

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT VIHIGA**  
**CRIMINAL APPEAL NO E029 OF 2024**

**DANCAN CHOSO**  
**LINYONYI.....APPELLANT**

**VERSUS**

**REPUBLIC.....**  
**RESPONDENT**

**(Being an Appeal from the Judgment of Hon S. K. Manyura (RM) delivered at Hamisi in the Senior Principal Magistrate's Court in Sexual Offence Case No E019 of 2021 on 24<sup>th</sup> February 2023)**

**JUDGMENT**

**INTRODUCTION**

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.
2. The Learned Trial Magistrate, Hon S. K. Manyura (RM) convicted him on the charge of defilement and sentenced him to fifteen (15) years imprisonment.
3. Being dissatisfied with the said Judgement, on 18<sup>th</sup> July 2024, he lodged an appeal herein. His Petition of Appeal was dated 12<sup>th</sup> July 2024. On 27<sup>th</sup> January 2025, he filed Amended Grounds of Appeal dated 22<sup>nd</sup> January 2025. He set out six (6) amended grounds of appeal.
4. His Written Submissions were dated 22<sup>nd</sup> January 2025 and filed on 27<sup>th</sup> January 2025 while those of the Respondent were dated and

filed on 14<sup>th</sup> March 2025. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

### **LEGAL ANALYSIS**

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify.
6. This was aptly stated in the case of **Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123** where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify, and thus make due allowance in that respect.
7. Having looked at the Appellant's Amended Grounds of Appeal, his Written Submissions and those of the Respondent, this court noted that the issues that had been placed before it for determination were as follows:-
  - a. **Whether or not the Charge Sheet was defective;**
  - b. **Whether or not the Prosecution proved its case beyond reasonable doubt; and**
  - c. **Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.**

8. The court therefore dealt with the said issues under the following distinct and separate heads.

**I. DEFECTIVE CHARGE SHEET**

9. The Appellant submitted that the charge did not disclose the offence of indecent act and the facts stated did not disclose all the elements of the offence as the word, “unlawful” was omitted.

10. On its part, the Respondent submitted that the charge preferred was that of defilement and it contained sufficient details and particulars to enable the Appellant know the charges that he faced. In this regard, it cited the case of **Fappyton Mutuku Ngui vs Republic[2020]eKLR** where it was held that the charge sheet was required to specify the offence in a clear and unambiguous manner and was to be accurate since technical defects could entitle an accused to acquittal upon appeal.

11. It argued that the omission in the words, “unlawful” in the particulars in the Charge Sheet did not in any way vitiate the trial or deter the Appellant from understanding the charges against him or making his defence. It further added that it could not be said to be lawful for a male adult to have carnal knowledge of a minor. It submitted that such omission was curable under Section 382 of the Criminal Procedure Code. It was emphatic that the Charge Sheet was properly drafted and that the Appellant understood the charges

that he faced and took part in the trial by cross-examining the witnesses and giving his defence.

12. Section 134 of the Criminal Procedure Code Cap 75 (Laws of Kenya) provides as follows:-

**“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.**

13. A perusal of the Charge Sheet dated 29<sup>th</sup> March 2021 indicated the specific offence which the Appellant was charged with together with particulars of the offence charged. The proceedings during trial were clear that the evidence that was tendered showed that the particulars of the offence he committed tallied with the offence that he was charged with. The Trial Court proceedings also showed that the Charges and the particulars thereof were read over and explained to him in a language that he understood, Kiswahili, and he responded to the same.

14. This court was not satisfied that the Appellant was prejudiced in the manner the Charge Sheet was drafted. Without belabouring the point, this court was not persuaded that omitting the word, “unlawful” was prejudicial to him to warrant him being acquitted of the offence that he had been charged with.

## II. PROOF OF PROSECUTION'S CASE

15. Amended Ground of Appeal No (1), (2), (3), (4) and (5) were dealt with under this head.
16. In determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases was proof beyond reasonable doubt, this court considered the ingredients of the offence of defilement.
17. It is now settled that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and identification of the perpetrator as was held in the case of **George Opondo Olunga vs Republic [2016] eKLR**. This court dealt with the same under the following distinct and separate heads.

### A. AGE

18. The Appellant did not submit on the issue of age. On the other hand, the Respondent submitted that the Charge Sheet indicated that the Complainant, LA (hereinafter referred to as "PW 1") was sixteen (16) years of age at the time of the commission of the offence. It relied on the case of **Musyoki Mwakavi vs Republic [2014] eKLR** where it was held that in a charge of defilement, age of the minor could be proved by medical evidence, baptism card, school leaving certificates, by the victim's parents and/or guardians, observation or common sense.
19. It pointed out that No 239853 PC (W) Wilbrodah Disi (hereinafter referred to as "PW 6") produced a Birth Certificate as an exhibit which showed that PW 1 was born on 29<sup>th</sup> November 2005

and was, therefore, was sixteen (16) years of age at the time of the commission of the offence.

20. Notably, a perusal of the Birth Certificate that was produced as an exhibit during trial showed PW 1 was born on 29<sup>th</sup> November 2005. The incident took place on 1<sup>st</sup> February 2021. This meant that she was about fifteen (15) years nine (9) months old at the material time of the incident.

21. As the Appellant did not challenge the production of the aforesaid Birth Certificate and/or rebut the said evidence by adducing evidence to the contrary, this court was satisfied that PW 1's age was proven beyond reasonable doubt and that she was a child at all material times.

### **B. IDENTIFICATION**

22. The Applicant placed reliance on the case of **Francis Karuiki Njiru & 7 Others vs Republic (2001)** where it was held that the evidence relating to identification must be scrutinised carefully and should only be accepted and acted upon if the court was satisfied that identification was positive and free from the possibility of error. He further relied on the case of **R vs Turnbull (1976) 63 CR.APP. R. 132** (sic) where it was held that the surrounding circumstances had to be considered and the fact whether the eye witness gave a description of his or her attacker to the police at the earliest opportunity.

23. He submitted that PW 1's testimony regarding his identification was inconsistent. He asserted that whereas her evidence was that she met him at around 7.00p.m on her way back home, she could not tell the court how long she knew him and what source of light was there was at the time for her to identify or recognise him as her perpetrator.
24. He pointed out that she testified that when he sent her away from his house, she met one Agona (pastor) on the way and he took her to the police. He argued that since Agona was the first witness, she ought to have told him who defiled her the previous day.
25. He added that whereas in her statement, she had mentioned that she knew where he lived, during cross-examination, she contradicted herself by saying that she did not know his house. He questioned how the police knew his house when she did not know it and how the people that led the police to his house knew about the defilement. He also questioned why the police took long to arrest him.
26. He was emphatic that there was doubt as to how PW 1 identified him as there was no favourable conditions that led to a positive identification and he was not caught in the act. He added that the incident happened at night and that no witness could tell how PW 1 identified him as the perpetrator. It was his contention that the ingredient of identification was not proved.

27. On its part, the Respondent averred that PW 1 positively identified the Appellant herein as the perpetrator as she stayed in her house that material night and chased her in the morning.
28. It submitted that the evidence of recognition which was held by courts to be more reliable and weightier than that of identification of a stranger as was held in the case of **Anjononi & Others vs Republic (1976-80) 1 KLR 1566, 1568.**
29. It also cited the case of **MTG vs Republic** (eKLR citation not given) where it was held that contradictions in evidence of a witness that would be fatal had to relate to material facts and be substantial.
30. It asserted that the inconsistencies and contradictions did not go into the core of the case and that the variance in itself did not in any manner distort or dislodge the commission of the offense as was held in the case of **S.O.O vs Republic[2018]eKLR** which cited the Tanzanian case of **Dickson Elia Nsamba Shapwata & Another vs The Republic Criminal App No 92 of 2007.**
31. A perusal of the proceedings showed that PW 1 testified that on 1<sup>st</sup> February 2021, at around 7.00pm when she was going home, the Appellant, who she knew, pulled her hand and took her to his house. He removed her purple dress, touched her breast and private parts and inserted his private part in hers. She said that she screamed and he covered her mouth. She said that she slept in his house that night and he chased her away in the morning.

32. This court noted that PW 1 was the only identifying witness as was submitted by the Appellant. Having said so, under Section 124 of the Evidence Act Cap 80 (Laws of Kenya), a trial court could convict a person on the basis of uncorroborated evidence of the victim if it was satisfied that the victim was telling the truth.

33. Notably, the proviso of Section 124 of the Evidence Act states that:-

**“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:**

**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**  
(emphasis).”

34. Even so, a trial court was required to exercise great caution before relying on the evidence of a single witness to convict an accused person as it would be one person’s word against the other.

