



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kithaka v Republic (Criminal Appeal E050 of 2025)
[2026] KEHC 6134 (KLR) (6 May 2026) (Judgment)**

Neutral citation: [2026] KEHC 6134 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL E050 OF 2025
RM MWONGO, J
MAY 6, 2026**

BETWEEN

JOHN KARIUKI KITHAKA APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal arising from the decision of Hon. V.M. Masivo, in
Runyenjes MCSO No. E006 of 2025 delivered on 27th August 2025)*

JUDGMENT

The Charges

1. The appellant was charged with defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. The particulars were that on 23rd January 2025 in Embu East subcounty within Embu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of WNI a child aged 17 years.
2. The alternative charge was committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars were that on 23rd January 2025 in Embu East subcounty within Embu County, the appellant intentionally and unlawfully caused his penis to touch the vagina of WNI a child aged 17 years.
3. The appellant pleaded not guilty and a plea of not guilty was duly entered. The matter proceeded to a full hearing, following which he was convicted. He was sentenced to 15 years imprisonment.



The Appeal

4. The appellant was dissatisfied with the findings of the trial court and he has now appealed. He seeks that the appeal be allowed, the conviction be quashed, the sentence be set aside and that he be set free. The appeal is premised on the following grounds:
 1. That the learned trial Magistrate erred in the matters of both law and fact by failing to analyze the credibility to enable him make a fair and just decision;
 2. That the learned trial magistrate erred in both matters of law by failing to note that the critical ingredients of defilement were not proved conclusively;
 3. That the learned Magistrate erred in matters of law and facts by imposing a long sentence of 15 years upon the appellant without taking into account that the appellant is a senior citizen and hence denied him hope for prospects;
 4. That the learned trial magistrate still erred in laws and facts by failing to consider that there was a grudge between the mother of the appellant and the parents of the victim; and
 5. That the learned trial magistrate still erred in laws and facts by rejecting the appellant's defense without giving cogent reasons.

The Evidence in the trial Court

5. PW1 was the victim. She stated that she met the appellant at the market place and he invited her to visit him at his place. At first, she refused but when he insisted, she agreed. Around the same time, she saw her father who ordered her to go home but she did not listen. The appellant took her on his motor cycle to a place where he asked for a room. A young man told him that the room was ready and he pushed her into it. In that room, he defiled her and then asked her to leave. It was about 10pm when she left the room.
6. She stated that the room was well lit, so she could see the appellant clearly and she had also seen him earlier so she knew his face. She informed her mother of the incident as soon as she got home. She was taken to the police station and then to the hospital for examination. She stated that she was 17 years old and she produced her birth certificate as proof. In cross-examination, she stated that she was taken by the appellant on his motor cycle, and that the appellant forced her to have sex with him.
7. PW2 was the victim's mother. She stated that on the day of the incident, she was running a few errands and returned home at around 7pm. She found PW1 missing and was nowhere to be found. The following day, PW1 returned at around 9pm and she was not walking normally. She beat PW1 and threatened her with a knife before PW1 told her what had transpired. Together, they went to Karurumo Police Post and reported the matter. PW1 was referred to Runyenjes Level 4 Hospital and she was examined. The medical examination revealed that she had engaged in sexual activity. In cross-examination, she denied having threatened the appellant and his family for failing to bring a thanksgiving gift to her after she prayed for healing of their kin.
8. PW3 was the victim's father who stated that his daughter went missing on the day of the incident. That he searched for her until the following day. In the evening, he reported the matter to the police station. He stated that he had seen the appellant at Karurumo Market and he had asked him if he had seen his daughter. The appellant directed him to an avocado tree. He met PW1 on the way to Karurumo as he was leaving the shopping center. He stated that when they got home, they interrogated PW1 and



she revealed that she had been defiled by the appellant. PW1 and PW2 went to report the matter at the police station.

