CKN v Republic (Criminal Appeal E042 of 2021)
[2026] KECA 287 (KLR) (13 February 2026) (Judgment)

Neutral citation: [2026] KECA 287 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL E042 OF 2021

MS ASIKE-MAKHANDIA, HA OMONDI & LK KIMARU, JJA

FEBRUARY 13, 2026

BETWEEN

CKN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgment of the High Court of Kenya at Bungoma (Riech, J.) dated 5th June 2020 in HCCRA No. 59 of 2019)

JUDGMENT

1. The particulars of the offence were that on diverse dates between January 2018 and September 2018 at [Particulars Withheld] in Cheptais Sub-County within Bungoma County he intentionally caused his penis to penetrate the vagina of SCN[1], a child aged 14 years. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. He pleaded not guilty to the charges.

   FOOTNOTE [1] Initials used to protect the minor's identity

2. During the trial, the prosecution called 5 witnesses in support of its case. The appellant gave sworn evidence and called one witness. At the conclusion of the trial, the Appellant was found guilty of the offence of defilement, convicted, and sentenced to 20 years imprisonment.

3. Aggrieved, the appellant appealed against conviction and sentence before the High Court of Kenya at Bungoma which appeal was unsuccessful, prompting this second appeal against the conviction and sentence. The appellant faults the learned judge for failing to re-analyze the evidence as statutorily required as a first appellate court and for meting out an excessive sentence in the circumstances.

4. Briefly, SCN the complainant herein, testified that in April 2018 her father, SN, summoned her to his home to plough a parcel of land. That night, he defiled her and warned her not to tell anyone.

She later confided in the appellant, her step-brother, but he took no action. She further stated that on another occasion, the appellant also defiled her after speaking to her in a way that allowed her to identify his voice. She did not report this immediately. On 20th September 2018, she disclosed the incidents to Nyumba Kumi officials. Both she and the appellant were subsequently arrested, and a medical examination revealed that she was pregnant.

5. PW2, James Butaki Chongoi, the village elder of Chebiuk location, testified that he was headed to Kopkirwa Primary School when he met one Geoffrey Maasai, who informed him that the appellant had reported being threatened by his father. A meeting was held, and the appellant's father indicated that the appellant had defiled the complainant, making her expectant. The complainant was interviewed and stated that she had been defiled by the appellant and her father (SN). The complainant further stated that the appellant had defiled her recently, while her father had been doing it for quite a long time. She stated that she had been seeing the appellant for at least 6 months at the time the issue was reported.

6. PW3, Maasai Geoffrey Kasiri, a Nyumba Kumi chairman, testified that he was informed of a dispute between the appellant and his father over the complainant, with each accusing the other of having sexual relations with her. A meeting was convened to address the matter, and all three parties were subsequently arrested.

7. PW4, Onesmus Wafubwa, a Clinical Officer, examined the complainant on 21st September 2018 and found that she was pregnant at approximately 24 weeks. He testified that her birth certificate indicated she was 16 years old.

8. PW5 Cpl Peter Mama, the investigating officer attached to Kopsiro police station testified that he was at Chwele market on 21st September 2018 when the village elder from [Particulars Withheld] called and informed him that some two men were almost getting lynched by members of the public. He rushed to the scene and took the two to the police station. PC Mama later learnt that the appellant and another had defiled the complainant and impregnated her. On interviewing her, she told him that her father had started defiling her when she was 12 years old. She confided in her brother (appellant herein) who instead of helping, threatened to kill her if she did not have sex with him. That she then started engaging in sexual intercourse with the appellant until the father noticed, which is when he reported the issue to the Chief. The Investigating Officer stated that according to the birth certificate, the victim was born on 25th October 2003. He further established that the appellant and his father had both defiled the complainant and arrested both of them.

9. Placed on his defence, the appellant testified that on 10th September 2018, he visited Cheptoror, where his sister, the complainant, was staying with their father, and found that she was unwell. Upon inquiry, she disclosed that their father had been defiling her a matter he reported to Nyumba Kumi officials. On 20 September 2018, while at the farm, he was called to a meeting with his father and sister and was subsequently arrested. He stated that his father had habitually defiled the complainant.

