

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MIGORI**  
**CRIMINAL APPEAL NO. E094 OF 2024**

**BRIAN OUMA OTIENO ..... APPELLANT**

**versus**

**REPUBLIC..... RESPONDENT**

**(Being an appeal against the Judgment of Hon. S. N. MUTAVA (Resident Magistrate) delivered on 26<sup>th</sup> September, 2024 in Rongo S.O. Case No. E016 of 2024, *Republic Vs\_Brian Ouma Otieno*)**

**JUDGMENT**

The Appellant was convicted and sentenced to serve 20 years imprisonment for the offence of defilement contrary to Section 8(1) as read with Section 8 (3) of the Sexual Offences Act.

The particulars of the offence were that the Appellant on diverse dates between 12<sup>th</sup> and 23<sup>rd</sup> May 2024 at Dede area, Awendo Sub-County in Migori County intentionally and unlawfully caused his penis to penetrate the vagina of J.A.O. a girl aged 13 years.

The Appellant was aggrieved by the conviction and sentence and he preferred the appeal herein vide an undated Petition of Appeal on the following grounds:

1. THAT the Trial Court erred in law and fact for failing to discern that the sentence enacted was harsh and excessive in the circumstances.

2. THAT the trial court blundered in both law and fact by not observing that the ingredients of the offence were not proven to the required standard in law.
3. THAT the trial court erred in law and fact by failing to comply with Article 50(2) (h) of the Constitution of Kenya 2010.
4. THAT the trial court never considered the defense of the defendant.
5. THAT the evidence in record did not corroborate hence conviction could not be meted out in the circumstances.

REASONS WHEREFORE the Appellant prayed that:

- (a). Conviction be quashed and sentence set aside
- (b). Reduction of sentence
- (c). Retrial or any other order the court may deem fit to grant.

The brief background of the case was that the Complainant herein left to go to Asumbi Vocational Training Center on 12<sup>th</sup> May 2024 but failed to reach her destination.

In the Complainant's testimony she said she knew the accused person. She said that from 12/5/2023 she left school and went to live with a man of God. She said she did not want to live with him and she went home and went to Dede to live with her mother's sister. She said she used to go to Brian's for night vigil and her parents then reported to the police that I was missing and that Brian had raped her. PW1 said Brian did not rape her. She said she was living with her aunt in Dede (Mama Akinyi) and she was arrested next to her aunt's home.

PW1 said she went to the police station and recorded her statement. She said she was caned to say she was having unprotected sex with Brian. She said she had never lived with Brian. She said she was not arrested while cooking breakfast. She said her aunt was present when she was arrested and was forced to say that my father took me to Brian.

When the Complainant attempted to retract her statement the Prosecuting Counsel applied that she should be declared a hostile witness and she be subjected to cross examination. Upon that application being granted the Complainant was cross examined and she said that she signed her statement by putting a thumb print. She admitted knowing Brian the accused person. She also confirmed that Brian was arrested by her mother because Brian went home for prayers. She said both pastors were male and both were known as Brian. She said Brian was arrested because he used to guide her. She said she was not aware Brian recorded a statement and stated they were arrested in the same house. She said they were arrested on the same day. She said the investigating officer lied that they were arrested at the same time. PW1 also said she did not know the Assistant Chief and she saw him the day she was arrested. She said she did not know why he stated that the Complainant was arrested in Brian's home. She confirmed she was taken to hospital and examined PW1 identified Treatment note - PMFI 1, PRC Form - PMFI 2 and P3 Form - PMFI 3 issued upon her examination and treatment.

PW2 Ombogo Francis Assistant Chief North Kanyamgony, Awendo testified that on 23/5/2024, around 7.30 a.m a woman by the name Beryl Atieno went to his home having been sent by Madam Opal Odero Assistant Chief Kamresi. She had a letter that stated she needed to get her child Joy Adhiambo. PW2 said he took one village elder and proceeded to the home where Beryl suspected her daughter was and

identified her daughter and they went to the house where they found the accused person. That he left the accused at the police station after arresting him. The matter was booked and they were issued with an OB. PW2 said the Complainant minor had disappeared since 13/3/2024. He said the Complainant and the minor were only two in the home. PW2 produced the letter dated 22/5/2024 - Exhibit 4. He identified the Appellant as the boy he arrested.

In cross examination PW2 said that the mother of the Complainant went looking for her child. He said the minor was outside and she wanted to run away but was apprehended. He said he was in the company of the mother and village elder but did not take photographs. PW3 Beryl Atieno from Rabondo Village testified that she was a farmer and J. A. was her daughter born on 11<sup>th</sup> September 2010. She produced Birth Certificate - Exhibit 5. She testified that on 12<sup>th</sup> May 2024 the Complainant left home and stated she was going to Asumbi Technical. That she left and went to church but later heard the Complainant was in Dede and did not go to Asumbi. PW3 said that she had taken the Complainant once to church in Dede. That PW1's friends told her she was in Dede and was committing a sin as she was believed to have been married. PW3 went to the chief to get a letter and went with the Chief to Dede town where they found the complainant in a house where she was staying with the accused person.

When the Appellant cross examined PW3 she said she did not know him and that she saw him on the day he was arrested. She said she had no documents to show the Complainant was going to school. She said she was shown where the Appellant lived. She said it was the chief who showed her where the Appellant lived and it is the chief who arrested the Appellant as she feared once Complainant saw her, they could run away.

PW4 Penina Ataigo Clinical Officer at Awendo Sub-County testified that she examined the Complainant herein and found she had a broken hymen though it was not freshly broken. She said that lab tests confirmed the Complainant was 5 weeks pregnant and also had epithelial cells which was a sign of infection. She said she filled PRC and P3 forms which she produced as exhibits Ex P2 & 3. She also produced Filter Card Ex P1.

PW4 further examined the Appellant who was 19 years old on allegations of having defiled the Complainant herein. PW4 also filled P3 form in respect of the Appellant and produced it as exhibit ExP6. She also produced Filter Card Ex P 5. In cross examination PE4 said she did not say that the Appellant raped the Complainant.

PW5 PC Erastus Musa No. 112677 of Awendo Police Station investigated the offence herein. It was his testimony that on 23/5/2024, he was at the station when he received the complaint. That the accused before court was arrested by the area Assistant Chief North Kanyamgony Sub-Location on allegations of defilement. He said it is the mother of the Complainant who lodged the report.

PW5 escorted the minor and accused person for examination at Awendo Sub County Hospital and P3 Form and PRC Form were filled and he later recorded statements of the witnesses.

That on 12/5/2024, the minor left home, to proceed to Asumbi Vocational Training to pursue a tailoring course but on 18/5/2024, the mother was informed her daughter did not reach the Training Centre but was seen in Dede area. She went to the Chief who wrote a letter addressing the Assistant Chief North Kanyamgony. That from the statement of the complainant she stated she had gone to visit her boyfriend Brian and they were living together. He said that medical tests revealed the minor was found to be pregnant. PW5 also

established from birth certificate that the minor was 13 years old having been born on 11/9/2010. PW5 preferred the charges against the accused person.

In cross examination PW5 said he had no proof that the Appellant and the Complainant were married. The Birth Certificate states the true age. The same was certified by the civil registry. He said that they did not need to do an identification parade as the Complainant was arrested with the Appellant.

At the close of prosecution case Brian Ouma Otieno, the Appellant herein elected to give sworn statement and said he was from Nyatike. He said that he was a minor before his arrest. He said that on 12/5/2024, he was at home and had had gone to see his grandfather and returned on 18/5/2024 to work at Dede. That on 23/5/2024 he was on his way to work when he was arrested by the Chief and his colleagues and taken to Sony Police Station. He said he was taken to hospital where he saw a young girl whom he was with and he was later charged with defiling her.

The Appellant was cross examined by Ms. Ombogo Prosecuting Counsel and he said he did not know J.A. A. He said he was arrested by the chief and the Complainant was not arrested in his home. He said he was not arrested together with the Complainant and the mother was not present. The Appellant said the chief did not know me before the offence and he did not know why the chief arrested him for no reason. The Appellant said he found the mother of the Complainant at the police station and he was not aware if she went to his home. He said he was not informed what he had done and he did not know why they linked him to Joy and not any other boy in the village. The Appellant said he interacts with many people as he is an upcoming gospel artist. He said he did not commit the offence.

This appeal was canvassed by way of written submissions. The Appellant's submissions are dated 14<sup>th</sup> March 2025 and are to the effect that the age of the Complainant was in doubt as the mother said that she was 17 years having been born in 2007 whereas the certificate of birth showed she was born in 2010. From the proceedings the court ordered that the minor be taken for age assessment but when matter came up again the prosecution merely said they had authenticated the certificate without saying how authentication was done. The matter then proceeded for hearing without proper confirmation as to the age of the Complainant. The Appellant argued that the age of the Complainant was therefore not proved beyond reasonable doubt.

The Appellant submitted that the evidence adduced by the Complainant vindicated him and needed to have been considered as she denied that the Appellant raped her and that she was cowed to implicate Brian.

The Appellant also claimed that the allegations that the Complainant was 5 weeks pregnant after going missing from 12<sup>th</sup> to 23<sup>rd</sup> May 2024 did not make sense and the prosecutions reliance on the same to support the charge cannot succeed.

The Appellant urged the court to uphold the rights under Article 27 of the constitution and protect him as he was unfairly treated by the trial court

The Appellant further submitted that the Trial Magistrate was biased as his rights were not considered but rather extraneous consideration for protection of victims of gender-based violence. He said that the prosecution witnesses were intimidated to testify against him' The Appellant said that the P3 form showed that the Complainant was given in marriage by the father without the involvement of the mother

and that previously she had been subjected to sexual abuse by several other men and it cannot be true that it was the Appellant.

The Appellant urged the court to quash the conviction and set aside the sentence.

The Respondents submissions are dated 9<sup>th</sup> October 2025. The Respondent submitted that the right to legal representation under Article 50(2)(g) &(h) of the Constitution was explained to the Appellant during plea taking and the Appellant elected to represent himself during trial and was able to competently cross examine witnesses and mounted his defense and the fact that he did not have an advocate was not fatal to the case as the said right is not absolute.

In regard to admissibility of evidence it was submitted that the testimony of the minor who had been declared hostile was proper in law and consistent with Section 163 of the Evidence Act which permits cross examination of such a witness.

It was further submitted that the under the proviso to Section 124 of the Evidence Act the evidence of a complainant in a sexual offence may be acted upon if the court, for reasons to be recorded is satisfied that the complainant is telling the truth. It was submitted that the Complainant's change of position was motivated by an attempt to protect the accused and her earlier recorded statement to the police bore greater probative value. That the evidence of the Complainant was corroborated by that of the Assistant Chief who went to rescue her and medical evidence and the court properly exercised caution and applied the correct legal test in admitting and evaluating the hostile testimony.

It was also submitted that excluding the evidence of the minor would not be in the interest of justice particularly in cases involving minors who are often vulnerable to influence or intimidation.

On whether the ingredients of the offence of defilement was proved to the required standards the Respondent relied on the case of **George Opondo Olunga Vs Republic [2016] eKLR** where it was stated that the offence of defilement is rooted on 3 elements namely age, penetration and identification of the perpetrator.

The Respondent submitted that all the 3 elements were proved beyond all reasonable doubt and the conviction and sentence should be upheld.

### **Analysis and Determination**

In a first appeal, the duty of the court was stated in **Mark Oiruri Mose vs. R (2013) eKLR** thus;

***“.... the Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.”***

Having considered the grounds of Appeal, and revisited the evidence tendered before the trial court afresh as well as the submissions by the rival parties, the issues for determination are:

1. Whether the Appellant's right to legal representation under Article 50(2)(h) was violated.
2. Whether the age of the complainant was proved.
3. Whether penetration was proved.
4. Whether the Appellant was positively identified as the perpetrator.

5. Whether the hostile-witness procedure was properly applied.
6. Whether the Appellant's defence was considered.
7. Whether the sentence was harsh and excessive in the circumstances.

The right to counsel under Article 50(2)(h) of the Constitution was explained to the Appellant during plea. The Appellant elected to represent himself. Under Article 50(2)(h), State-funded counsel is only mandated where "substantial injustice" would occur. None was demonstrated and therefore no violation was proved.

On whether the prosecution proved the age of the Complainant the Prosecuting Counsel on 13<sup>th</sup> June 2024 applied for time to investigate and establish the age of the Complainant as her mother said that she should be 17 years and certificate of birth showed she was born on 11<sup>th</sup> September 2010. The court then ordered for age assessment. However, when the matter came up for mention on 26<sup>th</sup> July 2024 the Prosecuting Counsel informed the court that the certificate of birth had been authenticated but it was not shown what method was used to authenticate it. Considering that the Complainant was not going to school and there was no other document to verify her age it is only the certificate of birth that the trial Magistrate relied upon to find that she was 13 years. In this case there was doubt as to the age of the complainant as the mother gave a different date from that in the certificate and in that case it is only the doctor who could professionally determine the age of the victim in those circumstances. The Magistrate who determined the matter was not the same one who took evidence of the minor and he was therefore he was not in a position to assess and know whether the complainant was really 13 years or 17 years as said by her mother. This court finds that there is doubt raised as to the age of the Complainant.

On whether penetration was proved medical evidence showed broken hymen (though not fresh), Laboratory tests also revealed the Complainant was approximately 5 weeks pregnant and she had epithelial cells which is an indication of infection. Presence of pregnancy in a 13-year-old is conclusive proof of penetration. This element was therefore proved.

On whether the Appellant was properly identified as the perpetrator the complainant recanted her statement in court and claimed coercion and being forced to implicate the Appellant. She denied ever living with him. Her evidence in court did **not** link the Appellant to any sexual act. The prosecution relied heavily on her earlier police statement. The Complainant said she living with her aunt in Dede and that is where she was arrested next to the Appellant's home and she said she was never arrested in Brian's home.

The law provides that statements of a hostile witness cannot be used as substantive evidence to prove the facts, unless admitted under narrow exceptions in the Evidence Act.

The proviso to Section 124 Evidence Act allows conviction on the complainant's evidence only if the court believes her — but here the complainant did *not* incriminate the Appellant in court.

The Assistant Chief said that the Complainants mother suspected her daughter was in a certain home and he accompanied her and she identified her daughter and they went to the house and found the Appellant whom they arrested. He said the Complainant was outside and wanted to run on seeing them but she was caught. The complainant's mother said she had once taken her daughter for prayers in a church in Dede and when she reported to her chief that

the complainant was in Dede where she was believed to be married the Chief gave her a referral letter to Chief of Dede. PW3 said the Chief found the Complainant staying with the Appellant. She did not go the Appellant's home as she feared the Complainant could escape on seeing her. The evidence tendered by PW2 and PW3 is circumstantial and does not link the Appellant to the offence. There was no forensic link, confession, or eyewitness. Identification of the Appellant as the perpetrator was not proved beyond reasonable doubt.

Although a complainant may be declared hostile under Section 163 Evidence Act, the court cannot rely on the statement recorded at the police station and discard what the witness has said in court in preference to the statement. The trial court's heavy reliance on the police statement was erroneous and renders the conviction unsafe.

The Appellant denied knowing the complainant, denied living with her, and challenged the circumstances of arrest. The trial court did not meaningfully analyse or weigh this defence against the prosecution case as required by the law.

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The 20-year term was the **mandatory minimum** under Section 8(3) for a child aged 12-15. Sentence was lawful. However, since conviction is unsafe, sentence cannot stand.

In conclusion while penetration was established, the prosecution failed to prove beyond reasonable doubt that the Appellant was responsible. The conviction rested on a recanted statement; flawed hostile-witness handling; circumstantial arrest evidence, and no positive identification. The conviction is therefore unsafe.

The appeal herein is therefore allowed, conviction quashed, sentence set aside and the Appellant should be released forthwith unless lawfully detained. Right of appeal 14 days explained.

**Dated, signed and delivered this 28<sup>th</sup> Day of November, 2025**

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**HON. JUSTICE A. ONGINJO**

**JUDGE**

**In the presence of: -**