9. PW4 was Anne Githinji a Clinician at Runyenjes Level 4 Hospital. She testified on behalf of the doctor who examined the victim. She produced a P3 and PRC forms for the victim as evidence and stated that the examination revealed no injuries to her genitalia and the hymen was broken. On cross-examination, she stated that the examination was done 2 days after the incident and according to the report, she had not changed her clothes or taken a bath.
10. PW5 was PC Elosy Mugambi who stated that the matter was reported at the station and she investigated it. She rehashed the facts according to PW1 and stated that she referred PW1 who was with PW2 to Runyenjes Level 4 Hospital for examination and treatment. She obtained the victim's birth certificate and charged the appellant with the offence. On cross-examination, she stated that the appellant was arrested by her colleagues 2 days after the incident.
11. DW1 was the appellant who denied committing the offence he was charged with. He said he protested his arrest and it was only at the police station that he was informed that he had defiled a child. In cross-examination, he stated that he saw the victim for the first time in court. He said he knew the complainant's mother as a customer, and that they had disagreed at some point in time.

Parties' Submissions on Appeal

12. The appeal was disposed of by way of written submissions.
13. In his submissions, the appellant challenged the prosecution's evidence. He stated that the medical examination ought not to have been done so late after the alleged incident. He argued that he has the right to be subjected to a DNA analysis to prove that he did not commit the offence.
14. The respondent relied on section 8(1) and (4) of the [Sexual Offences Act](#) and the case of NFN v Republic [2022] KEHC 11774 (KLR). He stated that the elements of the offence of defilement are as distinctly set out in that case. He also relied on the case of Philemon Koech v Republic [2021] eKLR and stated that the age of the victim was well established through her birth certificate that was produced as evidence. It submitted that there was also sufficient evidence to prove that there was penetration caused by the appellant. It also relied on section 2 of the [Sexual Offences Act](#) and the cases of Reuben Taabu Anjononi, Benjamin Akisa Anjononi and Monya Anjononi v Republic [1980] KECA 23 (KLR) and Wilson Waitegei v Republic [2021] KEHC 1458 (KLR) and asserted that the conviction is safe and the sentence is lawful.

Issues for Determination

15. The issues for determination are as follows:
 1. Whether the offences were proved beyond reasonable doubt; and
 2. Whether the sentences should be reviewed.

Analysis and Determination

16. The appeal herein is required to be determined through reevaluation of the evidence adduced before the trial court. This was stated in the case of Kiilu & Another v. Republic [2005]1 KLR 174, where the Court of Appeal held:

“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."

17. Section 8(1) and (4) of the *Sexual Offences Act*, provides:

"(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."

18. PW1 testified that she was 17 years old at the time of the incident. PW2, her mother, produced her birth certificate to prove this. Therefore, there is no doubt that the appellant was a minor at the time of the incident.

19. PW1 testified that the appellant took her to a house/room which was booked with the help of a third party. It was in that room where the appellant had sex with her. She explained in vivid detail how the appellant took her to a room, undressed her and had sex with her. He then asked her to leave. This was about 10.00 p.m. The room they were in had lights so she saw everything that happened. She was found the day after the incident. PW4 testified that the medical examination on the complainant was conducted 2 days after the incident, and there were no injuries noted on her genitalia, but that her hymen was broken. The PRC report indicates that the hymen was "not intact".

20. In his judgment, the learned magistrate set out in detail the evidence of PW1 and adverted to section 124 of the *Evidence Act*. He stated that he was satisfied that her explanation proved penetration. He said he considered her shame, posture movement and that he formed an opinion as to the veracity and credibility of PW1. He accepted her evidence.

21. According to section 2 of the *Sexual Offences Act*, penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person. From the evidence adduced, penetration was sufficiently proved.

22. On the issue of identification of the assailant, the proviso at section 124 of the *Evidence Act* provides that the testimony of a victim to a sexual offence on identification of his/her assailant does not need to be corroborated. It states:

"...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."

23. PW1's account of the incident as the victim is to be held as sufficient proof to implicate the appellant as her assailant. There was no other evidence given in the case that contradicted or controverted the testimony of PW1.

24. After conviction, the appellant was sentenced to the statutorily prescribed sentence of 15 years imprisonment. The sentence is prescribed under section 8(4) of the *Sexual Offences Act* and it is



couched in mandatory terms. This leaves no room for this court to review it or lower it beyond what is prescribed. Therefore, the trial court did not err in imposing that sentence.

Disposition

25. In the result, I find that the appeal lacks merit and it is hereby dismissed. The conviction and sentence meted by the trial court are hereby upheld.
26. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 6TH DAY OF MAY, 2026.

R. MWONGO

JUDGE

Delivered in the presence of:

1. Appellant Present in Court
2. Ms. Mwaniki for the Respondent
3. Francis Munyao - Court Assistant

