



**Republic v Gavudia (Criminal Appeal E002 of 2022)  
[2025] KEHC 17595 (KLR) (24 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 17595 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CRIMINAL APPEAL E002 OF 2022  
JN KAMAU, J  
NOVEMBER 24, 2025**

**BETWEEN**

**REPUBLIC ..... APPELLANT**

**AND**

**JOSHUA ALUGA GAVUDIA ..... RESPONDENT**

*(Being an Appeal from the Ruling of Hon M. Ochieng (PM) delivered at Hamisi in the Principal Magistrate’s Court in Sexual Offence Case No 17 of 2020 on 8th March 2022)*

**JUDGMENT**

**Introduction**

1. The Respondent herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) 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. After the close of the Prosecution case, the Learned Trial Magistrate, Hon M. Ochieng (PM) did not find the Prosecution to have established a prima facie case warranting the Respondent being placed on his defence. The said Learned Trial Magistrate acquitted him under Section 210 of the Criminal Procedure Code Cap 75 (Laws of Kenya).
3. Being dissatisfied with the said Judgement, on 18<sup>th</sup> March 2022, the Prosecution, the Appellant herein, lodged an appeal. It set out five (5) grounds of appeal.
4. Its Written Submissions were dated 22<sup>nd</sup> August 2024 and filed on 19<sup>th</sup> December 2024 while those of the Respondent were dated 8<sup>th</sup> February 2025 and filed on 10<sup>th</sup> February 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 Grounds of Appeal, its Written Submissions and those of the Respondent, this court noted that the issue that had been placed before it for determination was whether or not the Appellant established a prima facie case against the Respondent that warranted him being put on his defence.
8. The Appellant submitted that it presented evidence that was satisfactory against the Respondent. It argued that on age, the charge sheet stated that the victim, MSK (hereinafter referred to as "PW 1") was sixteen (16) years old at the time of the commission of the offence. It relied on the case of *Musyoki 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.
9. It contended that PW (hereinafter referred to as "PW 2") testified that the victim was a minor and produced her Birth Certificate which showed that she was born on 1<sup>st</sup> January 2004 meaning she was sixteen (16) years at the time of the commission of the offence. It was emphatic that the ingredient of age was proved beyond reasonable doubt.
10. On penetration, it 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.
11. It submitted that the evidence of the Clinical Officer, Odhiambo Abdala Yusuf (hereinafter referred to as "PW 3") corroborated that of PW 1 and that penetration was, therefore, proved. It added that in sexual offences cases the victim was normally the only witness as the offence was committed in secrecy.
12. On identification, it submitted that PW 1 testified that it was the Respondent who defiled her and also informed PW 2 of the same. It added that PW 1 identified the Respondent to the Investigating Officer, No 113023 Police Constable Jeremiah Ges (hereinafter referred to as "PW 4") when he visited the scene and that the Respondent was a Sub-chief and a neighbour, therefore, well known to PW 1.
13. It contended that as the Appellant was someone PW 1 knew well, she could not have been mistaken as to his identity. It pointed out that that was 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.
14. It was emphatic that it had proved beyond reasonable doubt the ingredients of the offence of defilement as against the Respondent and had made out a prima facie case against him to warrant him being placed on his defence. It asserted that the case herein was a sexual offence which in most cases had no eye



witness as the offences were mostly committed in secrecy. It argued that it availed the crucial witnesses who sufficiently proved the ingredients of the offence.

