



REPUBLIC OF KENYA



**Kedinyang v Republic (Criminal Appeal E012 of 2025)
[2026] KEHC 3627 (KLR) (19 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 3627 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPENGURIA
CRIMINAL APPEAL E012 OF 2025
RPV WENDOH, J
MARCH 19, 2026**

BETWEEN

EVANS KEDINYANG APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Evans Kedinyang was charged with the offence of defilement contrary to Section 8(1) as read with section 8(3) of the *Sexual Offences Act*. Alternatively, he faced a charge of committing an Indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act*.
2. The particulars of the charge were that on 19/9/2024 at [Particulars Withheld] Location, in Pokot Central, intentionally caused his penis to penetrate the vagina of C.C. a child aged fifteen (15) years, or that he touched the private parts of the child.
3. After a full trial, the appellant was convicted on the main charge and sentenced to serve twenty (20) years imprisonment. He is aggrieved by the said conviction and sentence which has provoked this appeal which was filed by Ndinyo Advocate, Counsel for the appellant.
4. The 10 grounds of appeal can be summarized into the following grounds: -
 1. That the offence of defilement was not proved beyond reasonable doubt;
 2. That there were material contradictions in the prosecution case;
 3. That the trial court erred by shifting the burden of proof to the appellant;
 4. That the defence was not considered;
 5. That section 124 of the *Evidence Act* was not complied with;



6. That the sentence is harsh and excessive.
5. It is the appellant's prayer that the conviction be quashed, sentence set aside and he be set at liberty.
6. This being a first appeal, this court has the duty to re-examine exhaustively, all the evidence tendered before the trial court, evaluate it and arrive at its own independent conclusions. The court will however bear in mind that it neither heard nor saw the witnesses testifying. This principle was espoused in *Okeno -V- Republic* (1972) EA 32.

The Prosecution case.

7. The prosecution called a total of four (4) witnesses.
PW1 C.C a girl aged fifteen (15) gave evidence on oath, that on 19/9/2024 she was going to her grandmother's place at Sasich when she met the appellant who offered her a lift on a motor cycle. He did not stop at her grandmother's place but went on to Chesta where he left her at a veranda and proceeded to Lomut and promised to come back to take her home. He came back at night, took her to a house where they slept together; that he asked her to remove her panty and he inserted his penis in her private parts and slept on her. In the morning, she asked him to take her to Sasich where he dropped her at a hotel about noon and at 5.00p.m. her brother, father and village elder arrested the appellant and both were taken to the police station and later she was taken to hospital.
8. PW2 MM recalled that on 19/9/2024, his daughter was sent home for fees and he went to Kapenguria to get money; He received information that the complainant was missing; that she had left for Sasich to her grandmother's house. On 20/9/2024, he went in search of the complainant and received information that she boarded Evans's motor cycle. He found PW1 at Sasich and informed the village elder and Kenya Police Reservist (KPR) who found PW1 and Accused; that the appellant offered him Kshs.5000/= but he declined and both were taken to Tamkal then Sigor police station.
9. PW3 Philemon Tulel, a Clinical Officer at Tamkal Dispensary produced treatment notes and P3 form in respect of the Complainant (PW1). He recalled that PW1 was examined on 21/9/2024 and all tests were negative. He examined complainant and found the hymen was broken and the tear was not recent and the genitalia were normal. No spermatozoa were found save for epithelial cells. There was no injury to the genitalia.
10. PW4 PC Ewoi Calistus of Tamkal police post recalled that on 20/9/2024, the complainant was taken to the post in company of two police reservists who reported that the appellant Evans Kedinyang had defiled the complainant. He recorded witness statements and issued P3 form to the complainant. PW4 also produced the complainant's Clinic card which indicated that she was born on 28/1/2009, P.Exh.3.
11. When called upon to defend himself the appellant testified on oath denying that he defiled the complainant. He admitted to giving the complainant a lift and took her to Chesta where he left her.

Appellants Submissions.

12. Mr. Ndinyo, the appellants Counsel framed eight (8) issues for determination.
13. On whether penetration was proved, he urged that there were no spermatozoa, tears fresh or old, bruises, signs of trauma; that the medical evidence was that there was no evidence of sexual activity; Counsel relied on *J.O.O. -VS- Republic* and *Mark Oiuri Mose -VS- Republic*.
14. Counsel also submitted that the court did not comply with Section 124 of the *Evidence Act* by warning itself and giving reasons for believing that the complainant was telling the truth.



15. Counsel also submitted that the prosecution was riddled with contradictions which go to the root of the charge, which relates to where they slept i.e. Chesta, where the complainant was found, daytime or nighttime. Counsel submitted that there was contradictory evidence on whether or not there was penetration and on the movements of PW1, where she was found and who found her.
16. Counsel also submitted that the court shifted the burden of proof on the appellant when the court stated that the defence was a bare denial and that it did not dispute the prosecution case which Counsel said was a grave misdirection.
17. Counsel also submitted that the identification was unsafe; no identification parade was done, that this may have been a fabricated case and the defence was not considered.
18. Lastly, it was submitted that the sentence of twenty (20) years was excessive and the court failed to consider the mitigating factors.

Respondent's Submissions: -

19. The Respondent filed submissions and opposed the appeal.
On whether the offence of defilement was proved; Counsel submitted that the three (3) ingredients required to be proved in a defilement case namely age of the child, penetration and identity of the culprit were proved
20. Relying on the case of Musyoki Mwakavi -VS- Republic (2014) eKLR, Counsel urged that the age of the complainant was proved by production of the child's health card;
21. On penetration, Counsel submitted that PW1 testified to what the appellant did which was corroborated by the evidence of PW3.
22. On identity of the culprit, it was submitted that the complainant spent a long time with the appellant during the day and night and interacted long enough to identify him.
23. On material contradictions, relying on the decision of Dickson Elia Nsamba Shapwata & Another - Vs- Republic CR. APP No.92 of 2007 where the Court of Appeal of Tanzania observed that the court should consider whether the contradictions are minor or go to the root of the matter and that in this case, the said inconsistencies are minor.
Counsel also submitted that the trial court did consider the defence and the court properly observed that it was a bare denial.
24. On the sentence, Counsel relied on Supreme Court decision in Petition No. E018/2023 Republic - V- Joshua Gichuki Mwangi where the court dealt with the issue of minimum sentences prescribed in the *Sexual Offences Act* and held that they are not unconstitutional and that the courts are called upon to exercise their discretion but cannot exercise their discretion to give sentence below the minimum sentence prescribed by the *Sexual Offences Act* because the parameters of the sentences are set by Parliament but not the Judiciary; that the trial court properly exercised its discretion after considering the mitigation and a presentence report Counsel urged the court not to interfere in both the conviction and sentence.

Determination: -

25. I have duly considered the evidence on record, the Grounds of Appeal and the rival submissions.



Whether defilement was proved:-

26. The appellant faced a charge of defilement under section 8(1) of the *Sexual Offences Act*. In the case of Charles Wamukoya Karani -VS- Republic CRA. 72 of 2013, the court held “the critical ingredients forming the offence of defilement are, age of the complainant, proof of penetration and positive identification of the assailant”
27. The burden rested on the prosecution to prove the following ingredients beyond reasonable doubt
 1. The complainant’s age;
 2. Proof of penetration;
 3. Proof of identity of the perpetrator.

Age of the complainant: -

28. In the case of Musyoki Mwakavi -Vs- Republic (2014) eKLR, the court held “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”.
29. In Joseph Kiet Seet -VS- Republic 2014 eKLR the court held “it is trite law that age of a victim can be determined by medical evidence and other cogent evidence”.
30. In Francis Omuroni -V- Uganda Cri. Appeal 2 of 2000 the Court of Appeal of Uganda held as follows “In defilement cases, medical evidence is paramount in determining the age of the victim and in the absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victims parents or guardian and by observation and common sense”.
31. In the present case, and guided by the above decision, the complainant herself told the court that she is fifteen (15) years old, a form I student. Her father testified to the same that PW1 was born on 28/1/2009 and availed her notification of birth P.Exh.3 produced by the Investigation Officer. The age of the complainant was ably proved to be fifteen (15) years and she was therefore a minor.

Penetration: -

32. Section 2 of the *Sexual Offences Act* defines penetration as follows “penetration means “the partial or complete insertion of the genital organs of a person into the genital organs of another person”.
33. In the case of Mark Oiruri Mose -VS- Republic (2013) eKLR the Court of Appeal explained what amounts to penetration when it said “..... So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and penetration need not be deep inside the girl’s organ”.
34. Again, in Eric Onyango Ondeng -VS- Republic (2014) eKLR, the court held “In Sexual Offences, the slightest penetration of the female organ by the male organ is sufficient to constitute the offence. It is not necessarily that the hymen be ruptured”.
35. PW1 testified that the appellant inserted his penis in her vagina. The Clinical Officer PW3 examined her three (3) days later on 21/9/2024. No tears, injury were seen in her genitalia nor were any Spermatozoa found. PW3 observed that the act took place three (3) days prior and it took too long for medical test to show. The above notwithstanding and guided by the authorities considered above, it is not necessary that there be spermatozoa, tear of hymen or injury to the genitalia to prove penetration. The act may have been on the surface of the complainants’ genitalia and that still amounts to penetration.



