



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Abdulkadir alias Yaba (Criminal Appeal E013 of 2025)  
[2026] KEHC 1021 (KLR) (4 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 1021 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARSEN  
CRIMINAL APPEAL E013 OF 2025  
JN NJAGI, J  
FEBRUARY 4, 2026**

**BETWEEN**

**REPUBLIC ..... APPELLANT**

**AND**

**KHAMISI ABDULKADIR ALIAS YABA ..... RESPONDENT**

*(Being an appeal from the judgment and acquittal of the Respondent by  
Hon. F.M. Mulama, Resident Magistrate, in Lamu Principal Magistrate's  
Court Sexual Offence Case No. E015 of 2024 delivered on 6/3/2025)*

**JUDGMENT**

1. The Respondent herein was tried 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 and time in the month of May 2024 at Utukuni area of Mkomani location in Lamu central sub county within Lamu county he intentionally and unlawfully caused his penis to penetrate the vagina of T.A. (herein referred to as the complainant), a child aged 15 years.
2. The Appellant was acquitted of the charge. The state was aggrieved by the judgment of the trial court and filed the instant appeal. The grounds of appeal are that:
  1. That the learned trial magistrate erred in both law and fact in acquitting the accused in spite of the cogent evidence adduced by the prosecution.
  2. That the learned trial magistrate erred in both law and fact by finding that the trivial inconsistencies in the testimony of the complainant, as compared to her statement recorded at the police, were prejudicial to the case.



3. That the learned trial magistrate erred in both law and fact by discrediting the testimony of the complainant based on the evidence of DW1, DW2, DW3 and DW4 who alleged that the complainant was ill-mannered.
4. That the learned trial magistrate erred in both law and fact by holding that the third element of identification was not proven, after discrediting the complainant. This was despite the complainant's positive identification of the accused, who was well known to her, having lived at the mother's house and received financial support from the accused – facts acknowledged by both the accused and DW2.
5. That the learned trial magistrate erred in both law and fact by holding that it was necessary to establish the names of the guests house the offence was committed in and the individuals who operated it, as well as to establish call or payment records, when these are not elements of the offence.

### **Case for the prosecution**

3. The case for the prosecution at the trial court was that the Respondent was the father to the complainant. The complainant was staying with her mother, PW2. The complainant dropped out of school in form 1. That in the month of April 2024, the Respondent's mother requested for the complainant to go and stay with her. The complainant joined her grandmother (mother to the respondent) and started to stay with her at her house. Arrangements were then made for the complainant to go back to school in the month of May 2024. The complainant did her school shopping and remained with a school bag to be bought.
4. It was the evidence of the complainant that on the night the bag was to be bought, the respondent asked her to accompany him to the shops to buy the bag. She did so. He took her to Utukuni area and collected money from a client. The Respondent then led her to a guest house within the area. He called at a person who was inside the house. The person opened the door and they entered into the house. The door was locked. The Respondent instructed her to go down the stairs within the house and he was left behind holding a conversation with the person who had opened the door. He soon after joined her downstairs and ushered her into a room in which there were lights on. He closed the door to the room and switched off the lights. He removed his clothes and told her to remove hers. She did so. He laid her on the bed and came on top of her. She asked him what he wanted to do and he told her that he was her father and he wanted to confirm if she was a girl. He inserted his penis into her vagina. She felt a lot of pain. After he finished he went to the toilet to clean himself. He then asked her to go and clean herself. She did so and put on her clothes. He told her not to tell anyone about what had happened. They went upstairs and he told her to wait for him outside the house. While outside the house she heard him asking the person of the house to give him his phone number so that he can send him money. They then boarded a motor cycle and returned to his mother's house. She took a bath and did not tell anybody about the incident.
5. It was further evidence of the complainant that on a certain day in the month of May 2024, the Respondent asked her to accompany him to get money from his clients. He then took her to the same guest house, called the same person who opened the door and he defiled her in the same room. That in the month of June he took her to a different guest house in the same area of Utukuni and defiled her in an upstairs room after which he paid and they returned home.
6. The complainant testified that in the month of August 2024 she returned to stay with her mother. That on the 27/8/2027 during the Maulid celebrations she went out with a friend and returned home at 10pm. Her mother got angry with her for returning home late. Her mother took her to the police



