Tandara v Republic (Criminal Appeal E013 of 2024)
[2026] KECA 324 (KLR) (27 February 2026) (Judgment)

Neutral citation: [2026] KECA 324 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL E013 OF 2024

SG KAIRU, AK MURGOR & P NYAMWEYA, JJA

FEBRUARY 27, 2026

BETWEEN

JACKSON KIRIGHA TANDARA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Voi (G. Dulu, J.) dated 7th February 2024 in HC. CR.A. No. E042 of 2022)

JUDGMENT

1. The Appellant, Jackson Kirigha Tandara was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act*. The particulars of the offence were that on diverse dates between 5th May 2021 and 25th May 2021 in Wundanyi Sub- County within Taita Taveta County intentionally and unlawfully caused his genital organ (penis) to penetrate the female genital organ (vagina) of CB a girl aged 13 years.

2. He pleaded not guilty to the charge and was tried before the Magistrate's Court at Voi, found guilty and convicted in a judgment delivered on 7th February 2022. He was thereafter sentenced to imprisonment for a term of 20 years.

3. He was dissatisfied with the conviction and the sentence. He appealed to the High Court. Upon hearing the appeal, the High Court at Voi (G. Dulu, J.) dismissed the appeal and upheld the conviction and the sentence in a judgment delivered on 7th February 2024. The High Court found that all the ingredients of the offence had been proved to the required standard and that the circumstances under which the offence was committed justified the sentence.

4. Still dissatisfied, the appellant lodged this second appeal. Based on his supplementary grounds of appeal that were canvassed in his written submissions, the appellant complaints are that the learned Judge of

the High Court erred in failing to consider: that no proper procedure of voire dire examination was conducted in relation to the minor in violation of Section 19 of the *Oaths and Statutory Declarations Act*; that "the physical primary penetration was not well established by the medical evidence beyond reasonable doubt"; and that the omission by the trial magistrate to explain to the appellant his rights to legal representation contravened Article 50 of *the Constitution*.

5. We heard the appeal on 16th July 2025. The appellant appeared virtually from Manyani Maximum Prison. Learned Prosecution Counsel Mr. Kariuki appeared for the respondent. Both parties relied entirely on their respective written submissions.

6. In support of the appeal, the appellant submitted that the trial court did not conduct voire dire examination in relation to the complainant as required by law; that based on the manner in which that examination was conducted, the complainant, a child of tender years, was incompetent to testify; that based on the record, no questions were put to the complainant to establish whether she understood the meaning of the oath before she was asked to give sworn testimony. The case of Johnson Muiruri v Republic [1983] eKLR was cited for the proposition that proper procedure should be followed when children of tender age are witnesses. The case of Samuel Wahini Ngugi v Republic [2012] eKLR was also cited for the proposition that failure to comply with Section 19 of the *Oaths and Statutory Declarations Act* vitiates the proceedings.

7. Regarding the complaint that penetration was not proved, it was urged that the finding by the trial magistrate that the complainant's hymen was broken was not sufficient evidence of penetration; and that a hymen can be broken by anything apart from sexual intercourse. It was urged, that there were gaps that cast doubts in the prosecution case; that no blood samples were taken from the victim and the child sired by the complainant to verify the genetic relationship and provide conclusive proof.

8. Lastly, it was submitted that the appellant was denied his right to legal representation as the trial court did not explain to him his rights in that regard.

9. In opposition to the appeal, it was submitted that under Section 361(1) of the Criminal Procedure Code, the Court on the second appeal must confine itself to matters of law; that in that regard, the issues for determination in this appeal are whether the prosecution proved its case beyond reasonable doubt; whether the appellant's defence was cogent and believable; whether the conviction was solely based on circumstantial evidence; and whether the sentence imposed is harsh and excessive.

10. It was submitted that all the ingredients of the offence were proved; that the victim's age was established through production of her birth certificate; that penetration was proven vide the victim's clear, cogent account, as corroborated by medical evidence of her pregnancy; and that the appellant was properly identified as the perpetrator of the offence having been recognized as such. It was urged that the appellant's defence was considered by both courts below with concurrent findings that the same did not dislodge the prosecution case.

11. As regards the sentence, it was urged that there is no reason or justification for interfering with it; that it has not been demonstrated that the sentence is manifestly excessive or hash or illegal or improper.

12. We have considered the appeal and the submissions. We echo the words of the Court in Karani v R [2010] 1 KLR 73 that in a second appeal such as this:

> " 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."

13. With that in mind, a brief restatement of the evidence will suffice for purposes of considering whether looking at the evidence, as a whole, the concurrent findings and decision by the two courts, are plainly wrong.

14. Eight witnesses testified for the prosecution. KM, PW1, received a report from PMM, the complainant's father who testified as PW3, that his daughter had disappeared and had been seen with the appellant. The complainant, CB, testified as PW2. Prior to her testimony, the record indicates that Voire Dire examination was conducted and captures what appears to be her answers to questions put to her before the court recording that "the minor is suitable to be sworn as she understands the reasons as to why she should be sworn."

