



REPUBLIC OF KENYA



**Kirao v Republic (Criminal Appeal E034 of 2024)
[2026] KEHC 862 (KLR) (30 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 862 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E034 OF 2024
JN NJAGI, J
JANUARY 30, 2026**

BETWEEN

KAHINDI KADENGE KIRAO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence by
Hon. P.E. Nabwana, SRM, in Mpeketoni Principal Magistrate's
Court Sexual Offence Case No. E007 of 2023 delivered on 5/3/2024)*

JUDGMENT

1. The Appellant herein was convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on diverse dates between 14th and 17th August 2022 at [Particulars Withheld] within Lamu West Sub County he intentionally caused his penis to penetrate the vagina of E. M. (herein referred to as the complainant), a child aged 14 years.
2. The appellant was sentenced to serve 20 years imprisonment. He was aggrieved by the conviction and the sentence and lodged this appeal. The grounds of appeal as per the Appellant's amended grounds of appeal are that;
 - (1) The trial court erred in law and fact in convicting the Appellant without considering that a voir dire examination was not conducted on the complainant contrary to section 19(1) of the Oaths and Statutory Declarations Act, CAP 15 of the Laws of Kenya.
 - (2) The trial court erred in law and fact in convicting the Appellant without considering the contradictions and discrepancies prevalent in the prosecution case.



- (3) The trial court erred in law and fact in failing to consider the age of the complainant PW1 was not proved in accordance with the law.
 - (4) The trial court erred in law and fact in failing to consider that the Appellant's defence.
3. The Appellant sought that the appeal be allowed by quashing the conviction and setting aside the sentence.

Prosecution Case

4. The evidence of the complainant was that she was at the material time aged 14 years. She was living with her father PW2. That on the 14th August 2022 she was sent by her mother to go and pick money from a person called Rama. That she went to Rama but she did not find him. That on the way back she met the Appellant who got hold of her by her hands and pulled her towards his house. He threatened to kill her if she screamed. On getting to his house he forced her to undress and she removed her skirt and panties. He took her to a bed and continued to threaten her. He removed his shorts and started to caress her breasts. He then inserted his penis into her vagina and defiled her. She stayed in his house for three days. On the third day a lady called Kadii joined her in the house. Her brother passed by the house of the appellant and heard her voice in the house. Her father then came with the police officers and took her to the police station. The appellant went into hiding.
5. The complainant's father PW2 on his part testified that he in September 2022 sent the complainant to pick money from her mother at her mother's place of work. That the complainant went away and did not come back. He reported to the village elder. That on the third day a brother to the complainant reported to him that he had heard the voice of the complainant in the house of the appellant. PW2 made a report to a police reservist officer, PW3, who informed the OCS. The OCS sent policemen to attend to the matter. The policemen found him and they went to the house of the appellant. They found the complainant in the house of the appellant with a certain lady, Kadii PW4. They took the complainant to the police station and then to hospital for examination.
6. Kadii PW4 told the court that she was a girlfriend to the Appellant. That sometimes in the month of September, she was in the house of the Appellant when the complainant went and found her in the house. She asked her to give her food. She gave her. That after she had eaten policemen went to the house and arrested both her and the girl. They were taken to the police station.
7. A clinical officer at Witu Health centre, PW5, testified that the complainant was taken to their medical facility with a history of defilement. That he examined her and found her with a missing hymen but with no injuries. He conducted other tests on her and filled a P3 form. He also examined her and assessed her age at 14 years.
8. The case was investigated by PC Magonda PW6 of Witu police station. He recorded statements of witnesses and learnt that the appellant had gone underground. On 3/4/2023 the Appellant was arrested by police reservists. PW6 went and re-arrested him and took him to the police station. The appellant recorded a confession statement before CI. John Waluke. He, PW6 charged the Appellant with the offence. During the hearing, the clinical officer PW5 produced the treatment notes, the P3 form and the age assessment report as exhibits, P.Exh. 1 - 3 respectively. The investigating officer PW6 produced the confession of the Respondent as exhibit, P.Exh.4.

Defence case

9. When placed to his defence, the Appellant stated in an unsworn statement that on the 4/4/2023 he was at his home with his family members when three police reservists went and arrested him. They



did not tell him the reason for his arrest. He was taken away. The officers started to beat him. A police vehicle found them on the way. He was taken to the police station where he was told that he had defiled a school girl. He denied it. On the following day the girl was brought to the police station by her father and they were taken to hospital. He was examined and returned to the police station. He was asked to sign some documents and he complied. He was charged.

