



**Katana v Republic (Criminal Appeal E030 of 2025)
[2026] KEHC 1294 (KLR) (6 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 1294 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E030 OF 2025
JN NJAGI, J
FEBRUARY 6, 2026**

BETWEEN

DAVIS TSUMA KATANA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal on the conviction and sentence by Hon. Nancy Makau, PM, in Malindi Chief Magistrate's Court Sexual Offence Case No. E092 of 2024 delivered on 5/3/2025)

JUDGMENT

1. The appellant was 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 diverse dates between 1st January 2024 to 24th April 2024 at (name withheld) within Kilifi County he intentionally caused his penis to penetrate the vagina of H.J.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 this appeal. The grounds of appeal are that:
 1. The learned trial magistrate erred in law and facts by failing to consider that there was no DNA Test conducted to the Appellant and victim to establish the paternity of the alleged child.
 2. The learned trial magistrate erred in law and facts by failing to consider that since there was no DNA test analysis then the elements of defilement (sic) identification and penetration were not proved in accordance with the threshold required by the law.
 3. The learned trial magistrate erred in law and facts by failing to consider that the age of the victim was not established according to the parameters of the law.



4. The learned trial magistrate erred in law and facts by failing to consider the Appellant's defence evidence.

Case for prosecution

3. The case for the prosecution was that the Complainant, who was PW2 in the case, was a primary school pupil then aged 15 years. She was staying with her mother PW3. The Appellant had in the year 2023 leased a shamba for cultivation from the complainant's mother. The Appellant had a house within the village.
4. It was the evidence of the complaint that she had known the Appellant since the year 2023 when he leased land from her mother. That she started a love affair with him. That on 1st January 2024 she went to his house and told him that she wanted to sleep with him. The Appellant responded positively and they engaged in sexual intercourse in his house wherein he penetrated her vagina with his penis. That from that day they continued to engage in sex in his house until April 2024 when she realized that she was pregnant. She informed the Appellant of her pregnancy. She was taken to hospital at Baolala where she was examined and confirmed to be pregnant. The matter was reported to the police. In the month of September 2024, she went to live with the Appellant at his home at Bamba. Her brother went there with the police and found her there. She was taken to the police station. She recorded a statement.
5. The complainant's mother testified that the Appellant leased her shamba in the year 2023 and he ploughed for 2 years. That in the month of August 2024 he eloped with her daughter, the complainant. She later received a report that she was at Bamba. She went and reported at Bamba police station. The complainant's brother looked for her and found her at the Appellant's home at Bamba. She was pregnant. She, PW3, recorded a statement with the police.
6. The complainant's brother PW3 testified that he lives at Shakahola. That his mother went with the police to his home and told him that the complainant was missing. He started to look for her. He found her with the Appellant at Matano Merine. Police went there and arrested them. The complainant was at the time pregnant.
7. A clinical officer at Baolala dispensary, PW1, testified that he examined the complainant on 2/9/2024 and found her with an old broken hymen and was 22 weeks pregnant. He completed her P3 form.
8. The case was investigated by PC Henry Onalo PW5 who said that the complainant's mother reported to the police that the Appellant had eloped with her daughter, the complainant. They later received a report that the Appellant and the complainant had been arrested by the police at Bamba. He went and picked them. The complainant was pregnant. He recorded statements from witnesses and issued the complainant with a P3 form. It was filled by a doctor. He charged the appellant with the offence.
9. During the hearing of the case in court, the clinical officer PW1 produced the clinical card, the P3 form and the treatment notes as exhibits, P.EXh.1 – 3 respectively. The investigating officer produced the complainant's birth certificate as exhibit, P. Exhibit 4. It indicated that she was born on 20/2/2009.

Defence case

10. When placed to his defence the Appellant stated in a sworn statement that he had leased land from the complainant's mother and that he used to sleep at their home. That he and the complainant were used to each other. That on 10/2/2024 the complainant reported to him that there were rumours that they were in a relationship. He assured her not to worry as they were not in a relationship. She told him that she was expectant and asked him for advice as she feared being chased away by her family. He promised to help her.



11. It was the evidence of the Appellant that he was not in any sexual relationship with the complainant. He denied that he impregnated her. He however admitted in cross-examination that he was arrested where he was staying with her.

Submissions

12. The Appellant submitted that the charge sheet laid out before the court was defective in that it was too general in terms of time which prejudiced his trial. That it is a principle of criminal law that the charge sheet must be clear so that the accused understands what he is facing.
13. The Appellant submitted that the voir dire examination that was conducted by the trial court did not meet the standard required under section 19(1) of the Statutory Oaths and Declarations Act. That the inquiry should be aimed at determining the child's ability to understand the solemnity of the oath and the nature of the oath. That the court must record the terms in which the court was satisfied that the child understood the nature of oath. That failure to do so is fatal to the case.
14. It was submitted that the Appellant was not provided with an interpreter and that the language used was not clearly indicated in the court record. That this was a violation of the Appellant's right to fair hearing.
15. The appellant submitted that no forensic examination such as DNA was done linking the Appellant to the pregnancy of the complainant.
16. It was further submitted that the trial court did not consider the Appellant's defence.
17. The Respondent on the other hand submitted that the charge against the Appellant was proved beyond reasonable doubt. That the age of the complainant was proved by a birth certificate. That the Appellant was well known to the complainant and that her evidence that she had a sexual relationship with the Appellant was not challenged in cross-examination. That the complainant identified the Appellant as the perpetrator of the offence. That the court believed the evidence of the complainant that she was a credible witness. That the court considered the Appellant's defence and dismissed it as there was no grudge between the Appellant and the complainant. The Respondent urged the court to dismiss the appeal.

Analysis and determination

18. This being a first appeal, this court is mandated to analyze and re-evaluate the evidence afresh in line with the holding in the case of *Odhiambo v Republic Cr App No 280 of 2004 (2005) 1 KLR* where the Court of Appeal held that: -

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour.”

19. The ingredients of the offence of defilement are: proof of the age of the victim, proof of penetration and proper identification of the perpetrator, see *George Opondo Olunga vs. Republic [2016] eKLR*.
20. The complainant testified that she was at the material time aged 15 years. This was supported by her birth certificate, P.Exh.4, that showed that she was born on 20/2/2009. This placed her age in the year 2024 at 15 years. The age of the Complainant was therefore proved.



21. On the element of penetration, Section 2 of the *Sexual Offences Act* defines the same as:

“the partial or complete insertion of the genital organs of a person into the genital organs of another person.”
22. The Appellant submitted that the offence was not proved as there was no DNA conducted to prove that he is the one who impregnated the complainant. However, the law is that the offence of defilement can be proved by other ways other than by way of medical evidence. In *AML v Republic* (2012 eKLR) the Court of Appeal held that:

It was submitted that there was no medical evidence to connect the appellant with the offence as no DNA test was conducted. The position of the law is that the offences of rape and defilement are proved by way of oral evidence and circumstantial evidence and not necessarily by medical evidence.
23. The complainant when examined at hospital was found with an old broken hymen and was 22 weeks pregnant. The mere fact that the complainant had an old broken hymen or that she was pregnant did not connect the Appellant with the offence of defilement on the complainant. The medical evidence did not connect the Appellant with the defilement on the complainant. In the absence of medical evidence to support the charge, that left the oral evidence of the complainant.
24. The complainant told the trial court that she started engaging in sex with the Appellant on the 1st January 2024 which continued up to April 2024 when she got pregnant. That he used his penis to penetrate her vagina. That the sexual activities used to take place at his house after work. That after she got pregnant the Appellant moved to his home at Bamba. She followed him there. The police found her there with the Appellant and they were arrested. The trial court found the evidence of the complainant to be consistent and credible.
25. I have considered the evidence of the complainant. There was no doubt that she was telling the truth that the appellant penetrated her vagina with his penis for the period between January and April 2024. Upon the complainant testifying in court, the Appellant was given an opportunity to put questions to her in cross-examination but he opted not to ask her any. He therefore did not challenge the evidence of the complainant in cross-examination. Her narration of the events must therefore have been true and there was no reason to disbelieve her evidence. I agree with the trial court that the complainant was a truthful witness. This is confirmed by the fact that the Appellant admitted that he was arrested while in her company at the place he went to live after he left her village.
26. The Appellant was a person well known to the complainant. She identified him as the person who penetrated her.
27. The Appellant argued that the trial court did not conduct a proper voir dire examination on the complainant before she was allowed to give sworn evidence in court. This is not true. The trial court's record indicates the questions that were put to the complainant during the voir dire examination. She was asked whether she goes to church and she said that she goes to Jesus Calvary Church. She was asked what they are taught in church and she replied that they are taught to respect their parents and to speak the truth. She stated that if one lies will be condemned by God. She was asked whether she knew what an oath is and she replied that, “I know when I take an oath I am to speak the truth”. From all this it is clear that voir dire was properly conducted. The complainant understood the meaning of oath and the duty to speak the truth. Besides that, voir dire examination is only required to be conducted to children of tender age which expression means children under the age of 14 years, see *Kibageny Arap*



Kolil v Republic [1959] EA 92. The complainant was at the material time aged 15 years and therefore voir dire examination was not necessary.

28. The Appellant argued that the trial court did not consider his defence. The Appellant's defence was a denial that he did not defile the complainant. He admitted that he was staying at the home of the complainant at the time the complainant says that he defiled her. He admitted that he was arrested while living with her. The trial court dismissed his denials. The evidence against the Appellant was overwhelming and there was no truth in his denials.
29. Though the appellant alleged that the charge sheet was defective, I have perused the same and do note that it discloses the offence that the Appellant was facing. It states the particulars of the offence including the time and place the offence was committed. The charge was thus specific enough as to give the Appellant notice of the offence he was facing. Consequently, I do not find any defect in the charge.
30. The Appellant stated that the language of the court was not clearly stated and that he was not provided with an interpreter. I have gone through the court record. The language of the court was indicated throughout the proceedings as English/Kiswahili. This means that the proceedings were conducted in either of the languages. The court record indicates that all the prosecution witnesses testified in Kiswahili language. The Appellant gave his defence in the said language. There was a court interpreter throughout the trial. The allegation that Appellant's right to fair trial was violated for lack of interpretation has no basis.
31. In view of the foregoing, I find that the Appellant was convicted on solid and overwhelming evidence. There is no merit in the appeal and the same is dismissed.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 6TH DAY OF FEBRUARY, 2026

J. N. NJAGI

JUDGE

In the presence of:

Miss Ochola for Respondent

Appellant – present virtually at GK Prison Malindi

Court Assistant - Rahma

