



REPUBLIC OF KENYA



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

**JKM v Republic (Criminal Appeal E008 of 2021)
[2025] KEHC 7063 (KLR) (28 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7063 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL APPEAL E008 OF 2021
JK NG'ARNG'AR, J
MAY 28, 2025**

BETWEEN

JKM APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against both the conviction and the sentence arising from sexual offence case S. O No. 16 of 2019 in the PM's Court at Kerugoya by Hon. G. Kirugumi (SRM) a judgment delivered on 13/5/2021)

JUDGMENT

1. JKM, the Appellant herein, was charged with the offence of defilement contrary to Section 8(1) & 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of this offence were that on 21/12/2019 at [Particulars withheld] village in Kirinyaga County, he unlawfully and intentionally caused his penis to come into contact with the anus of B.M.G a child of 11 years.
2. The appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of the alternative charge were that on 21/12/2019 at [Particulars withheld] village in Kirinyaga County, he unlawfully and intentionally caused his penis to come into contact with the anus of B.M.G a child of 11 years.
3. The Appellant pleaded not guilty to the said charge and the matter proceeded to full trial with the prosecution calling a total of seven (7) witnesses in support of its case against the Appellant.
4. It was the prosecution's case that on 21/12/2029 at around 1:00pm, the minor was swimming at Rutui river together with other boys from his school. He was in shorts and vests when swimming and could see the appellant walking to and fro. That after swimming, the minor was left behind wearing his trouser when the appellant tripped him, removed his trouser and dragged him to a bush. That the appellant pushed the minor to the ground, stepped on his left leg and undressed. He then ordered



- the minor to sleep facing upwards and when the minor resisted, the appellant slapped him. He then ordered him to lick his penis and hit him again in the head using his fist upon resistance.
5. That the appellant forced his penis into the minor's mouth causing him to vomit and the appellant ordered the minor to clean him up using his shorts which he did. The appellant then rolled the minor over and inserted his penis into his anus causing the minor to scream in pain but the appellant boxed him into silence. That the appellant also made the minor lick his anus and the minor complied due to the appellant's violence.
 6. The minor then put on his shorts and ran away when the accused fell asleep leaving behind his sweater and trouser. That he met his friend on the way and told him that he had been raped and they went back to the scene in search of the appellant but never found him. That out of fear, the minor did not inform his father as he feared being punished for swimming at the river. It was not until the minor's uncle interrogated him on 25/12/2019 that the minor reported what had happened and they went to the police station together with the minor's father.
 7. That the minor was taken to Kerugoya County Referral Hospital on the same day for treatment. The minor identified the appellant at the police station and had described his hair style as a mo-hawk with beads and added that he had seen him before as he went to school at Mukithi area. The minor had also described him sufficiently to his uncle. It was also the prosecution's case that the minor had seen blood stains in the anal region when he passed stool and that the minor led the police to the scene and they recovered his clothes.
 8. After full trial, the Appellant was found guilty, convicted accordingly, and sentenced to life imprisonment.
 9. The Appellant has now come before this Court faulting the trial court for the aforesaid decision based on the following grounds: -
 - i. That the learned magistrate erred in law and in facts by not considering that no direct evidence was adduced by the prosecution.
 - ii. That the learned magistrate erred in law by not considering my issue of charge sheet amendment.
 - iii. That the sentence imposed on me was harsh and excessive.
 - iv. That the trial magistrate failed to consider that the prosecution failed to prove their case beyond reasonable doubt.
 10. The Appellant thus prayed that the appeal be allowed and the conviction be quashed and sentence to be set aside and he be set at liberty.
 11. This Court directed that this Appeal be canvassed by way of written of submissions. On record are the respondent's submissions dated 3/7/2023. The appellant's undated submissions were also on record. I have considered the respective submissions by both parties and the entire record before court.
 12. I am mindful that this is a first appeal. As a first appellate court, this Court is obligated to re-evaluate the evidence and make its own conclusions while bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See the cases of *Pandya v R* {1957} EA 336;



Ruwalla v R {1957} EA 570 and Kisumu Criminal Appeal No. 28 of 2009 David Njuguna Wairimu v. Republic [2010] eKLR where the Court of Appeal held that: -

“the duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusion on that evidence without overlooking the conclusion of the trial court. There are instances where the first appellate court may depending on the facts and circumstances of the case, come to the same conclusion as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

13. The appellant amended his grounds of appeal vide his submissions and reduced them to: -
 1. Whether the ingredient of penetration was properly proved.
 2. Whether identification was proved.
 3. Whether there were contradictions and inconsistencies.
 4. Whether the burden of proof was shifted.
14. The appellant submitted that owing to the nature of the arrest, his case was that of mistaken identity and thought he had been arrested for allegedly raping a woman, the woman denied that he raped her and instead of release, he was charged with the instant charge sheet and framed.
15. On penetration, the appellant submitted that according to the medical evidence, there was no obvious injury on the anal region and no abnormality was detected. That though occult blood was seen in the minor's stool, other tests were not taken to rule out other sicknesses that would result in blood in the stool. That PW1 was not a credible witness as he testified that he was not attended on the day he was taken to hospital due to long ques, and was examined on 26/12/2019.
16. That this contradicted the medical officer's testimony who testified that the minor was examined on 21/12/2019. That the medical officer also examined one Samson Karuguri Gakuru yet in the charge sheet the accused was BMG, a different person. That there was thus doubt whether the P3 form and PCR produced were correct as the charge sheet indicated a different person. That though the medical officer explained, the confusion that occurred was a result of trying to frame the appellant.
17. On identification, the appellant submitted that PW2 never saw the appellant raping the minor and only testified that he saw him beating the minor and thought it was joke. That PW1's identification was not properly identified as the minor identified the appellant at the police station and he did not lead to the arrest of the appellant. That dock identification was also not proper and no identification parade was carried out to confirm that the appellant attacked and defiled the minor. That the minor's physical description of the appellant to PW3 was also not proper as he did not mention the type of clothes the appellant was wearing. That the reliance of the mo-hawk hair style should not have been acted on unless all possibilities of mistaken identity were eliminated and the court was convinced that the evidence was water-tight.
18. The appellant further submitted that the contradictions and inconsistencies went to the root of the case and the prosecution did not proof the case to the required standards. That the conviction was not justified and the trial court shifted the burden of proof to the appellant. That there was no cogent, direct and compelling evidence to convict the appellant.



19. On the part of the Respondent, it was submitted that the prosecution proved its case against the Appellant for the offence of defilement to the required legal standard of beyond reasonable doubt.
20. On identification, it was submitted that the minor's evidence was unequivocal that on 21/12/2019 he was swimming at River Rutui with other boys from [Particulars Withheld] Primary School and he saw the appellant moving back and froth near where he was. That as he was dressing to follow the other boys, the appellant attacked him and he explained in details the ordeal he suffered at the hands of the appellant and he was able to identify him in the dock.
21. On age, it was submitted that the minor was born on 27/3/2007 and the minor was able to identify his birth certificate which was produced by PW7, the police officer.
22. On penetration, it was submitted that PW6 proved that there was penetration after he examined the minor on 25/12/2019. That occult blood was found in the minor's stool and the minor was advised to sit on salted water and bath.
23. Issues for Determination
24. Having considered the record of appeal as well as the submissions by parties, I discern the following issues for determination: -
 - a) Whether the offence of defilement was proved;
 - b) Whether there were contradictions and inconsistencies; and
 - c) Whether the sentence was harsh and excessive