Submissions

10. The appeal was canvassed by way of written submissions. The appellant submitted that the trial court failed to conduct a voir dire examination on the complainant so as to establish whether she understood the meaning of an oath despite the fact that the complainant was under the age of 14 years. That taking the evidence of the complainant before conducting a voir dire examination violated the law and consequently the evidence tendered by the complainant was not safe to convict on. The Appellant in this respect cited the case of Republic v Kathurima, Nyeri CRA No. 137 of 2014.
11. The Appellant submitted that the prosecution witnesses were not consistent in their evidence and as such it was not safe to rely on their evidence to convict him. That the complainant in her evidence stated that it is the complainant's girlfriend, Kadii, who found her in the Appellant's house while the said girlfriend stated in her evidence that it is the complainant who found her in the house of the Appellant on the third day. Therefore, that the evidence of the two witnesses was contradictory and it cannot be known as to who was telling the truth on the issue. That the inconsistencies in the evidence should be resolved in favour of the Appellant. The cases of Paul Kanja Gitari v Republic (2015) eKLR and Kazungu Mramba Mweni v Republic E.A.No.220 of 2002 were referred in this respect.
12. It was submitted that the age assessment report and the P3 form alluded to by the clinical officer are not contained in the Record of Appeal. Therefore, that the evidence to that end was mere assertion of the clinical officer whose benefit of doubt should be accorded to the Appellant.
13. The Appellant faulted the trial court for not considering his defence. He urged the court to do so and allow the appeal.
14. The respondent on the other hand submitted that the case against the appellant was proved beyond reasonable doubt. That the age of the complainant was proved by the age assessment report, PExh.3 which indicated the age of the complainant at 14 years. That the evidence of the clinical officer PW5 confirmed that the complainant's hymen had been broken and that the complainant had a whitish discharge and puss cells which was a sign of infection. That the Appellant was a person well known to the complainant and she could not mistake him for anyone else.
15. It was submitted that the defence of the appellant was made up of mere denials that did not cast doubt on the prosecution case.
16. On sentence, it was submitted that the appellant was sentenced to the minimum sentence as provided under the section of the law the appellant was charged with. The Respondent urged the court to dismiss the appeal.

Analysis and determination

17. This being a first appeal, this court is mandated to analyze and re-evaluate the evidence afresh in line with the holding in the case of Odhiambo v Republic Cr App No 280 of 2004 (2005) 1 KLR where the Court of Appeal held that: -

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it



must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour.”

18. The same principles were re-stated by the Court of Appeal in the case of *Kiilu & another v Republic* [2005]1 KLR 174, thus:

An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.

It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

19. The elements of the offence of defilement that the prosecution is required to prove beyond reasonable doubt are: proof of the age of the victim, proof of penetration and identity of the perpetrator, see the *Charles Wamukoya Karani vs. Republic*, Criminal Appeal No. 72 of 2013.

20. Starting with the element of the age of the complainant, the law is that the age of a person can be proved in various ways. In the case of *Mwalongo Chichoro Mwajembe -Vs- Republic*, Msa Cr.App. No. 24 of 2015 (UR), the Court of Appeal held as follows:

“... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim’s age, it has to be credible and reliable.”

21. The complainant in this case stated that she was aged 13 years but that she did not know her date of birth. Her father PW2 did not mention anything to do with the age of the complainant. The clinical officer who examined the complainant, PW 4, stated that he examined the complainant and assessed her age at 14 years. In view of the examination by the clinical officer, I find the age of the complainant to have been proved at 14 years.

22. The Appellant faulted the trial court in allowing the complainant to give sworn evidence before conducting a voir dire examination on her to establish whether she understood the duty of telling the truth and understood the nature of the oath. The Respondent did not make a comment on the issue in their submissions.

23. The complainant having been of the age of 14 years at the time she testified in court was in law a child of tender age. A child of tender age was defined in the case of *Kibageny Arap Kolil v Republic* [1959] EA 92 to mean a child under the age of fourteen years. That being the case, the trial court was required under section 19 of the *Oaths and Statutory Declarations Act* to conduct a voir dire examination on the complainant before admitting her evidence in court with the purpose of determining whether she was possessed of sufficient intelligence to justify the reception of her evidence and understood the nature of oath. The trial court in this case did not comply with that requirement.



24. The purpose of voir dire examination was explained by the Court of Appeal in *Johnson Muiruri vs Republic* [1983] KLR 445 as follows:

“Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him....

A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth....

The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction.”

25. In *Maripett Loonkomok v Republic* [2015] eKLR, the Court of Appeal had his to say in respect of voir dire examination:

“Section 19 of the *Oaths and Statutory Declarations Act* is concerned with the reception and admissibility of evidence of a child of tender years. The section starts by declaring that where the child does not, in the opinion of the court understand the nature of an oath, his evidence may nonetheless be received though not given upon oath. But that evidence shall only be received if, again in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the evidence and also if, the child understands the duty of speaking the truth...The question therefore is, who is a child of tender years? The *Sexual Offences Act* and the *Oaths and Statutory Declarations Act* are silent on this question. However way back in 1959 in the celebrated case of *Kibageny Arap Kolil v R* (1959) EA 82 the Court of Appeal for Eastern Africa held that the phrase “a child of tender years” meant a child under the age of 14 years. The only statutory definition of a “child of tender years” is section 2 of the *Children Act* where it is defined to mean a child under the age of 10 years. This Court has recently in *Patrick Kathurima v R*, Criminal Appeal No 137 of 2014 and in *Samuel Warui Karimiv R* Criminal Appeal No 16 of 2014 stated categorically that the definition in the *Children Act* is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honored 14 years remains the correct threshold for voire dire examination.....

