



REPUBLIC OF KENYA



**Mwambua v Republic (Criminal Appeal E008 of 2023)  
[2025] KEHC 5447 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5447 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CRIMINAL APPEAL E008 OF 2023**

**JN KAMAU, J**

**APRIL 30, 2025**

**BETWEEN**

**JULIUS KWEYA MWAMBUA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon S.O Ongeri (SPM) delivered at Vihiga in  
Principal Magistrate's Court in Sexual Offence Case No E006 of 2021 on 31st March 2023)*

**JUDGMENT**

**Introduction**

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* Cap 62 A (Laws of Kenya). He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.
2. The Learned Trial Magistrate, Hon S.O. Ongeri (SPM) convicted him on the main charge of defilement and sentenced him to life imprisonment.
3. Being dissatisfied with the said Judgment, he lodged an appeal herein. His Petition of Appeal was dated 27<sup>th</sup> April 2023 and filed on 28<sup>th</sup> April 2023. He set out seven (7) grounds of appeal.
4. In his Written Submissions dated 12<sup>th</sup> August 2024 and filed on 27<sup>th</sup> August 2024, he incorporated his Amended Grounds of Appeal of even date. He set out four (4) Amended Grounds of Appeal. The Respondent's Written Submissions were dated and filed on 12<sup>th</sup> November 2024. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.



## Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify.
6. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify, and thus make due allowance in that respect.
7. Having looked at the Appellant's Amended Grounds of Appeal, his Written Submissions and those of the Respondent, it appeared to this court that the issues that had been placed before it for determination were as follows:-
  - a. Whether or not the Trial Court relied on a defective charge sheet;
  - b. Whether or not the Prosecution proved its case beyond reasonable doubt; and
  - c. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.
8. The court therefore dealt with the said issues under the following distinct and separate heads.

### I. Charge Sheet

9. Amended Ground of Appeal No (1) was dealt with under this head.
10. The Appellant submitted that this being the first appellate court, it had the liberty to weigh conflicting evidence, peruse the entire proceeding and draw its own conclusion as was held in the case of *Okeno vs Republic*(1972) EA.
11. He contended that the charge sheet that the Trial Court relied on to convict him was defective under Section 214 of the *Criminal Procedure Code* in that the charges were framed under Section 8(2) of the *Sexual Offences Act* on defilement while the evidence adduced supported a charge under Section 20(1) on incest by male person. He argued that the said defective charge could not therefore support a conviction and a sentence of life imprisonment and could not be cured by Section 382 of the *Criminal Procedure Code*.
12. He placed reliance on the case of *Yongo vs Republic Criminal Appeal No 1 of 1983*(eKLR citation not given) where it was held that a charge was defective under Section 214(1) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) where it did not accord with the evidence in the committal proceedings given during trial or it gave a misdescription of the alleged offence in the particulars.
13. He pointed out that from the evidence on record that the Complainant, SJ (hereinafter referred to as "PW 1") was his grand-daughter hence fell within the provisions of Section 20(1) of the *Sexual Offences Act*. He asserted that although Section 22 of the *Sexual Offences Act* which spelt the tests of relationship did not mention a grandfather, in the case of *GK vs Republic* [2018]eKLR, it was held that although a grandfather was not mentioned, they fell within the prohibited degree of consanguinity.
14. On its part, the Respondent submitted that the Charge Sheet it preferred in this case was that of defilement and that it contained sufficient details and particulars as to enable the Appellant to know the charges he faced. In this regard, it placed reliance on the case of *Fappyton Mutuku Ngui vs*



Republic [2020]eKLR where it was held that the charge sheet should specify the offence in a clear and unambiguous manner and should be accurate since technical defects would entitle an accused to acquittal upon appeal.

15. It pointed out that the legal principle governing charge sheets was that an accused person should be charged with an offence known in law and that it should be one that was clear enough for him or her to understand and enable him prepare for his defence. It submitted that the Charge Sheet was properly drafted, that the Appellant understood the charges he faced and that he took part in the trial by cross-examining the witnesses.
16. Going further, Section 134 of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) provides as follows:-

“Every charge or information shall contain and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

17. In addition, it was held in *Sigilani vs Republic* (2004) 2 KLR, that the principle of the law governing charge sheets was that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.
18. The Respondent was clear in its submissions that it had preferred the charge of defilement against the Appellant. Applying the test above and upon keenly perusing the charge sheet, this court found that the particulars of the offence of defilement were clearly spelt out, and these included the section of the law creating the offence, the date of the offence, the place of the offence, the act constituting the offence and the name of the victim.
19. The Appellant did not raise any objection before the Trial Court or any contention that the Charge Sheet was defective. He fully participated in the trial in clear demonstration that he understood the charge. He cross-examined the witnesses and was able to put an appropriate defence. This was sufficient indication that he understood the particulars of the charge he faced. The offence was disclosed and stated in a clear and unambiguous manner, there was no allegation that because of the way that the Charge Sheet was drafted or framed, he was unable to plead to a specific charge that he could not understand or that he was unable to prepare his defence. In the circumstances, the Appellant could not be said to have been prejudiced.
20. Even assuming that there was some defect or omission in the Charge Sheet, the same was still curable under Section 382 of the *Criminal Procedure Code* which provides as follows:-

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”



21. In any event, the Appellant who admitted that he was PW 1's grandfather did not suffer any prejudice on account of the offence he was charged with because the sentence for the offence of incest, where the victim was below eighteen (18) years, and that of defilement where a child was below eleven (11) years was life imprisonment.
22. Although the word "grandfather" was not mentioned, it was evident that the Appellant could be charged under Section 20(1) of the [Sexual Offences Act](#) which provided as follows:-

"Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge, his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years.

Provided that, if it is alleged in the information or charge and provided that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person."
23. On its part, Section 8(2) of the [Sexual Offences Act](#) stipulates that:-

"A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."
24. Article 157 (10) of [the Constitution](#) provides that the Director of Public Prosecution (DPP) could not be directed how to charge. The said provision provided that the DPP was required to exercise his powers and power independently and not under the direction or control of any person or authority.
25. Section 8(2) of the [Sexual Offences Act](#) prescribed mandatory minimum sentence of life imprisonment while Section 20(1) of the [Sexual Offences Act](#) gave the trial court to exercise discretion from between ten (10) years to life imprisonment. In view of its prosecutorial powers, the DPP could be faulted for choosing whichever provision of the law it found would best dispense justice for a child who was aged eleven (11) years at the time of the offence.
26. In the premises foregoing, this court found and held that Amended Ground of Appeal No (1) was not merited and the same be and is hereby dismissed.

## **II. Proof Of Prosecution's Case**

27. Amended Grounds of Appeal Nos (3) and (4) were dealt with under this head.
28. In determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases was proof beyond reasonable doubt, this court considered the ingredients of the offence of defilement.
29. It is now settled that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and identification of the perpetrator as was held in the case of *George Opondo Olunga vs Republic* [2016] eKLR. This court dealt with the same under the following distinct and separate heads.

### **A. Age**

30. The Appellant did not submit on this issue. However, he admitted that PW 1 was four (4) years old.



31. On its part, the Respondent placed reliance on the case of *Musyoki Mwakavi vs Republic*[2014]eKLR where it was held that in a charge of defilement, age of the minor could be proved by medical evidence, baptism card, school leaving certificates, by the victim's parents and/or guardians, observation or common sense. It submitted that No 101487 PC Hebert Okumu (hereinafter referred to as "PW 4") testified that PW 1 was four (4) years old and produced Post-natal Care Book as exhibit which showed her date of birth as 20<sup>th</sup> November 2016.
32. This court had due regard to the case of *Kaingu Elias Kasomo vs Republic* Criminal Case No. 504 of 2010 (unreported) where the Court of Appeal stated that the age of a minor in a charge of defilement could be proved by medical evidence and documents such as baptism cards, school leaving certificates. It can also be proved by the victim's parents or guardian and observation or common sense as was held in the case of *Musyoki Mwakavi vs Republic*(Supra).
33. PW 4 tendered in evidence the Post-natal Care Book dated which showed that PW 1 was born on 20<sup>th</sup> November 2016. The incident herein occurred on diverse dates the last date being 19<sup>th</sup> February 2021. That meant that PW 1 was aged four (4) years.
34. As the Appellant did not challenge the production of the aforesaid Post-natal Care Book and/or rebut this evidence by adducing evidence to the contrary, this court was satisfied that PW 1's age was proven using medical evidence and that she was a child at all material times.

## **B. Identification**

35. The Respondent submitted that the Appellant was well known to PW 1 as he was her grandfather and they lived in the same homestead and she could therefore not have been mistaken as to his identity. It pointed out that that was evidence of recognition which was more reliable and weightier than that of identification of a stranger as was held in the case of *Anjononi & Others vs Republic* (1976-80) 1 KLR. It added that there was proper identification as there was proof of prior knowledge of the Appellant.
36. As the Appellant admitted that he was PW 1's grandfather, the ingredient of identification was proven beyond reasonable doubt as the same was by recognition. The question of whether he committed the offence was a different matter altogether.

## **C. Penetration**

37. The Appellant invoked Section 2 of the *Sexual Offences Act* and submitted that the evidence on record did not prove that he inserted his penis in PW 1's vagina as PW 1 stated that he pierced her with a needle. He argued that the contents of the P3 Form did not support the evidence in chief of the Clinical Officer, Paul Muturi Dungu (hereinafter referred to as "PW 3"). He blamed PW 3 for misdirecting the court.
38. He contended that a doctor's medical opinion must flow from the examination findings but in this case, PW 3's findings were not supported by his examination findings but by the history given by PW 1. He was emphatic that the medical evidence did not establish that she was defiled and as she stated that she was pierced by a needle.
39. He placed reliance on the case of *Arthur Mshila Manga vs Republic*[2016]eKLR where it was held that the medical evidence on record did not establish that the minor was defiled.
40. He asserted that the Trial Court failed to consider his defence of alibi alongside the Prosecution evidence. In this regard, he invoked Section 107(1) and (2) of the *Evidence Act* and cited the case of *Victor Mwendwa Mulinge vs Republic* (eKLR citation not given) where it was held that the burden of



- proving the falsity of the appellant's defence lay on the prosecution and that that burden never shifts to the defence as also held in *Karanja vs Republic*[1983]eKLR. He pointed out that even if he raised his defence of alibi for the first time in court, the Prosecution was supposed to invoke Section 309 of the *Criminal Procedure Code* and seek leave to adduce further evidence in reply to rebut his defence of alibi.
41. It was his contention that this case was in bad faith as he had been framed by PW 1's aunt, one M A who was the complainant but was never called as a witness during trial. He further relied on the case of *Ouma vs Republic*[1986]eKLR where it was held that the court in evaluating the prosecution's case, it must have in mind the accused person's defence.
  42. The Respondent also relied on Section 2 of the *Sexual Offences Act* and placed reliance on the case of *Mohammed Omar Mohammed vs Republic*[2020]eKLR where it was held that the key evidence relied by the courts in rape cases and defilement to prove penetration was the complainant's testimony which was usually corroborated by the medical report presented by the medical officer.
  43. It submitted that PW 1's evidence was without doubt understood to mean that the Appellant penetrated her vagina and therefore proved the ingredient of penetration. It added that the evidence of PW 3 corroborated that of PW 1. It asserted that it was also important to note that in sexual offences cases the victim was normally the only witness as the offence is committed in secrecy and that the Trial Court warned itself of such evidence.
  44. It placed reliance on the case of *Charles Wamukoya Karani vs Republic Criminal Appeal No 72 of 2013* (eKLR citation not given) where it was held that the critical ingredients forming the offence of defilement were age of the complainant, proof of penetration and positive identification of the assailant. It was emphatic that all the ingredients of defilement were proved in this case beyond reasonable doubt.
  45. It pointed out that the Appellant's assertion that the Trial Court did not consider his defence was without merit as he was given an opportunity to defend himself pursuant to Section 211 of the *Criminal Procedure Code* where he testified on oath and called witnesses to support his case but did not rebut the Prosecution's evidence.
  46. PW 3 observed that PW 1 had a whitish discharge, a ruptured hymen and injuries on her vagina. He also pointed out that she had difficulties in walking. He concluded that a penis was used to inflict injuries. He produced P3 Form, Post Rape Care (PRC) form and treatment notes as exhibits in this case.
  47. The Appellant testified that on the material day, he left home in the morning for work and on his way back he was arrested. He denied having committed the offence. Timina Kweyu (hereinafter referred to as "DW 1") and Evachi Kwenya (hereinafter referred to as "DW 3") corroborated his evidence.
  48. After carefully analysing PW 1's evidence, her language of being pierced with a needle was ambiguous. While it could have been imagery of a penis, the fact that she stated that the Appellant removed it from his shoe and pierced her with it on the thigh created doubt in the mind of this court on the circumstances surrounding this matter. There was no indication where the bleeding was. This was a gap that the Prosecution ought to have probed further to establish if penetration really took place.
  49. Notably, DW 3 who was PW 1's father was categorical that if the Appellant had defiled PW 1, he would have known. The Appellant was his father. No family member testified regarding PW 1's defilement. Mary Ayuma who PW 2 said was the one who reported the incident was a crucial witness but she was never called to testify. DW 3 accused the said Mary Auma who was his aunt as the one who instigated the complaint. It was the considered view of this court that the absence of her evidence led this court to further entertain doubt as to whether there was more than met the eye in this matter.



50. Weighed against the evidence that was adduced by the Prosecution witnesses, this court found that the Prosecution had not proven that the Appellant defiled PW 1 on the material date to the required standard, which in criminal cases, was proof beyond reasonable doubt. It was irrespective that OW 3 had found that she had been defiled. The question of who did it was pertinent but had not been established herein.
51. In the premises, Amended Grounds of Appeal Nos (3) and (4) were merited and the same be and are hereby dismissed.

### **Disposition**

52. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal dated 27<sup>th</sup> April 2023 that was lodged on 28<sup>th</sup> April 2023 was merited and the same be and is hereby allowed. The conviction and sentence be and are hereby set aside and/or vacated as they were both unsafe.
53. It is hereby directed that the Appellant be and is hereby released from custody forthwith unless he be held for any other lawful cause.
54. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 30<sup>TH</sup> DAY OF APRIL 2025**

**J. KAMAU**  
**JUDGE**