- station. She was taken to hospital where she was examined and found to have a missing hymen. She was interrogated and she disclosed that it is the Respondent who had defiled her and taken away her virginity.
7. The mother to the complainant PW2 testified that on the 27/9/2024, the complainant had gone out for mauid celebrations and returned home at 10pm. She asked her where she had come from and she was hesitant to say. She took her to the police station. She was questioned and she said that she had been out for mauid celebrations with a friend. She was taken to hospital where she was examined and found not to be a virgin. She was questioned on how she had lost her virginity and she said that it is the Respondent who had defiled her and taken away her virginity. They went back home. They returned to the police station on the following morning. She told the police that the Respondent had defiled her in guest houses on three occasions.
  8. A doctor at King Fahad Hospital, PW3 testified that the complainant was seen at their hospital by Dr. Said on 29/9/2024 wherein she gave a history of being defiled by one Yaba Makoma on three occasions. That the doctor examined her and noted that she had a normal genitalia with missing hymen. Later on 30/9/2024 the complainant's P3 form and Post Care form were filled by Dr. Saddam of the same hospital.
  9. PC Weldon Kirui PW4 testified that on 29/9/2024 he received a phone call from the mother of the complainant PW2 who told him that her daughter had been defiled by a certain person who operates a butchery at Mkomani area of Lamu. The complainant and her mother joined him and took him to the butchery. The complainant identified the suspect, the Respondent and they arrested him. They took him to the police station.
  10. The case was investigated by PC Mercy Katana PW4 who said that the case was reported at the police station on 29/9/2024. She interrogated the complainant who narrated to her that the Respondent had defiled her in guest houses on three occasions. Her P3 form was filled. She obtained her birth certificate that indicated her date of birth as 24/10/2008. She charged the Respondent with the offence. During the hearing, she produced the birth certificate in court as exhibit, P.Exh.1. The doctor PW3 produced the treatment notes, the P4 form and the Post Rape Care form as exhibits, P.Exh.3 – 4 respectively.

### **Defence Case**

11. When placed to his defence, the respondent stated in a sworn statement that he lives at Wiyoni in Lamu. That he was known to the complainant's mother. That he heard rumours that he was the father to the complainant. The complainant was then brought to stay with his mother and his sisters. She Started to steal money from those she was staying with. She used also to disappear from home and she was returned to her mother. That one day the complainant's mother called her and told him that the complainant had returned home late and she was taking her to the police station. She requested for Ksh.2,000/= from her. He refused to give her. He was arrested and charged with the offence. He denied defiling the complainant or taking her to a guest house. That after the case was filed he heard from his cousin who is a friend to the boyfriend of the complainant's mother that the complainant's mother was asking for Ksh.600,000/= to have the case dropped.
12. The Respondent called 3 witnesses in the case. His sister DW2 testified that the complainant was brought to stay with her mother and sister after it was said that she was a daughter to the Respondent and that she was having issues where she was staying with her mother. That when the girl was staying with the said people, her behavior became unbecoming and she was returned back to her mother. It was her evidence that she did not believe that the Respondent defiled the complainant.



13. Najma Swaleh DW3 testified that she is a resident of Wiyoni. That the Respondent operates a butchery and she used to buy meat from him. That she used to see the complainant and her mother PW2 chewing miraa at sea front area. That the two used to go out together at night and she used to see them in clubs. That the complainant had a boyfriend and she used to see her in the company of the said boyfriend.
14. Harun Mohamed DW4 told the court that he lives in Kanu area and he is the village headman. That he has known the respondent since birth. That the complainant is from his village and a neighbor. She stays with her mother and grandmother. That she is of bad behaviour as he meets her walking late at night in the village. That at times she goes out with her mother at night. At one time she was not going to school.