Whether the offence of defilement was proved

25. Section 8(1) of the *Sexual Offences Act* (herein The Act) provides that: -

“a person who commits an act which causes penetration with a child is guilty of an offence termed defilement”. While 8(3) states: a person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”
26. In the case of *George Opondo Olunga v Republic* (2016) eKLR the ingredients for the offence of defilement were set out as: -
 - a. Proof of the age of the victim;
 - b. Proof of penetration or indecent act;
 - c. Identification of the perpetrator.
27. On the issue of age, it is trite that the age of the victim of defilement is essential element because defilement is a sexual offence committed against a child who under the Children's Act is a person below the age of 18 years. In addition, the age of the child is an aggravating factor for purposes of determining the sentence to be imposed as per the penalty clauses in the *Sexual Offences Act*. The younger the child the more severe the sentence.
28. In this case, PW1 (the minor) told the trial court that he was born on 27/3/2007 and marked his birth certificate as MF1. PW7 produced the birth certificate as PEXH3 and the same was proof that the minor was aged 12 years at the time of the alleged offence which occurred on 21/12/2019. As such, the trial court cannot be faulted for concluding that the ingredient of age had been met as prescribed



in Section 8(3) of The Act. The Court of Appeal in *Edwin Nyambogo Onsongo vs. Republic* (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement: -

“... 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.”

29. I find that this ingredient was sufficiently met.

30. On penetration, Section 2 of the *Sexual Offences Act* define penetration as follows: -

“The partial or complete insertion of the genital organ of a person into the genital organs of another person.”

31. Section 2 of *Sexual Offences Act* describes genital organs as: -

“genital organs” includes the whole or part of male or female genital organs and for purposes of this Act includes the anus”

32. On standard of proof, Hon. R. Nyakundi J. in *Republic vs. Ismail Hussein Ibrahim* [2018] eKLR stated: -

“...the prosecution has the duty to prove all the ingredients of the offence beyond reasonable doubt and there is no burden on the part of the accused to prove his innocence at any one given time. The law only permits very few statutory exceptions where an accused person can be called upon to give an explanation in rebuttal. However, this does not shift the burden of proof from the prosecution”

33. The Court of Appeal in *Chila v. Republic* (1967) E.A 722 articulated this position and held that: -

“The Judge should warn ... himself of the danger of acting on uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless court is satisfied that there has been no failure of justice.”

34. It then follows that the testimony of a minor, even of uncorroborated, is sufficient to convict a person with the charge of defilement where the court is satisfied that the minor is telling the truth.

35. On the issue of penetration, the minor was categorical that on 21/12/2019, he was swimming at Rutui river with other boys from school and that he saw the appellant wondering around the area. That he was swimming in a short and vest and once done, the other boys left him as he was wearing his trousers. That it was at that point that the appellant approached him and tried to lure him to go back to swim and when he declined, the appellant offset an attack on the minor that led to eventual defilement. The minor was elaborate on how the entire ordeal went out, remembering the appellant’s violence during the offence.

36. He testified that the appellant violently forced him to lie facing upward and lick his penis. That the appellant forced his penis inside the minor’s mouth which caused him to vomit. The appellant then



rolled him over and inserted his penis inside his anus and he scream in pain causing the appellant to box him into silence. The appellant was to then force the minor to lick his penis and anus.