It follows from a long line of decisions that voire dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child’s intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this court recently found that;

“In appropriate cases where voire dire is not conducted, but there is sufficient independent evidence to support the charge ... the court may still be able to uphold the conviction”.

26. From the foregoing authorities, the evidence of the complainant herein that was taken without a voir dire examination being conducted could not be used to convict the Appellant unless there was sufficient independent evidence to support the charge. This is the position taken by Mrima J. in *Sammy*



- Ngetich v Republic [2018] eKLR where the trial court took the evidence of a complainant aged 13 years without conducting a voir dire examination.
27. In *Abdi Abdiraham & another v Republic* (2013) eKLR, the High Court at Garissa set aside a conviction and sentence of the appellant on account of failure on the part of the trial magistrate to conduct voir dire examination of the child who was aged 13 years at the time she gave evidence.
 28. In *Samuel Warui Karimi v Republic* [2016] eKLR where the trial court failed to conduct a voir dire examination on a complainant aged 12 years, the Court of Appeal held that her evidence was not properly received and the conviction of the appellant was unsafe.
 29. The above being the legal position, the question is whether there was independent evidence to sustain the conviction of the Appellant herein in the absence of the evidence of the complainant.
 30. The complainant testified that the Appellant pulled her to his house and on getting there he forced her to undress and proceeded to penetrate her vagina with his penis. That she stayed in house until when she was rescued after 3 days.
 31. Section 2 of the *Sexual Offences Act* defines “penetration” as:

“the partial or complete insertion of the genital organs of a person into the genital organs of another person.”
 32. Penetration can be proved by way of medical evidence or by oral or circumstantial evidence. The clinical officer who examined the complainant PW5 found her with missing hymen but with no injuries. This meant that there was no evidence that the hymen was freshly broken. This leads to the conclusion that there was no independent medical evidence to support penetration on the complainant at the material time. Medical evidence in support of defilement was therefore lacking in the case.
 33. The evidence that tended to connect the Appellant with the offence is the evidence of the police reservist PW3 and Kadii PW4 that the complainant was found in the house of the Appellant. However, the evidence of the two witnesses cannot be said to be independent evidence in proof of defilement against the appellant as their evidence was only limited to the fact of the complainant being found in the house of the Appellant and not on defilement. What happened between the complainant and the Appellant when the complainant was in the appellant’s house is only known to the two of them. Consequently, PW3 and PW4 did not offer independent evidence that the Appellant defiled the complainant.
 34. The other evidence that tended to connect the Appellant with the offence is the evidence of investigating officer PW6 that the Appellant confessed in a statement taken under caution, P.Exh. 4, that he committed the offence. The law is that the such a statement can only be taken by a police officer of the rank of inspector of police and above who should during the hearing satisfy the court that the statement was made voluntarily without threats, coercion or influence of any kind as provided for under the Judges’ Rules. In this case, the statement was produced in court by the investigating officer PW6 who never adduced evidence that safeguards as provided for in the Judges’ Rules were complied with in taking the statement. The statement was therefore erroneously admitted as evidence in the case and was thus of no evidential value.
 35. In view of the foregoing, I do not find any independent evidence to support the charge of defilement in face of the fact that the evidence of the complainant could not in the circumstances of this case be used to convict the Appellant. In the absence of such independent evidence, I find the conviction on the appellant to have been unsafe.



36. The question is whether I should acquit the appellant or order a retrial. The principles governing whether a re-trial should be ordered or not were enunciated in *Fatehali Manji v Republic* [1966] EA 343 by the East Africa Court of Appeal as follows:

“In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person.”

37. In *Mwangi v Republic* [1983] KLR 522 the Court of Appeal also held thus:

“We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant.”

38. The trial in this case was vitiated by the trial court in failing to conduct a voir dire examination on the complainant before her evidence was taken in court. The offence was said to have been committed in August 2022 at which time the complainant was a child of tender years. She is as of now no longer a child of tender years which means that there will be no need of a voir dire examination being conducted on her before her evidence is taken in court. For the appellant to be re-tried under such circumstances will likely cause him prejudice and injustice. I do not consider it legally tenable to order a re-trial in the circumstances of this case. The alternative is to acquit the Appellant of the offence.

39. The upshot is therefore that this court finds merit in the appeal. Consequently, the conviction entered on the appellant by the trial court is quashed and the sentence thereof set aside. I order that the Appellant be set at liberty forthwith unless lawfully held.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 30TH DAY OF JANUARY, 2026.

J. N. NJAGI

JUDGE

In the presence of:

Miss Ochola HB for Mr. Oluoch for Respondent

Appellant -present virtually at GK Prison Malindi

Court Assistant - Rahma

