



**Chemiati v Republic (Criminal Appeal E019 of 2024)  
[2025] KEHC 18073 (KLR) (14 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 18073 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL APPEAL E019 OF 2024  
MS SHARIFF, J  
NOVEMBER 14, 2025**

**BETWEEN**

**KENNEDY MAKWA CHEMIATI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence in Sexual Offences Case No. E012 of 2021 at the Principal Magistrate's Court at Sirisia by Hon. R. K. Langat-PM delivered on 30th January 2024.)*

**JUDGMENT**

**Background**

1. The Appellant herein was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars being that on 21<sup>st</sup> February 2021, at around 2100 hours at (particulars withheld) village, Sasuri Location, Cheptais Sub-County within Bungoma County, he intentionally and unlawfully caused his penis to penetrate the vagina of B.C. a child of eight (8) years.
2. The Appellant equally faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) [Sexual Offences Act](#). No. 3 of 2006. The particulars of the offence were more less the same.
3. The Appellant pleaded not guilty to the offences. The Respondent called Four (4) witnesses in support of its case and in his defense, the Appellant gave sworn testimony, and called one (1) witness.
4. The trial Court after considering the evidence adduced by both parties found that the Respondent had proved its case against the Appellant beyond reasonable doubt on the main charge. The Appellant was convicted and sentenced to serve Thirty (30) years in prison.



## Appeal

5. Aggrieved by the conviction and sentence, the Appellant filed his memorandum of appeal dated 6<sup>th</sup> February 2024, which I shall reproduce the grounds verbatim: -
  - a. The learned trial magistrate erred in law and fact in convicting the Appellant when the Prosecution failed to prove the charge beyond reasonable doubt.
  - b. The learned trial magistrate erred in law and fact in convicting the Appellant when no evidence had been tendered in proof of the charges against the Appellant.
  - c. The learned trial magistrate erred in law and fact in convicting the Appellant on the strength of the uncorroborated testimony of the Complainant.
  - d. The learned trial magistrate erred in law and fact in rejecting the evidence of the Appellant without any valid reason.
  - e. The learned trial magistrate misdirected herself in finding that the evidence of the Prosecution witnesses was direct, consistent and overwhelming.
  - f. The learned trial magistrate erred in law and fact by convicting the Appellant without considering his defense.
  - g. The learned trial magistrate erred in law by imposing an excessive sentence in the circumstances of the case and ignoring the mitigation by the Appellant.
6. The Appellant prayed that this Court allows his appeal in its entirety, quash his conviction and the trial Court sentence be set aside, and he be set at liberty.
7. According to the Court proceedings dated 13<sup>th</sup> February 2025, the Respondent alleges that it filed a Notice of Enhancement of sentence, but on my perusal of the Court physical record and the Court Tracking System there is no such Notice of Enhancement.
8. The appeal was canvassed by way of written submissions. Both parties complied with the Court directions.
9. The duty of a first appellate Court was restated in the case of David Njuguna Wairimu vs. Republic [2010] eKLR wherein the Court of Appeal cited the case of Okeno v. R [1972] EA. 32 and held thus: -

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

## Evidence

10. After a brief voir dire examination, the trial magistrate established that the minor is intelligent, but did not understand what an oath was and its sanctions. He deduced that it was best she gave an unsworn statement.



11. It was the Respondent's case that the minor in this matter who gave evidence as PW1, was a class 3 student at (particulars withheld) Primary School and that she was 9 years old as she was born in the year 2013. According to her, she was residing with her parents and two siblings, and that she normally slept in the sitting room with her sister. She recalled on 21<sup>st</sup> February 2021, the Appellant referred to by his moniker as Otimini, visited their home while she was sleeping with her sister. She told the Court that it was common for the Appellant to sleep at the house and on that very day he was drunk and her father allowed the Appellant sleep in their house.
12. It was her testimony that while sleeping, the Appellant herein removed her pant, placed his fingers inside her private part (pointing to her vagina), proceeded to remove his thing between his leg (dudu) and inserted it into hers. She told the Court that she raised an alarm but his father did not hear her and that she felt pain in her private parts after the ordeal. It was her testimony that, in the morning, she alerted her father on what had happened but he only told her to go to school. At the School the headteacher noticed that she was unwell and referred her to Madam J who escorted her to Tuikut Health Centre and later to Cheptais Heath Centre. According to her, the ordeal occurred in their house when there was no light and while her sister slept. She told the Court that by the time she woke up, the Appellant had already left.
13. In cross-examination, she stated that her father was in the bedroom while the Appellant defiled her and that she did raise an alarm. She identified that Appellant as the person who defiled her and admitted that her father ran away from their home after the Appellant's arrest.
14. PW2 EC testified that the minor was her daughter born on 15<sup>th</sup> April 2013. She recalled on 21<sup>st</sup> February 2021, she had differed with the minor's father and left her home with the younger child leaving the rest with their father. She stayed away up to 24<sup>th</sup> February 2021 when she received a call from the minor's school alerting her of the incident. She went to the school wherein Nyumba Kumi came to question her and she took the minor to TuiKut Dispensary. It was her testimony that the minor told her that the Appellant defiled.
15. On cross-examination, she told the Court that she was not present when the ordeal occurred, and that the Appellant came to seek forgiveness.
16. PW3 No. 237XXXXX PC Mohammed Ali of Chesikaki Police Station stated that he received information from (particulars withheld) Primary School that one of their students had been defiled and was taken to the hospital by a teacher. He proceeded to Cheptais Sub-County Hospital where he found the minor had been examined. After her examination, they proceeded to the Station wherein the minor on interrogation told him that while she was sleeping the Appellant defiled her and that he also threatened her with dire consequences if she told her parents.
17. He issued a P3 form and after investigations he apprehended the Appellant. He told the Court that the minor was Eight (8) years old at the time of the incident and proceeded to produce in Court the minor's Birth Certificate. He identified the appellant as the person they arrested.
18. PW4 David Sambu a clinical officer stationed at Chepatis Sub-County Hospital presented a P3 form and treatment notes which were filled by his colleague who was on annual leave. It was his testimony that the minor visited the facility with a history of defilement and she had changed her clothes but her pant was wet with whitish discharge. On vaginal examination he observed her hymen was absent with presence of foul-smelling whitish discharge and her labia majora and labia minora had bruises. On laboratory examination, he told the Court that the minor's VDRL test was positive, the urinalysis test indicated presence of epithelial cells and blood discharge. He opined that she had defiled. He produced



in Court that minor's treatment notes (Tuigut Dispensary), treatment notes (Cheptais Sub-County Hospital), P3 form and PRC form.

19. In cross-examination, he told the Court that the Appellant was also examined and the laboratory examination concluded presence of epithelial cells which were also found in the minor. He produced in Court the appellant's treatment notes.
20. At the close of the Prosecution's case, the Appellant was placed on his defence whereupon he tendered sworn evidence denying committing the alleged offence and that the victim's father fled after the incident.
21. DW2 JC testified that he is the assistant chief and that he was called by a teacher from (particulars withheld) Primary School. On arriving at the school with Nyumba Kumi, they found the minor mopping and on interrogating her, she told him that she fell from a tree and that her father did not take her to the hospital. It was his testimony that on interrogating her, he established that the minor's father had defiled her and that was a piece of information that PW2 confirmed to him. He proceeded to arrested the Appellant, who told him that he was not the one who defiled the minor.

### **Issues for Determination**

22. I have considered the Appellant's grounds of appeal, the evidence adduced before the trial Court as well as the submissions and rebuttal thereto, and the applicable law. It is my view that the issues for determination are as follows:
  - a. Whether the Respondent proved its case to the desired threshold;
  - b. Whether the sentence meted upon the Appellant was appropriate.

### **Analysis and Determination**

#### **a. Whether the Respondent proved its case to the desired threshold**

23. The Appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* which provides:
  - 8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement
  - 8(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
24. The offence of defilement is rooted on three main ingredients being the age of the victim (must be a minor), penetration and the proper identification of the perpetrator. These ingredients are provided for under Section 8(1) of the *sexual Offences Act* No. 3 of 2006 and must each be proven for a conviction to issue. (see George Opondo Olunga vs. Republic [2016] eKLR.)

#### **Proof of age of the minor.**

25. A child is defined as a person under the age of eighteen years. Is the victim herein a child?



26. In the case of Hilary Nyongesa Vs Republic Eldoret Criminal Appeal, No. 123 of 2009 the Court stated that:
- “Age is such a critical aspect in Sexual Offences that it has to be conclusively proved.... And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim.”
27. In Musyoki Mwakavi –VS- Republic Machakos High Court Criminal Appeal No. 172 of 2012, the court was of the view that:-
- “...apart from medical evidence, the age of the complainant may also be proved by birth certificate, the victim’s parents or guardian and observation or common sense...”.
28. It was PW2’s evidence that the minor was her daughter and was born on 15<sup>th</sup> April 2013 she produced the minor’s Birth Certificate in Court as PEXH4, which I could not see on my perusal of the exhibits. Pursuant to the above case, I believe that evidence of PW2, treatment notes and P3 form is sufficient proof to establish the age of the minor. The trial Court found that the minor was 8 years at the time of the incident.
29. If the minor was born on 15<sup>th</sup> April 2013, and the incident herein occurred on 21<sup>st</sup> February 2021, this simply means that at the time of the incident the minor was 8 years 6 days. It is therefore sufficient to say that age was proved beyond any reasonable doubt.

### **Proof of penetration**

30. Penetration is proved through the minor’s evidence and corroborated by medical evidence. The minor’s testimony coupled with medical examination must be sufficient to determine whether penetration occurred.
31. Section 2 of the Sexual Offences Act provides that: -
- “Penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;
32. In George Owiti Raya Vs Republic [2013] eKLR it was held that: -
- “There was superficial penetration because there was injury on the vaginal opening as the medical evidence has indicated and further there was a whitish-yellow foul-smelling discharge seen on the genitalia... it remains therefore that there can be penetration without going past the hymen membrane.”
33. In Erick Onyango Ondeng V. Republic (2014) eKLR the Court of Appeal held as follows on the aspect of penetration:
- “In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.”
34. Similarly, the Supreme Court of Uganda held in Bassita vs. Uganda S.C. Criminal Appeal Number 35 of 1995, that: -
- “The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victim’s own evidence and



corroborated by the medical evidence or other evidence. Though desirable it is not a hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt".

35. It was the PW1's testimony that on 21<sup>st</sup> February 2021, the Appellant visited their home while she was sleeping with her sister. She told the Court that it was common for the Appellant to sleep at the house and on that very day he was drunk and her father allowed the Appellant sleep in their house. It was her testimony that while she was sleeping, the Appellant herein removed her pant, placed his fingers inside her private part (pointing to her vagina), proceeded to remove his thing between his leg (dudu) and inserted it into hers. She felt pain in her private parts after the ordeal. That at School, the headteacher noticed that she was unwell and referred her to Madam J who escorted her to Tuikut Health Centre and later taken to Cheptais Heath Centre.
36. According to her, the ordeal occurred in her house when there was no light and it was the Appellant who defiled her as he was the only one sleeping with them in the sitting room and that her sister was sleeping when the offence occurred.
37. The Clinical Officer testified that the minor visited the facility with a history of defilement and she had changed her clothes but her pant was wet with whitish discharge. On vaginal examination, he noted absence of the hymen with foul-smelling whitish discharge and her labia majora and minora had bruises.
38. He told Court that the minor's VDRL test was positive, presence of epithelial cells and blood discharge. He opined that the minor was defiled.
39. From the above, it is clear that the minor had been defiled and the clinical officer (PW3) confirmed the same. I am thus satisfied that penetration was proved to the required standard.  
Whether the Appellant was positively identified by the minor as her assailant.
40. The minor testifying as PW1 told the Court that the Appellant was well known to her and even referred to him by his moniker Otimini. She told the Court that it was common for the Appellant to sleep at the house and on that very day he was drunk and her father allowed him sleep in their house. Despite there being no light the minor was very certain and/or categorical that it was the Appellant who defiled her as on the day of the incident he showed up at their house drunk and her father allowed him to sleep with her and her sibling in the sitting room. The Appellant's defence on whether he knew the minor was silent.
41. PW1 testified on how she was defiled, it was unlikely that in defilement cases which are committed in privacy there would be an eyewitness but found that the victim knew the suspect very well as he was familiar with her and she knew him. PW1 viewed the offender from a close position and that her narration of the incident did not take place abruptly but that there was a sequence of events that took place before the minor was allegedly defiled, like the arrival of the appellant at their house drunk and the conversation between the Appellant and PW1's father to the point that he allowed him sleep in their house. That she even described him by his moniker, Otimini, and that the Appellant did not dispute that name. That she was acquainted with the Appellant as it was not his first time sleeping at her house, hence her recognition of the Appellant met the threshold in Republic Vs. Turnbull's case.
42. It is also accepted in law that evidence of recognition is stronger than that of identification because recognition of someone known to one is more reliable and assuring than the identification of a stranger (see Anjononi & Others v Republic [1980] KLR 59).



43. The evidence by the minor leaves no doubt that the Appellant is the one who caused penetration. Accordingly, I find that the elements of defilement namely, penetration and minority age of the victim were proved beyond doubt. The conviction was therefore proper.

**b. Whether the sentence meted upon the Appellant was appropriate**

44. The applicable principles in considering sentence on appeal were restated by the Court of Appeal in *Bernard Kimani Gacheru v Republic* [2002] eKLR, in the following terms:

“It is now settled law, following several authorities by this court and the high court, that sentence is a matter that rests in the discretion of the trial court. Similarly, the sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account the wrong material, or acted on the wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist”.

45. I note that Section 8 (2) of the *Sexual Offences Act* provides as follows:

“8(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

46. Opposing the appeal, the Respondent filed its written submissions and in Court proceedings dated 13<sup>th</sup> February 2025, alluded to invoking Section 354(3)(b) of the Criminal Procedure Code wherein the Prosecution Counsel urged this Court to enhance sentence of 30 years as meted out by the lower Court to life imprisonment. The Court of Appeal in *J.J.W. v Republic* [2013] eKLR held as follows as to enhancement of the sentence by the High Court;

“It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354 (3) (ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal.”

47. It is clear from the record that the cross-appeal on sentence was not filed as the Appellant did not respond to the same. On my analysis of the Court Tracking System, there is no Notice of Enhancement filed by the Respondent. It is clear that the Respondent failed to adhere to the requisite procedure in regard to the filing of its notice for enhancement of sentence wherefore I find that no not of enhancement of sentence was ever filed



48. Consequently, the appeal is devoid of any merit. It is dismissed in its entirety.

Orders accordingly.

**DELIVERED, SIGNED AND DATED AT BUNGOMA THIS 14<sup>TH</sup> DAY OF NOVEMBER 2025.**

**M.S.SHARIFF**

**JUDGE**

In the presence of:

Appellant

Ms Kibet for the Respondent

Peter Machoni – Court Assistant

