Njogo v Republic (Criminal Appeal E010 of 2025)
[2026] KEHC 3099 (KLR) (6 March 2026) (Judgment)

Neutral citation: [2026] KEHC 3099 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E010 OF 2025

MA ODERO, J

MARCH 6, 2026

BETWEEN

LAMECK MBACHIA NJOGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant Lameck Mbachia has filed this appeal challenging his conviction and sentence in the Magistrates Court at Mukurwe-ini.

2. The Appellant had been arraigned in the trial court on 8th February 2023 facing a charge of Defilement Contrary To Section 8(1) as read with Section 8(4) Of The *Sexual Offences Act* 2006.

3. The particulars of the charge were that

> "On the month of March 2022 at unknown date at Gakira Village Thamu Location in Mukurwe-ini Sub-County in Nyeri County, unlawfully and intentionally caused his penis to penetrate the vagina of JWM a child aged 16 years."

4. The Appellant faced an alternative charge of Committing An Indecent Act With A Child Contrary To Section 11(1) Of The *Sexual Offences Act* 2006.

5. The Appellant pleaded 'Not Guilty' to both charges and his trial commenced before the Lower Court on 27th February 2023. The prosecution called a total of six (6) witnesses in support of their case.

6. The complainant 'JWM' told the court that she was sixteen (16) years old and a Form one student at Kaharu Secondary School. The complainant stated that she lived with her mother and grandparents at Gakira village. She stated that she knew the Appellant 'Lameck' as he was her mother's cousin and lived about ten (10) metres away from their home.

7. The complainant testified that sometime in the year 2022 (she does not recall which month) the Appellant came to their home at about noon and dragged her to his nearby house. There the Appellant proceeded to defile the complainant.

8. The complainant did not disclose to anyone what the Appellant had done to her. Sometime later the complainant began to experience stomach problems. Her mother took her to Karaba Dispensary and they were referred to Mukurwe-ini Hospital. Upon examination the complainant was found to be five (5) months pregnant. The complainant told the court that she delivered a baby boy on 24th January 2023 by Caesarian Section at Mukurwe-ini Hospital. The complainant asserts that it was the appellant who defiled her and who is the father of her child.

9. PW2 'GN' is the mother of the complainant. PW2 confirms that the Appellant Lameck Mbacha is her cousin. PW2 testified that in January 2023 the complainant began to experience stomach pains while in school. The mother collected her from school and took the complainant to Karaba Dispensary. They were referred to Mukurwe-ini Hospital. Upon being examined at the hospital the doctor revealed that the complainant was pregnant. On 24th January 2023 the complainant delivered a son through caesarean section.

10. The medical personnel at the hospital reported this incident of a minor giving birth to police. PW2 was then arrested by police. PW2 told the police that it was the appellant who had defiled and impregnated her child. The appellant was then arrested and charged.

11. PW3 Caroline Mwanamisi is an obstetrician gynecologist attached to Mukurwe-ini Hospital. She told the court that she examined the complainant and prepared the P3 form dated 6th February 2023. PW3 found that the child was pregnant at forty (40) weeks gestation and also noted old tears in the hymen.

12. PW4 John Kinyua Mwangi was the assistant chief of Kaharu sub-location. PW4 told the court that in October 2020, he received a phone call from Karaba Dispensary informing him that the minor 'JWM' who resided in his area was pregnant. PW4 visited the family's home and the grandmother confirmed that indeed the child was expectant. The chief then reported the incident to the police. Later on 2nd February 2023, PW4 was informed that the child had delivered a baby. He then went to the appellant's home, arrested the appellant and escorted him to Mukurwe-ini police station. PW4 confirmed that the two families were related.

13. PW5 PC Elizabeth Mwikali is the investigating officer. She stated that upon being alerted of the incident, she visited the hospital and found the complainant was admitted there, having delivered a baby boy by caesarian section. PW5 recorded a statement from the complainant and thereafter went to the home of the Appellant and arrested him. The officer then took Appellant and the baby to Nairobi Government Chemist where samples were extracted from both for analysis. Upon receiving the results of the DNA analysis PW5 charged the Appellant with the offence of Defilement.

14. PW6 Christine Matindi is an analyst attached to the Government Chemist in Nairobi. She told the court that police brought the Appellant and the baby to her office and samples were extracted for analysis. She conducted an analysis to determine the parentage of "Baby LM". PW6 prepared and signed her report dated 20th April 2013, which she produced in court as an exhibit Pexhb 5.

15. At the close of the prosecution case the Appellant was ruled to have a case to answer and was placed on her defence. The Appellant gave a sworn defence in which he denied having defiled the complainant.

16. On 19th September 2024 Hon. Nyakundi Senior Resident Magistrate delivered her judgment in which she convicted the Appellant on the main charge of Defilement. After listening to the Appellants statement in mitigation the trial court sentenced him to serve fifteen (15) years imprisonment.

17. Being aggrieved by both his conviction and sentence the Appellant filed this Memorandum of Appeal, which appeal is premised upon the following grounds:-

> " 1. That, the trial magistrate erred in law and facts by failing to consider that prosecution tendered collaborated and inconsistences evidence.
>
> 2. That, the trial magistrate erred in law and facts when she failed to consider that the medical evidence was collaborated done in a required standard to identify the problem the appellant have chronic epilepsy and diabetes.
>
> 3. That, the trial magistrate erred in law and facts when she failed to identify that a man who is epileptic episode does not have ability to rise up children, because the medicine they take it destroys organism system.
>
> 4. That, the trial magistrate erred in law and fact when she rejected my plausible evidence without cogent reason to do so, contravening section 169 of p.c.
>
> 5. That, other further grounds to be adduced at the hearing of this appeal.
>
> 6. That, the appellant wish to be present during the hearing of this appeal."

Analysis And Determination

18. I have carefully considered the record of appeal as well as the submissions filed by both parties. This is a first appeal in which the High Court is required to review the evidence adduced before the Lower Court and to draw its own conclusions on the same.

19. In okeno -vs- republic [1972] E.A 32 the Court of Appeal set out the duties of the first appellate Court as follows:-

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to afresh and exhaustive examination (Pandya -vs- Republic) (1957) EA 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh the conflicting evidence and draw its own conclusion..... It is not the function of a first appellate court merely to securitize the evidence to see if there was some evidence to support the lower courts finding and conclusions. It must make its own findings and draw its own 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."

20. Similarly in David Njuguna Wairimu -vs- Republic [2010] eKLR, the Court of Appeal stated as follows;-

> " The duty of the first appellate court is to analyse and re-evaluate the 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 facts and circumstances of the case come to the same conclusion as those of the Lower Court. It may rehash those conditions. We do not think there is anything objectionable in doing so provided that 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."

21. In Kenyan Law there exists the presumption of innocence. The Accused has no obligation or duty to prove his/her innocence. The Appellant had been charged with a criminal offence. As such the burden lay on the prosecution to prove each aspect of the case beyond reasonable doubt.

22. In the case oF Republic -vs- Ismail Hussein Ibrahim

[2018] eKLR the Court held that

> " The burden is upon the state to prove beyond reasonable doubt that the defendant is guilty of the crime charged. It is a strict and heavy burden. The evidence must overcome any reasonable doubt concerning the defendant's guilt but it does not mean that the defendants must be proved beyond all possible doubt."

23. The Appellant faced a charge of Defilement. In the case of Charles Wamukoya Karani -vs- Republic [2013] eKLR the Court set out the critical ingredients of a charge of Defilement as follows:-

> " The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

24. The age of the victim is a critical factor in a charge of defilement as the law provides for the sentence to be imposed (upon conviction) based on the child's age.

25. Rule 4 of the Sexual Offences Rules states that

> " When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."

26. In the case of Francis Omuroni -vs- Uganda, Criminal Appeal No. 2 of 2000, the Court of Appeal of Uganda stated as follows:-

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and commonsense....."

27. Similarly in Edwin Nyambogo Onsongo -vs- Republic

[2016] eKLR the Court stated thus

> " .....the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be provoked by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victims age, it has to be credible and reliable." [Own emphasis]

28. In this case the complainant told the court that she was born on 14th November 2006 and was therefore aged sixteen (16) years in the year 2022 when the incident occurred.

29. PW2 the Complainant's mother confirmed that she delivered the complainant on 14th November 2006. She produced a copy of the complainant's Birth Certificate Serial No 0130077 which confirmed

that the child was born in November 2006. I am satisfied that there is reliable proof of the age of the complainant and I am satisfied that it has been proved that the complainant was a minor in the year 2022 when this incident occurred.

30. The next element of the charge of Defilement requiring proof is the fact of penetration. Section 2(1) of the *Sexual Offences Act* 2003 defines penetration as

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

31. The complainant in this case narrated to the Court how the Appellant who was a relative living nearby came to her home and dragged her to his house. In her own words the complainant stated that

> " He [the Appellant] took me to his bed. He lifted my skirt and removed my innerwear. He inserted his penis into my vagina..... He removed his clothes, all his clothes. He removed my innerwear completely. We were on top of his bed. He lay on top of me. He defiled me for about 30 minutes ....."

32. The complainant has given a clear, cogent and graphic description of what happened. The complainant was a teenager. She clearly knew what the sexual act entailed and she specified that the Appellant used his penis to penetrate her vagina.

33. The complainant had no reason to lie about the incident if it did not occur. The child was not engaged in flight of fancy. Indeed the trial court noted as follows;-

> " The minor was candid in answering questions throughout her testimony. She answered questions immediately."

These observations regarding the demeanour of the complainant were made by the trial magistrate who actually saw and heard the witness testify. This court has no reason to doubt these findings by the trial court.

34. The question may arise as to why the complainant made no reports to her parents/guardians about the incident. By her own admission the child did not report the defilement. It must be remembered that the complainant was a teenager. At this age many girls suffer shame and confusion regarding matters sexual. She may have felt ashamed about the defilement or may have feared being blamed for the incident by her caregivers.

35. The fact that penetration did occur is conclusively proved by the fact that shortly after the incident the complainant was found to be pregnant. She later went on to deliver a live male child. PW3 Caroline Mwanamisi an obstetrician gynecologist confirmed that she examined the complainant at Mukurwe-ini Hospital and found that the child was pregnant at 40 weeks gestation. PW3 also confirmed that upon examination the complainant she noted an old broke hymen which is indicative of penetration. PW3 produced as an exhibit the P3 form as well as the PRC Form in respect of the complainant both of which prove the above findings. [Pexb 2 and Pexb 3]

36. Based on the evidence on record I am satisfied that the fact of penetration was sufficiently proved.

37. The final element requiring proof in a case of defilement is the identity of the perpetrator. Sufficient evidence must be adduced to prove that it was the appellant who defiled the child. As is to be expected there was no eye witness to the act. Sexual offences are normally perpetrated under cover. It is unlikely that there would be somebody close by watching what was going on.

38. The Complainant identified the Appellant as the man who defiled her.

The Appellant was a relative who was well known to the child. In her evidence the complainant states that

> " I know the Accused. He is called Lameck Mbachia Chege. He is my mother's cousin. Mother is called Grace Njoki. Accused is my neighbour about 10 m away. He does not have a family. Damaris Wanjiku Chege is the mother. He stays in the same compound with the mother but in different houses about 30m apart. I stay with [my] mother and my grandparent,....."

It is obvious that the complainant knew the Appellant very well and was even aware of the living arrangements of the Appellants family.

39. PW2 'GN' who was the complainant's mother and PW4 John Kinyua Mwangi who was the local chief both confirm that the Appellant was related to the family of the complainant. PW4 confirmed that the two families lived in peace and he was not aware of any bad blood between them.

40. Therefore there exists clear evidence of recognition by the complainant of her assailant. In the case of Anjononi & Others -vs- Republic [1980] KLR the Court held that

> " .....recognition of an assailant is more satisfactory more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other....."

41. Finally on this point of identification the evidence reveals that the complainant delivered a baby boy on 24th January 2023. The doctor PW3 told the court that the complainant delivered a full term normal baby weighing 2.5 kgs. This corresponded with the child's evidence that she was defiled in March 2022. Thus this pregnancy clearly resulted from that defilement.

42. More importantly PW5 PC Elizabeth Mwikali who was the Investigating Officer told the court that she took both the Appellant and the baby to the government chemist in order that a DNA test be conducted to determine the paternity of the baby borne by the complainant.

43. PW6 Christine Matindi was the analyst who took samples from the Appellant and the baby and conducted the DNA test. She produced in court her report dated 20th April 2023 (Pexb 5). The findings of PW6 which were confirmed in her report was that there was a 99.99% chance that the Appellant was the biological father of the complainant's baby. This report points clearly at the Appellant as the man who defiled and impregnated the complainant. This is expert evidence which has not been controverted at all.

44. The Appellant gave a sworn defence in which he vehemently denied having defiled the child. The Appellant however cannot explain why the complainant a mere child would identify him if he was not the one who defiled her. As pointed out earlier there was no known grudge against the Appellant by the complainant or her family. What possible reason would the child have had to frame the Appellant.

45. Secondly the scientific evidence positively identified the Appellant as the biological father of the child borne by the complainant. Certainly the Government analyst who did not know the Appellant before had no reason to falsely implicate the Appellant. Moreover no doubt has been cast on this expert evidence.

46. In his submissions the Appellant claimed that he suffers from diabetes.

He claimed that the drugs he takes for that medical condition render him incapable of fathering a child. The Appellant did not call any evidence to prove this claim. No medical report was produced to show that the Appellant had no capacity to sire a child. I concur with the decision of the trial court to dismiss the Appellants defence.

47. The question arose as to whether the defence of insanity was available to the Appellant. In his defence the Appellant stated that his mind had been unwell for sometime. In order for the defence of insanity to apply it must be shown that the accused was not in full control of his mental facilities at the time of commission of the offence. This was not proved in this case.

48. The record indicates that the appellant underwent several mental assessments. The final report dated 9th January 2024 was prepared by DR Catherine Syengo a Senior Consultant Psychiatrist attached to Mathari Hospital. The appellant was diagnosed as suffering from epilepsy and hypertension. No mention of a mental disorder was made in this report.

49. The trial magistrate in her judgment analysed at great length the question of the defence of insanity and found that the said defence was not applicable in this case. I do agree that there exists no evidence to show or even to suggest that the Appellant was suffering from any mental impairment at the time this offence was committed.

50. From the evidence I find there was clear, cogent and reliable evidence pinpointing the Appellant as the man who defiled and impregnated the complainant. I find that the prosecution proved their case beyond reasonable doubt. The conviction of the Appellant was sound and I confirm that conviction.

51. Following his conviction the Appellant was granted an opportunity to mitigate. The court also received a pre-sentence report which report was filed on 30th September 2024. The report was favourable and recommended a sentence of three (3) year probation.

52. I have read the trial magistrates ruling on sentencing. The court did consider the mitigation by the Appellant and the pre-sentence report. The court also took into account the impact of the incident on the complainant. She had to drop out of school in order to care for her baby. The *Sexual Offences Act* provides for minimum mandatory sentences upon conviction. In the case of REPUBLIC -vs- MWANGI & OTHERS [2021] eKLR the Supreme Court of Kenya upheld the constitutionality of the minimum mandatory sentences under this Act. Therefore the sentence imposed upon the Appellant was lawful. Section 5.8 (4) of the *Sexual offences Act* provides

> "(4) A person who commits the 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."

53. Therefore the fifteen (15) year sentence imposed upon the Appellant Was lawful and is hereby confirmed.

54. I note that the appellant was in remand custody for the duration of his trial. In her sentence Ruling at Paragraph (5) the trial magistrate noted that the Appellant had been in custody since 2nd February 2023 and indicated that the period would be discounted. In imposing the final sentence the trial court did discount the period spent in remand and directed that the Appellants sentence would run from 2nd February 2023. I find that the trial magistrate correctly applied the principles of sentencing in this regard.

55. Finally I find no merit in this appeal. The same is dismissed in its entirety. The conviction and sentence of the trial court are upheld and confirmed.

DATED IN NYERI THIS 6TH DAY OF MARCH 2026

.....

MAUREEN A. ODERO

JUDGE