



**Kongwe v Republic (Criminal Appeal E039 of 2024)  
[2025] KEHC 6751 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 6751 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CRIMINAL APPEAL E039 OF 2024  
A. ONG'INJO, J  
FEBRUARY 27, 2025**

**BETWEEN**

**MADUU KONGWE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the Judgment of Hon. M. O. Obiero (SPM) delivered on 30th August 2023 Kehancha S.O. Case No. E037 of 2023, Republic Vs Maduu Kongwe Chegere)*

**JUDGMENT**

**Background**

1. The Appellant was convicted and sentenced to serve 15 years in prison for the offence of defilement contrary to Section 8(1) as read with Section 8 (4) of the [Sexual Offences Act](#).
2. The particulars of the offence were that the Appellant on diverse dates between 15<sup>th</sup> January 2022 and 25<sup>th</sup> July 2022 at Nyamagongwe Location Kuria East Sub-County within Migori County intentionally and unlawfully the Appellant caused his penis to penetrate the vagina of S.B.D a child aged 14years.
3. The Appellant was aggrieved by the conviction and sentence and he preferred the appeal herein vide Petition of Appeal filed on 30<sup>th</sup> April 2024 the following grounds:
  - a. That, the trial court erred in law and fact by not complying with Article 50(2) (g) and (h) of [the Constitution](#).
  - b. That, the trial court erred in law and in fact by not observing that the ingredients of the offence of defilement had not been proved to the required standard in law.

Reasons wherefore the Appellant prayed that:

The conviction be quashed and sentence set aside.



4. The Prosecution's case was that the Appellant was PW1, the Complainant's step-father and used to live in their home after her parents separated. She said that in January 2022 the Appellant used to force her to have sex with him whenever her mother went to work. She said he used to do it over lunch time. That the Appellant could pull her and take her to the bed where he removed her clothes and have sex with her. PW1 said the Appellant had sex with her severally but she feared telling her mother.
5. PW1 testified further that there was a time the Appellant stole her mother's money and ran away and it is when he was arrested that she disclosed to her mother that he had been defiling her. That the matter was reported at Kegonga Police Station and PW1 later taken to hospital where on examination she was found to be expectant. By the time she was testifying in court she was 7 months pregnant. She said she did not have a boyfriend.
6. In cross examination PW1 said that the Appellant forced her to have sex with him and threatened her if she disclosed to the mother. She said she was not told what to say in court by the mother. She said it was the Appellant who made her pregnant. She said the Appellant stole her mother's money and went away in April and returned in June 2022.
7. PW2, Anne Nyamohanga Boke produced Certificate of Birth for PW1-EXP1 showing the Complainant was born on 14.12.2007. She testified that on 20.8.2022 at around 9.00pm she went to Chief's home to report that her money had been stolen and she was referred to go and make the report to the police. That when she went back home and informed her children she found the person who stole her money PW1 told her that the person who stole her money had been defiling her when she was away at work. PW2 again went back to the Police Station and reported. That when she took the Complainant to hospital she was found to be pregnant. PW2 said she was married to the Appellant for 7 years.
8. In cross examination PW2 said that the Complainant told her the Appellant threatened he would poison her if she reported. She said that the Appellant took her 15,000/= on 7.7.2022 and then left home and switched off his phone. She said that the Complainant had already been delivered of a child by the time she was testifying in court. PW2 said she had no grudge with the Appellant.
9. PW3 P. C. Everlyne Abuga investigated the offence herein while at Kegonga Police Station. She testified that on 21.8.2022 the area Chief Mr. Nyamagondi took the Appellant to the station on allegations he was pretending to be a witch doctor and that he had conned many people. That after 30 minutes PW2 went to the station with her daughter on allegations the Appellant had defiled her. On interrogation of the girl PW3 learnt that the Appellant was step-father to the Complainant. She learnt from the Complainant that the Appellant had severally defiled her but she feared telling her mother until the Appellant went away. PW3 issued P3 form and took the Complainant to Kegonga Sub-County Hospital where she was examined and P3 filled and the Appellant was charged. PW3 said she did not know if the Appellant had a grudge with the Complainant's mother.
10. PW4 the Clinical Officer Allan Odhiambo examined the Complainant on 22.8.2022 following allegations of defilement. The Complainant reported that she had missed her menses for 3 months and she was feeling a baby playing in her stomach. PW4 confirmed that the Complainant was expectant and this confirmed penetration of her genital organ. He also observed torn hymen. He filled P3 and PRC forms and produced them together with Treatment Notes as exhibits 2,3 and 4.
11. In cross examination PW4 said he did not know if the Appellant is the one who defiled the girl.
12. The Appellant in his sworn statement denied having committed the offence and said that on 19<sup>th</sup> August 2022 he discovered that his wife was having an affair with the Chief. That the Chief later went to arrest him alledging he was a conman. That when he was arraigned in court he was he was told he



had defiled the girl. In cross examination the Appellant said that the Chief betrayed him and that the Complainant was used by the mother.

This Appeal was canvassed by way of written submissions.

13. In the Appellant in his written submissions raised additional grounds as follows;

\_ THAT the trial Magistrate erred in law and fact in not diligently considering the evidence of 1<sup>st</sup> Report of the Prosecution witness to the authority to gauge the truth and accuracy of their embellishments.

\_ THAT the court erred in both law and fact in not indicating the instances of demeanor of the Complainant relied upon in accepting her evidence.

\_ THAT the trial court erred in law and fact in not making a finding that the Appellant's should run from the date when arrested pursuant to Section 333(2) of the *Criminal Procedure Code*.

14. In the submissions the Appellant argued that there was no DNA forensic test to link him directly to this crime.

15. The Appellant also submitted that there was no instant of demeanor of the Complainant pointed out by the Trial Court that would have made him believe the uncorroborated evidence of the Complainant.

On the issue of penetration,

16. On sentence the Appellant faulted the trial court for not making a finding that the minimum mandatory nature of sentence under the *Sexual Offences Act* is unconstitutional. In support of his position he cited the holding in *Maingi & 5 others v Director of Public Prosecutions & another* [2022] KEHC 13118 (KLR) at Machakos and the Court of Appeal holding in *Joshua Gichuki Mwangi Vs Republic* [2022] KLR.

17. The Appellant also faulted the trial Magistrate for failing to make a finding that his remand period from 21<sup>st</sup> August 2022 was not factored in his sentence pursuant to Section 333(2) of the CPC.

18. The Respondent's on the other hand filed written submissions dated 14<sup>th</sup> November 2024 and submitted that the offence of defilement is rooted in 3 ingredients namely penetration, age of the complainant and identity of the assailant and that each must be proved by the Prosecution beyond reasonable doubt to ensure conviction is sustained. The Respondent cited the holding in *George Opondo Olunga V Republic* [2016] eKLR

19. On the 1<sup>st</sup> element of age the Respondent cited the holding in *Edwin Nyambogo Onsongo V Republic* (2016) eKLR where it was stated:

“.....the question of proof of age has finally been settled.....”

20. It was submitted that the Complainant testified that she was 14 years at the time she was defiled and the Certificate of Birth confirmed her age as having been born on 14<sup>th</sup> December 2007 and therefore age was proved to the required standard.

21. On the 2<sup>nd</sup> element it was submitted that the Appellant was well known to the Complainant who said that on various dates in 2022 the Appellant forced her to have sex with him and as a result she conceived. That Medical examination also confirmed that the Complainant was not only defiled and her hymen torn but that she was also pregnant. Thus there was proof of penetration.

22. On the 3<sup>rd</sup> element of identification of the assailant the Respondent submitted that the Complainant knew the Appellant as her step-father and was categorical that he is the one who defiled her.



23. On whether the trial court failed to comply with Article 50(2)(g) and (h) the Respondent cited the holding in *Mokaya V Republic* CRA NOE020 of 2023[2024] KEHC4607(KLR) where Okwany J held

“ I note.....”

24. The Respondent submitted that legal representation is not an absolute right and it is only mandatory where if one is charged with an offence whose penalty is mandatory death sentence and where substantial injustice will arise. It was submitted that in this matter the Appellant demonstrated that he clearly understood the charge against him and he was able to cross examine the prosecution witnesses and mounted his defence. The Respondent argued that there was no infringement of the Appellant’s rights.

25. The Respondent urged the court to uphold the trial courts conviction and sentence and dismiss the appeal.

### **Analysis and Determination**

26. In a first appeal, the duty of the court was stated in *Mark Oiruri Mose vs. R* (2013) eKLR thus;

“ .... the Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.”

27. Having considered the grounds of Appeal, and revisited the evidence tendered before the trial court afresh as well as the submissions by the rival parties, the issues for determination are :

- \_ Whether the ingredients of the offence of defilement were proved beyond reasonable doubt.
- \_ Whether the Appellant’s rights under Article 50(2), (g) and (h) of *the Constitution* were infringed by the trial court.

28. Section 8 (1) as read with 8(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.....
- ..... (3) 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.”

29. To begin with whether the Appellant’s rights under Article 50(2) (g) and (h) were infringed this court this court has perused the trial court’s records and confirmed that the Appellant was informed about his rights to choose an Advocate of his choice but he said he was ready to proceed. Charge was then read to him and he pleaded not guilty. Subsequently the matter proceeded to full hearing where the Appellant was given an opportunity to cross examine prosecution witnesses and thereafter mounted his own defense. The Appellant did not complain during the hearing of prosecution case or during his defense that he was prejudiced in any way. This court therefore finds that this ground cannot succeed.

30. Concerning whether there was proof of age of the victim, the evidence of PW1 was that she was born on 14.12.2007 and she was 14 years at the time of the incident. The Appellant did not dispute that the Complainant was 14 years. He had resided with her and her mother PW2 for 7 years before he allegedly



stole money and ran away. There was also the evidence of the Clinical Officer who filled the P3 form and said the Complainant was 14 years old. There was therefore proof of age beyond reasonable doubt.

31. The Court of Appeal in the case of Edwin Nyambogo Onsongo Vs Republic [2016] eKLR stated as follows on proof of age.

“... 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.”

32. On the issue of penetration, the Complainant was examined by PW4 who established that her hymen was torn and that she had also conceived and the pregnancy was 7 months old by the time the Complainant was testifying. The Complainant could not have been pregnant if there was no penetration of her genital organ by the genital organ of a male person.

33. On whether the Appellant was positively identified as the assailant, PW1 said that the Appellant had defiled her severally whenever her mother went to work and mostly during lunch time but she feared reporting because the Appellant threatened to poison her. The Complainant knew the Appellant very well. The Appellant claimed the Chief betrayed him and that the Complainant was used by the mother to fabricate him but the Complainant was categorical that it was the Appellant who defiled her. She said she had told the court the truth and that it was the Appellant who forced her to have sex with him and made her pregnant.

34. PW2 said she had no grudge with the Appellant that would make her fabricate him. From the evidence of the Prosecution witnesses and from the fact that the Complainant was established to be pregnant this court finds that the Appellant was properly identified as having defiled the Complainant who was his step-daughter and therefore there could not have been mistaken identity since the defilement mostly took place during the day in broad day light during lunch time in the houses used as abode for the Appellant, PW2 and PW2’s children.

35. Based on the re-evaluation of the records of the trial court and the grounds of appeal as well as the submissions by the rival parties this court finds that the appeal on conviction and sentence do not have merit and same is dismissed save that the sentence should take effect from 24<sup>th</sup> August 2022.

Right of Appeal 14 days.

**DATED, SIGNED AND DELIVERED THIS 27<sup>TH</sup> DAY OF FEBRUARY, 2025.**

.....

**HON. JUSTICE A. ONGINJO**

**JUDGE**

**In the presence of: -**

