



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nyagundo v Republic (Criminal Appeal E145 of 2024)  
[2026] KEHC 3162 (KLR) (6 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 3162 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL APPEAL E145 OF 2024  
JN NJAGI, J  
MARCH 6, 2026**

**BETWEEN**

**THOMAS GAMBO NYAGUNDO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from original conviction and sentence by Hon. R. M. Amwayi, PM in Kaloleni  
Principal Magistrate's Court Sexual Offence Case No. E024 of 2024 delivered on 9/9/ 2024)*

**JUDGMENT**

1. The appellant was convicted of the offence of defilement contrary to section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No.3 of 2006 and sentenced to serve 15 years imprisonment. The particulars of the offence were that on the 18<sup>th</sup> day of May, 2024 at (name withheld) area of Rabai Location within Kilifi County, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of T.J.D (herein referred to as the complainant), a child aged 16 years.
2. The Appellant was aggrieved by the conviction and the sentence of the trial court and lodged the instant appeal on the following grounds:
  1. That the learned trial magistrate erred both in law and fact by failing to consider that the prosecution case was never proved beyond reasonable doubt.
  2. That the learned trial magistrate erred in law and fact by convicting the appellant on a charge that was defective.
  3. That the Learned trial magistrate erred in both law and fact by failing to appreciate the inconsistencies and contradictions in the prosecution witnesses.



4. That the learned trial magistrate erred in both law and fact by failing to appreciate that the complainant was not a credible and reliable witness.
5. That the learned trial magistrate erred in law and fact by arriving at a conviction against the weight of evidence.
6. That the Learned Trial Magistrate erred in both law and fact by failing to appreciate and consider his defence.

**Prosecution's case.**

3. The case for the prosecution is that the complainant was at the material time a junior secondary school student in grade 8. She was staying with her parents, her father PW2 and her mother PW5. She was aged 16 years.
4. It was the evidence of the complainant that on the 18/5/2024 she went to the farm with her parents. Later on they were returning home when she was given a lift home on a motor cycle by a neighbour. That when her parents arrived home she lied to them that she had been given money by a person called Besingwa to take to his family but she was lying in order to go to the appellant's house. She found the appellant cooking. She did not say whether anything happened between them on that day.
5. It was further evidence of the complainant that in May she was going to a wedding when she passed by the school where the Appellant was working as a guard. She talked to him and he told her that he would give her money if she slept with him. He suggested she goes on Saturday. That when she went there he took her to the kitchen where he pushed her to the floor. He undressed her and he removed his trousers. He had penetrative sexual intercourse with her on the floor of the kitchen. She dressed and left for home.
6. It was her evidence that when she got home her father asked her where she was coming from. She was hesitant to tell him but he beat her up and she told him that she was coming from Kamoti School. She narrated to him what had happened. They set out looking for the appellant at the school. They found him hiding in a tree plantation. They reported the matter to the police station. On the following morning they reported to the chief. She was taken to a local dispensary. She was issued with a P3 form at the police station. It was filled at Mariakani sub county hospital. The Appellant was arrested.
7. The father to the complainant PW2 testified that on the material day, he came from the farm with this wife and PW1. On the way they met a rider and he requested him to carry PW1 home. When he got home, his daughter said that Besingwa had given her money to take to his wife. He allowed her to go. She overstayed and he decided to go and look for her but he did not find her. She came back at 9pm and lied that she was with Salama. He beat her up and she disclosed that she was at Kamoti school with the appellant. They went to the school but was informed that he was in the tree plantation. They found him. He came out of the plantation and complainant identified him.
8. A clinical officer at Mariakani sub county Hospital PW3 testified that the complainant was examined at their hospital on 19/5/2024 and she was found with a missing hymen. Tests were conducted but no spermatozoa were seen. Her P3 form was completed.
9. The area chief PW4 testified that on the 19/5/2024 the complainant went to him in the company of her father. The father reported that the complainant had been defiled on 18/5/2024 at Kamoti Secondary School. He interrogated the girl and she confirmed that she had been defiled. He took her to Rabai Health center in the company of her father. She was examined after which he directed her father to take her to the police station.



10. The complainant's mother PW5 testified that on the material day she was coming from the farm together with her husband and daughter. PW1 went home on a motorcycle. When they got home, PW1 said that she was taking money to Besingwa. She left and had not come back by 9pm. She came back 30 minutes later and when she asked her where she had been, she lied that she was at Besingwa's place washing utensils. Her father beat her up and she told her father that she was going to take him where she had been. The two left together.
11. The case was investigated by PC Lilian Kadzo PW6 of Rabai police station. She testified that the case was reported at the station on 19/5/2024. That the incident was said to have occurred on 18/5/2024 at 8:00p.m. She interrogated the complainant and established that the complainant had lied to her parents that she was taking money to Besingwa but she instead went to meet up with the appellant at Kamoti Secondary where he works as a watchman. That the appellant defiled her while they were in the kitchen. She arrested the appellant and charged him with the offence.
12. The investigating officer established that the complainant was aged 16 years. During the hearing she produced the complainant's clinic card as exhibit, P.xh.1. It showed that she was born on 31/3/2008. The clinical officer during the hearing produced the complainant's P3 form, Post Rape Care form, treatment notes and the lab results as exhibits, P.xh.2 – 5 respectively.

### **Defense case**

13. The appellant in his defence said that he works as a security guard at Kamoti Secondary School. That on 18/5/2024 he was at Kibarani where he had gone to collect relief food. He was in the company of his son. He went at 8am and later went to work at 6pm. He found his reliever there and they exchanged the shift. He left to take his luggage and son home. He went back to the school at 7pm. It was his evidence that he met the complainant's parents on his way to work. They greeted each other and they went their way. That at 9pm while at work he was approached by some people who asked him about the complainant's whereabouts. He said that he did not know her. They informed him that the complainant had said that she was with him. They threatened to beat him up. They took the girl to hospital. That after two week he was arrested and charged. He denied defiling the complainant or promising her any money.

### **Submissions**

14. The appellant through his advocate filed submissions on the 11<sup>th</sup> day of March, 2025. The Respondent did not file submissions.
15. Counsel contended that the appellant was charged with the offence of defilement of a child contrary to Section 8(1) as read with Section 8 (2) of the *Sexual offences Act* No. 3 of 2006. That at no point did the prosecution make any application to amend the charges.
16. It was submitted that the charge against the appellant was defective as the evidence revealed that the victim was 16 years old but the Appellant was charged under subsection 8(2) of the *Sexual Offences Act*. He submitted that the defect could only be cured by an amendment under Section 214 of the Criminal Procedure Code before the close of the prosecution case. Counsel alluded to the fact that the trial court amended the charge without reference to the appellant. It was his submission that the error entitled the appellant to an acquittal.
17. It was submitted that the matter was decided on the evidence of a single witness, the complainant and that the medical evidence produced did not support her case as there was no evidence of a recent sexual activity. Counsel relied on the case of *Olukuru vs Republic (2024) KEHC 7700* and submitted that



the trial court misdirected itself for relying on the sole testimony of the complainant who was not a credible and reliable witness.

18. It was further submitted that the court's reliance on the absence of the hymen to conclude that penetration had occurred was a misdirection. Such evidence could not be evidence of penetration. There was no evidence that the hymen was freshly broken. That its age was not known. That the evidence by the clinical officer could not offer any corroboration. Counsel relied on the case of PKW vs Republic (2012) eKLR and that of David Mwingiriwa vs Republic (2017) eKLR.

### **Analysis and determination**

19. This being the first appellate court in the matter, the court is guided by the principles set out in the case of David Njuguna Wairimu –vs- Republic (2010) eKLR where the Court of Appeal stated;

“That the duty of the 1<sup>st</sup> appellate court is to analyze and re-evaluate evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the circumstances of the case come to the same conclusions as those of the lower court. It may rehash those conclusions as those of the lower court. We do not think that there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”

20. I have considered the grounds of appeal, the evidence on record and the submissions of the Appellant. The Appellant argued that the charge was defective in that he was charged with the offence of defilement of a child contrary to Section 8(1) as read with Section 8 (2) of the *Sexual Offences Act* No. 3 of 2006 but it was established that the child was aged 16 years which brought the offence under section 8(4) of the *sexual Offences Act*. However, that the prosecution did not make any application to amend the charge to bring it under section 8(4) of the Act. Therefore, that the charge was defective because the wrong penal section was quoted.
21. Counsel for the appellant submitted that the defect could only be cured by an amendment under Section 214 of the Criminal Procedure Code before the close of the prosecution case. Counsel alluded to the fact that the trial court amended the charge without reference to the appellant. It was his submission that the error entitled the appellant to an acquittal.
22. It is clear that the drafting of the charge in this case did not conform with the manner of drafting charges under section 137 of the Criminal Procedure Code as the charge refers to the offence of defilement as created under section 8(1)(2) of the *Sexual Offences Act* which is applicable where the victim is a child aged less than eleven years. I however do not see reason to interfere with the conviction. The particulars of the charge clearly stated that the Appellant was charged with defiling a child of the age of 16 years. The Appellant was therefore well aware of the charge that he was facing. He was not prejudiced in any way by the fact of the charge quoting the wrong section of the law. The defect is one that was curable under the provisions of section 382 of the Criminal Procedure Code which section insulates a finding or sentence of the trial court from challenge on account of any error, omission or irregularity in the charge unless it has occasioned a miscarriage of justice. In the case of Emmanuel Mulei Kilova vs Rep (2020) eKLR the court held as follows;

“Citing a wrong penalty section in my view does not go to the root of the charge in the circumstances. The most crucial thing is to have the charge proved to the required standard. Section 382 Criminal Procedure Code focuses not on formal compliance with the rules of



framing the charge, but on whether any error, omission or irregularity that has occurred in the charge, has occasioned a failure of justice.”

23. The sentence for defiling a child of the age of 16 years is provided for under section 8(4) of the [Sexual Offences Act](#). The trial court did not err in sentencing the Appellant under that section.
24. The Appellant argued that the charge of defilement was not proved beyond reasonable doubt.
25. To sustain a conviction in a charge of defilement, the prosecution is required to prove three elements of the offence which are proof of: the age of the victim, penetration on the victim and identification of the assailant. This position was held in the case of Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013 where it was held: -

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”
26. On the age of the complainant, a copy of the child health card was produced by PW5 showing that she was born on 31<sup>st</sup> March, 2008. The complainant was aged 16 years when the offence was said to have been committed on 18<sup>th</sup> May, 2024. The age of the complainant was therefore properly proved and the charge under Section 8 (1) and (4) of the [Sexual Offences Act](#) properly preferred.
27. On the element of penetration, the trial magistrate held that penetration on the complainant was confirmed by the medical officer. The complainant was seen by the doctor on 19<sup>th</sup> May 2024 which was the following day after the alleged incident. The medical evidence by PW3 was to the effect that there was evidence of defilement as the hymen was broken. The witness did not explain what led to that conclusion yet there was no evidence of any physical injuries or bruises on her genitalia. There were no spermatozoa found.
28. A broken hymen “per se” is not conclusive evidence of a sexual activity, see P.K.W –vs- Republic (2012) eKLR. In the case against the Appellant, there was no evidence that the hymen was freshly broken which would have supported the defilement. There were no bruises in the complainant’s genitalia. In view of the foregoing, it is the finding of this court that the trial magistrate was wrong in holding that the medical evidence adduced before the court supported defilement. There was no such evidence.
29. The trial court held that the evidence of the complainant on defilement was truthful, credible and consistent. That she did not have any reason of framing the Appellant with the offence.
30. It was the evidence of the complainant that on 18<sup>th</sup> May, 2024, she lied to her parents that she had been given money by Besingwa to take his family. She instead went to the house of the Appellant and found him. She however did not make any allegation of having been defiled by the appellant on that day. She instead stated that the defilement took place later on a Saturday the Appellant had promised to give her money to have sexual intercourse with him. That on that day she went to the Appellant at the school and he defiled her in the kitchen.
31. The parents to the complainant on the other hand testified that the defilement took place on 18/5/2024, the day they had come from the shamba and the appellant lied that she had been given money to take to Besingwa’s family. This was contrary to the evidence of the complainant who never said that defilement took place on that day though she went to his place on that day. If then there was any defilement which day did it take place?
32. It is clear from the evidence that there is a day that the complainant returned home late and when she was asked by her parents where she had been, she did come out clearly where she had been. Her father beat her up and she said that she had been with the appellant. The complainant admitted that she had



lied to her parents when she was going out. Being a confessed liar, she could as well be lying that she was defiled by the appellant. She might have lied to escape the beating by her father.

33. The prosecution always has the burden to prove its case beyond reasonable doubt, see Pius Arap Maina –vs- Republic (2013) eKLR. The trial court in this case did not consider the contradictions between the evidence of the complaint and her parents on the day she was purported to have been defiled by the Appellant. In my view, the testimony of the complainant was not reliable to sustain a conviction. The appellant ought to have been given the benefit of doubt.
34. The upshot is therefore that this court finds merit in the appeal. The case was not proved beyond reasonable doubt. Consequently, the conviction is quashed and the sentence set aside. I order the Appellant be set at liberty forthwith unless lawfully held.

**DELIVERED, DATED AND SIGNED AT GARSEN THIS 6<sup>TH</sup> DAY OF MARCH, 2026.**

**J. N. NJAGI**

**JUDGE**

In the presence of:

Mr. Oluoch HB for Miss Ocholla for Respondent

Appellant – present virtually at G.K. Prison

Court Assistant - Rahma