36. The complainant was the only witness to the act, as is with the case with most Sexual Offences which are committed in secret. The court in its decision found the complainant to be credible and truthful. “Having considered the totality of the evidence, the testimony of PW1 which the court found credible and truthful (see section 126 of the [Evidence Act](#)) is sufficient to establish penetration as contemplated by the Act.”
37. Section 124 of the [Evidence Act](#) provides as follows:-“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:
38. 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.”
39. In this case, the trial court quoted section 126 of the [Evidence Act](#) in finding the complainant to be credible and truthful. It is my considered view that the court made a typing error by referring to Section 126 of the [Evidence Act](#) instead of section 124 of the [Evidence Act](#).
40. The trial court having believed the complainant by finding her credible and truthful, this court has no reason to differ from that finding of fact to find otherwise. This court is satisfied that penetration was proved.

On identity of the appellant.

41. This court finds that the identity of the appellant was not an issue. Firstly, the appellant admitted that he gave the complainant a lift to Chesta. It is a fact he met the complainant on the material day. The complainant went on to testify that after the appellant gave her a lift, she later spent the night with him at Chesta and next day, he took her to Sasich. The complainant interacted with the appellant for so long both during daytime and night that she could not have mistaken him for another. He was properly identified and it led to his arrest on same day. On allegation of fabrication, there was totally no reason alluded to, as to why the complainant would frame the appellant.

Whether burden of proof was shifted and defence considered: -

42. The Court in considering the appellants defence found that it was a mere denial and did not dislodge the prosecution case. In my view, that finding does not amount to shifting the burden of proof on to the appellant. Even if the court had, this court has an opportunity to reconsider the defence. It is sufficient if an accused person gives a reasonable or plausible explanation in his defence. He may as well keep quiet when called upon to defend himself. In this case, having considered the appellant’s defence which was about four short sentences. I do agree with the trial court that the defence was a bare denial. To the extent that the court found that the accused did not give an alibi, the court was now trying to shift the burden of proof. It is my considered view that the trial court did consider the defence and made findings on it, rejecting it as untrue.

Of contradictions: -

43. The appellant also complained that the prosecution case was riddled with contradictions. Courts have over the years dealt with the issue of whether all contradictions or discrepancies will be fatal to the prosecution case.



44. In Joseph Maina Mwangi -Vs- Republic CRA.73/1993 the court held inter alia “In any trial there are bound to be discrepancies. An Appellate court in considering these discrepancies must be guided by the wording of section 382 of the Criminal Procedure Code viz whether such discrepancies are fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence”.
46. In Tweihangane Alfred -Vs- Uganda CRA.139/2001 (2003) UGCA 6, the Court of Appeal of Uganda held that not every contradiction warrants rejection of evidence. The court put it this way “with regard to contradictions in the prosecution’s case, the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they put to deliberate untruthfulness or if they do not affect the main substance of the prosecution case.”
47. The above position was buttressed in the Tanzania case of Dickson Elia Nsamba Shapwata & Another -Vs- Republic where the court stated this, “In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”
48. The appellant’s complaint is in regard to where the appellant was arrested. PW1 was clear that they slept at the appellant’s house at Chesta and next day, he dropped her at Sasich. PW2 clarified that PW1 was not with the appellant when he was arrested. PW5 then said that the appellant was arrested at Chesta. I find that there is totally no contradiction or discrepancy in that evidence. Besides, the place of arrest of the appellant would not in any way weaken the prosecution case because the arrest of the appellant is not in dispute. My finding is that there were no material contradictions in the prosecution evidence.
49. After evaluating the evidence on record, there is no reason to fault the decision of the trial court and I find that the prosecution proved its case to the required standard, of beyond any reasonable doubt. I affirm the conviction.

Whether the sentence is excessive: -

50. The complainant was aged fifteen (15) years. Under section 8(3) of the [Sexual Offences Act](#), upon conviction, where the victim is aged between twelve to fifteen years, one is liable to imprisonment for a term of not less than twenty (20) years. Sentence is an exercise of the court’s discretion which should be done within the confines of the law. In Republic -VS- Joshua Gichuki Mwangi SC Petition No. E018/2023, the Supreme Court settled the confusion that had arisen after the Francis Karioko Muruatetu -VS- Republic Petition No. 15/2020 decision where the Supreme Court declared the mandatory death sentence as unconstitutional but not the minimum sentences like in this case. When the law provides for a minimum and maximum sentence, judicial discretion on sentencing is not taken away. It should be exercised within those confines.
51. In this case, the court meted out the minimum sentence and therefore acted within the law. This court has no discretion to mete out a lesser sentence. In the end, I find the appeal to lack merit. It is hereby dismissed.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAPENGURIA THIS 19TH DAY OF MARCH, 2026.

R. WENDOH

JUDGE



In the Presence of :-

Appellant – in person

Ms. Koech for Respondent - Prosecution Counsel

Juma/ Hellen Court Assistants