### **Submissions**

15. The Appellant through its Prosecution Counsel submitted that the prosecution adduced watertight case against the Respondent as all ingredients of the offence of defilement being proof of the age of the victim; proof of penetration and identification of the perpetrator were proved beyond reasonable doubt. That the complainant told the trial court that she was aged 16 years though the birth certificate indicated that she was aged 15 years at the time she testified in court.
16. That on penetration, the doctor PW3 stated that the complainant's hymen was missing at the time of examination. That the Respondent was identified by both the complainant and her mother as they knew him very well. That the Respondent himself and his sister DW2 confirmed the evidence that the complainant was at one time living with the Respondent's mother. That the doctor examined the complainant in September 2024 when she was found with a hymen which was not freshly broken and therefore the complainant's evidence that she was defiled by the respondent in May and June 2024 was believable. Therefore, that the evidence of the complainant did not need the evidence of any other person to corroborate it. Reliance was placed in the case of *J.W.A v Republic (2014) KLR* where the Court of Appeal held that:

It is now settled that courts shall no longer be hamstrung by requirements of corroboration when the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful.
17. It was submitted that the Respondent was positively identified as the person who defiled the complainant.
18. On inconsistencies in the prosecution case, the Appellant submitted that the inconsistencies noted by the trial court such as the date the complainant was taken to the police station and to hospital; the difference in the name of the Respondent as given to the police officers during reporting as well as failure by the complainant to include the words used by the Respondent in her statement when she asked him what he wanted to do to her, were all trivial inconsistencies that should not have affected the decision of the court. That the investigating officer PW3 clarified the date the report was made at the police station. That the dates of defilement was stated in the charge sheet as diverse dates in the month of May. That it is the date of defilement that touched the core of the case and not the date the same was reported to the police. That as regards the name of the Respondent, it was submitted that he pleaded to the names stated in the charge sheet and that is what the court should have relied on. More so that these did not go to the core of the case.
19. It was submitted that the issue was whether the complainant was defiled or not but the defence witnesses painted the complainant as an ill-mannered child yet she was a child in need of care and



protection. That the trial court erred in acquitting the Respondent and therefore this court should quash the acquittal, convict and sentence the Respondent.

### **Respondent's submissions**

20. The Respondent through his counsel submitted that the complainant and the investigating officer did not lead evidence to establish the locus quo on the specific place of the offence. That the investigating officer did not visit the scene nor did he summon any witness such as the care takers of the guest houses who could have placed the Respondent and the complainant at the alleged scenes of crime. Neither did the officer give an explanation of the failure to visit the scene. More so that the complainant did not give the names of the guest houses where the incidents took place.
21. It was submitted that the case was driven by malice by the mother of the complainant, PW2, after the Respondent denied paternity of the complainant which was shown by the attempt by PW2 to solicit money from the Respondent so that the criminal charges could be dropped. That the trial court having assessed the demeanor of the mother to the complainant must have formed the impression that her allegations were tainted by personal vendetta.
22. The Respondent submitted that the case for the complainant was tainted with inconsistencies and discrepancies. That there was discrepancy as to the date the matter was reported to the police with the P3 form indicating 29/9/2024 at 1352 hours while the PRC form indicated 29/9/2024 at 1130pm. That the complainant stated that she went to hospital on the 28/9/2024 while her mother stated it was on 27/9/2024. That no explanation was given on the variance on the dates.
23. It was submitted that the history/narration at the hospital was given by the complainant's mother and not by the complainant. No reason was given why the minor did not give the history herself.
24. The Respondent submitted that an appellate court should not interfere with an acquittal unless the decision of the trial court is perverse or is based on misdirection or is unsupported by evidence. That in this case the trial magistrate properly evaluated the evidence and applied the correct legal principles to the facts and circumstances of the case. That the inconsistencies in the prosecution case were material and fatal to the prosecution case thus rendering the acquittal lawful. Counsel for the Respondent urged the court to uphold the acquittal and dismiss the appeal.

### **Analysis and determination**

25. This being a first Appeal, this Court has a duty to evaluate the evidence, analyze it afresh and draw its own conclusions at the same time while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify as did the trial Court. In *Okeno v 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...”



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

“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.”

27. The trial magistrate in his 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. For an offence of defilement to be proved, three ingredients must be proved beyond reasonable doubts. In the case of *Fappyton Mutuku Ngui v Republic* [2012] eKLR the court enumerated them in the following terms:

The first is whether there was penetration of the complainant’s genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.

28. The trial magistrate made a finding that the birth certificate produced in the case proved that the complainant was aged 15 years and five months, she having been born on 24/10/2008. The Respondent did not raise any issue on the age of the complainant. The age was therefore proved at 15 years.

29. On penetration, the trial court made a finding that the same happened and that the issue was as to who penetrated the complainant.

30. 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.”

31. The law is that penetration can be proved by way of oral or circumstantial evidence which may be corroborated by 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.”

32. In this case the complainant was examined at King Fahad Hospital about 3-4 months after the incident. The complainant was found with a normal genitalia and the only thing the doctor could confirm is that she had a missing hymen. There was thus no medical evidence to support penetration on the complainant by the Respondent. That being so, the issue of defilement could only be proved by the oral evidence of the complainant or by circumstantial evidence.

33. On identification of the Respondent, the trial magistrate made a finding that the Respondent was well known to the complainant but held that the Respondent was not identified as the person who penetrated the complainant due to numerous inconsistencies in the prosecution evidence such as: The inconsistency on the date the complainant was taken to hospital and the date the case was reported to



the police; Inconsistencies between what the complainant told the police in her witness statement and the evidence she adduced in court which proved dishonesty on the part of the complainant; Failure by the complainant to name the guest houses she was taken to; Failure to call witnesses from the said guest houses and to produce payment receipts or call records from the said places; Inconsistency in the name of the Respondent made when the matter was reported to the police.

34. The trial court in respect to these inconsistencies cited the case of *Twahangane Alfred v Uganda* (2003) UGCA 6 where it was held that a court may ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or they do not affect the main substance of the prosecution's case. The magistrate thereupon held that the inconsistencies in the case before him pointed to deliberate untruthfulness and as such identification was not proved.
35. The Appellant argues that the inconsistencies in the prosecution case did not go to the core of the prosecution case and were not serious enough as to lead to the acquittal of the Respondent. The question then is whether the inconsistencies were serious enough as to lead to the acquittal of the Respondent. In other words, whether the evidence of the complainant was credible as to lead to the conclusion that she was defiled by the Respondent.
36. The trial magistrate conceded that the Respondent was a person well known to the complainant. The Respondent himself admitted in his evidence that the complainant was living with his mother. He also admitted that he was well known to the complainant's mother. The issue of identification of the Respondent was therefore not in issue as he was well known to the complainant.
37. The complainant being a child aged 15 years was the only witness in the case that the Respondent defiled her. In that case her evidence has to be considered in the context of the provisions of section 124 of the *Evidence Act* which provides 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 a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth. ”

38. It was the evidence of the complainant that the Respondent defiled her on three occasions at two guest houses at Utukuni village in Lamu. That the issue came to light after she was taken to the police station by her mother after she went home late from Maulid festivities whereupon she was taken to hospital and examined. She was found not to be a virgin and upon interrogation as to how she had lost her virginity, she disclosed that it is her father, the Respondent who had defiled her and taken away her virginity.
39. The P3 form P.Exh.3 and the Post Rape Care form P.Exh.4, indicate that the complainant was taken to hospital on 29/9/2024. Though the mother to the complainant said that she took the complainant to hospital on 27/9/2024, this was not a material contradiction in the case as the hospital documents are clear on the date the complainant was taken to hospital. Besides that, the Respondent himself confirmed that the complainant's mother called him on the date the complainant returned home late from maulid celebrations and she told him that she was taking the complainant to the police station for



returning home late. It is the same time that the complainant was taken to hospital. This was therefore not a material discrepancy in the case and the court should have ignored it.

40. The trial court took issue with the name of the Respondent in that the name used in the investigation diary was Yabah Hamis Swaleh while the Respondent was named in the charge sheet as Hamis Abdulkadir Yabah. That this created doubt in the mind of the court as to whether the perpetrator was the Respondent herein or Yabah Hamis Swaleh. That in view of this the benefit of doubt ought to have been given to the Respondent.
41. I tend to think that the trial court was reading too much in the evidence. In the first place, the name used in the charge sheet against the Respondent was Khamis Abuldadir alias Yaba. Nowhere in the evidence did he deny the alias name. The complainant named the Respondent as her father in her witness statement, D.Exh.1, and gave his name as Yaba Hamis Swaleh. Neither the complainant nor the Respondent were questioned in court on the latter name when they testified in court. There was then no reason for the trial court to entertain doubt on whether the person said to have defiled the complainant was the Respondent by whatever name he was called. There was no contradiction in the name of the Respondent as he did not deny the other names in court.
42. The trial court partly based its decision on the ground that the complainant was of bad character as testified by the defence witnesses. However, the defence did not cross-examine the complainant on the instances of bad character they alluded to in court. The fact that she returned home late on one instant during the Maulid festival was not evidence of bad character that could lead to the whole of her evidence being dismissed.
43. The court faulted the investigating officer for not making any attempt to visit the guest houses mentioned by the complainant to find out whether she could get any evidence to corroborate the complainant's evidence.
44. The trial court also based its decision arising from the contradictions and discrepancies between what the complainant told the police in her witness statement and her evidence in court. One instant cited by the court was that in her witness statement the complainant stated that when the defilement happened on the first occasion, the Respondent had told her that he wanted her to accompany him to his butchery for her to help him calculate the day's sales but he took her to a guest house and defiled her. However, that in her testimony in court she stated that he had asked her to join her in collecting money from her debtors.
45. Another instant cited by the trial court is that the complainant did not mention in her witness statement that the Respondent before defiling her told her that he wanted to confirm whether she was a girl. Also, that the complainant did not mention in her witness statement of being taken to the second guest house.
46. I have on my part re-examined the evidence of the complainant. There are indeed some contradictions in the testimony of the complainant as given in court and as captured in her statement to the police. In her statement to the police, D.Exh.1, she stated that on the first occasion when the Respondent defiled her, he asked her to accompany him to his butchery to help him calculate the day's sales. That instead of taking her to the butchery, he took her to a guest house where he defiled her. In her evidence in court, she stated that the Respondent had on that day taken her out from home to buy her a school bag. That after buying the bag he said that he wanted to collect money from some clients he had made deliveries to. She accompanied him and he collected money from some people. He then led her to a guest house where he defiled her.



47. The question was whether this was a material contradiction in the case. In my view, the reason why the complainant left home in the company of the Respondent on the first day she alleges the Respondent to have defiled her was important piece of evidence in the case. Did they leave the home to buy a school bag or for them to go to the Respondent's butchery to calculate the day's sales? Why would the complainant have given contradictory reason on what she was going to do when she left her grandmother's house in the company of the Respondent? It simply means that one of the reasons given as to why they left the home on that day was a lie. Was she then a credible witness?
48. Whereas in her evidence in court the complainant stated that the Respondent defiled her two times in the same guest house in the month of May and that in the month of June he did so in another guest house within Utukuni area, she stated in her statement to the police that the defilement on the three occasions took place in the month of May. Her witness statement did not mention the defilement having taken place in the month of June. More so, the statement says that the second occasion took place at another guest house at Utukuni area whereas her evidence in court was that the second occasion took place in the same guest house as on the first occasion. The charge sheet stated that the defilement took place in the month of May 2024.
49. In my consideration, the complainant should have been in a position to give a vivid narrative of the places and time the defilement took place. This is not something that a complainant in a case of defilement can forget easily. Even if she could not remember the exact dates when the incident took place, she should have been in a position to remember the sequence and places they took place. She cannot have remembered when she recorded her statement to the police that the three occasions took place in the month of May only for her to come to court and say that the third occasion was committed in the month of June. The discrepancies in the her evidence went to her credibility as a witness.
50. The Court of appeal in the case of *Ndungu Kimanyi v Republic* [1979] KLR 283, held the following on credibility of witnesses:
- The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.
51. I have keenly gone through the judgment of the trial court and noted that the court doubted the credibility of the complainant due to the discrepancies in her evidence though the court did not state so in clear language.
52. Section 124 of the *Evidence Act* allows the court in sexual offences involving children to convict on the sole evidence of a child victim where the court is satisfied that the child is telling the truth and records reasons for believing the evidence of the child. In this case the complainant was the sole witness to the defilement. The police did not conduct further investigations in the case and only opted to rely on her evidence. In view of the discrepancies observed above in the evidence of the complainant, the complainant did not give the impression that she was a credible witness. The inconsistencies in her evidence were serious as to lead to her evidence not being believed. I do not find strong reasons on why the trial court should have believed her evidence. Consequently, it is my finding that it was not safe to convict on the sole reliance on the evidence of the complainant. The trial court did not err in dismissing the case.
53. The upshot is that I do not find any merit in the appeal and the same is dismissed.

**DELIVERED, DATED AND SIGNED AT GARSEN THIS 4<sup>TH</sup> DAY OF FEBRUARY 2026**



**J. N. NJAGI**

**JUDGE**

In the presence of:

Mr. Soita for Appellant

Mr. Oluoch for Respondent

Respondent – Present

Court Assistant - Rahma

