and experienced. In the case of Julius Kioko Kivuva v. Republic [2015] KEHC 712 (KLR), the court considered the elements in proof of penetration and stated:-

“...Evidence of sensory details, such as what a victim heard, saw, felt, and even smelled, is highly relevant evidence to prove the element of penetration, as a victim’s testimony is the best way to establish this element in most cases. The specificity of this category of evidence, even though it may be traumatic, strengthens the credibility of any witness’s testimony, and is particularly powerful when the ability to prove a charge rests with the victim’s testimony and credibility as it does in this appeal.”
30. In this instance, the victim recalled that the Appellant asked her to remove her clothes whereby she rolled her skirt down to her knees then the Appellant removed his long trouser and had unprotected sex with her. The fact of penetration was corroborated by the medical evidence and I have no reason to disbelieve the evidence.
31. On identification, the Appellant was well known to the victim. They engaged together severally during daytime. There was a relationship born of the predatory moves of an older man towards a child. He used money to persuade her to have sex with him and the process did not take a day. The court is satisfied that the identification was proper in the circumstances.
32. The Appellant has faulted the conviction of the trial court on the basis of contradictions in the prosecution’s case. Regarding contradictions in a criminal case, the Court of Appeal in Jackson Mwanzia Musembi v. Republic [2017] KECA 748 (KLR) cited with approval the Ugandan case of Twehangane Alfred v. Uganda, Criminal Appeal No. 139 of 2002 [2003] UGCA, 6 where it was held that:-

“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor



contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.”

33. I have reviewed the contradictions in the prosecution's case. With respect to the evidence adduced by the prosecution, the court does not find any substantial contradictions. There are discrepancies regarding the dates of the offences. However, it is clear that in July and August 2021, the Appellant committed the offence and that a report was made to the police on 7<sup>th</sup> September 2021. The victim was taken for treatment and medical examination on 9<sup>th</sup> September 2021. The evidence was consistent, credible and well corroborated. This court observes that the alleged contradictions are not so grave as to constitute material contradictions necessary to vitiate the proceedings of the trial court. It is trite that human recollection of events may not be 100% accurate. Many people tend to forget the exact dates and times of certain incidents but that does not mean that the incident did not occur. In the same vein, one can confuse the dates when an incident occurred but this does not negate the fact that the incident did occur.

34. The Complainant's credibility as a witness was not questioned. From her conduct, she was a reliable and truthful witness otherwise she would not have revealed that she had been defiled by more than one person. The Appellant did not shake her evidence in his cross-examination. By dint of Section 124 of the Evidence Act, an accused person can be convicted on the sole evidence of the victim. Section 124 of the Evidence Act provides that:-

“...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.”

35. For the reasons stated above, I am convinced that the Appellant was telling the truth and was sufficient to sustain a conviction on its own.

36. On evaluation of the evidence, I find that the Appellant's defence did not dislodge the prosecution's case. He advanced a defence that he had been framed yet he did not suggest to the victim, victim's father and the village elder that he had been framed. The line of defence was an afterthought as the Appellant did not even advance any reasons as to why the witnesses were framing him. The trial court did not err in rejecting his defence. I find that the conviction was safe.

37. Regarding the sentence of 15 years imprisonment. It is the prescribed minimum sentence as provided by law. The court had no discretion whatsoever in meting out the sentence. In *Republic v. Joshua Gichuki Mwangi; Initiative for Strategic Litigation in Africa (ISLA) and 3 others (amicus curiae)* [2024] KESC 34 (KLR), the Supreme Court held that:-

“Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law...”

38. The Supreme Court has affirmed that minimum sentences as prescribed in the Sexual Offences Act should not be interfered with. See *Muruatetu & Another v. Republic; Katiba Institute & 4 others (amicus curiae)* [2021] KESC 31 (KLR) (Directions) where the court pronounced itself regarding the constitutionality of mandatory sentences as follows:-

“The Supreme Court's decision did not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute. The decision



was not an authority for stating that all provisions of the law prescribing mandatory or minimum sentences were inconsistent with *the Constitution*.”

39. In Alvin Kabaka Magolo v. Republic [2025] KEHC 3932 (KLR), the court held:-

“[20] Turning to the second ground urged by the appellant, it is true that until recently our courts were developing a jurisprudential trajectory which impugned the constitutionality of the minimum sentences in the *Sexual Offences Act* on separation of powers grounds. However, that jurisprudential trajectory was snuffed out by a recent binding decision of the Supreme Court in Republic vs. Joshua Gichuki Mwangi (Petition E018 of 2023) [2024] KESC 34 (KLR) (delivered on 12th July, 2024). In that case, the Supreme Court categorically held that the mandatory minimum sentences in the *Sexual Offences Act* are not unconstitutional; and that trial courts have no discretion to go below the statutory minimum sentences in sexual offences...”

40. Flowing from the above, it is clear that the statutory minimum sentence in sexual offences is still mandatory. The court’s hands as it were, are tied. Whether the court considers mitigating factors, such as remorse, age, or rehabilitation, the outcome on sentencing is still the same. Once one is convicted of the offence of defilement, he must be sentenced to a mandatory sentence which is prescribed in accordance with the age of the victim. In this case, the victim was aged 17 years old and the sentence was in accordance with the provisions of the law.

41. The upshot is that the appeal against conviction and sentence lacks merit and is dismissed. However, the sentence should align with Section 333 (2) of the Criminal Procedure Code and so computation of sentence must take into account the time spent in custody.

42. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 17<sup>TH</sup> DAY OF NOVEMBER 2025.**

**A. C. BETT**

**JUDGE**

In the presence of:

Appellant present virtually in person

Ms. Chala for the Respondent

Court Assistant: Polycap