15. She then testified on oath. She stated that she was aged 13 years in class 8; that in March 2021 she was introduced to the appellant who lured her, and took her to a house and forced her to sleep with him, had sex with her and did not use a condom; that that "continued till April 2021"; that she did not get monthly periods thereafter and looked for the appellant and together they ran away to a home in Wundanyi. She testified further that the appellant used to lock her in the house where "he did do sexual intercourse and later on 25th May 2021" he left. Maurice Maghanga (PW5) then assisted her and took her to a place known as Bura. Her father, PW3, was then called who then reported the matter to the police on 26th May 2021. The appellant was thereafter arrested. It was her testimony that she was taken to Moi Hospital, and it was found that she was pregnant.

16. Cross examined at length by the appellant, CB maintained that the appellant took her "by tuk tuk" to a house and told her, "that I am your wife" and that it was him who defiled her and spoilt her life and that by the time of her testimony on 9th August 2021, her pregnancy was 5 months old.

17. Other relevant witnesses included the Medical Officer at Moi Referral Hospital, Dr. Joto Nyawa, PW7 who examined the complainant at that hospital. The examination revealed that she was pregnant. PW7 produced the P3 Form, the treatment notes and ultrasound images as exhibits.

18. The Investigating Officer, Police Constable Grace Chogo (PW8) of Voi Police Station was at the police station when the complainant and her father reported the incident. She referred them to Moi Hospital for examination and recorded statements before charging the appellant with the offence.

19. Having found that he had a case to answer, the appellant was placed on his defence. In his testimony, after narrating his family background, stated that when he got home from work on 31st May 2021 at about 7.00 pm he was arrested by police officers who slapped him and took him to Voi Police Station; that at the police station he signed documents under duress. He denied the allegations against him maintaining that he "never had any contact" with the complainant and denied knowing her.

20. In its judgement delivered on 7th February 2022, the trial court found that the complainant's age was proven vide her birth certificate; that penetration was proven vide the victim's clear, cogent account, as corroborated by medical evidence of her pregnancy; and that the appellant was recognized as the perpetrator. The court found the appellant's defence to be untruthful and as already stated convicted the appellant and sentenced him to imprisonment for a term of 20 years. On the first appeal, the High Court concurred.

21. There are, therefore, concurrent findings of fact by the trial court and the High Court that the appellant committed the offence of defilement as charged. As this Court stated in Adan Muraguri Mungara v Republic, Cr. No. 347 of 2007 (Nyeri), the circumstances under which it will disturb

concurrent findings of fact by the trial court and the first appellate court are limited. The Court stated thus:

> "As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere."

22. Having examined the record, we discern no error of law or miscarriage of justice occasioned by the High Court in affirming and upholding the conviction of the appellant. All the ingredients of the offence of defilement were proved to the required standard. The appellant was well known to the complainant having detained her and defiled her over an extended period. The complaint that the complainant's testimony was not corroborated has no merit. Although under Section 124 of the *Evidence Act*, no corroboration was required (See Maripett Loonkomok v Republic [2016] eKLR and Lomaisia v Republic (Criminal Appeal 136 of 2018) [2023] KECA 148 (KLR)) there was indeed medical evidence tendered by PW8 that was corroborative.

23. It is also instructive in our view that the grounds of appeal raised by the appellant before the High Court and the grounds raised in the present appeal are substantially different. The question of voir dire examination being improper has been raised in this Court for the first time. Moreover, and as already demonstrated above, the record of the trial court shows that the complainant was indeed examined prior to her testimony, and the trial court was satisfied that she was competent to give sworn testimony. (See also Lomaisia v Republic (above).

24. As regards the complaint by the appellant that his right to legal representation under Article 50 was violated, the learned Judge of the High Court stated:

> "Indeed, the trial court record does not show that the appellant was informed by the court of his right to legal representation. However, in my view since the appellant would still have to pay for his legal representation and the law presumes everyone to know the law, I find no fatal error committed by the trial court. I dismiss that ground".

25. In the case of Owuor v Republic (Criminal Appeal 16 of 2019) [2022] KECA 18 (KLR) this Court discussed at length the question of legal representation in light of pronouncements by the Supreme Court of Kenya in the case of Charles Maina Gitonga v Republic [2020] eKLR, where the apex Court addressed similar issues as raised by the appellant in the instant appeal. In the present case, apart from the fact that the appellant did not raise the matter before the trial court, the record shows that the appellant keenly followed the trial proceedings and effectively cross- examined witnesses and addition to advancing his defence. There is no evidence that the appellant was incapacitated in the trial for lack of legal representation. It is not shown that the appellant suffered prejudice or injustice as a result. See Jackson Kalenga v Republic [2019] eKLR and Alex Kipchirchir Kiptoo v Republic [2018] eKLR.

26. As regards the sentence, it is not shown that the trial court or the High Court in affirming the sentence did not properly exercise its discretion and neither is it demonstrated that given the circumstances in which the offence was committed that the sentence is manifestly excessive or that the sentence is not lawful.

27. In conclusion we find no merit in this appeal. The appeal is hereby dismissed in its entirety.

28. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF FEBRUARY 2026.

S. GATEMBU KAIRU, FCIArb, C.Arb.

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JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR