

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. E007 OF 2025

REPUBLIC.....APPELLANT

VERSUS

CHENGO MWAMBAYA NGAO.....RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. L. N. Wasige (Mrs), Principal Magistrate, in Kaloleni Principal Magistrate's Court Sexual Offence Case No. E034 of 2021 delivered on 9/5/2022)

JUDGMENT

1. The Appellant herein was tried and 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 7th August 2021 (name withheld) village within Kilifi county he intentionally and unlawfully caused his penis to penetrate the vagina of P.K.K. (herein referred to as the complainant), a child aged 15 years.
2. The Appellant was sentenced to serve 20 years imprisonment. He was aggrieved by the conviction and the sentence and lodged the instant appeal. The grounds of appeal are that:
 - 1) The appellant pleaded guilty/not guilty at trial

- 2) The appellant is a poor man and has no money for appeal.
- 3) The appellant did not wish to be presented at the hearing stage of appeal.

Case for the prosecution

3. The case for the prosecution is that the complainant was a 15 year old primary going girl. She was living with her mother PW2 at V village. The Appellant was their neighbor about 100 meters away from their home. That on the material day the complainant`s mother was away attending a burial.
4. It was the evidence of the complainant that on the material day her mother had left the Appellant`s house keys with her for her to hand them over to him. That at around 8 pm the complainant was at her home when the Appellant went there to collect his keys. He found her having prepared supper and she served him. After he finished taking it he told her that he wanted her. She was at the time preparing to go and take a shower and she had wrapped a lesa around her body. The Appellant stripped her of the lesa and undressed himself. He proceeded to have sex with her on a couch at the sitting room. He had by that time locked the door to the house. That as he continued to have sex with her, her uncle Mwalimu Karisa PW3 knocked the door. The Appellant opened the door. Many people gathered there. Her uncle tied both of them with robes and took them to the chief`s

office. They were taken to the police station. She was taken to hospital and examined. She recorded a statement to the police.

5. The complainant`s mother PW2 testified that she was on that day attending a burial at her in-laws home. She had left the complainant at home with her brother called Kennedy who is dump. That she was called by her brother-in-law PW3 who told her that the complainant had been defiled by the Appellant. She returned home on the following day and found the complainant at the police station. She was taken to hospital.
6. The complainant`s uncle PW3 testified that he was on that day in bed when he was alerted by the complainant`s brother Kennedy that there was something going on at their house. He went with him to the house of the complainant about 300 meters away. He knocked the door and found it was locked from inside. Neighbours started gathering there. He threatened to break the door. The Appellant then identified himself and said he is the one who was inside. He opened the door. He PW3 entered into the house and found the complainant hiding under the bed while naked. Some women gave her a lesa to cover herself. They took the complainant and the Appellant to the chief`s office. They left the Appellant there and returned home with the complainant. They took her back there on the following day

and then took her to G. police station. They recorded statements.

7. A clinical officer at Mariakani sub county hospital PW4 told the trial court that the complainant had been attended to at a local health centre before he saw her on 9/8/2021. He noted that she had a bruise on the elbow and her hymen was recently broken. He filled her P. 3 form.
8. A neighbour to the complainant PW4 told the court that he was on the material day at his home at 10 pm when he was visited by a person called Mbogo who asked him to accompany him to the home of the complainant. They went there in the company of Mwalimu, PW3 and found the door locked from inside. They knocked the door but there was no response. The Appellant then identified himself and came out of the house. They entered into the house and found the complainant hiding under the bed. She was naked. She was given a lesa to cover herself. They took her and the Appellant to the chief`s office. The Appellant was left at the chief`s office but the complainant was returned home. On the following day they reported the matter at G. police station.
9. The investigating officer PW6 testified that on 8/8/2021 at 2pm he was at the police station when the complainant was taken there by elders and her mother. She reported that she had been defiled by the Appellant on the previous day. The complainant`s mother handed over to her, the investigating

officer, the complainant`s Child Health card that indicated that the complainant was born on 27/3/2002. She charged the Appellant with the offence. During the hearing of the case in court the clinical officer PW4 produced the outpatient booklet, laboratory results and the P3 form as exhibits, P.Exh.2, 3 and 4 respectively. The investigating officer PW6 produced the child health card as exhibit, P.Exh.1.

Defence Case

10. When placed to his defence, the Appellant stated in a sworn statement that on 7/8/2021 he was at work at Kibao Kiche. He worked up to 8pm. On the following day he went to a barber shop and he was arrested by police officers. It was his evidence that he neither knew the complainant nor her mother. That he was not related to them and he saw them for the first time in court.
11. The appeal was canvassed by way of written submissions.

Appellant`s submissions

12. The Appellant faulted the trial court in the manner it conducted the *voir dire* examination and for that reason submitted that the trial is vitiated.
13. It was submitted that the trial court failed to consider the contradictions between the evidence of the complainant`s mother PW2 and her brother in law PW3 on their relationship with the Appellant wherein PW2 said that

the Appellant was her uncle but PW3 said that he is not related to the Appellant.

14. The appellant further faulted the prosecution for not calling Kennedy to shed light on what transpired on that day. He submitted that failure to call the said witness created doubt in the prosecution case.
15. The Appellant submitted that the trial court failed to consider his defence of alibi. He submitted that his conviction was not safe. He urged the court to allow the appeal.

Respondent`s submissions

16. The Respondent submitted through the prosecution counsel that the case against the Appellant was proved beyond reasonable doubt. That the age of the complainant was proved by the production of Child Health Card that showed that she was at the material time aged 15 years.
17. It was submitted that the evidence of the complainant that she was penetrated by the Appellant was corroborated by her uncle PW3 who found the Appellant inside the house of the complainant and found the complainant in the same house while naked. That the evidence on defilement was further corroborated by the clinical officer PW4 who found the complainant with a broken hymen.
18. On identification of the Appellant, it was submitted that he was identified by the complainant as he was related to her mother. It was submitted that there was no contradiction

in the prosecution evidence. The Respondent urged the court to dismiss the appeal.

Analysis and determination

19. This being a first Appeal, this Court has a duty to evaluate the evidence, analyze it afresh and draw its own conclusions while at the same time bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify as did the trial Court. In **Okeno vs. Republic [1972] EA 32**, the Court of Appeal for East Africa had the following to say in this connection:

"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 whole 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; it must make its own findings and draw its own 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..."

20. The standard of proof in a criminal case is that of beyond reasonable doubt. Lord Denning in **Miller vs. Ministry of Pensions (1947) 2 All ER, 372** stated as follows on this standard:

"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice."

21. The trial magistrate in her judgment correctly identified the ingredients of the offence of defilement as proof of the age of the victim, proof of penetration and proof of the identity of the perpetrator, see **Dominic Kibet Mwareng v Republic (2013) eKLR**.

22. The prosecution produced the complainant's prenatal child health card that showed that she was born on 27/3/2006. This placed the age of the complainant in August 2021 at 15 years. The age of the complainant was therefore proved at 15 years.

23. On penetration, the trial court made a finding that the complainant was penetrated. That the clinical officer PW4 found the complainant with a broken hymen and that lack of the same was proof of penetration on the complainant.

24. 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."

25. The evidence of the clinical officer PW4 is that he found the complainant with a broken hymen but that there were no tears or bruises in the vagina. Thus there was no evidence that the hymn was recently broken. Without evidence that the hymen was freshly broken there was no basis of the finding by the clinical officer that there was evidence of penetration on the complainant. The mere absence of hymen is not proof of penetration. It is trite that the hymen can be broken by other activities such vigorous exercise. More so that some girls are born without it, see **P.K.W v Republic [2012] KECA 103 (KLR)**. In view of this the trial magistrate erred in holding that absence of hymen proved penetration. Consequently, there was no medical evidence to support

the evidence of the complainant that she was penetrated by the Appellant.

26. However, lack of medical evidence in support of a charge of defilement is not fatal to the case as defilement can be proved in other ways other than by way of medical evidence. In the case of **Kassim Ali v Republic (2021) eKLR** the Court of Appeal stated that;

“...the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence.”

27. The trial magistrate in this case found that there was sufficient oral evidence that proved that the Appellant penetrated the complainant. That this came out from the evidence of the complainant that was corroborated by her uncle PW3 and a neighbour PW4 who found the Appellant inside the house of the complainant with the door locked from inside. The trial court found the Appellant was a person well known to the complainant. That she was a truthful witness and her evidence was not shaken in cross-examination. Similarly, that PW3 and PW4 were truthful witnesses. That the only conclusion that could be made out of the circumstances that the Appellant was found inside the house of the complainant by PW3 and PW5 is that the Appellant was having sex with the complainant inside the said house. That the defence of the Appellant that he did not know the prosecution witnesses was a lie as he was a neighbour to PW1, PW2, PW3 and PW5 and he was a relative to the complainant and her mother.

28. I have considered the judgment of the trial court in its entirety and the reasons given for the conviction of the Appellant on the offence of defilement. I have no reason to differ with the findings made by the trial court. It is clear from the evidence of the complainant that the Appellant went to her house on the evening of the material day to collect his house keys and after she gave him supper he proceeded to defile her. The Appellant was found inside the house of the complainant by PW3 and PW5. That the two witnesses the found the Appellant inside the house of the complainant corroborates the evidence of the complainant that the Appellant defiled her. There was nothing to indicate that the three prosecution witnesses were lying against the Appellant. The finding of the trial magistrate that they were truthful witnesses cannot be faulted. There was sufficient evidence that the Appellant penetrated the Complainant.

29. The Appellant alleged that the trial court did not consider his defence. This is not correct as the court did so and dismissed the defence as a lie. There cannot have been any truth in the defence of the Appellant that he was not known to the complainant, her mother, PW3 and PW5 as they all lived in the same village. He was related to the complainant and her mother. He himself admitted that he left work on that day at 8pm. He did not explain where he went after leaving work. The complainant stated that the Appellant went to her house at 8pm. It is then clear that he

left work and went to the house of the complainant. The defence did not create any doubt that he defiled the complainant at after 8pm. The trial court correctly dismissed the defence.

30. The Appellant argued that there were contradictions in the evidence of PW2 and PW3. PW2 said that she was related to the Appellant as he came from her clan while PW3 said he was not related to him. This is not a contradiction as PW3 was a brother-in-law to PW2. It is therefore possible for PW2 to have been related to the Appellant and PW3 was not related to the Appellant.
31. The Appellant argued that failure to call as a witness the complainant`s brother called Kennedy created doubt in the prosecution case. However, there is no number of witnesses required to prove a fact in a criminal trial. The evidence that Kennedy could have adduced was given by his uncle PW3 and their neighbor PW4. Failure to call him was not fatal to the the prosecution case.
32. The Appellant submitted that the trial court did not properly conduct the *voir dire* examination before the complainant testified in court.
33. The complainant was of the age of 15 years. A *voir dire* examination is only required to be conducted where the child witness is of tender age and 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 so it was not necessary to conduct a *voir dire* examination on the complainant before her evidence was admitted in court. And if this were not the case, the trial court did conduct a *voir dire* examination though not in the manner of question and answer method. The manner the same was conducted did not cause any prejudice to the Appellant.

34. The upshot is that the case against the Appellant was proved beyond reasonable doubt and the Appellant convicted on solid evidence. There is no merit in the appeal and the same is dismissed.

Delivered, dated and signed at GARSEN this 30th day of January 2026.

J. N. NJAGI

JUDGE

In the presence of:

Miss Ochola for Respondent

Appellant- present virtually at G.K. Prison Malindi

Court Assistant - Rahma