Nyabuti v Director of Public Prosecutions (Criminal Appeal E047 of 2024) [2026] KEHC 716 (KLR) (22 January 2026) (Judgment)

Neutral citation: [2026] KEHC 716 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E047 OF 2024

TW CHERERE, J

JANUARY 22, 2026

BETWEEN

JOSEPH ANARI NYABUTI ..... APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT

(Being an appeal against conviction and sentence in Keroka MCSO E083 of 2023 by Hon. Ombija C.A (SRM) on 29th August 2024)

JUDGMENT

Background

1. The Appellant, Joseph Anari Nyabuti, was charged in *Keroka MCSO E083 of 2023* 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 *Act*).

2. The particulars of the charge were that on the night of 16th and 17th September 2023,in Borabu Sub-County within Nyamira County, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of RK, a child alleged to be aged eleven years.

3. The Appellant was also charged with an alternative count of touching the complainant's breasts and vagina contrary to section 11 (1) of the *Act*.

4. The prosecution called six witnesses. Upon conclusion of the trial, the Appellant was convicted on 28th August 2024 and sentenced to twenty (20) years' imprisonment.

5. Dissatisfied with both the conviction and sentence, the Appellant lodged the present appeal. He filed a Petition of Appeal, Supplementary Grounds of Appeal, and Written Submissions dated 15th October 2024, in which he faulted the trial court on the following grounds:

1. That the learned trial magistrate erred in law and fact in holding that the prosecution had proved its case beyond reasonable doubt, yet the evidence on record was inconsistent, contradictory, and insufficient to sustain a conviction.

2. That the trial court erred in relying on suspicion, assumptions, and inference rather than cogent and credible evidence to link the appellant to the alleged act of defilement.

3. That the learned magistrate failed to appreciate that the evidence tendered did not conclusively establish penetration as required in law.

4. That the trial court erred in accepting medical evidence which did not clearly correlate with the alleged dates of the offence and did not conclusively support the prosecution case.

5. That the learned trial magistrate failed to reconcile material inconsistencies and contradictions in the prosecution evidence, particularly with regard to the dates of the alleged offence and the sequence of events leading to the complaint.

6. That the learned magistrate erred in law and fact by failing to adequately consider the appellant's defence and the explanations offered therein.

7. That the learned trial magistrate failed to properly evaluate the credibility of the prosecution witnesses in light of the surrounding circumstances and possible motives for fabrication.

8. That the trial court erred in law by shifting the burden of proof to the appellant, contrary to established principles of criminal law, by drawing adverse inferences from matters that were not proved by the prosecution.

9. That the learned magistrate erred in law and fact by failing to uphold the appellant's right to a fair trial as guaranteed under Article 50(2)(g) and (h) of the *Constitution*.

10. That the sentence imposed was harsh, excessive, and not supported by a proper exercise of judicial discretion.

6. The Respondent filed Written Submissions dated 07th November 2025, in which the appeal was not opposed. On the contrary, the Respondent expressly conceded the appeal on the grounds that the age of the complainant was not proved, the medical evidence did not conclusively establish penetration, and the trial court failed to properly analyse the evidence as required by law.

7. As a first appellate court, this Court is under a duty to reconsider and re-evaluate the evidence afresh and to draw its own independent conclusions, while bearing in mind that it did not see or hear the witnesses testify. This principle was articulated in *Okeno v Republic* [1972] EA 32 and reaffirmed in *Kariuki Karanja v Republic* [1986] KLR 190.

Issues for Determination

8. From the pleadings, submissions, and the record, the following issues arise for determination:

1. Whether the age of the complainant was proved beyond reasonable doubt

2. Whether penetration was proved beyond reasonable doubt

3. Whether the identity of the perpetrator was proved

4. Whether the prosecution evidence was so deficient as to render the conviction unsafe

Analysis and Determination

Whether the age of the complainant was proved beyond reasonable doubt

9. The Appellant contended that the age of the complainant was not proved with certainty, pointing to inconsistencies in the evidence where the complainant stated she was six years old, while the charge sheet indicated she was eleven years old. The Respondent expressly conceded this ground, noting that no birth certificate, age assessment report, or other independent evidence was produced, and that the Investigating Officer admitted that no documentary proof of age was obtained.

10. Regarding the first element of age, the Court of Appeal in the case of *Justin Kubasu v Republic* [2020] eKLR cited *Edwin Nyambogo Onsongo v Republic* [2016] eKLR in which the Court cited with approval *Mwolongo Chichoro Mwanyembe v Republic*, Mombasa Criminal Appeal No. 24 of 2015, that;

> "... 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.".

11. In the present case, the evidence on age was inconsistent and unresolved. The discrepancy between the complainant's testimony and the particulars of the charge was not reconciled, and no additional evidence was adduced to clarify the complainant's age. In those circumstances, the prosecution failed to prove the age of the complainant beyond reasonable doubt.

Whether penetration was proved beyond reasonable doubt

12. As to whether penetration was proved, 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." To establish the charge of defilement against the Appellant, it must be proved that there was an act of penetration that is, either partial or complete insertion of male genital organs, into that of complainant and that the Appellant had been positively identified as the person who committed the act of penetration.

13. In *Bassita v Uganda* S. C. Criminal Appeal No. 35 of 1995, the Supreme Court of Uganda held 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 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 a reasonable doubt."

14. The Appellant submitted, and the Respondent conceded, that the medical evidence was inconclusive. The P3 form indicated that the labia majora, labia minora and cervix had "no injuries noted", and did not conclusively state whether penetration had occurred. There was also uncertainty as to whether the witness who testified was the one who completed the P3 form.

15. While penetration may be proved by the testimony of the complainant alone, where medical evidence is available, it must be evaluated alongside that testimony. In the present case, the trial court did not interrogate or reconcile the inconclusive medical findings with the conclusion that penetration had been proved.

16. I am satisfied, as conceded by the Respondent, that penetration was not proved beyond reasonable doubt.

Whether the identity of the perpetrator was proved

17. It was not in dispute that the Appellant is the father of the complainant, and the case was therefore one of recognition.

18. However, as stated by the Court of Appeal in *Matimu v Republic* (Criminal Appeal 4 of 2020) [2025] KECA 1545 (KLR) (3 October 2025) (Judgment) the prosecution must prove three essential ingredients, namely: the age of the complainant, penetration, and the identity of the perpetrator. These elements are conjunctive and not disjunctive. Consequently, where the prosecution fails to establish both the age of the complainant and the fact of penetration, proof of identity, even if assumed to be satisfactory, cannot in law salvage the prosecution case.

Whether the conviction was safe

19. It is trite law that a criminal conviction cannot be founded on conjecture, speculation, or evidence that leaves material elements of the offence in doubt. Where any essential ingredient of an offence is not proved beyond reasonable doubt, the resulting conviction is unsafe and cannot be allowed to stand.

20. In the present case, and notwithstanding the Respondent's concession, this Court's own independent re-evaluation of the record leads to the inescapable conclusion that the prosecution failed to prove the offence of defilement to the requisite standard of proof.

Final Orders

21. Before making the final orders, the Court notes and appreciates the Respondent's candid and responsible concession of the appeal, recognising that not every conviction may properly be sustained, particularly where, upon judicial scrutiny, it is shown to be against the weight of the evidence on record.

22. In the result, the Court makes the following orders:

    1. The appeal is allowed.

    2. The conviction is quashed.

    3. The sentence of twenty (20) years' imprisonment is set aside.

    4. The Appellant shall be released forthwith, unless otherwise lawfully held.

DELIVERED AT NYAMIRA THIS 22ND DAY OF JANUARY 2026

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Hilda

Appellant - Present

For the DPP - Mr. Chirchir (SADPP)