

JUDGMENT
HCCRA E027 OF 2024



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYAMIRA
CHERERE-J
HCCRA E033 OF 2023

BETWEEN
SAMUEL NYAKUNDI NYANGENA.....
APPELLANT
AND
REPUBLIC
..... RESPONDENT

**(Being an appeal from the conviction and sentence in
Keroka Criminal Case 794 of 2014 by Hon. N.Kahara (RM)
on 18th December 2015)**

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Introduction

1. 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. The particulars of the charge were that on 08th August 2014 at Keroka within Nyamira County, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of HKM, a child aged about three and a half (3½) years.
2. Upon the conclusion of the trial, the Appellant was convicted on 18th December 2015 and sentenced to life imprisonment, being the sentence prescribed by law for the offence as charged.

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3. Aggrieved by both the conviction and the sentence, the Appellant lodged the present appeal. In the Petition of Appeal dated 10th July 2023, the Appellant challenged the conviction and sentence on several grounds, inter alia, that the offence was not proved beyond reasonable doubt; that penetration and identification were not proved; that reliance on the evidence of a child of tender years was improper; that the requirements of section 124 of the Evidence Act were not complied with; that the prosecution failed to call a crucial witness; and that the sentence imposed was harsh and excessive.
4. The appeal was canvassed by way of written submissions. The Appellant filed written submissions dated 10th November 2025. The Respondent, through the Office of the Director of Public Prosecutions, likewise filed written submissions similarly dated 10th November 2025, urging this Court to dismiss the appeal and uphold both the conviction and the sentence.
5. This being a first appeal, this Court is duty bound to re-evaluate the entire evidence on record, subject it to a fresh and exhaustive analysis, and draw its own independent conclusions, while bearing in mind that it neither saw nor heard the witnesses testify. This duty was articulated by the

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former Court of Appeal for East Africa in **Okeno v Republic [1972] EA 32** and reiterated in **Kiilu & Another v Republic [2005] 1 KLR 174.**

Issues for Determination

6. Having considered the Petition of Appeal, the record of the trial court, and the rival submissions, the following issues arise for determination:

- 1) Whether the age of the complainant was proved beyond reasonable doubt
- 2) Whether penetration, within the meaning of section 2 of the Sexual Offences Act, was proved
- 3) Whether the Appellant was positively identified as the perpetrator of the offence
- 4) Whether the evidence of the complainant, a child of tender years, was properly received and corroborated in accordance with section 124 of the Evidence Act
- 5) Whether the failure by the prosecution to call an alleged crucial witness weakened the prosecution case; and
- 6) Whether the sentence imposed was harsh, excessive, or unlawful.

1) Whether the Age of the Complainant Was Proved

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7. The offence of defilement is constituted by three essential ingredients, namely proof that the complainant was a minor, proof of penetration, and proof of the identity of the perpetrator. This position was restated by the Court of Appeal in **John Mutua Munyoki v Republic [2017] KECA 376 (KLR)** where the Court emphasised that all these elements must be proved beyond reasonable doubt.
8. In the present case, the charge sheet indicated that the complainant was aged three and a half (3½) years at the time of the offence. A certificate of birth produced in evidence showed that the complainant was born on 26th September 2010 and was therefore slightly under four years old on the date of the alleged offence.
9. The age stated in the charge sheet was therefore an approximation and was entirely consistent with the documentary evidence produced at the trial. Both descriptions placed the complainant well below the age of eleven years.
10. Consequently, the charge of defilement under section 8(1) as read with section 8(2) of the Sexual Offences Act was properly framed. The minor variance in the stated age neither misled the Appellant nor occasioned any prejudice to his defence.

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11. I therefore find that the age of the complainant was proved beyond reasonable doubt and that the charge as laid was lawful and appropriate.

2) Whether Penetration Was Proved

12. Penetration is defined under section 2 of the Sexual Offences Act as the partial or complete insertion of the genital organs of a person into the genital organs of another person.

13. The Court of Appeal in **Mark Oiruri Mose v Republic [2013] KECA 67 (KLR)** authoritatively held that penetration need not be deep and that even surface or partial penetration is sufficient to establish this ingredient of the offence.

14. In the present case, the medical evidence disclosed bruising on the complainant's thighs and labia, the presence of whitish discharge, as well as pus and yeast cells. Although the hymen was intact, the clinical officer formed the opinion that there had been forceful penetration, albeit not full penetration.

15. In light of the statutory definition and the binding authority of the Court of Appeal, the fact that the hymen was intact does not negate penetration. The medical findings were consistent with partial penetration within the meaning of section 2 of the Act.

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16. I accordingly find that the prosecution proved the element of penetration beyond reasonable doubt.

3) Identification of the Appellant

17. The complainant referred to the assailant as “Sokoro”. PW2, the complainant’s mother, testified that the Appellant was her father’s brother and was commonly known as “Choma”.

18. In his defence, the Appellant did not deny that he was well known to both the complainant and her mother, nor did he dispute that he was known by the said nicknames within the family setting.

19. This was therefore a case of recognition by close family members. Applying the principles enunciated in **Sumba v Republic [2024] KECA 521 (KLR)**, I am satisfied, as was the trial court, that the identification of the Appellant was proper and free from the possibility of error.

4) Failure to Call an Alleged Crucial Witness

20. The Appellant contended that the learned trial magistrate erred in law and fact by convicting him when the prosecution allegedly failed to call a crucial witness, namely the grandmother of the complainant, in whose care the minor had been placed.

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21. The applicable legal position is set out in section 143 of the Evidence Act (Cap 80), which provides that no particular number of witnesses is required for the proof of any fact. In **Donald Majiwa Achilwa & 2 others v Republic [2009] KECA 163 (KLR)**, the Court of Appeal held that an adverse inference for failure to call a witness will only arise where the evidence on record barely establishes the prosecution case and a material witness is deliberately withheld.
22. I have carefully re-evaluated the evidence on record in light of this complaint. The evidence discloses that the complainant's grandmother was not an eye-witness to the alleged incident, and there is nothing on record to suggest that she had direct knowledge of the events giving rise to the charge. Her testimony would therefore have been peripheral and not material to the proof of the offence.
23. In the circumstances of this case, the prosecution evidence sufficiently established the elements of the offence, and the failure to call the complainant's grandmother did not occasion any prejudice to the Appellant. This ground of appeal therefore fails.

5) Whether the Sentence Was Harsh or Excessive

24. The Appellant contended that the sentence imposed was harsh and excessive.

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25. Section 8(2) of the Sexual Offences Act prescribes a mandatory sentence of life imprisonment where the victim is aged eleven years or below.
26. In **Hadson Ali Mwachongo v Republic [2016] KECA 521 (KLR)**, the Court of Appeal underscored that proof of age by cogent evidence is an essential ingredient of the offence because the sentence prescribed by law is directly dependent on it.
27. In the present case, the certificate of birth produced in evidence shows that the complainant was three and a half (3½) years old at the time of the offence. The sentence imposed was therefore mandatory and lawful.
28. This Court therefore finds no basis upon which to interfere with the sentence imposed by the trial court.

Disposition

29. Having resolved all the issues for determination, I make the following findings and orders:
- 1) The conviction was sound and the sentence lawful.**
 - 2) The appeal against both conviction and sentence is dismissed in its entirety.**
 - 3) The conviction for the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act and the sentence of life**

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imprisonment imposed by the trial court are
hereby affirmed.

DELIVERED AT NYAMIRA THIS 29th DAY OF
January 2026



WAMAE.T. W. CHERERE
JUDGE

Appearances

Court Assistant - Terer

Appellant - Present

**For Appellant - Mr. Onchweri for Mr. Gekombe for
Gekombe & Associates Advocates**

For the DPP - Mr. Chirchir (SADPP)