



**Nyambura v Republic (Criminal Appeal E063 of 2024)
[2026] KEHC 3619 (KLR) (19 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 3619 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL APPEAL E063 OF 2024
MA ODERO, J
MARCH 19, 2026**

BETWEEN

JAMES KANG'ARA NYAMBURA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant JAMES KANG'ARA NYAMBURA has filed this appeal challenging his conviction and sentence in the Magistrates' Court.
2. The Appellant had been arraigned in the Lower Court on 8th June 2023 facing a charge of Defilement Contrary To Section 8(1) As Read With Section 8(3) Of The [Sexual Offences Act](#) 2006. The particulars of the charge were that

“On diverse dates in the months of May and June 2023 at [Particulars Withheld] in Muhito Location of Mukurwe-ini Sub County within Nyeri County, you unlawfully and intentionally caused your penis to penetrate the vagina of AWG alias AWN a child aged 16 years.”

3. The Appellant entered a plea of 'Not Guilty' to the charge and the trial commenced on 28th August 2023. The prosecution called a total of eight (8) witnesses in support of their case.
4. The complainant 'AWN' told the court that she was sixteen (16) years old having been born on 13th November 2006 and was a student at [Name Withheld] Secondary School. The complainant told the court that the Appellant was a security guard in Ngoru area.
5. The complainant's evidence which was rather long and winding was that on 19th May 2023 she woke up and left her home at 9.00am to visit a friend 'AN'. As they were watching TV another friend 'SM' Came and joined them. The three girls then went to Mukurwe-ini town where they met a friend of



- 'SM' who sells gas cylinders. That 'SM' requested the complainant to accompany her to the house of the Appellant. They walked there and found Appellant with one 'Lawrence' and 'Muthoni'
6. The complainant states that she and 'SM' spent the night in the Appellants house but states that the Appellant did not spend the night there as he used to work at night. That two girls remained in that house for a period of about two (2) weeks from 19th May 2023 to 2nd June 2023.
 7. The complainant stated that on one particular day 'SM' went away leaving the complainant alone in the house. She states that on the following morning being 20th May 2023 the Appellant came home from work and began to touch her breasts. That the Appellant removed the complainant's underwear and proceeded to defile her. Later her friends 'Muthoni' and 'SM' and came but the complainant did not report the defilement to either of them. They all cooked lunch and ate.
 8. The complainant continued to reside in the house of the Appellant for a several more days. She stated that on 1st June 2023 the Appellant also defiled her friend 'SM' and states that she found the two in the act in the same bed.
 9. Some days later the complainant went to look for her friend 'SM' in the house of one 'B'. She was accosted by the mother of B 'SM' then showed up. That B's mother reported both girls to the police for truancy and an officer from Ichamara Police Post came on a motorcycle and took them both to the police station. The complainant remained in cells until the following Monday when her mother came and picked her.
 10. After her stint in the cells the complainant continued to interact with her friends, left home and continued sleeping at various houses. Her mother eventually traced her at the home of one 'Shiko' and took her to Mukurwe-ini Police Station. Thereafter she was taken to Mukurwe-ini Hospital where she was examined and subjected to laboratory tests.
 11. PW2 BMR told the Court that he was seventeen (17) years old and was a Form Three student at [Particulars Withheld]School. He states that on 27th May 2023, a Saturday, he left home to go to the nearby shops to buy bread. On the way he met the complainant and her friend 'SM' heading to Ngoru from Mukurwe-ini direction. Two days later both girls came to the home of PW2 to visit him while his mother was away. They spent the day watching TV and eating sugar-cane. A day later 'SM' took PW2 to a house in Ngoru where they found the complainant cooking rice. PW2 says he did not find the Appellant in that house.
 12. Later the mother of PW2 complained to police that her son was refusing a transfer to a day school from boarding school. The police picked PW2 and took him to the police station where he was counselled and later was released to his mother. PW2 told the court that he did not know the Appellant and had only seen him in court.
 13. PW2 Millicent Ruguru Maina is the mother of 'B'. (PW2) she told the court that she worked as a matron at Kihati Girls Secondary School. PW3 explained that she was having problems with her son because she wanted to transfer him to a day school as she was unable to afford the school fees for the boarding school the boy was attending.
 14. On 2nd June 2023 PW3 says she was looking for her son in order to escort him to the new school but could not find him. She reported him as missing to Ichamara Police Post. As PW3 left the Post Police she met her son walking with the complainant. Soon thereafter 'SM' also appeared. Police then arrested all the youths and took them to the police station. Pw3 says she did not know the Appellant had never seen him before and did not know why the Appellant had been charged.



15. PW4 Nganga Edwin is a clinical officer attached to Mukurwe-ini Hospital. He told the court that he examined the complainant on 2nd June 2023. He produced her clinical notes and the PRC form and the P3 form. (Pexh 2 and 3)
16. PW5 RWG told the court that the complainant was her grand-daughter who lived with her as the child's mother worked elsewhere. PW5 confirmed that the complainant was a Form one student attending [Name Withheld] Secondary School.
17. PW5 told the court that on 19th May 2023 the complainant left the home at 8.00pm ostensibly going for school games. That she did not see the child until about two weeks later when she found the complainant at the Mukurwe-ini police station wearing new clothes. PW5 also saw 'SM' a friend of the complainant at the police station. PW5 says she has no idea where the complainant had been for this two (2) week period. The witness stated that she does not know the Appellant at all and has never seen him before.
18. PW6 PC Francis Nderi of Ichamara Police Post was the arresting officer. PW6 told the court that on 2nd June 2023 whilst at the police post he received a call from a lady PW3 who was seeking assistance in respect of her son who had refused to transfer to a day school. PW6 rode to Ngoru Centre on his motorcycle where he found PW3, her son and two (2) girls. PW6 took them all to the police station for questioning as the girls were not in school.
19. According to PW6 the complainant told him that she was married to 'Jimmy' (Appellant). PW6 summoned the Appellant to the police station and he came. He counselled PW2 who agreed to go to the day school.
20. PW7 PC Florence Waithera of Mukurwe-ini Police Station was the investigating officer.
21. PW8 'SMN' is the complainant's friend. She told the court that she was aged seventeen (17) years old and had dropped out of school. PW8 told the court that on 19th May 2023 at 5.00pm she and the complainant attended Fresher's Night Party at Mukurwe-ini Technical Training Institute (MTTI). That they stayed there until 9.00am the following day. PW8 told the court that the two then went to the house of one 'Mary' at Ngoru where they stayed until 2nd June 2023 when police arrested them at the instigation of PW3. PW3 claimed that the two girls were influencing her son not to go to school. According to PW8 the Appellants house was close to the house where they were staying. She denies that the complainant ever stayed at the home of the complainant.
22. At the close of the prosecution case the Appellant was found to have a case to answer and was placed onto his defence. The Appellant gave a sworn defence in which stated that he was an electrician but worked as a night guard in Ngoru area. The Appellant stated that he used to work during the night. The Appellant denied having defiled the complainant. He states that he does not know the complainant nor her friend 'SM'. He insists that the two girls did not stay in his house but were being hosted by his neighbour one 'Muthoni'. The Appellant produced as evidence the Attendance Sheet from his place of work showing the times when he was on duty (Dexb 1).
23. DW2 Mary Muthoni told the court that she is a neighbour to the Appellant and she does casual work of washing clothes to earn a living (commonly known as 'Mama Fua'). DW2 states that on 20th May 2023 the Complainant and SM came to visit her. That they stayed in her house until 1st June 2023 assisting her with her work. DW2 denies having witnessed any personal interaction between the complainant and the Appellant.



24. DW3 Jackson Ngunjiri Muchoki told the court that he resides with the Appellant who is his neighbour. He states that at no time did the complainant visit and stay at their house. He states that the two girls used to visit their neighbour called 'Muthoni' (DW2) and stay in her house.
25. On 31st September 2024 Hon. D. Nyakundi delivered the judgment in which she convicted the Appellant on the main charge of Defilement. The Appellant was allowed an opportunity to mitigate after which the court sentenced him to serve fifteen (15) years imprisonment. Being aggrieved by his conviction and sentence the Appellant filed the Memorandum of Appeal dated 1st October 2024 which appeal is premised upon the following grounds:-

- “ 1. That, the learned trial magistrate court erred in law and fact by failing to consider that the medical evidence was not proved by the required standard by the law.
2. That, the trial court magistrate further failed to acknowledge that there was no investigation carried out, there was an existing grudge in between appellant and Millicent (Matron) the matter was not proved to the required standards.
3. That, the learned trial magistrate court erred in law and fact by failing to consider that there was an existing grudge in between PW2 Millicent and the appellant.
4. That, the trial magistrate erred in both law and fact by rejecting my defence which was not challenged by the prosecution side and more-so, I wish to be in support of the current one.
5. That, the learned trial court magistrate erred in law and facts by finding conviction reliance on the uncollaborated and inconsistencies evidence adduced by the prosecution witnesses.
6. That, the learned trial magistrate erred in law and fact by failing to investigate that pw1 evidence was not of her knowledge she was couched by police officer.
6. That since I cannot remember all what transpired during the hearing of this case, I kindly request this Honourable court to supply me with my court proceedings.”

Analysis And Determination

26. 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.
27. 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 a fresh 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 scrutinize 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.”

28. 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 basis of the law and the evidence to satisfy itself on the correctness of the decision.”

29. In Kenya 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.

30. 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.”

31. Before I deal with the substantive appeal a mention must be made of the charge sheet. The main charge names the Accused as James Kang'ara Nyambura. However in the alternative charge the name of the Accused is given as 'Joseph Kabuku Mugwe'. No explanation has been given for the two different names and no evidence was adduced to show that the two names referred to the same Accused person. There is no indication in the record that the prosecution ever took any steps to amend the charge sheet. Accordingly I do find that the charge sheet was defective as it lacked clarification the name of the Accused. Having said that I will proceed to deal with the main appeal.

32. 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.”

33. 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.

34. 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.”



35. 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.....”
36. 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 proved 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 victim’s age, it has to be credible and reliable.” [Own emphasis]
37. In this case the complainant told the court that she was born on 13th November 2006 and was therefore aged seventeen (17) years in the year 2023 when the incident occurred. PW7 the investigating officer obtained and produced in court a copy of the complainant’s Birth Certificate Serial No. 8XXXXX7 Pexb 1 which confirmed that the child was born on 13th November 2006. Pexb 1. The Complainant in her evidence did identify her birth certificate. As such I am satisfied that there is reliable and conclusive evidence to prove that in March 2023 when this incident is alleged to have occurred the complainant was aged seventeen (17) years and was therefore a minor.
38. The next element which requires proof is the fact of penetration. Section 2(1) of the *Sexual Offences Act* defines penetration as
- “the partial or complete insertion of the genital organs of a person into the genital organs of another person.”
39. The complainant told the court that on 20th May 2023 the Appellant returned from work at 6.00am and began to touch her breasts. She went on to state that the complainant removed her underwear and proceeded to defile her.
40. Corroborative evidence of the fact of penetration is provided by the evidence of the clinical officer PW4 who confirmed that he examined the complainant on 2nd June 2026 and noted that she had an old broken hymen. Various laboratory tests were carried out but no infections were noted. The doctor produced in evidence the complainant’s medical records. PRC form Pexb 2 and P3 form Pexb 1. The fact of the broken hymen provides proof the penetration did occur.
41. The third element of the charge of Defilement which requires proof is the identity of the perpetrator. The prosecution is required to adduce evidence to show that it was the Appellant who defiled the complainant.
42. The complainant herself identified the Appellant as the man who defiled her. The complainant stated that she did not know the Appellant well before this incident but was taken to his house by her friend ‘SM’ According to the complainant the two girls stayed in that house with ‘SM’ coming and going for about two (2) weeks.



43. The complainant stated that the Appellant worked as a security guard and used to go to work at night. She states that on 20th May 2023 her friend ‘SM’ was not in the house. The Appellant came back from his night duty at 6.00am and proceeded to defile her. The complainant did not tell anyone about the incident. It appears rather odd that the complainant would have been defiled and did not bother to tell the friend with whom she was staying in the house what had occurred to her – however be that as it may the fact that she did not disclose the fact of the defilement to her friend does not mean that the incident did not occur.
44. Defilement is an offence which normally occurs under cover of darkness or in secret. There is usually no eye witness to the offence. In this case the only witness who was able to identify the Appellant as the perpetrator of the crime was the complainant herself. Therefore the only evidence against the Appellant was that of a Single witness.
45. There exists no legal barrier to a court basing the conviction of an accused person on the evidence of a single witness. Section 143 of the Evidence Act Cap 80 Laws of Kenya provides as follows;-
- “No particular number of witnesses shall in the absence of any provision of law to the contrary be required for the proof of any fact.”
46. However in relying on the evidence of a single witness as the basis for conviction a court is required to take extra precaution in testing the evidence of that single witness in order to satisfy itself of the reliability of the said evidence. The obligation of the trial court to thoroughly test the evidence of a single witness was reiterated in the case of Maitanyi -VS- Republic [1986] KLR 198 where the Court held as follows:-
- “1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.
 2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light, available conditions and whether the witness was able to make a true impression and description.
 3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.
 4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.”
47. The question then would be whether the complainant was a reliable witness. As pointed out by the learned trial magistrate herself several contradictions were to be noted in the prosecution case. These were enumerated by the trial court at Page 17 line 22 of the judgment as follows:-
- “1. That the prosecution’s evidence is characterized by the following contradictions which demonstrate the lack of a legally viable prima facie case:-
 2. The complainant claimed that she spent a night at the Accused’s home on 19th May, 2023 whereas PW8 indicated that the two (2) girls had visited the



Mukurwe-ini Technical Institute for fresher's night [on 19th May 2023] before visiting PW8's cousin the next day.

3. PW3 alleged that there was no use of force against the minors herein whereas PW2, PW8 and the complainant confirmed that they were beaten up before their arrest and in the course of them recording their statements with the police;
 4. The alleged subject dates have not been proved as the Complainant alleged that she was with PW8 who in turn indicated she was elsewhere;
 5. The complainant alleged that PW8 was defiled by the Accused while PW8 denied the same;
 6. PW8 testified that the Complainant visited PW8's cousin at the behest of PW8 who denied the complainant's allegations that the Complainant was hosted by the said cousin and the Accused;
 7. The Complainant and PW8 confirmed that the Accused was involved in night duties as a security guard which contradicts the alleged timings of the subject defilement incidents;
 8. PW8 testified that the Complainant is her friend who is a habitual liar and habitually flees from her home; and
 9. The Investigating Officer demonstrated malice by recording statements from the Complainant and PW8 which confirmed that many more individuals could be accused of defilement including PW2 and one Kelvin Njuguna yet the police only arrested and charged the Accused as confirmed by the reading of the covering report by the investigating officer.
 10. I find that if the minors herein had been beaten by the police during their rescue on 2nd June, 2022 the Hospital would have picked the same as the girls were examined within the same day. PW8 intimated that she would travel to Gikondi during the material time and that she could not tell if PW1 intimated that she was defiled when PW8 was away. The Accused used to work at night and get home in the morning when PW1 alleged to have been defiled. The girls' clothes were seized from the Accused's home which disproves the allegations by PW8 and DW2 that DW2 hosted the girls during the material time.
48. My own examination of the evidence reveals that indeed several contradictions emerged in the complainant's evidence. Firstly in her evidence the complainant indicated that she was defiled on 20th May 2023. However under cross-examination she states that "on 25/5/2023 Accused defiled me."
49. On the other hand the Investigating Officer PW7 in her evidence-in chief stated that the complainant was defiled on 30th May 2023. PW7 later changes and says the defilement occurred on 25th May 2023. The officer was put to task regarding the confusion in the dates during cross-examination and she stated;-
- "My statement first indicates 30/5/2023. I just found myself indicating later events then indicated earlier ones. On 25/5/2023 'A' opened the door for Accused....."



50. This explanation by PW7 leaves more questions than answers and certainly does not clear up this confusion regarding the date of the incident. Secondly the complainant in her evidence in chief narrated to the Court only one incident of defilement. However under cross-examination the complainant says

“He defiled me on one occasion only. My statement indicates that on 25/05/2023 at about 6.00am James came and knocked and I went back to bed.....”

51. However this changes in re-examination where the complainant says

“James defiled me on two instances. I cannot recall the date for the second instance. It was in his house. I got confused so I did not testify on the second incident.....”

