Kimanga v Republic (Criminal Appeal 23 of 2018)
[2026] KECA 650 (KLR) (25 March 2026) (Judgment)

Neutral citation: [2026] KECA 650 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 23 OF 2018

JM MATIVO, PM GACHOKA & AO MUCHELULE, JJA

MARCH 25, 2026

BETWEEN

JOHN MAKORI KIMANGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the judgment and decree of the High Court at Naivasha (C. Meoli, J.) dated 3rd May 2014 in HCCRA. NO. 48 OF 2016)

JUDGMENT

1. John Makori Kimanga was before the trial court charged with defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act*. The particulars of the offence were that on 5th December 2015, the appellant defiled E.A.N., a 15-year- old girl. The appellant also faced an alternative charge of indecent act with a minor contrary to section 11(1) of the *Sexual Offences Act*. After a full trial, the appellant was convicted on the main charge and sentenced to 20 years' imprisonment. His attempt to reverse the trial court's judgment at the High Court failed, prompting him to lodge the present appeal.

2. In the appeal before us, the appellant contends that there were inconsistencies in the prosecution witnesses that went to the root of the prosecution case; that the medical evidence adduced was inconclusive to sustain the charge; and that his defence was not considered.

3. In summary, the evidence presented at trial was that on 5th December 2015, E.A.N. (PW1) went to her aunt's house to take care of a baby. While she was changing the baby's diaper, the appellant entered the house while holding a knife and threatened to kill her if she made any noise. He then pushed her onto a seat and stuffed a cloth into her mouth. Thereafter, he removed both his clothes and hers and proceeded to have sexual intercourse with her. The incident was interrupted by persistent knocking on the door by PW1's younger sister. Upon hearing the knocking, the appellant quickly dressed and

hid under the bed, warning PW1 not to reveal either his presence or what had occurred. Despite the threat, when PW1 opened the door, she immediately informed her younger sister about the incident. Her sister then peeped under the bed and saw the appellant hiding there. The appellant came out from under the bed and left the house, claiming that he had done nothing wrong. PW1 testified that she experienced pain during the incident. Later, at about 5:00 p.m., when her parents returned home, she informed them of what had happened. The matter was subsequently reported at Karati Post, after which PW1 was taken to Naivasha District Hospital for medical examination. According to PW1, she knew the appellant as her aunt's neighbor. During her cross-examination, she denied the allegation that the appellant had come to the house asking her to look after his child. According to her, her sister was too shocked to scream when she saw him hiding under the bed. She reiterated that there were no neighbours around at the time of the incident.

4. N.M.W., who testified as PW2, stated that she was born in 2001, while PW1 was born in 2000. She explained that on the day in question, she went to her aunt's house, which was not far from their home, where PW1 was staying. After repeatedly knocking on the door, PW1 came out crying. She said that 'baba Mary' had raped her and that he was hiding under the bed. To verify this, PW2 went inside and looked under the bed and saw the appellant. He then followed them outside, asking if he had done anything wrong. During her cross-examination, PW2 testified that when she saw the appellant under the bed, she left the house shaking and crying but did not scream. According to PW2, she did not see the appellant holding a knife. She also confirmed that there were no neighbors nearby. They both stayed inside the house until their mother returned.

5. S.N. (PW3), the complainant's mother, testified that PW1 was born in 2000 while PW2 was born in 2001. She testified that PW2 told her that something bad had happened to PW1. Out of fear, she did not say anything more. PW3 thus went to PW1, who at the moment was staying at the aunt's house. PW1 then narrated the incident to her of how, while she was changing the baby's diaper, the appellant came into the house, holding a knife, threatened her, pushed he onto a seat, placed a handkerchief in her mouth, before proceeding to have sexual intercourse with her. That when PW2 came to knock on the door, the appellant hid the knife in his pocket and hid under the bed. On opening the door, PW1 narrated to her that she told PW2, that the appellant had raped her and was hiding under the bed. PW2 indeed confirmed that he was hiding under the bed, in their aunt's house. Both PW1 and PW2 were crying when the appellant asked them whether there was any issue. The incident was then reported. PW3 in conclusion testified that her husband assisted in the arrest of the appellant on the material day, while in his house.

6. Faith Wanjiku (PW4) presented a P3 form prepared for PW1 on 5th December 2015. PW4 testified that she examined PW1 on 8th December 2015. The examination revealed that the appellant had injuries in the vagina at least three (3) days old. The clinical officer concluded that the examinee had been defiled due to the broken hymen. That her findings tallied with the PRC forms that had been filled on 5th December 2015, which indicated that the act was vaginal and that her hymen was broken. During her cross-examination, PW4, in contradiction, testified that PW1 did not have any injuries.

7. In his testimony, Police Constable Boniface Abuko (PW5) recalled that on 6th December 2015, he was asked to investigate the incident. He confirmed that PW3's house and the aunt's house was a walking distance. That indeed the appellant was found underneath the bed by PW2. He was arrested at 8:00pm of the material day. He did not have the knife with him at the time of the arrest. PW5 confirmed PW1's age to be 15 years old as per the immunization card, having been born on 2nd July 2000.

8. In his defence, the appellant gave unsworn evidence. He denied committing the offence. He testified that on the material day, his daughter being unable to take care of his one-year-old son, he took them to the neighbour's house and asked PW1 to take care of him while the daughter, aged nine (9) years

old played outside. That when the babies had slept, he left to fetch water. He then returned and sat outside the house when PW2 came by and found him there.

9. When the appeal came up for hearing, the appellant was present in person while Mr. Omutelema, Senior Assistant Director of Public Prosecution, appeared for the respondent. The parties opted to rely on their already filed written submissions.

10. Through his submissions dated 20th May 2025, the appellant submitted that the offence of defilement was not proved. He argued that the prosecution's case was marred with inconsistencies as PW1 testified that the appellant had threatened her using a knife, yet PW2 did not make mention of any knife. Secondly, PW2 testified that she was too shocked to scream but in contradiction testified upon peeping under the bed, she had a confrontation with the appellant, yet she too shocked to vocally react. Thirdly, the incident took place on 5th December 2015 yet the P3 form was filled on 8th December 2015, three (3) days later. Based on the above inconsistencies, it was the appellant's assertion that the credibility of PW1 and PW2 was questionable and lacked corroboration. The said contradictions were not minor.

11. That with respect to the medical evidence, it was asserted to be inconclusive as: the P3 form was filled on 8th December 2015, yet the incident took place on 5th December 2015; during her testimony, PW4 confirmed that there were no injuries on PW1's genital area; no DNA evidence was collected from the appellant, linking him to the incident; lastly, a broken hymen was not proof that defilement had taken place. He relied on the case of Joseph Mwangi -vs- Republic [2015] eKLR to buttress the argument that a broken hymen was not sufficient proof that defilement had occurred. That this court must look for corroborative evidence linking the appellant to the alleged act. Lastly, it was also his assertion that his alibi defence was not considered.

12. In opposing the appeal, learned prosecution counsel Mr. Omutelema for the respondent relied on the submissions dated 9th June 2025 and asserted that all the elements of the offence of defilement were proved beyond reasonable doubt. It was his position that pursuant to section 143 of the *Evidence Act*, a fact can be proved by the evidence of a single witness. That PW1 testified that the appellant defiled her while she was in her aunt's house tending to a baby. When PW2 knocked on the door, the appellant got dressed and hid under the bed. Upon opening the door, PW1 informed PW2 of the incident and that the appellant was hiding beneath the bed. This testimony was indeed corroborated by PW2, who confirmed by checking under the bed and found the appellant. The element of penetration was thus proved by the two prosecution witnesses and the medical evidence, as PW4 concluded that defilement had occurred due to the broken hymen. The question of penetration was not decided by the superior court; thus, it cannot be raised as a question of law before this court.

13. Counsel urged that the age of PW1 had been established to be 15 years old through her own testimony, PW3's testimony, and the immunization card. The identity of the appellant was indeed established by both PW1 and PW2, who knew the appellant well. Both the trial court and the superior court found PW1 and PW2 to be credible witnesses. He relied on the case of Karanja & another -vs- Republic [1990] KLR to buttress the issue of circumstantial evidence in defilement cases. With respect to the appellant's defence, the same was rejected as being unbelievable and a mere afterthought. It was properly dismissed as it did not displace the prosecution's overwhelming evidence. Mr. Omutelema ultimately urged for the dismissal of the appeal in its entirety.

14. This being a second appeal, our jurisdiction flows from section 361 (1) of the Criminal Procedure Code. Our focus is on matters of law and not facts, which have presumably been settled by the two courts below. We can only interfere with factual conclusions where those courts considered irrelevant facts, neglected relevant ones, or clearly erred in their judgment. The role of this Court on second

appeals has been reiterated in a plethora of decisions, including Dzombo Mataza -vs- Republic [2014] KECA 831 (KLR), where it was held that:

> "As already stated, this is but a second appeal. Under the law, we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court – see Okeno -vs- Republic (1972) E.A. 32. By dint of the provisions of section 361(1)(a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong. We do not discern such misgivings in this appeal."

15. We are also aware that we should limit our determination to issues that were raised before the first appellate court. On this principle we refer to the holding of the Supreme Court in Republic -vs- Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) [2024] KESC 34 (KLR) that:

> "...Thus, the Court of Appeal's jurisdiction on second appeals is limited to only matters of law and it could not interfere with the decision of the High Court on facts unless it was shown that the trial court and the first appellate court considered matters, they ought not to have considered, failed to consider matters they should have considered, or were plainly wrong in their decision when considering the evidence as a whole. In such a case, such omissions or commissions would be treated as matters of law." [Emphasis ours]

16. With that in mind, we have reviewed the record and appreciated the tone and significance of the submissions and authorities as presented by the parties. The issue of inconsistencies in the prosecution's case was not raised before the superior court on first appeal. Therefore, what we shall determine is whether the offence was proved. In determining this issue, we will answer the question whether the appellant's defence was considered.

17. To secure a conviction on a charge of defilement under the Sexual Offenses Act, the prosecution was required to establish beyond doubt, that the complainant was a minor; there was penetration; and that the appellant was the one who penetrated the minor (S.K.M. -vs- Republic [2021] eKLR).

18. PW 1 stated that she was born in 2000, which meant she was 15 years old as stated in the charge sheet. Her mother (PW 3) stated that the child was born in 2000. PW 4 produced PW 1's immunization card which showed that she was born on 2nd July 2000. Both courts below accepted that, given the date of birth, PW 1 was 15 years when the offence was committed. We have no reason to depart from that conclusion.

19. On the question of the identity of the appellant as the perpetrator of the offence, it was evident from the facts of the case that PW 1 and PW 2 knew the appellant. The appellant, on his part, stated that he knew both PW 1 and PW 2, and also their mother PW 3.

    He also accepted that he met them at his house on this day, although he denied defiling PW 1. It followed that his identity was not in question.

20. As to whether there was penetration, PW 1's evidence was that the appellant entered the house in which she was changing the diapers of her auntie's child and, while holding a knife which he threatened to use on her if she made noise, threw her onto a seat and, after removing his clothes and hers, had

sexual intercourse with her. He had put a piece of cloth in her mouth so that she does not make noise. PW 2 knocked on the door. The appellant kept away his knife and went to hide under the bed. PW 2's evidence was that when she entered the house, she found the appellant hiding under the bed. The trial court found both PW 1 and PW 2 to be truthful witnesses, and accepted their evidence. The first appellate court reconsidered the evidence and equally accepted it. The appellate court observed that there was no reason why PW 1 and PW 2 could invent this story, if the incident did not occur. From the record, both PW 1 and PW 2 were cross- examined and remained firm. It was concluded by both courts that the appellant's defence was a mere denial which was not acceptable.

21. The two courts below found that PRC and P3 forms confirmed that PW 1 had been penetrated. We consider that, once PW 1 was found to be a believable witness, her evidence regarding penetration, even without corroboration, was sufficient under section 124 of the *Evidence Act* to found a conviction on the charge of defilement (see PNK -vs- Republic (Criminal Appeal No. 368 of 2012 [2022] KECA 553 (KLR)).

22. In conclusion, we find that the appellant was convicted on overwhelming evidence and, therefore, the appeal lacks merit. It is hereby dismissed.

DATED AND DELIVERED AT NAKURU THIS 25TH DAY OF MARCH 2026

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA, C.Arb, FCIArb.

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR