



REPUBLIC OF KENYA



**Njite v Republic (Criminal Appeal E042 of 2024)
[2026] KEHC 2578 (KLR) (25 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 2578 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL APPEAL E042 OF 2024
JN KAMAU, J
FEBRUARY 25, 2026**

BETWEEN

HENRY ESILABA NJITE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgment of Hon S. Onger (SPM) delivered at Vihiga in the Principal Magistrate's Court in Sexual Offence Case No E028 of 2022 on 3rd February 2023)

JUDGMENT

Introduction

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.
2. The Learned Trial Magistrate, Hon S. O. Onger (SPM) convicted him of the main charge and sentenced him to twenty-five (25) years imprisonment.
3. Being dissatisfied with the said Judgment, on 4th December 2024, he lodged an appeal herein. His Petition of Appeal was dated 28th November 2024. He set out four (4) grounds of appeal.
4. His Written Submissions were dated 12th March 2024 and filed on 19th May 2025 while those of the Respondent were dated and filed on 30th June 2025. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.



Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify.
6. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify, and thus make due allowance in that respect.
7. Having looked at the Appellant's Grounds of Appeal, his Written Submissions and those of the Respondent, this court noted that the issues that had been placed before it for determination were as follows:-
 - a. Whether or not the Prosecution proved its case beyond reasonable doubt; and
 - b. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.
8. The court therefore dealt with the said issues under the following distinct and separate heads.

I. Proof Of Prosecution's Case

9. Grounds of Appeal No (1), (2), (3) and (4) of the Petition of Appeal were dealt with under this head.
 1. In determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases was proof beyond reasonable doubt, this court considered the ingredients of the offence of defilement.
 2. It is now settled that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and identification of the perpetrator as was held in the case of *George Opondo Olunga vs Republic* [2016] eKLR. This court dealt with the same under the following distinct and separate heads.

A. Age

12. The Appellant submitted that age was a critical ingredient as it was a determinant of the sentence that the accused person would be meted with. He contended that a part from the verbal testimony of the minor, his parents never shed any light on the same. He argued that no birth certificate was produced and that although the Age Assessment Report was availed, it did not prove the age of the Complainant, PO (hereinafter referred to as "PW 1") as it did not show the method used in determining the age.
13. He placed reliance on the case of *Kiangu Kasomo vs Republic* Criminal Appeal No 404 of 2010 (eKLR citation not given) where it was held that the age of the victim in a sexual assault under the *Sexual Offences Act* was a critical component as it formed part of the charge which must be proved the same way as penetration in the cases of rape and defilement. He was emphatic that the methodology used to arrive at the findings of age was unclear and an approximated age without the margin of error was presented which made it malicious and unbelievable too as its authenticity could not be ascertained.
14. On the other hand, the Respondent submitted that the Charge Sheet indicated that PW 1 was sixteen (16) (sic) years of age at the time of the commission of the offence. It relied on the case of *Musyoki*



- Mwakavi vs Republic[2014]eKLR where it was held that in a charge of defilement, age of the minor could be proved by medical evidence, baptism card, school leaving certificates, by the victim's parents and/or guardians, observation or common sense.
15. It pointed out that PW 1 testified that he was aged fourteen (14) years and that No 59884 Sgt James Mukungu (hereinafter referred to as "PW 5") produced an Age Assessment Report dated 18th August 2022 as exhibit and which showed that PW 1 was approximately fourteen (14) years of age. It argued that as the Appellant did not rebut this evidence at all, therefore, it had proved the ingredient of age beyond reasonable doubt.
 16. This court had due regard to the case of Kaingu Elias Kasomo vs Republic Criminal Case No. 504 of 2010 (unreported) where the Court of Appeal stated that the age of a minor in a charge of defilement could be proved by medical evidence and documents such as baptism cards, school leaving certificates. It can also be proved by the victim's parents or guardian and observation or common sense as was held in the case of Musyoki Mwakavi vs Republic [2014] eKLR.
 17. Notably, PW 5 tendered in evidence the aforesaid Age Assessment Report which indicated that PW 1 was approximately fourteen (14) years of age. As the Appellant did not challenge the production of the aforesaid Age Assessment Report and/or rebut this evidence by adducing evidence to the contrary, this court was satisfied that PW 1's age was proven using medical evidence and that she was a child at all material times.

B. Identification

18. The Appellant did not submit on this issue. On its part, the Respondent averred that PW 1 testified that he was the Appellant's nephew which evidence was corroborated by PW 1's father, Isaac Mukuna (hereinafter referred to as "PW 2") who stated that the Appellant was his cousin hence an uncle to PW 1. It added that the incident also happened during daytime and, therefore, PW 1 clearly saw the Appellant. It pointed out that in his defence, the Appellant also stated that PW 1 was his nephew.
19. It contended that the Appellant was, therefore, someone well known to PW 1 and he could not have been mistaken as to his identity. It submitted that that was the evidence of recognition which was held by courts to be more reliable and weightier than that of identification of a stranger as was held in the case of Anjononi & Others vs Republic (1976-80) 1 KLR 1566, 1568. It was emphatic that there was proper identification as there was prior knowledge of the Appellant.
20. It further asserted that the inconsistencies and contradictions did not go into the core of the case and that the variance in itself did not in any manner distort or dislodge the commission of the offense as was held in the case of S.O.O vs Republic[2018]eKLR which cited the Tanzanian case of Dickson Elia Nsamba Shapwata & Another vs The Republic Criminal App No 92 of 2007.
21. A perusal of the proceedings showed that PW 1 told the Trial Court that on the material day of 1st June 2022, he was from church when he met the Appellant who gave him Kshs 40/= and told him to buy githeri (sic). He said that the Appellant took him to his house which had three (3) rooms and threatened him to give him his penis. When he declined, the Appellant pulled him to the kitchen, laid him on the ground, told him to remove his clothes. He stated that the Appellant removed his trouser and short and inserted his penis in his anus.
22. It was his further testimony that the Appellant later disengaged and told him to go home. He found his father cutting trees and he informed him and another man what had transpired. He added that the Appellant had threatened to cut him with a panga if he screamed. He confirmed that he was a nephew to the Appellant who was his uncle.



23. This court noted that PW 1 was the only identifying witness. Having said so, under Section 124 of the *Evidence Act* Cap 80 (Laws of Kenya), a trial court could convict a person on the basis of uncorroborated evidence of the victim if it was satisfied that the victim was telling the truth.
24. Notably, the proviso of Section 124 of the *Evidence Act* states that:-
- “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 (emphasis).”
25. Even so, a trial court was required to exercise great caution before relying on the evidence of a single witness to convict an accused person as it would be one person’s word against the other. Other corroborating evidence such as proof of penetration could assist the trial or appellate court to come with a determination as to who between the opposing witnesses was being truthful.
26. PW 1 positively identified the Appellant as the perpetrator of the offence. They were relatives. In his defence, the Appellant confirmed that indeed PW 1 was his nephew. There could not, therefore, have been any possibility of a mistaken identity of the Appellant. This court thus came to the firm conclusion that the Prosecution proved the ingredient of identification which was by recognition.

C. Penetration

27. The Appellant submitted that judicial power should be exercised in a non-arbitrary manner following the laid down principles and standards for its effectiveness. He contended that fairness, equality and impartiality must be the guiding principles and ignoring any of them leads to controverted decisions. He added that the defence must be given equal chances and the prosecution and the entire evidence deeply scrutinized and evaluated before a final decision was made. He was emphatic that an accused person being human, his human rights must be protected.
28. It was his contention that from the evidence of PW 1’s, PW 2’s and Rebecca Ambina (hereinafter referred to as “PW 3”), there were strong and threatening revelations which the Trial Court could not ignore as they proved that the charge against him was malicious and defamatory. He denied knowing anything about the offence herein and noted that the Trial Court disregarded his evidence. He argued that PW 1 was testifying and acting on the instructions of the father. In this regard, he placed reliance on the case of *Abdala Mwanza vs Republic*[2018]eKLR where it was held that it was also trite that every case of sentencing should strictly be considered on its own circumstances.
29. He questioned how PW 1 was allegedly attended to in hospital and left to go home on soiled clothes with fecal matter. He argued that a man who engaged in a sexual action at his pleasure would only disengage possibly after relieving himself through an ejaculation and that PW 1’s state during examination indicated that he never took a shower yet there was never any signs of fluids or sperms or dried matter of the same that was noted. He added that there was no blood stains despite the forceful anal penetration except purported lacerations which humans lacerate too as the defecation of hard fecal



- matter could cause the same. He termed the evidence of penetration as weak, misplaced, uncalled for, insecure and misleading. He was emphatic that penetration was thus not proved beyond doubt.
30. On its part, the Respondent invoked Section 2 of the *Sexual Offences Act* and placed reliance on the case of Mohammed Omar Mohammed vs Republic[2020]eKLR where it was held that the key evidence relied upon by the courts in rape and defilement cases in order to prove penetration was the complainant's own testimony which was usually corroborated by the medical report presented by the medical officer. It submitted that the evidence of PW 1 was corroborated by that of the Clinical Officer, Paul Muturi Bango (hereinafter referred to as "PW 4") and that penetration was, therefore, proved.
 31. It contended that the Trial Court considered the Appellant's defence and made a finding that there was no malice on the part of PW 1. It argued that the Appellant did not rebut the evidence of the Prosecution and, therefore, his evidence that the Trial Court did not consider his defence was without merit.
 32. Notably, PW 4 testified that on examination of PW 1, he had fecal matter and injuries being lacerations at 6 & 12 O'clock at the anal orifice. He added that the anal muscles were weak and his underpant were dirty with human waste. He added that the approximate injury was within twenty-four (24) hours and that a penis caused the injuries. He opined that PW 1 had been defiled as there was penetration. He produced the P3 Form and Post Rape Care (PRC) Form as exhibits during trial.
 33. In his defence, the Appellant denied the charges. He said he did not know what happened on the material day of 1st June 2022. He only explained how he was arrested on 4th June 2022. He stated that he had a land dispute with PW 2 and that they reconciled.
 34. Notably, PW 1's evidence was corroborated by the scientific evidence of PW 4. The Appellant's defence was simply a denial. His evidence was not watertight enough to have displaced the Prosecution's inference of guilt on his part. His argument that the case was full of contradictions or that he was framed thus fell by the wayside.
 35. As had been stated hereinabove, any contradictions or inconsistencies were insignificant and did not affect the inference of guilt on his part. The witnesses who were called by Prosecution adduced sufficient evidence to establish the charge.
 36. In the premises foregoing, this court found and held that the Prosecution had proven its case to the required standard, which in criminal cases, was proof beyond reasonable doubt that the Appellant defiled PW 1 on the material diverse dates as there was proof of defilement as PW 4 testified.
 37. In the premises foregoing, Ground of Appeal No (1), (2) and (3) were therefore not merited and the same be and are hereby dismissed.

II. Sentence

38. The Appellant did not raise the issue of sentence as a ground of appeal herein. As he had alluded to the extent of his sentence, this court deemed it prudent to consider the legality or otherwise of his sentence.
39. He cited Section 8(1) and (3) of the *Sexual Offences Act* and submitted that sentencing serves several objectives which includes retribution and deterrence which are attributes to punishment of the offenders. He argued that, therefore, it must not be lost in the mind of this court that the principles of sentencing safeguards and protects the rights of the accused persons and in particular, first offenders. He added that a first offender should have the benefit of the very least severe form of a punishment and that any sentence must be justifiable commensurate and proportionate to the circumstances of the case.



40. He faulted the Trial Court’s decision for violating his rights under Article 29(f) and Article 50(2)(p) and (q) of *the Constitution* of Kenya, 2010. He added that this court had the jurisdiction to make a determination of his rights pursuant to Article 23(1) and 165 of *the Constitution* of Kenya. He placed reliance on the case of Ogalo s/o Owuora [1954], 24 EACA 70 where it was held that the court had the power to interfere with any sentence imposed by a trial court if it was evident that the trial court acted on wrong principles.
41. On its part, the Respondent invoked Section 8(3) of the *Sexual Offences Act* and Section 329 of the Criminal Procedure Code and placed reliance on the case of Supreme Court Petition No E018 of 2023 Republic vs Joshua Gichuki Mwangi (eKLR citation not given) where it was held that it was Parliament and not Judiciary that set the parameters of sentencing for each crime.
42. It argued that the Trial Court took into account the evidence, the nature of the offence and the circumstances of the case in arriving at appropriate sentence. It added that the Appellant’s sentence was lawful and that he had not shown why this court should interfere with the same.
43. The Appellant herein was sentenced under Section 8(3) of the *Sexual Offences Act* Cap 63 A (Laws of Kenya). The same provides as follows: -
- “ 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”
44. This court faulted the Trial Court for having sentenced the Appellant herein to twenty-five (25) years imprisonment. It appeared excessive as an accused person was entitled to enjoy the least prescribed minimum sentence as provided Article 49(2)(p) of *the Constitution* of Kenya which provides as follows:-
- “ Every accused person has the right to a fair trial, which includes the right—
to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing”
45. The Trial Court did not explain what aggravating factors existed at the time of commission of the offence warranting it to mete out to the Appellant herein a higher sentence than what was prescribed in Section 8(3) of the *Sexual Offences Act*. This court found it prudent to reduce the same to twenty (20) years as provided in law.
46. This court could not mete out against the Appellant herein a lower sentence than what was prescribed in the law. In the case of Joshua Gichuki Mwangi vs Republic [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR where it held that Section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing offences and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.
47. However, in a decision that was delivered on 12th July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case Joshua Gichuki Mwangi vs Republic (Supra) and stated that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence. The Supreme Court directed the relevant organs to abide by its decision noting that the appellant therein had since been released from prison.



48. Going further, this court was mandated to consider the period he spent in remand while his trial was on going as provided in Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

49. Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) provides that:-

“Subject to the provisions of section 38 of the Penal Code (cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody” (emphasis court).

50. Further, Clause 4.6.20 (ix) of the Judiciary Sentencing Policy Guidelines provides that:-

“The Sentencing Court shall be guided by the sentencing principles and objectives set out in Part I of these the Guidelines in all resentencing hearings. The following mitigating factors were set out by the Supreme Court as particularly relevant in a resentencing hearing:...

Time already spent in prison by the convict...”

51. The requirement under Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in *Ahamad Abolfathi Mohammed & Another vs Republic*[2018]eKLR.

52. A perusal of the Charge Sheet indicated that the Appellant was arrested on 6th June 2022. Although he was granted bond, he did not seem to have posted the same. He was sentenced on 15th March 2023. A perusal of the Trial Court proceedings indicated that the Trial Court did not take that period into account. However, this was a period that ought to be taken into account while computing his sentence.

Disposition

53. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Petition of Appeal dated 28th November 2024 and filed on 4th December 2024 was partially merited. His conviction be and is hereby upheld as it was safe. However, his sentence of twenty-five (25) years imprisonment be and is hereby dismissed and substituted with a sentence of twenty (20) years imprisonment.

54. However, for the avoidance of doubt, his prayer under Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) was merited and the same be and is hereby allowed. It is hereby directed that the period between 6th June 2022 and 14th March 2023 be and is hereby taken into account while computing his sentence pursuant to Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

55. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 25TH DAY OF FEBRUARY 2026

J. KAMAU

JUDGE