The complainant is not very clear on how many times she was defiled. PW4, the clinical officer who examined the complainant and told the court that the child reported to him that she would engage in Sexual contact 3 times in a day. PW4 also stated that the complainant told him that the sexual contact was with her boyfriend. Yet during her evidence the complainant had stated that she only knew the Appellant before as a security guard in Ngoru area. She did not state that he Appellant was her boyfriend. The narrative which the complainant gave to the clinical officer is very different from what she told the court.

52. An incident of defilement would be a traumatic event in the life of any young girl – it is unlikely that she would not remember how many times she was defiled. The complainant’s evidence regarding the number of times she was defiled is wildly inconsistent. The complainant was not a young child. She was a girl on the cusp of adulthood. I doubt that she would be confused regarding the number of times she had been defiled.

53. PW7 who was the investigating officer stated under re-examination that she interviewed the two girls separately and that their versions of the events was contradictory. PW7 stated that ‘SM’ lied to her. The officer did not explain how or why she came to the conclusion that SM was lying and the complainant was being truthful. The very real possibility that both girls were lying to the officer has not been ruled out.

54. The fact that upon examination the complainant was found to have tears in her vagina is proof of penetration. However that physical evidence does not prove the identity of the perpetrator. The clinical officer noted that the complainant had “old tears” He confirmed that he could not tell when the act of defilement had occurred. The complainant herself admitted that she was not a virgin - that she had been sexually active prior to this time. This would therefore explain the old tears in the vagina.

55. Aside from the issue of the incidence of defilement the complainant was also inconsistent regarding other aspects of her evidence. For example the complainant stated that she and PW8 went to the house of the Appellant on 19th May 2023. However PW8 told the court that she and the complainant attended a freshers bash at MTTI on 19th May 2024 and spent the night there leaving the next day at 9.00am. Likewise PW7 the investigating officer told the court that both girls informed her that they attended the freshers bash on 19th May 2024 where they danced the night away. Why would the complainant tell the investigating officer that she was at a party on the night of 19th May 2024 yet tell the court that she spent that night at the house of the Appellant.

56. It is not lost to the court that PW8 who was a friend to the complainant and with whom the complainant shared many exploits described the complainant as a ‘habitual liar’ and a truant who



regularly flees from her home. In her own evidence the complainant admitted that she had lied on several occasions. She stated that

“I lied to my grandmother that I was going to play games with classmates. I lied about taking my sweater and not watching TV when James and Sylvia were having sex. I lied to B’s mother about SM. I did not lie about defilement.”

57. Where inconsistencies and contradictions are noted in the evidence of a single witness the court has to decide whether such inconsistencies are minor and inconsequential or whether they are material to the extent of denting the credibility of that single witness. In this case it is my view that the latter applies.
58. I am mindful of the fact that the complainant’s character is not the issue in this case. However as the trial magistrate noted from her own narration of her activities the complainant is of questionable character. She was a school girl who regularly played truant and by her own admission often lied to her caregivers (grandmother) about where she was going. All in all the complainant did not strike this court as a reliable and/or honest witness.
59. In the judgment of the lower court the magistrate indicated that the circumstantial evidence indicated that the complainant had been defiled. I do agree with this finding. However given the inconsistencies highlighted above I find that there remains a dark shadow of doubt regarding the credibility of the single witness and the identification of the Appellant by this single witness.
60. Section 124 of the *Evidence Act* deals with corroboration of evidence in Criminal Cases and provides for corroboration of the evidence of the victim in a case of sexual assault. The proviso to Section 124 reads as follows:-

“.....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.”

61. For the reasons highlighted above the complainant was not in my view a credible witness. Her evidence was incoherent and contradictory. The trial magistrate did not specifically record the reasons why she believed the evidence of the complainant. I find that there remains doubt regarding the identification of the Appellant. The benefit of such doubt must be accorded to the Appellant. Finally I allow this appeal. The conviction of the Appellant is set aside and the sentence imposed by the trial court is hereby quashed. The Appellant is to be set at liberty forthwith unless he is otherwise lawfully held. No order on costs.

DATED IN NYERI THIS 19TH DAY OF MARCH 2026.

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MAUREEN A. ODERO

JUDGE

