Nyaga v Republic (Criminal Appeal E040 of 2025)
[2026] KEHC 1299 (KLR) (11 February 2026) (Judgment)

Neutral citation: [2026] KEHC 1299 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E040 OF 2025

RM MWONGO, J

FEBRUARY 11, 2026

BETWEEN

GIBSON MUKUNDI NYAGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising from the decision of Hon. S.K. Ngii, in Siakago MCSO No. E018 of 2025 delivered on 18 th June 2025)

JUDGMENT

Background

1. In the lower Court, the appellant was charged with defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act*. The particulars were that on 29th April 2025 at Mbeere North subcounty within Embu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of WNI, a child aged 17 years. The alternative charge was that the appellant committed an indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars were that on 29th April 2025 at Mbeere North subcounty within Embu County, the appellant intentionally and unlawfully caused his penis to touch the vagina of WNI, a child aged 17 years.

2. The appellant pleaded not guilty. After a full hearing, he was convicted for defilement and sentenced to 15 years imprisonment.

The Appeal

3. Dissatisfied with the judgment of the trial court, the appellant filed a petition of appeal dated 02nd July 2025. By it, he seeks that the appeal be allowed, the conviction be quashed, the sentence be set aside, and the appellant be set free. The appeal is premised on the following grounds:

1. That the Learned trial Magistrate erred both in law and fact by convicting the appellant on an offence and charge whose particulars were not proved, were inconsistent and not supported by any evidence;

2. That the Learned trial Magistrate erred in law and in fact in convicting the Appellant on uncorroborated evidence;

3. That the Learned trial Magistrate erred in law and in fact in convicting the Appellant when the medical examination done on the complainant did not link the Appellant to the alleged offence;

4. The Learned trial Magistrate erred in law and in fact in failing to consider the Appellant's sworn testimony in his defence;

5. That the Learned trial Magistrate erred both in law and fact by convicting the Appellant on insufficient evidence;

6. That the Learned trial Magistrate erred both in law and fact by convicting the Appellant whereas the prosecution's case was full of inconsistencies and contradictions;

7. That the Learned trial Magistrate erred in law and fact by convicting the Appellant when the prosecution did not prove their case beyond reasonable doubt;

8. The Learned trial Magistrate erred in law and fact by disregarding the Appellant's defence of alibi; and

9. That the learned trial magistrate erred in both law and in fact by sentencing the appellant to a sentence of Fifteen (15) years imprisonment which was harsh and excessive in the circumstances.

The Evidence in the Trial Court

4. PW1 was John Mwangi a Clinical Officer at Mbeere District Hospital. He stated that he examined the victim on 30th April 2025. He observed that the external genitalia were normal; there were no lacerations or bruises; the hymen was perforated but it was an old perforation; and there were pus cells in the urine without spermatozoa. He produced the treatment notes, and the P3 and PRC forms as evidence.

5. PW2 was the victim who stated that she was a 17-years-old student. She said she knew the appellant as a student at Kabachu Vocational Training. On the day of the incident, she stated that she had gone to collect her uniforms from the tailor's shop at 8.00 p.m when she met the appellant along the way at Mururiri shopping center. He stopped her and they spoke for about 15 minutes, before he took the clothes that she had collected from the tailor and went with them to his friend's house. That while there, he persuaded her to sit with him and she did before he took her into the house at about 9pm.

6. The appellant asked her to have sex with him but she told him that she was already pregnant by one Onesmus who was his friend. He persuaded her to have sex with him. Although she indicated that she was not willing, he went on to do it anyway. She was worried about school but he promised to wake her up early to go to school. She spent the night with the appellant and he woke her up at 5.00 am, but she said she was afraid of her mother. She then slept until 8am, and the appellant left for work, leaving her a padlock to lock the house if she decided to leave.

7. Shortly afterwards, she heard a knock on the door. When she opened the door, it was her mother, brother and sister-in-law. He brother reported the matter at the police station and the appellant was

arrested. She was taken to hospital for examination. She said that Onesmus did not live in the same plot as the appellant. She learned that the house where she slept belonged to one Kim. In cross-examination, she stated that the appellant pulled into the house by force and the house was not his. That they were not found in that house together.

8. PW3 was the victim's mother who testified that PW2 was 17 years old at the time of the incident. She produced a birth certificate as proof. On the day of the incident at around 8pm, she received a text message from a strange number informing her that PW2 had gone to the shopping center to collect her clothes. She looked for PW2 at her friend's house but she was not there. Earlier that evening, she had received a text message from another number and she had intended to ask PW2 about it but she did not return home. The following morning, she called the strange number from which she had received a text message earlier the previous evening and the recipient told her where PW2 was with a man.

9. While on the way there, PW3 met the appellant and PW2 was found in the house. The appellant was arrested by a mob and he was taken to the police station with PW2. She found PW2's blouse at the scene and when she later asked PW2 how it got there, she said that the appellant had taken it and so she had followed him to get it back. In cross-examination she stated that it was her son who found the appellant in the house which belonged to another friend. She did not know if the house was rented jointly by the appellant and a friend.

10. PW4 was the victim's brother. He testified that on 29th April 2025, his sister called him to go home and help search for PW2. He told PW3 that they would search for her the following day. He learned that PW3 had received messages from a certain phone number. He suspected that it was PW2 who was sending those messages. They called the strange numbers back and they were informed of PW3's location. PW4 sent a spy to the location and he went there. Secretly, he looked and saw PW2's shoes near the door and he saw the appellant leaving the direction of the houses but he couldn't tell from which house he emerged.

11. PW4 further stated that PW3 joined him and he told her that he had seen the appellant coming from the general direction of the place where PW2 was. He followed the accused and told him to show him where PW2 was and he took him back to the hose where they had spent the night. At first, PW2 refused to open the door. However, when he called the police, she opened the door and the appellant and PW2 admitted that they had spent the night there. In cross-examination, he stated that he saw the appellant leaving the plot heading out and he followed him. He found the exact house with the help of the landlady.

12. PW5 was PC Monica Muteti of Siakago Police Station. She stated that on 30th April 2025, PW4 reported that PW2 had gone missing and she had been found in a man's house at Mururiri Market area. The police accompanied PW4 to the scene where the appellant and PW2 were being held and they escorted them back to the police station. PW2 narrated her version of the events and then she was referred to the hospital where she was examined, and a P3 form was filled. In cross-examination, PW5 stated that the appellant was found at the scene but he collected his ID from another house.

13. The appellant testified as DW1. In his sworn statement, he denied committing the offence. He stated that the place where the incident happened is not his house; that he lives in a different place. That he woke up to go to work and he was accosted by members of the public saying that he had hidden PW2 but it was not true. He was arrested and taken to Siakago Police Station and later charged with the offence. In cross-examination, he stated that he wrote a statement at the police station but he was not allowed to read it before signing it. That it is not true that PW2 is his girlfriend and that he was framed for the offence.

Parties' Submissions on the appeal

14. The appeal was disposed of by way of written submissions.

15. The appellant submitted that there was weakness in the prosecution's case given that none of the witnesses placed him at the scene. That the house does not belong to him and he did not stay there that night. He discredited the testimony of the victim and stated that it was suspect that the victim was defiled but she was not in a hurry to leave the place where she was allegedly wronged. According to him the testimony of PW2 shows that she was already engaging in sexual activity and she framed the appellant to avoid repercussions from her parents. He relied on the case of Charo v Republic [2016] KEHC 5619 (KLR) and urged the court to set aside the conviction and set him free.

16. The respondent relied on section 8(1)(4) of the *Sexual Offences Act* and the case of NFN v Republic [2022] KEHC 11774 (KLR). It stated that the elements of the offence of defilement are distinctly set out. It also relied on the cases of Philemon Koech v Republic [2021] eKLR and stated that the age of the victim was well established through her birth certificate that was produced as evidence. it submitted that there was also sufficient evidence to prove that there was penetration caused by the appellant, and relied on the cases of Reuben Taabu Anjononi, Benjamin Akisa Anjononi and Monya Anjononi v Republic [1980] KECA 23 (KLR) and Wilson Waitegei v Republic [2021] KEHC 1458 (KLR). The respondent urged that the conviction is safe and the sentence is lawful.

Issues for Determination

17. The issues for determination are as follows:

    1. Whether the offences were proved beyond reasonable doubt; and

    2. Whether the sentences should be reviewed.

Analysis and Determination

18. The role of this court as an appellate court, is to determine the appeal through re-evaluation of the evidence adduced before the trial court. In the case of Kiilu & Another v. Republic [2005]1 KLR 174, the Court of Appeal stated thus:

> " 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 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; 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."

19. Section 8(1) and (4) of the *Sexual offences Act*, provides:

> "(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."

20. PW2 testified that she was 17 years old at the time of the incident. PW3, her mother, produced her birth certificate to prove this. Therefore, there is no doubt that the appellant was a minor at the time of the incident.

21. PW1 the Clinical Officer, examined PW2 and observed that the genitalia were normal and did not have external injuries. There were no bruises or lacerations and the hymen was perforated (old perforation). PW2 also stated that she spent the night with the appellant and he had sexual intercourse with her even though she told him not to because she was pregnant by one Onesmus. She said that the appellant used a condom during the act and afterwards, they slept until the next morning.

22. According to section 2 of the *Sexual Offences Act*, penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person. From the evidence of PW2, she was clearly having sexual relations with other people before her encounter with the appellant that day. However, this does not discount her argument that the appellant had sex with her that day against her wish. In that regard, penetration was sufficiently proved through the evidence availed.

23. On the issue of identification of the assailant, the proviso at section 124 of the *Evidence Act* provides that the testimony of a victim to a sexual offence on identification of his/her assailant does not need to be corroborated. However, such testimony must, first of all, be there and then be believable. The provision states:

> "...Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

24. In this case, PW2 stated that she knew the appellant as a student at a nearby vocational institute and that he lured her to his friend's house that day. That he took the blouse she was carrying from the tailor and went with it, forcing her to follow him. She said that she stood outside the house for a while but the appellant eventually pulled her into the house to sit with him. He then asked her to have sex with him.

25. PW3 stated that he saw the appellant leaving the general direction of the house where PW2 was, the following morning and that is when he followed him and caused him to be arrested. In his defense, the appellant, stated that he was not at any given point at the house where PW2 was found, and that he was at a different location. When asked to indicate this alternative location or alibi, he said he had no evidence of the alibi. The evidence on record proves beyond reasonable doubt that the appellant was PW2's assailant.

26. It is also clear from the cross examination conducted by the appellant that he did not raise the issue of alibi early. He was able to show that he was not found in the house with the victim at the time of the incident. However, he was found outside the house. Clearly, the appellant's attempt to raise an alibi was unsuccessful, and I agree with the learned trial magistrate that the defence of alibi was an afterthought.

27. After conviction, the appellant was sentenced to the statutorily prescribed sentence of 15 years imprisonment. The sentence is prescribed under section 8(4) of the *Sexual Offences Act* and it is couched in mandatory terms leaving no room for this court to review it to a level any lower than that. Therefore, the trial court did not err in imposing that sentence.

Disposition

28. Ultimately, there is nothing in the appeal that persuades me that the appeal has any merit. Accordingly, the appeal is hereby dismissed in its entirety, and the lower court's finding on conviction and sentence are hereby upheld.

29. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 11TH DAY OF FEBRUARY, 2026.

R. MWONGO

JUDGE

Delivered in the presence of:

Appellant Present in Court

Ms. Mukami for Appellant

Ms. Mwaniki for the Respondent

Francis Munyao - Court Assistant