10. DW2 JK on her part stated that she did not have anything to say regarding the case as she could not testify on what she did not see.

11. In support of the appeal, the appellant contends that the ingredients of the offence were not proved. First, the appellant faults his identification on the ground that the offence occurred at night and there is no indication as to the intensity of the light. Further, that the appellant talking to the complainant, allegedly during the act was an insufficient identification.

12. Regarding penetration, the appellant contended that pregnancy alone does not prove penetration as such the DNA test ought to have been conducted to prove paternity.

13. Regarding the sentence, it is the appellant's lamentation that the same was excessive in the circumstances as he ought to have benefited from the least prescribed form of punishment. Further, that in meting out the sentence, both the trial and the 1st appellate court failed to consider the time already spent in custody during trial. Urging the court to reduce the sentence, the appellant contended that he is reformed, rehabilitated and ready to reintegrate into society.

14. In rebuttal, the respondent submitted that the prosecution proved all the essential elements of the offence of defilement beyond reasonable doubt; that the age of the complainant was conclusively established through the production of her birth certificate and corroborated by her testimony, placing her within the ambit of section 8(3) of the *Sexual Offences Act*.

15. Regarding penetration, it is argued that the complainant's evidence clearly demonstrated penetration, which was medically confirmed by a torn hymen and pregnancy. In support of this, reference was made to the case of Charles Wamukoya Karani vs. Republic Cr. Appeal No 72 of 2013 (UR) which emphasized the need to establish the ingredients of defilement namely age, penetration and identification.

16. Further, that the appellant was positively identified through recognition, being the complainant's stepbrother with whom she shared a homestead, eliminating any possibility of mistaken identity, consistent with holding in Anjononi & Others vs. Republic [1980] eKLR. The complainant's testimony was consistent, credible, and corroborated by medical and circumstantial evidence, and was properly relied upon pursuant to section 124 of the *Evidence Act*. It was argued that the appellant's defence amounted to a mere denial and did not displace the cogent prosecution evidence. Accordingly, we were urged to find that both the trial court and the first appellate Court correctly found that the offence of defilement under section 8(1) as read with section 8(3) of the *Sexual Offences Act* was proved as such the appeal lacks merit.

17. Having considered the appeal, the rival submissions, the authorities cited and the law, in view of the mandate of this Court on a second appeal, this Court's duty as a second appellate court is confined to a consideration of issues of law only. As was succinctly articulated in Karani vs. R [2010] 1 KLR 73:

> " This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters, they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

18. Our considered view is that the main issues that fall for determination are whether the offence of defilement was established beyond a reasonable doubt and whether the sentence should be interfered with.

19. Turning on the first issue, in a case of defilement, the prosecution must prove three key ingredients: the age of the victim, that there was penetration, and the identification of the perpetrator.

20. On the question of the age of the complainant, the Court of Appeal in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

> " ...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. From the evidence on record, the age of the minor in this case was proved to be 14 years old. This was stated by the complainant and was proved by the production of her birth certificate which indicated that she was born on 25th October, 2003. The prosecution proved that the complainant was aged 14 years old at the time of the commission of the offence.

22. On the aspect of penetration, the two courts relied on the evidence of PW1 and PW4 to conclude that the same was proved in line with section 2 of the *Sexual Offences Act*. Furthermore, from the pregnancy test results, there was nothing to suggest that the pregnancy was artificially implanted other than through penetration.

23. As regards the identity of the person who committed the offence, the appellant was identified by SCN. In her evidence, the complainant stated that she been defiled by her father since when she was 12 years old, and when she confided in the appellant, he blackmailed her and began defiling her as well. The complainant was categorical that they slept with the appellant in the same room and in May, one night, the appellant came down on the floor and had sex with her. The complainant further stated that he used his penis and inserted it in her vagina. Identification was therefore by recognition. In Waingwe vs. Republic (Criminal Appeal 142 of 2016) [2023] KECA 401 (KLR) (31 March 2023) (Judgment) this Court held that:

> "It is commonplace that recognition of an assailant is more satisfactory, more assuring, and more reliable than the identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

24. The identification was proper; thus, this element was also established to the required standard. In view of the foregoing findings, the offence was proved to the required standard and we hold that the first appellate court properly reconsidered and re- evaluated the evidence and came to the correct conclusion that the charge of defilement was proved to the required standard against the appellant, and his defence was properly rejected.

25. The appellant contends that SCN's evidence needed corroboration in terms of the DNA testing to prove the charge as per Section 36 of the *Sexual Offences Act*. In Williamson Sowa Mbwanga vs. Republic (2016) eKLR this Court stated that;

> "...it is patently clear to us that whilst paternity of PM's child may prove that the father of the child had defiled PM, that is not the only evidence by which defilement of PM can be proved. The fact, as happens in many cases, that a pregnancy does not result from conduct that would otherwise constitute a sexual offence, does not mean that the sexual offence has not been committed. In this case, there does not have to be a pregnancy to prove defilement. A DNA test of the appellant would at most determine whether he was the father of PM's child, which is a different question from whether the appellant had defiled PM. As the Court of Appeal of Uganda rightly stated, in the sexual offence of defilement, the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and that it is not necessary that the hymen be ruptured. (See Twehangane Alfred vs. Uganda, Cr. App. No. 139 of 2001)."

Clearly then, the absence of a DNA test does not negate the prosecution's case. See also IMA vs. Republic [2019] eKLR.

26. Turning to the question of severity of the sentence, under section 8 (1) as read with section 8(3) of the *Sexual Offences Act*, a person found guilty of the offence of defilement of a girl aged between 12 and 15 years is liable to imprisonment for a term of 20 years. The appellant was sentenced to 20 years imprisonment as prescribed by law.

27. By virtue of section 361(1) of the Criminal Procedure Code, in cases such as the one before the Court, where appeals lie from the subordinate courts, this Court is expressly estopped from hearing matters of fact. It provides:

    1. A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section:

        a. on a matter of fact, and severity of sentence is a matter of fact..."

28. Furthermore, the Supreme Court in its decision in the case of Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) held that:

> ....we must take cognizance of provisions of Section 361(1) of the Criminal Procedure Code which, in cases of appeals from subordinate courts, explicitly bars the Court of Appeal from hearing issues relating to matters of fact. This section also elaborates that the severity of sentence is a matter of fact and not of law and the Court of Appeal is barred from determining questions relating to sentences meted out, except where such sentence has been enhanced by the High Court....Thus, the Court of Appeal's jurisdiction on second appeals is limited to only matters of law and it could not interfere with the decision of the High Court on facts unless it was shown that the trial court and the first appellate court considered matters they ought not to have considered, failed to consider matters they should have considered, or were plainly wrong in their decision when considering the evidence as a whole. In such a case, such omissions or commissions would be treated as matters of law. Consequently, the respondent's appeal on the grounds that his sentence was harsh and excessive was not one that the Court of Appeal could lawfully determine as it fell outside the purview of the Court of Appeal's jurisdiction."
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> From the above excerpt, it is clear that the appellant's appeal against the severity of the sentence is outside the purview of this Court's jurisdiction. For this reason, this ground also fails.

29. The prosecution having proved its case to the required standards, the conviction and sentence of the trial court as confirmed by the High Court has to be upheld. The appellant has also urged us to take into account the fact that the trial court and the first appellate court did not take into consideration the period that he was in remand custody. The appellant was arrested on21st September, 2018 and remained in remand until completion of the trial. Section 333 (2) provides that:

    (2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

    Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

By dint of section 333(2) of the Criminal Procedure Code, this period shall be deducted from his sentence. It is only to that

extent that the appeal gets a slight breath of life; but in all other aspects the appeal fails and is dismissed.

30. The appeal is without merit and is dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 13TH DAY OF FEBRUARY, 2026.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR