



REPUBLIC OF KENYA



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**Tsimba v Republic (Criminal Appeal E038 of 2025)  
[2026] KEHC 5966 (KLR) (29 April 2026) (Judgment)**

Neutral citation: [2026] KEHC 5966 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARSEN  
CRIMINAL APPEAL E038 OF 2025**

**JN NJAGI, J**

**APRIL 29, 2026**

**BETWEEN**

**CHIONZO TSIMBA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from original conviction and sentence by Hon. L.N.Wasige,  
Senior Principal Magistrate, in Garsen Senior Principal Magistrate's  
Court Sexual Offence Case No.E022 of 2022 delivered on 30/7/ 2025)*

**JUDGMENT**

1. The appellant was convicted of the offence of defilement contrary to section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No.3 of 2006 and sentenced to serve 15 years imprisonment. The particulars of the offence were that on diverse dates between 4<sup>th</sup> August 2022 and 12<sup>th</sup> November 2022 at (name withheld) village in Tana Delta sub county within Tana River County he intentionally caused his penis to penetrate the vagina of G.M. (herein referred to as the complainant), a child aged 16 years.
2. The Appellant was aggrieved by the conviction and the sentence and lodged the instant appeal on the grounds that:
  1. That the trial court erred in law and fact in finding that the age of the complainant was proved beyond reasonable doubt despite glaring inconsistencies and irregularities in the birth certificate (P. Exhibit 6).
  2. That the trial court erred in making assumptions regarding the identity of the complainant as reflected in the birth certificate without calling the maker thereof, the complainant's mother, or an officer from the Registrar of Births and Deaths to clarify the discrepancy in names.



3. That the trial court erred in admitting and relying on P. Exhibit 6 which bore a different name (Grace Kemuma) from that used by the complainant in court (Grace Kazungu Linet) contrary to the rules of evidence and the burden of proof.
  4. That the trial court erred in shifting the burden of proof to the Appellant by curing gaps in the prosecution case through conjure and assumption.
  5. That the trial court erred in law and fact in finding that penetration was proved beyond reasonable doubt when the medical evidence was inconclusive, improperly produced, and not linked to the Appellant.
  6. That the trial court erred in relying on DNA evidence without reconciling the inconsistencies in the complainant's initial report and statement to the police in which she failed to mention the Appellant.
  7. That the trial court erred in failing to evaluate the defence raised by the Appellant and in failing to consider the possibility of fabrication arising from a pre-existing dispute between the Appellant and the complainant's uncle.
  8. That the prosecution's conduct in repeatedly standing down PW1 for 'counselling and preparation' prejudiced the fairness for the trial and raises reasonable doubt as to the voluntariness and credibility of her testimony.
  9. That the trial court erred in law by convicting the Appellant on evidence that did not meet the threshold of proof beyond reasonable doubt as required under Article 50(2)(a) of *the Constitution*.
3. The prosecution called 4 witnesses in the case while the Appellant was the only witness in his case.

#### **Case for prosecution**

4. The case for prosecution was that the complainant, PW1 in the case, was at the material time a class 8 pupil aged 16 years. She was living with an aunt and an uncle all of whom did not testify in the case. It was her evidence that she had a lengthy love relationship with the Appellant but she could not remember how long it lasted. That during the time of the relationship he impregnated her while she was in class 8. The matter was reported to the police. She later gave birth.
5. A clinical officer at Ngao sub county hospital PW3 testified that he examined the complainant at their medical facility on 12/11/2022 and found her with a broken hymen but not freshly broken. He sent her to the lab where a test on her urine was done that revealed presence of spermatozoa in her urine. A high vaginal swab was done but no presence of spermatozoa was detected. The clinical officer filled the complainant's P3 form. A pregnancy test was not done as they did not have pregnancy kits at the time. Due to the presence of spermatozoa in her urine he formed the opinion that the complainant had been defiled.
6. A government analyst at Mombasa government chemist laboratory PW2 testified that on the 3/8/2023 the complainant together with a daughter to the complainant (name withheld) and the Appellant were escorted to their laboratory and they took buccal samples from the three of them for purposes of DNA sampling. That he conducted an analysis on the buccal samples and found that the Appellant is 99% the biological father of the complainant's daughter. He prepared a report to that end.
7. The case was investigated by PC Jarvis Muthini PW4 of Tarasaa police station. It was his evidence that the case was reported at the police station on 12/11/2022. He escorted the complainant to hospital



in the company of her uncle. He recorded the statement of the complainant and obtained her birth certificate. He charged the Appellant with the offence of defilement.

8. During the hearing of the case in court, the government analyst produced his report as exhibit, P.Exh.1. The clinical officer PW3 produced the treatment notes, Post Rape Care form and the P3 form as exhibits, P.xh.2, 3 and 4 respectively.
9. The complainant's birth certificate was produced as exhibit, P.Exh.6.

#### **Defence case**

10. In his defence, the Appellant stated in an unsworn statement that he did not know anything on the charges levelled against him. That he was not around at the time he was said to have defiled the complainant. That the uncle to the complainant owed him some money and when he demanded the same from him he refused to give him. That after the case was instituted the mother to the complainant went to his house and threatened him. He denied that he defiled the complainant.
11. The appeal was canvassed by way of written submissions.

#### **Appellant's submissions**

12. The Appellant submitted that the age of the complainant was not proved beyond reasonable doubt for the reason that the name in the birth certificate did not correspond with the name in the charge sheet. More so that the document was improperly admitted as it was produced in court by the court prosecutor.
13. It was submitted that penetration was not proved as the credibility of the complainant was materially compromised, she having been stood down twice and subjected to preparation that undermined the reliability of her testimony. That the medical evidence adduced in court was inconclusive as no test was conducted to link him with spermatozoa found in the urine of the complainant. Additionally, that the clinical officer PW3 did not conduct a pregnancy test at the time he examined the complainant. Nor did the witness establish that he is the one who made the medical documents he produced in court which deprived the defence an opportunity to cross-examine the makers of the documents so as to test their accuracy and the circumstances under which the findings were recorded.
14. It was submitted that while the DNA test may establish paternity, it does not establish the age of the mother of the child at the time of conception and the circumstances under which the pregnancy occurred. That in this case the DNA evidence only established that the Appellant was the father to the child but did not establish the age of the complainant at the time of conception. That the evidence of the complainant was that she was already of the age of 18 years when she testified in court. Therefore, that reliance on the DNA evidence could not cure the failure to prove the age of the complainant.
15. The Appellant for the foregoing reasons urged the court to allow the appeal.

#### **Respondent's submissions**

16. The Respondent on the other hand submitted that the age of the complainant was proved by the birth certificate, P.Exh.1. That the trial magistrate had the opportunity of seeing the complainant when she testified and confirmed that she was indeed a minor of 16 years. That this evidence was not controverted by the defence.
17. It was submitted that the complainant narrated how the Appellant penetrated her by inserting his penis into her vagina. That her evidence was corroborated by the clinician PW5 who found her with redness on the vagina.



18. The respondent submitted that the complainant identified the Appellant as the person who defiled her. That identification was that of recognition. That there was no mistaken identity.
19. It was submitted that the ingredients of the offence of defilement were proved. The Respondent urged the court to dismiss the appeal.

### **Analysis and determination**

20. This being a first appeal, the court has a duty to re-evaluate and re-consider the evidence on record and come to its own conclusion. The court should also appreciate the fact that unlike the trial court it did not have the advantage of seeing and hearing the witnesses. These principles were re-stated by the Court of Appeal in the case of *Kiilu & another v Republic* [2005]1 KLR 174, thus:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.

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 court’s findings and 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.”

21. The appellant was facing a criminal charge. Proof in a criminal trial is that of beyond reasonable doubt. Lord Denning in *Miller vs. Ministry of Pensions* (1947) 2 All ER, 372 stated as follows on the standard of proof in criminal cases:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice.”

22. The offence of defilement is premised under Section 8 of the *Sexual Offences Act* No. 3 of 2006. The law states as follows: -

#### **8. Defilement**

1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
  4. A person who commits an 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.
23. Thus, for the Offence of defilement to stand, three ingredients must be proven. These ingredients were outlined in the case of *George Opondo Olunga v Republic* [2016] eKLR, as the age of the victim, positive identification or recognition of the offender, and penetration.



24. I have considered the grounds of appeal, the record of the trial court and the submissions of the appellant and those of the respondent. The appeal is based on the grounds that the three ingredients of the charge of defilement were not proved and that the trial court failed to evaluate the defence raised by the Appellant
25. On the issue of the age of the complainant, the Appellant submitted that the same was not proved as the birth certificate produced in court as P.Exh.6 bore a different name to that of the complainant as stated in the charge sheet.
26. The name of the complainant as indicated in the charge sheet is G.M, while the name in the birth certificate is Grace Kemuma. When the complainant she appeared in court for hearing on 12/7/2023, she told the court that she is called Grace Kazungu Linnet. The trial court in trying to resolve the discrepancy stated in its judgment that there was no dispute that the complainant is called Grace. That her name was captured in the P3 form as Grace Mwamunga and in the treatment notes as Grace Mwamunga Linet. That the name of her mother is captured in the birth certificate as Linet Kwamboka Mwamunga. That in view of this, the names Mwamunga and Linet come from her mother and the name Kemuma is her second name as captured in the birth certificate. That there was nothing unusual for her to be referred to as Grace Mwamunga or Grace Mwamunga Linet. Therefore, that the said birth certificate belonged to the complainant.
27. It is however to be noted that the birth certificate was not before the court when the complainant testified in the case and she was not recalled after the document was availed in court for her to confirm whether the name contained in the birth certificate belonged to her. Her mother also did not testify in the case and there was no evidence that the woman named in the birth certificate was the mother to the complainant. Besides that, the investigating officer did not identify the birth certificate when he testified in court. Neither was the document marked for identification (MFI) when he testified. The court record indicates that after the investigating officer completed testifying and was cross-examined by the Appellant, the court prosecutor told the trial court that he had forgotten to have the prosecutor produce the birth certificate. That he wished “for it to be produced as Exhibit 6”. The court then allowed the document to be produced as prayed though it did not make a formal order to that effect.
28. In my view it was not proper for the court prosecutor to produce the birth certificate in court himself as he was not a witness in the case. The investigating officer having completed testifying in the case, the proper procedure was for the prosecutor to apply to recall the investigating officer to produce the document after which the Appellant would be given an opportunity to cross-examine the witness on the document.
29. Besides that, the investigating officer told the court that the document was brought to him by the guardian to the complainant. The guardian did not testify in the case and his identity is not known. The investigating officer said in his evidence that he did not record further statement of the complainant upon receiving the document to ascertain from her whether the name stated in the birth certificate belonged to her and whether the woman named in the document was her mother. Neither did he confirm whether the name the complainant gave to the court as Grace Kazungu Linet belonged to the same person as the one named in the charge sheet as GM. In view of this, I find no evidence that the birth certificate produced in court belonged to the complainant nor do I find evidence that the woman named in the birth certificate was the mother to the complainant. The finding of the trial court that the name in the birth certificate referred to the complainant was made out of conjecture and was not supported by any evidence. It was for the complainant herself to clarify the issue of her name and not for the court to make deductions from the evidence.



30. When the complainant testified on 12/7/2023 she told the court that she was aged 17 years and did not produce evidence to support the assertion. She again appeared in court on 13/11/2024 when she said that she had by then attained the age of 18 years which she did in September 2024. She again did not avail evidence to support that. Her parents or guardian did not appear in court to confirm her age. In view of the foregoing, I find that the age of the complainant was not proved.
31. On the question of penetration, the complainant gave evidence that the Appellant was her fiancé and that he had impregnated her when she was in class 8. That he was the father to her child. That she was in a lengthy relationship with him but that she could not remember how long it lasted.
32. The trial magistrate in convicting the appellant of the offence of defilement stated that she had observed the demeanor of the complainant in court and found her a truthful and credible witness. That she was in a long relationship with the Appellant who impregnated her when she was in class 8. That the government analyst confirmed that the Appellant is the biological father to the complainant's child which was prove that the Appellant must have had sex with the complainant resulting to him impregnating her. That the clinical officer at Ngao Hospital did not conduct a pregnancy test on the complainant as the hospital did not have pregnancy kits. That the explanation by the clinical officer was plausible.
33. I have considered the evidence adduced before the trial court on penetration on the complainant. The trial court in convicting the Appellant of the offence relied on the evidence of the complainant that the Appellant impregnated her and that the DNA report of the government analyst PW2 indicated that the Appellant was the biological father of the child born to the complainant.
34. The Appellant was charged under the name of Chionzo Tsimba. The name appearing in the Government analyst's report from whom a buccal swap was taken for purposes of conducting a DNA profile is one Rama Tsimba Chionzo. The Government analyst PW2 stated that the said name was contained in the Exhibit memo form from the police. The said exhibit memo was not produced in court.
35. The investigating officer in the case PW4 stated in his evidence as contained in his written statement that he produced in court as P.Exh.6 (document indicates as exhibit 25) that he on the 16<sup>th</sup> November 2022 vide OB No.02/16/11/2022 submitted the exhibit collected at the material day at the Government Chemist for further analysis. The statement further indicates that they arrested the Appellant on 23<sup>rd</sup> November 2022.
36. If then the Appellant was arrested on 23/11/2022, what exactly are the exhibits that the investigating officer says were collected at the government chemist laboratory on 16/11/2022 by which time the Appellant had not been arrested? How come that the investigating officer did not produce the exhibit memo prepared on that day to show what was submitted to the government chemist on that day?
37. The Appellant was charged under the name of Chionzo Tsimba. According to the government analyst PW2, buccal swaps were taken from a person named Rama Tsimba Chionzo as indicated in the exhibit memo that was forwarded to them by the police. The investigating officer did not mention such an exhibit memo in his evidence. Neither did he mention that he escorted the Appellant to the government chemist laboratory on 23/8/2023 for the purposes of a buccal swap being taken from him. He stated that he did not make a record of the name of the Appellant as being Rama.
38. The complainant in her evidence mentioned a person called Rama whom she said was forcing her to have sex with her. She said that the person called Rama is not the Appellant whom she referred to in her evidence as Chionzo. This means that Rama and Chionzo are two different persons. There was no



evidence that the appellant is called Rama or Rama Chionzo Tsimba as indicated in the government analyst's report, P,Exh1. The sum total of all this is that there was no evidence the person from whom buccal swap was taken at the government chemist laboratory on 23/8/2023 was the Appellant. There was no evidence that he is the same person as Rama Tsimba Chionzo who was found to be the biological father of the complainant's child. The trial court did not properly analyse the evidence on DNA profile before relying on it to hold that the Appellant is the person who impregnated the complainant.

39. The trial court further made a finding that the complainant was a truthful and credible witness. Section 124 of the Evidence Act allows a court in sexual offence cases involving children to convict on the sole evidence of the child victim if the court is satisfied that the child is telling the and the court gives reasons for such a finding.
40. I have keenly examined the evidence adduced by the complainant and note that she only made generalized statements that she had sex with the Appellant. There were no details as to the dates and places the sex took place. If for any reason she could not remember the dates, she ought to at least have been in a position to remember where the incidents used to take place. Though the complainant stated that she had a long love affair with the Appellant, the charge sheet only indicated a period between August 2022 and November 2022, a period of 3 months. This is not possibly a long period. Further to this, she told the trial court that she did not mention the Appellant (Chionzo) in her statement to the police. That she told the police that the man who was forcing her to have sex with him is Rama and not Chionzo (the Appellant). Why then was the Appellant charged if the complainant did not mention him in her statement to the police? Was she a credible witness if she did not mention the Appellant in her statement to the police?
41. The Appellant in his defence denied that he defiled the complainant. It was the duty of the prosecution to prove the case beyond reasonable doubt. In view of the foregoing, it is the finding of this court that there was no sufficient evidence to form a basis of a conviction on the Appellant.
42. The upshot is that I find the appeal to be merited. Consequently, the conviction entered on the Appellant is quashed and the sentence thereof set aside. I order that the Appellant be set at liberty forthwith unless lawfully held.

**DELIVERED, DATED AND SIGNED AT GARSEN THIS 29<sup>TH</sup> DAY OF APRIL 2026.**

**J. N. NJAGI**

**JUDGE**

In the presence of:

Ms Mkongo for Respondent

Appellant present virtually at Malindi GK prison

Court Assistant – Mwero