Other corroborating evidence such as proof of penetration could assist the trial or appellate court to come with a determination as to who between the opposing witnesses was being truthful.

35. PW 1 positively identified the Appellant as the perpetrator of the offence. She was emphatic that it was him who defiled her as she stayed in his house that material night and he chased her away in the morning. She testified that the Appellant was a person from Mbihi and she took police officers to his house. Her grandmother, Jescah Musimbi (hereinafter referred to as "PW 2") was confirmed that she is the one who led her, the Chief and the Village Elder to his house whereupon he was arrested.

36. There could not, therefore, have been any possibility of a mistaken identity of the Appellant. The contradiction by PW 1 of whether she knew or she did not know his house was not an inconsistency that was fatal to the Prosecution's cases as she was very clear in her evidence that she took the police to his house and they waited for him but he did not come back as he had escaped. His assertions that the ingredient of identification was not proved therefore fell on the wayside. This court thus came to the firm conclusion that the Prosecution proved the ingredient of identification which was by recognition.

### **C. PENETRATION**

37. The Appellant submitted that the evidence of PW 1 and that of the Clinical Officer, Evans Karega (hereinafter referred to as "PW 5")

were contradicting as PW 1 stated that she was examined the day after she was defiled whereas PW 5 stated that he examined her after three (3) days had lapsed. He placed reliance on the case of **Ndungu Kimani vs Republic[1979]eKLR 282** where it was held that the witness in criminal case upon whose evidence was proposed to be relied upon ought not to create an impression in the mind of the court that he was not a straight forward person or raise suspicion about his trustworthiness.

38. He further asserted that the evidence of PW 1 and PW 2 on how PW 1 was defiled also contradicted each other. In this regard, he relied on the case of **Ramkrishna Denkerrai Pandiya vs Republic Appeal No 6 of 1920** and **Richard vs Republic Appeal No 45 of 1981** CA (both eKLR citation not given) where the common thread was that two (2) contradictory statements could not be admitted in a court of law as either one was the truth and the other was not.

39. He contended that crucial witnesses like one Agona were not called by the Prosecution and that failure to call them gave the impression that the evidence would have been prejudicial as was held in the case of **Kingi Ole Tenko vs Republic 1121/1991**. He also relied on the case of **CMM vs Republic[2012]eKLR** where it was held that the truth or otherwise of the complainant's story could only be confirmed by calling one of the children who were present with the complainant and the appellant in the house.

40. On its part, the Respondent invoked Section 2 of the Sexual Offences Act and placed reliance on the case of **Mohammed Omar Mohammed vs Republic[2020]eKLR** where it was held that the key evidence relied upon by the courts in rape and defilement cases in order to prove penetration was the complainant's own testimony which was usually corroborated by the medical report presented by the medical officer. It submitted that the evidence of PW 5 corroborated that of PW 1 and that penetration was, therefore, proved.

41. It argued that it was trite that no particular number of witnesses were required for the proof of a fact. It invoked Section 143 of the Evidence Act (Cap 80 Laws of Kenya) and relied on the case of **Keter vs Republic(2007) EA 135** where it was held that the prosecution was not obliged to call superfluity of witnesses, but only such witnesses as were sufficient to establish the charge beyond any reasonable doubt. It was emphatic that it called all the crucial witnesses to support its case.

42. Notably, PW 5 testified that PW 1's labia was hyperemic, her hymen was missing and freshly torn and that she had a whitish discharge. He confirmed that the weapon was a penis. He classified the injuries that PW 1 sustained as "Harm." He produced the P3 Form, Post Rape Care (PRC) Form and treatment notes as exhibits during trial.

43. In his defence, the Appellant denied knowing or defiling PW 1. In his sworn evidence, he stated that he was arrested for a different

offence but was charged for defilement. He denied having committed the act.

44. Notably, PW 1's evidence was corroborated by the scientific evidence of PW 5. The Appellant's defence was simply a denial. His evidence was not watertight enough to have displaced the Prosecution's inference of guilt on his part. His argument that the case was full of contradictions or that he was framed thus fell by the wayside.

45. As had been stated hereinabove, any contradictions or inconsistencies were insignificant and did not affect the inference of guilt on his part. The witnesses who were called by Prosecution adduced sufficient evidence to establish the charge. Failure to call the said Agonda or any other witness to testify was not fatal to the Prosecution's case.

46. In the premises foregoing, this court found and held that the Prosecution had proven its case to the required standard, which in criminal cases, was proof beyond reasonable doubt that the Appellant defiled PW 1 on the material diverse dates as there was proof of defilement as PW 5 testified.

47. In the premises foregoing, Amended Ground of Appeal No (1), (2), (3), (4) and (5) were therefore not merited and the same be and are hereby dismissed.

#### **I. SENTENCE**

48. Ground of Appeal Nos (1) and (2) of the Petition of Appeal and Amended Ground of Appeal No (6) was dealt with under this head as they were all related.

49. The Appellant herein was sentenced under Section 8(4) of the Sexual Offences Act Cap 63 A (Laws of Kenya). The same provides as follows: -

**“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”**

50. This court could not therefore fault the Trial Court for having sentenced him to fifteen (15) years imprisonment as that was lawful.

51. Notably, in the case of **Joshua Gichuki Mwangi vs Republic [2022] eKLR**, the Court of Appeal reiterated the reasoning in the case of **Dismas Wafula Kilwake vs Republic [2018] eKLR** where it held that Section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing offences and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.

52. However, in a decision that was delivered on 12<sup>th</sup> July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case **Joshua Gichuki Mwangi vs Republic** (Supra) and stated

that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence. The Supreme Court directed the relevant organs to abide by its decision noting that the appellant therein had since been released from prison.

53. As this court was bound by the decisions of courts superior to it, its hands were tied as regards the exercising of its discretion to reduce the Appellant's sentence. It had no option but to leave the said sentence that was meted against the Appellant herein undisturbed.

54. Going further, this court was mandated to consider the period he spent in remand while his trial was on going as provided in Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

55. Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) provides that:-

**“Subject to the provisions of section 38 of the Penal Code (cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code**

**Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody”**

(emphasis court).

56. Further, Clause 4.6.20 (ix) of the Judiciary Sentencing Policy Guidelines provides that:-

**“The Sentencing Court shall be guided by the sentencing principles and objectives set out in Part I of these the Guidelines in all resentencing hearings. The following mitigating factors were set out by the Supreme Court as particularly relevant in a resentencing hearing:...**

**(ix) Time already spent in prison by the convict...”**

57. The requirement under Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in **Ahamad Abolfathi Mohammed & Another vs Republic**(Supra).

58. The Appellant submitted that he was arrested on 27<sup>th</sup> March 2021 and was convicted on 24<sup>th</sup> February 2023. He asserted that the Trial Court directed that his sentence run from the date of conviction rather than the date of arrest. He invoked Section 333(2) of the Criminal Procedure Code and placed reliance on the case of **Paul Omondi Odipo & 4 Others vs Republic Miscellaneous Application No E049 of 2021**(eKLR citation not given) where it was held that while applying Section 333(2) of the Criminal Procedure Code alongside its provisions, the sentence of imprisonment ought to run from the date of arrest.

59. He, therefore, urged this court to consider the time that he spent in remand during trial pursuant to Section 333(2) of the Criminal Procedure Code.

60. The Respondent was not opposed to his prayer under Section 333(2) of the Criminal Procedure Code. It cited the case of **Ahamad Ablofathi Mohammed & Another vs Republic[2018]eKLR** where it was held that courts were obliged to take into account the period that the accused persons spent in custody before they were sentenced.

61. A perusal of the Charge Sheet indicated that the Appellant was arrested on 27<sup>th</sup> March 2021. Although he was granted bond, he did not seem to have posted the same. He was sentenced on 24<sup>th</sup> February 2023. This was a period that ought to be taken into account while computing his sentence. A perusal of the court proceedings indicated that the Trial Court did not take this period into account which was erroneous.

62. In the premises, Amended Ground of Appeal No (6) on the Appellant's prayer under Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) was merited and the same be and is hereby allowed.

### **DISPOSITION**

63. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Amended Grounds of Appeal dated 22<sup>nd</sup> January 2025 and filed on 27<sup>th</sup> January 2025 were not merited and the same be and is hereby dismissed. His conviction and sentence be and are hereby upheld as they were both safe.

64. However, for the avoidance of doubt, his prayer under Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) was merited and the same be and is hereby allowed. It is hereby directed that the period between 27<sup>th</sup> March 2023 and 23<sup>rd</sup> February 2023 be and is hereby taken into account while computing his sentence pursuant to Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

65. It is so ordered.

**DATED** and **DELIVERED** at **VIHIGA** this **27<sup>th</sup>** day of **November**  
2025

**J. KAMAU**  
**JUDGE**