Njoroge v Republic (Criminal Appeal E011 of 2024)
[2026] KEHC 3255 (KLR) (10 March 2026) (Judgment)

Neutral citation: [2026] KEHC 3255 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAHURURU

CRIMINAL APPEAL E011 OF 2024

LN MUTENDE, J

MARCH 10, 2026

BETWEEN

JAMES CHEGE NJOROGE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. James Chege Njoroge, the Appellant, was charged with the offence of Defilement contrary to Section 8(1) (3) of the *Sexual Offences Act* No. 3 of 2006. Particulars of the offence were that on the 20th day of June, 2021, at [Particulars Withheld] in Nyandarua West Sub-County within the Nyandarua County intentionally caused his penis to penetrate the vagina of R.M.K. a child aged 15 years.

2. In the alternative, he faced the charge of Committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. Particulars being that on the 20th day of June, 2021, in [Particulars Withheld] in Nyandarua West Sub-County within the Nyandarua County intentionally touched the vagina of R.M.K. a child aged 15 years with his penis.

3. The Appellant was taken through full trial, found guilty, convicted for defilement and sentenced to 20 years imprisonment.

4. Aggrieved, he appeals on grounds that;

    1. That the learned trial Magistrate erred in both law and in fact by finding a conviction against the weight of evidence on record which was manifestly insufficient, inconsistent and had glaring gaps hence incapable of sustaining conviction.

    2. That the learned trial Magistrate erred in both law and in fact by failing to appreciate that the main ingredient of the offence had not been proven to the required degree by the prosecution.

3. That the learned trial Magistrate erred in both law and in fact by failing to find that the evidence by the prosecution did not support the charge against the Appellant.

4. That the learned trial Magistrate erred in law and in fact in failing to find the Complainant's evidence was not corroborated in any way by direct evidence of other prosecution witnesses.

5. That the learned trial Magistrate erred in law in failing to give due and/or adequate consideration to the Appellant's defence.

6. That the learned trial Magistrate erred in both law and in fact by passing a sentence which was manifestly harsh and excessive in the circumstances in any event.

5. Briefly, facts of the case were that on 20th June, 2020, R.M. a form one student was chased away from home with her sister by their father JM. They went to a neighbour's place who said she had visitors then they returned home but their father refused to open the door. This being the case she went to the house of the Appellant, her friend and told him that she had been chased away and had nowhere to sleep. He offered her a place while her sister went elsewhere. And in the course of the night they had sex.

6. The victim returned home the following morning and her mother PW2, CW claimed she was loitering. She confessed to have slept at the house of the Appellant. The area Chief was notified. The victim led them to the house of the Appellant who was later apprehended by the Complainant's cousins PW7 Patrick Ngunjiri and Babu and escorted to the Ngomongo Police Post. Since he was injured PW4 No. 22861 Senior Sergeant, the officer in-charge of the Police Post escorted him to hospital for treatment.

7. In the meantime, the Complainant was also subjected to medical examination with a view of establishing if she had been molested. All these culminated into the Appellant being charged.

8. Upon being placed on his defence, the Appellant gave sworn evidence. He stated that on the 21st May, 2021 he left work early since there was curfew, and he wanted to prepare supper. At about 9.40pm he heard a knock on the door. It turned out to be the girl's mother and Ngunjiri who greeted him and asked whether he knew the girl and he answered in the affirmative. But when he asked if he had slept with her he denied and they dragged him outside. That Ngunjiri had a grudge with him since he had sold his motor cycle without telling him. He asked for Kshs.25,000/-. They assaulted him but Ngunjiri's brother told them to take him to the police station, however, he asked them to take him to hospital.

9. That by then he had separated from his wife. They took him to the police post and the police took him to hospital. The police asked him for money but he denied having any hence he was charged.

10. The trial court analyzed evidence adduced and found that what occurred between the Appellant and victim was male – female sexual intercourse, an act of defilement that was proved beyond reasonable doubt.

11. The appeal was disposed through written submissions which I have duly considered.

12. This being a first appellate court, it has the duty to reappraise evidence presented at trial and reach an independent finding based on the facts and law. And in doing so it must consider all relevant aspects of the case bearing in mind the fact of having not seen nor heard witnesses who testified. This role and responsibility was clearly set out in Okeno v Republic [1972] EA 32 where the Eastern Court of Appeal delivered itself 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 (Pandya v Republic [1957] EA 336) and the appellate

court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v R [1957] EA 570). 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 finding 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, see Peters v Sunday Post [1958]EA 424." This was also set out in the case of Kiilu & Another v Republic [2005] KLR 174."

13. The gravamen of the Appellant is that evidence adduced was incapable of sustaining a conviction as the Complainant's evidence was not corroborated and the charge was not proved.

14. Statute criminalizes the offence of defilement. Section 8(1) of the Sexual Offences provides thus;

> A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

15. For an offence to be classified as defilement, three (3) elements must be proved and the standard of proof is beyond reasonable doubt. The ingredients are;

    i. Age of the victim

    ii. Proof of the act of penetration.

    iii. Positive identification of the perpetrator.

16. In Elias Kaingu v Republic Criminal Appeal No. 504 of 2010 the Court of Appeal stated that;

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim".

17. This particular element does not seem to be in dispute. But, the victim stated that she was 16 years old at the time of testifying. PW2 her mother stated that she was born in 2005 and a birth certificate adduced in evidence proved that the victim was born on 26th October, 2005 hence aged 15 years, eight months at the time of the incident.

18. Section 2 of the *Children Act* defines a child as;

> " child" means an individual who has not attained the age of eighteen years.

19. This was evidence that she was under 18 years hence a child, evidence that is not in dispute.

20. The main contention as gleaned from submissions by the Appellant is the element of penetration. It is urged that what came out clearly is the element of the victim having slept with the Appellant in his house. That the decision of the court was influenced by the fact that the Complainant's hymen was broken which made the court observe that the missing hymen was corroborated by the testimony of the victim that the penis had penetrated her vagina.

21. It is further urged that the medical report showed that there was no record as to fresh lacerations; bleeding; bruising; recent tears; spermatozoa and signs of penetration which meant that it was

medically impossible to attribute the torn hymen to the Appellant. In this regard, reliance was placed on PKW v Republic where the Court of Appeal stated that;

> " Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury and medical examinations can also rupture the hymen. When a girl engages in vigorous physical activity like horseback ride, bicycle riding and gymnastics, there can also be natural tearing of the hymen."

22. Section 2 of the *Sexual Offences Act* provides thus;

> " penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person.

23. In Hadson Ali Mwachango v Republic [2016] KECA 521 (KLR) the court stated that;

> " .....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."

24. Indeed, upon examination, the Complainant had normal external genitalia. The hymen was broken and with an old scar and she had some whitish discharge. On the laboratory tests being conducted, there was not spermatozoa.

25. The presence of spermatozoa in a defilement case is not a requirement because penetration does not have to be deep enough, a tip is sufficient to constitute the offence.

26. Evidence of penetration in the case was single witness testimony. The victim is faulted for not being particular on the act of penetration, hence her evidence could not prove penetration. Reliance is placed on the case of Julius Kioko Kivuva v Republic [2015] eKLR where the court held that;

> " PW1's testimony in this regard was not specific as to the act of penetration; and her evidence of having sex does not necessarily prove that penetration took place, in the absence of further evidence and details as to what actually happened in the act of having that sex. Evidence of sensory details, such as what a victim heard, saw, felt, and even smelled, is highly relevant evidence to prove the element of penetration, as a victim's testimony is the best way to establish this element in most cases. The specificity of this category of evidence, even though it may be traumatic, strengthens the credibility of any witness's testimony, and is particularly powerful when the ability to prove a charge rests with the victim's testimony and credibility as it does in this appeal."

27. The defence put up was a denial. The Appellant acknowledged knowing the victim. Then went on to narrate the events of the date of his arrest.

28. The Complainant testified that she went to the Appellant's house whom she referred to as a 'friend'. On cross – examination she said that she willingly undressed. The question would be whether a party

reading the decision would understand what having sex entails. Being understood as a consensual sexual activity between two (2) of them does not make the same not to mean penetration.

29. The Appellant also complains that evidence adduced by the victim had no direct corroboration of other prosecution witness. Evidence adduced was that the act of sex happened at night and the only witnesses were the Complainant and Appellant. Section 124 of the *Evidence Act* provides;

> Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> 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.

30. Additional independent evidence to strengthen or confirm evidence of a victim to establish the truthfulness is not a legal requirement. A court can convict on uncorroborated evidence of the victim once satisfied that the victim is truthful and reasons recorded for such contentment. The trial court believed the testimony of the victim as to what transpired. It is a case where the victim appreciated the Appellant as a friend and no reason was given why she would frame him.

31. The act of penetration took place in respect of a child incapable of consenting to it. Identification of the perpetrator is not questioned. Hence the conviction is affirmed.

32. On the question of sentence, Section 8(3) of the *Sexual Offences Act* provides thus;

> A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

33. Clearly, other than the prayer that the sentence be set aside as there is risk of miscarriage of justice no further submissions were advanced. The law provides for mandatory minimum sentence hence the court did not misdirect itself as it arrived at a just decision.

34. For that reason, the appeal is devoid of merit. Accordingly, it is dismissed in its entirety.

35. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 10TH DAY OF MARCH, 2026.

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L.N. MUTENDE

JUDGE