15. It further contended that the Trial Court in its Ruling held that there was no forensic evidence (DNA) conducted to link the Respondent to the offence. In that regard, it argued that DNA was not a requirement to prove penetration and that it was not the only evidence through which commission of a sexual offence could be proved. It added that PW 3's evidence showed that PW 1 was defiled.
16. To buttress its point, it relied on the case of *AML vs Republic*[2012]eKLR where it was held that the fact of rape or defilement was not proved by way of a DNA test but by way of direct evidence. It was emphatic that penetration could be proved through the victim's sole testimony or through the victim's testimony corroborated by the medical evidence which was the case herein and, therefore, it proved its case beyond reasonable doubt.
17. It placed reliance on the cases of *Erick Onyango Ondeng' vs Republic* [2014]eKLR and *Richard Munene vs R* [2018]eKLR where the common thread was that it was not every trifling contradiction or inconsistency in the evidence of the prosecution witness that would be fatal to its case as it was only when such inconsistencies were substantial and fundamental to the main issue in question and creates doubts in the mind of the trial court that an accused person would be entitled to benefit from it.
18. It was its contention that the contradictions and inconsistencies did not go to the core of the case and that the variance in itself did not in any manner distort or dislodge the case. It pointed out that the Trial Court should have considered the evidence adduced as a whole and, not selectively. It added that in its Ruling, the Trial Court had stated that PW 1 had contradicted herself in her evidence but did not specify what the contradictions were. It urged the court to consider the evidence on record and the gravity of the offence and find that the appeal was merited and order that the Respondent be placed on his defence.
19. On his part, the Respondent placed reliance on the cases of *Okeno vs Republic*[1979] E.A 32 and *Shantilal M. Rulwala vs R*[1975] E.A 570 where the common thread was that the first appellate court must itself weigh conflicting evidence and draw its own conclusions. He argued that from the holding in the aforementioned cases, the Trial Court observed that the demeanour of PW 1 was not credible and held that she contradicted herself in her evidence.
20. He contended that in criminal law, it was a general principle in law that the burden of proof lay with the prosecution at all stages of the trial and, therefore, if that burden was not discharged at the close of the prosecution's case, the trial court had the discretion to rule that there was no case to answer under Section 210 of the Criminal Procedure Code.
21. He argued that the Trial Court's finding was proper as PW 1 stated that whatever she was stating on examination-in-chief, she was told to say so by the police and that although she claimed that she was with others when she was held (sic), she failed to name who those other people were, hence the Trial Court was justified to hold that there were no eye witnesses. He added that the Trial Court was right to hold that no DNA test was done but argued that the court did not base its decision on DNA results only.
22. He further asserted that the Trial Court was justified to hold that PW 1's evidence was full of contradictions as although she said that she knew her perpetrator by his full names, she later stated that she was defiled by one Sabu who was a different person from the Respondent. He was emphatic that the contradiction undermined the credibility of the entire case.
23. He further contended that the ground that the Trial Court erred by failing to declare the victim a vulnerable witness was misconceived as the Trial Court noted her as having been shy, soft-spoken and



- slow in her responses and referred to Section 199 of the Criminal Procedure Code. He pointed out that the contradictions highlighted were material and left gaping holes in the Prosecution's case that could not be filled even if were to be put on his defence.
24. He asserted that there were no documents that were produced by the Prosecution to prove that PW 1 was mentally challenged as had been alleged. He argued that that was a contravention of Article 50 of *the Constitution* of Kenya which required that an accused person be informed, precisely, of every particular of the charge against him. He challenged PW 3's evidence and submitted that with such serious challenges in the Prosecution's case, placing him on his defence in the circumstances would have been an exercise in futility. It urged this court to uphold the Trial Court's Ruling.
  25. "Prima facie" is a Latin word defined by Black's Law Dictionary, 8<sup>th</sup> Edition as "Sufficient to establish a fact or raise a presumption unless disproved or rebutted". "Prima facie case" is defined by the same dictionary as "The establishment of a legally required rebuttable presumption." Put another way, it meant the establishment of a rebuttal presumption that an accused person was guilty of the offence he/she was charged with.
  26. This court had due regard to the case of Ramanlal Trambaklal Bhatt vs R [1957] E.A 332 at 334 and 335, where it was held that it might not be easy to define what is meant by a "prima facie case", but at least it had to be a case which a reasonable tribunal, properly directing its mind to the law and the evidence could convict a person if no explanation was offered by the defence.
  27. Turning to the case herein, this court analysed the evidence tendered to determine if the standard in the above case had been reached. The Prosecution called four (4) witnesses.
  28. PW 1 testified that on the material day of 5<sup>th</sup> April 2020, during evening hours, she had gone to fetch wood with others (sic), which others she did not know. She stated that the Respondent "alimshika" (caught her)(sic). She added that the Respondent touched her private parts with his "dudu" and his "dudu" entered her private parts.
  29. She further stated that he asked her that they repeat the act as he would give her money and they did so. She said that she went home and after three (3) days she told her grandmother what had happened and that her grandmother took her to hospital and then to the Police Station.
  30. On being cross-examined, she stated that she had told the police that it was Sabu who held (sic) her and that the Respondent was not Sabu. On re-examination, she stated that she knew Sabu and that Sabu was the Respondent.
  31. PW 2 testified that PW 1 informed her that on her way back from fetching firewood, she met the Respondent who lay on her. She added that PW 1 showed her and the police where the incident occurred and told them that her defiler was Joshua, the Respondent herein. She pointed out that the Respondent was a Sub-chief and a neighbour. She further said that on their way back, they met the Respondent and the Police arrested him.
  32. PW 3, the Clinical Officer, testified that he examined PW 1 on 12<sup>th</sup> April 2020 after four (4) days had lapsed. He stated that PW 1 had been previously been treated at Vihiga County Referral Hospital at Mbale on 11<sup>th</sup> April 2020 but that the police upon realising that the Post Rape Care (PRC) Form was not filled, they brought her to him.
  33. When he was cross-examined, he told the Trial Court that he examined PW 1 on the seventh (7<sup>th</sup>) day. He testified that he did not trace any spermatozoa but the hymen was not intact. He added that the incident had been discovered after five (5) days and that the child was mentally challenged thus she had lapses especially on dates.



34. PW 4 was the Investigating Officer, His evidence corroborated that of PW 1, PW 2 and PW 3. During cross-examination, he testified that he met the Respondent by accident and that it was PW 1's caretaker, one Collins Wanyama, who said the Respondent was the perpetrator by pointing at him and that at the time PW 1 was ahead of them.
35. He said that it was alleged that PW 1 was defiled on 5<sup>th</sup> April 2020 but that the report was made on 11<sup>th</sup> April 2020. He pointed out that Josephine, a friend of PW 1 may have learned that PW 1 was defiled as she was the one who told her grandmother and then told the said Collins Wanyama. However, she was not called as a witness as she was in Mombasa and could not be traced.
36. PW 4 further testified that in the course of his investigations, he learned that PW 1 was sexually active and had had sexual relations before. He said that Sabu was nickname title of a Sub-Chief and that according to PW 1, Sabu was her neighbour. He added that at the time of the offence, the Respondent was no longer the Sub-chief.
37. This court noted that PW 1 was the only identifying witness. 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.
38. 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).”
39. 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 could assist the trial or appellate court to come with a determination as to who between the opposing witnesses was being truthful. Other corroborating evidence could be proof of penetration, which was not proven in the instant case.
40. After carefully analysing the evidence that was adduced by the Prosecution, this court agreed with the Trial Court, that PW 1 contradicted herself in her evidence especially as to who actually defiled her. PW 3's evidence was also not direct and credible. A hymen that was not intact and absence of spermatozoa was not sufficient proof of defilement. He was required to extrapolate his findings further especially as he examined PW 1 several days after she was alleged to have been defiled.
41. PW 4 also confirmed that it was one Collins Wanyama who pointed at the Respondent as the person who had defiled PW 1 at which time, PW 1 was walking ahead of them and had not identified the Respondent as her perpetrator. PW 4's further evidence was that Josephine who might have learnt of the defilement had told PW 1's grandmother who PW 1's defiler was and her grandmother in turn told the said Collins Wanyama.
42. In his testimony, it did not also come out clearly who told PW 4 that it was the Respondent was the perpetrator. He merely stated that “coincidentally”, the Respondent was passing by and he arrested



- him. In fact, in his cross-examination, he admitted that he did not state how the Respondent was identified.
43. In her evidence, PW 1 contradicted herself when she said she was told to say what she said and then said that she was not forced to say what she told the Trial Court. This court entertained doubt as to whether she properly identified the Respondent as her perpetrator when her evidence was read alongside that of PW 4.
44. Going further, PW 4 stated that in the course of his investigations, he learnt that PW 1 was sexually active and had had previous sexual relationships. The Prosecution did not close the gap between the time PW 1 was allegedly defiled and the time she was taken to hospital to conclusively pin the Respondent as the person who had defiled her. Whereas DNA analysis was not mandatory to prove sexual offences, it was critical to connect an accused person to the complainant.
45. Although PW 3 pointed out that PW 1 was mentally challenged and had lapses on mentioning the exact dates, the Trial Court observed that she was shy, soft-spoken and slow in her responses. It did not mention her mental condition. If indeed, it had noted that PW 1 was mentally challenged, then it ought to have conducted voire dire examination. In the absence of corroborative evidence and evidence that PW 1 understood the meaning of oath, it was difficult to conclusively state that the Respondent defiled PW 1 as she had alleged.
46. As courts have stated time and time again, it must always be remembered that an accused was the favourite child of the law, and every effort should be made to ensure that he or she effectively and meaningfully benefitted from all the rights accorded to him by the law. The burden of proof was on the Prosecution to prove its case beyond reasonable doubt.
47. Restricting a person's liberty was not an issue that could be taken casually. Indeed, Article 29(a) of *the Constitution* of Kenya provides as follows:-
- “Every person has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause.”
48. In the premises foregoing, this court could not fault the Trial Court for having found that the Prosecution had not established a prima facie case to warrant the Respondent being put on his defence. Indeed, the burden of proof did not shift to the Respondent herein to prove that he did not defile PW 1. To the contrary, the burden of proof remained with the Prosecution to demonstrate that the Respondent defiled PW 1 as she had alleged.

### **Disposition**

49. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal dated and lodged on 18<sup>th</sup> March 2022 was not merited and the same be and is hereby dismissed.
50. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 24<sup>TH</sup> DAY OF NOVEMBER 2025**

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

