



**Kongole v Republic (Criminal Appeal E001 of 2025)  
[2025] KEHC 16240 (KLR) (5 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16240 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPENGURIA  
CRIMINAL APPEAL E001 OF 2025  
RPV WENDOH, J  
NOVEMBER 5, 2025**

**BETWEEN**

**ABRAHAM KABILA KONGOLE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. Abraham Kabila Kongole was charged and convicted for the offence of Defilement contrary to section 8(1) as read with Section 8(3) of the *Sexual Offences Act*.
2. In the Alternative, the appellant faced a charge of committing an indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act*.
3. The particulars of the charge are that in the month of August 2023, at West Pokot County, intentionally caused his penis to penetrate the anus of I.K., a male juvenile aged thirteen (13) years or that he intentionally touched the buttocks of a male juvenile aged thirteen (13) years.
4. The case proceeded to full trial after the prosecution called a total of five (5) witnesses while the defence called only one (1) witness.
5. Upon conviction, the appellant was sentenced to serve twenty (20) years imprisonment.
6. Being dissatisfied with the conviction and sentence, the appellant preferred this appeal citing the following grounds.
  - (1) That the offence of defilement was not proved to the required standard;
  - (2) That the appellant's defence was not considered;
  - (3) That crucial witnesses were not called;



- (4) That the sentence was harsh and excessive;
- (5) That the case was riddled with discrepancies and inconsistencies.
7. The appellant therefore prays that the conviction be quashed, sentence set aside and he be set at liberty.
8. This is a first appeal and it behoves this court to exhaustively re-examine all the evidence tendered before the trial court, analyze and evaluate it and arrive at its own conclusions. The court however bears in mind that this court did not have occasion of hearing or seeing the witnesses testify. This court draws guidance from the case of *Okeno v Republic* (1972) EA 32.

**Prosecution case.**

9. The Prosecution called a total of five (5) witnesses to support their case.
10. PW1 GM, the complainant's mother recalled 21/5/2024 she went to the son's school and when she was leaving, the son followed her and informed her that a teacher had sodomized him and he began crying. The child told her that he had been threatened not to reveal. PW1 took the child to Bendera Hospital, then Kapenguria Referral where he was treated. PW1 told the court that the complainant was in boarding school and that she knew the appellant as the son's teacher.
11. (PW2) I.K a minor aged ten (10) years, recalled that he was a student at [Particulars Withheld] and on 10/8/2023, after the preps of 9.00 p.m. the dormitory was cold because some windows were broken; that the teacher who is the appellant, asked some students to move where windows were not broken; that the appellant asked him and Titus to go and sleep in his room; that they all slept in the teacher's bed with the teacher sleeping in the middle; that at night, the Appellant removed his clothes and inserted his penis in PW2's anus and he felt a lot of pain but he did not scream; that his friend was asleep; that the Appellant warned him against telling his parents or he would kill him; that other children complained of having been sexually abused and the appellant was chased from the school but the headteacher told them not to tell what happened to anyone.
12. PW3 Kenneth Kipchumba, a Clinical Officer at Kapenguria Hospital examined the complainant who was aged thirteen (13) Years. On 17/6/2024, he found the complainant's anal region to have rashes but no tear or splinter or presence of discharge and that the rashes were an indication of chronic infection from a Sexual Transmitted infection (STI) and he came to the conclusion that the complainant was sodomized. He prescribed medication and filled the P3 form and PCR form. He found that the complainant was suffering from Post-Traumatic stress and referred him to Counselling.
13. PW4 Brian Pyoch, the headteacher at [Particulars Withheld] Primary school recalled the 28/5/2024 when the parent of I.K. (PW2) came to school to pay school fees and requested to speak to her child. He heard the complainant's mother scream and she told him that Ibrahim had sodomized the son. The matter was reported to the Director and the Deputy. The child repeated the same narration to them and they took him to Hospital; that the child was traumatized and by then, the teacher had left the school and the matter was reported to the police.
14. PW4 confirmed that the teacher had been given a room in the dormitory where students slept; that he was able to access the students from his room but was not allowed to sleep with the students.
15. PW5 PC (W) Lydia Chebet was the Investigating Officer in the case. She recalled that on 17/6/2024, a suspect in a case of defilement was taken to the station. She issued PW1 and 2 with a P3 form and escorted them to Kapenguria Hospital. PW5 conducted her investigations and charged the appellant with the offence.



## Defence Case : -

16. When called upon to defend himself, the appellant gave unsworn evidence. He recalled the 14/6/2024, he was at home when three men went to his home and told him how there was relief food at the District Commissioner's (DC's) place. He went there and he was informed that he committed an offence and was taken to Makutano; that they asked for Kshs.200,000/= but he did not have. He denied committing the offence.

## Appellant's Submissions

17. Whether there was penetration, the appellant submitted that the Clinical Officer did not find any discharge or tears on the complainant save for the rashes; that it was also not proved who caused the rashes to the complainant's anal region; that the complainant was examined six months after the incident and no evidence to connect him to the offence. The appellant relied on the case of Allan Mungai Gathongo v Republic Cr. App 343/2005 where the court found that penetration had not been proved.
18. On the second ground, the appellant submitted that the court relied on hearsay evidence, because the boy that the complainant mentioned as Titus who allegedly slept on the same bed with him and the appellant was never called as a witness and all that PW2 said about him was hearsay. The appellant also complained that crucial witnesses were not called including PW1's husband whom she allegedly called upon PW2 disclosing to her what happened to him, that the other boys who were allegedly sodomized were not called as witnesses.
19. Lastly, the appellant complained of inconsistencies in the prosecution case. He urged that whereas the charge sheet indicated that the complainant was thirteen (13) years, the birth certificate indicated that he was ten (10) years and that the mother claimed that he was born in 2012 then changed to 2014. He wondered which age is the correct one.
20. The appeal was opposed and the Prosecution Counsel Mr. Majale filed written submissions. He urged that the complainant's Mother testified and produced a birth certificate which puts the complainant's age at ten (10) years; that the particulars of the charge indicated that he was thirteen (13) years and it is that section upon which the sentence was based.
21. On penetration, Counsel submitted that the complainant gave an account of how the appellant defiled him and he kept it to himself due to fear having been threatened; that the complainant's testimony was supported by the findings of PW4 who found the complainant infected with an STI consistent with sodomy. It was Counsel's view that the appellant's identity was not in doubt because the appellant was the complainant's teacher.
22. As regards the sentence, Counsel submitted that the court handed the appellant the minimum sentence under section 8(3) of the *Sexual Offences Act* and the Magistrate's hands were tied.

## Determination.

23. The appellant faced a charge of defilement under section 8(1) as read with section (3) of the *Sexual Offences Act*. The Prosecution bears the burden to prove the offence beyond reasonable doubt the following: -
  1. That the complainant was a minor;
  2. Proof of penetration;
  3. Proof of identity of the perpetrator;



24. In the case of *Dominic Kibet Mwareng v Republic* (2013) eKLR, the Court stated “the critical ingredients forming the offence of defilement are The age of the complainant; Proof of penetration; or Positive identification of the assailant.

#### **Age of the complainant: -**

25. In the case of *Joseph Kiet Seet v Republic* (2014) eKLR, the court held that “It is trite law that age of a victim can be determined by medical evidence and other cogent evidence”
26. In the case of *Francis Omuroni v Uganda CRA 2/2000* the Court of Appeal of Uganda held thus, “In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim’s parents or guardian and by observation and common sense.”
27. See also *Mwalongo Chichoro Mwajembe v Republic CRA 24/2018* & *Edwin Masara Onsongo v Republic* (2016) eKLR.
28. In his testimony, the complainant (PW2) said that he was ten (10) years old PW1, the complainant’s mother also stated that he was ten (10) years having been born 2014 as per the birth certificate. The court took the complainant through a *voire vire* examination thus confirming that he was a child of tender age. The court is satisfied that the complainant was a minor. The court however, observes that though the appellant was charged under section 8(3) as read with section 8(3) of the *Sexual Offences Act*. Since PW2 was said to be ten (10) years the appellant should have been charged under section 8(1) as read with section 8(2) of *Sexual Offences Act* where the sentence would be more severe, i.e., life imprisonment. The variations in the age in the charge sheet and evidence are of no consequence because medical evidence overrides all. The age of the complainant was proved to be ten (10) years.

#### **Penetration.**

29. Section 2 of the *Sexual Offences Act* defines penetration to mean “the partial or complete insertion of the genital organs of a person into the genital organs of another person”.
30. Under section 2 of the *Sexual Offences Act*, genital organ includes the anus.
31. In the case of *Mark Oiruri Mosev Republic* (2013) eKLR the Court of Appeal explained what amounts to penetration as follows:- “..... So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and penetration need not be deep inside the girl’s organ”.
32. Again, in *Eric Onyango Ondeng – V- Republic* (2014) eKLR, the court held; “In sexual offences, the slightest penetration of the female sex organ by the male organ is sufficient to constitute the offence. It is not necessarily that the hymen be ruptured”.
33. PW2 clearly narrated to the court that when sleeping in the appellants bed, the appellant removed his clothes, and inserted his penis in his anus and he was in a lot of pain, but did not scream. He did not tell anyone about this incident because, the appellant threatened to kill him if he did. This is not an uncommon occurrence where children are threatened with harm, they can keep secrets for long if not forever. In this case, the appellant was a person of authority over PW2. He was a teacher of PW2 and it is no wonder PW2 said nothing till the appellant left the school. On examination by PW3, he found that the complainant had rashes and upon examination, it was found to be a Sexually Transmitted Disease (STD) to the anal opening which to him was consistent with Sodomy. Because of the period taken before examination, it was not possible to find fresh evidence like tears. The trial court believed



the complainant as a truthful witness. PW2's testimony was corroborated by the testimony of PW3 on the infection as evidence of penetration. This court is satisfied that penetration was proved.

### **Proof of identity of the perpetrator.**

34. The appellant was PW2's music teacher. PW2 explained to the court how he came to sleep in the appellant's bed; that the appellant had a room in their dormitory and that the dormitory was cold because of broken windows and the appellant suggested that PW2 and Titus go to sleep in his bed. PW4, the head teacher at Murpus school confirmed that the appellant had been given a room in the student's dormitory and he could access the dormitory, though he was not supposed to sleep with students. Thus PW4's testimony went to corroborate PW2's testimony. The appellant had an opportunity to defile the complainant. There is no known reason why the complainant would have framed the appellant. Infact, the complainant had been so affected and suffered from post-traumatic stress and needed counselling. The court has no doubt that the appellant was the perpetrator.

### **Whether crucial witnesses were not called: -**

35. In *Bukenya & others v Uganda* (1972) EA 549, the court set down the principles used to determine the consequences of failure to call witnesses when it said: -
1. The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent;
  2. The court has the right and duty to call witnesses whose evidence appears essential to the first decision of the case; and
  3. That where the evidence called is barely adequate, the court may infer that the evidence of the uncalled witness would have tended to be adverse to the prosecution.
36. In *Keter v Republic* (200007) IEA 135, the court was categorical that: "The prosecution is not obligated to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."
37. The appellant complained that the complainant's father should have been called as a witness. However, the complainant's father did not witness the incident nor did he play any role in the case. It was unnecessary to call him as a witness.
38. As respects, Titus, whom PW2 said they slept in the same bed with the appellant, PW2 was categorical, that Titus was fast asleep and never woke up as the appellant defiled him. The only evidence that Titus would have, is to confirm that he slept in the same bed with PW2, and the appellant. In my view, failure to call the said Titus was not fatal to the prosecution case.
39. In the end, this court comes to the same conclusion as the trial court, that the Prosecution proved beyond all reasonable doubt that the appellant defiled PW2.
40. Is the sentence excessive? In sentencing the court exercises its discretion guided by *the Constitution*, the relevant laws and the Judiciary Guidelines on Sentencing. In addition, the court takes into account the following mitigating factors –
- i. Retribution: to punish the offender for his/her criminal conduct in a just manner;
  - ii. Deterrence; to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences;



- iii. Rehabilitation; to enable the offender reform from his/her criminal disposition and become a law-abiding person;
  - iv. Restorative justice; to address the needs arising from the criminal conduct such as loss and damages;
  - v. Community Protection; to police the community by incapacitating the offender.
  - vi. Denunciation; to communicate the community's condemnation of the criminal conduct.
  - vii. Reconciliation; to mend the relationship between the offender the victim and the community
  - viii. Reintegration; To facilitate the re-entry of the offender into the society.
41. I have read the trial court's record and do note that it did not address the appellant's mitigation or any of the guidelines on sentencing.
42. The appellant indicated that he was remorseful, that he has a family that depends on him and sought the court's leniency. The offence that the appellant committed is abhorrent and must be condemned by all means. He stole the innocence of a small child whom he has left traumatized and may never heal from the said trauma.
43. The court should have considered a deterrent sentence. He was handed only twenty (20) years imprisonment which is the minimum sentence under section 8(3) of the *Sexual Offences Act*. The sentence is very lenient under the circumstances and the court will not intervene.
44. In the end, I find no merit in the appeal. It is hereby dismissed in its entirety.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAPENGURIA THIS 5<sup>TH</sup> DAY OF NOVEMBER, 2025.**

**R. WENDOH**

**JUDGE**

In the Presence of:-

Appellant – present in person (virtual).

Mr. Majale for Respondent - Prosecution Counsel.

Juma/ Hellen Court Assistants.