37. The minor also explained how he ran away after the appellant fell asleep and he only wore his short leaving his sweater and trouser behind out of fear that the appellant would wake up. He met his friend Maina, told him that he had been raped and took him back to the scene while armed with sticks only to find that the appellant had left. He testified that he did not disclose the ordeal to his father out of fear of being beaten for going to the river. That however on 25/12/2025, he had visited his uncle and told him what transpired. That the said uncle called his father and explained to him what the minor had said and all three of them went to report the matter at the police station. That they were sent to Kerugoya County Referral Hospital for examination.
38. The minor added that on 27/12/2025, his father informed him that the offender had been arrested and when the minor went to the police station, he identified the appellant as the one who raped him. The minor narrated how he took the police to the scene where they found the vomit and the minor's sweater and trouser which he marked as MF1 2. He added that there was blood coming out of his anus after going for a long call.
39. Even without further corroboration, I note that the minor was sure of what he saw and he gave a detailed elaboration of the day without inconsistencies. He gave a clear narration of how the appellant defiled him including that he beat him up, forced his penis in his mouth, inserted his penis in his anus and forced the minor to lick his penis and his own anus after defiling him and the minor cooperated out of fear. On that evidence alone, if find that a conviction of guilt would have been safely entered as the minor was truthful as to what he experienced at the hands of the appellant.
40. However, there was other evidence before the court that collaborated the minor's evidence. PW2 also testified that on 21/12/2019 at around 1:00pm, he was also swimming at Rutui River where he found other boys swimming. That the minor also joined them and the appellant approached them. That he asked whether he could join them in the river and they all swim naked as they would otherwise have to wait for their clothes to dry. That they declined and he went to the bridge then went back from where he came from and then came back. PWW testified that the appellant tried to beat them as they refused to remove their clothe.
41. That the minor had forgotten his trouser and he went back to get it. He testified that as he went away and, on the hill, he saw the appellant beating the minor and he thought it was a joke and went away. He also testified that he had seen the appellant before at the river on another occasion when he was with another boy and the appellant had still requested them to swim naked and they declined and left.
42. The evidence of PW2 corroborated the minor's evidence that on the fateful day, they were swimming at the river and they had seen the appellant roaming around the river. PW2 also corroborated that the appellant beat up the minor as testified. There was also the testimony of PW3, PW4 and PW7, and their narration of what the minor told them was similar to what the minor testified in court thus the minor's evidence was consistent.
43. I also note that PW7 testified that the minor led them to the scene and he indeed found the vomit still on the ground, as well as the minor's trouser and t-shirt. The minor had marked the clothes for identification and PW7 produced them as exhibit 2 and 3. This collaborated the minor's testimony that he vomited when the appellant forced his penis into the minors mouth, and that the minor ran away leaving behind some of his clothes.
44. There was also the medical evidence on record which further corroborated the minor's evidence. PW6, a clinical officer from Kerugoya Police Station testified that he examined the minor on 25/12/2019



and found that the minor had tenderness on the floor of the mouth under the tongue. Though the anal area was normal, there was occult blood in the minor's stool corroborating his testimony that he had a burning sensation in the anal region when passing stool and he could see blood after going for a long call. PW6 explained that the burning sensation as well as blood in the stool indicated that there was an injury inside the anal orifice which had not healed noting that the offence occurred four days prior to the offence.

45. Though there were no visible injuries on the minor's anal region, I note that four days had since lapsed since the offense and it was possible that no visible injuries could be seen. In Court of Appeal in *Geoffrey Kioji v Republic*, NYR Crim. App. No. 270 of 2010 (Nyeri) where it was stated that: -

“Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”

46. Cumulatively, I find that the medical evidence collaborated the minor's evidence of penetration in addition to the testimonies of PW2, P34, PW4 and PW7. I find that the ingredient of penetration was proven to the required standard.

47. On identification, though the appellant raised the defense of mistaken identity through his submissions, I find that he was positively identified. PW1 testified that he had seen the appellant before the incident happened thus the appellant was not a stranger to him and was recognizable. The minor testified that he described the offender well to his uncle, PW3. I do note that the incident happened during the day at around 1:00pm and lasted a while and in close proximity and the minor was able to clearly see and interact with the offender. He had also seen the appellant before and was bale to describe him in detail four days past the offense. This circumstances do not allow for mistaken identity. On identification in *R. vs. Turnbull & Others* [1973] 3 ALLER 549 it was held that:

“...The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation? At what distance: In what light: Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?”

48. PW3 similarly testified that the minor described the offender as medium sized, light and had a hair style on the head with beads. That he called the assistant chief to report the matter and upon description, the assistant chief was able to recognize him as he had received a different report regarding the appellant and he knew his home. This was confirmed by PW5, the area chief, who testified that he was able to identify the appellant from that description as he had been previously reported for allegedly raping an old woman in the same bush.
49. PW4 testified that when they went to the appellant's home, they found him there and he fit the description given by the minor and he had not changed the hair style. That he was also medium size



and brown. More importantly, PW2 had also positively identified the appellant. He testified that he had seen him before at the river and that the appellant had even tried to persuade him and his friend to swim naked but they declined and left. PW2 also testified that even on the material day of the offense, he had interacted with the appellant as he had again tried to persuade them to swim naked and he threatened to beat him.

50. PW2 testified that the person he talked to had a mo-hawk style, beads and earring. This collaborated the minor's testimony as well as the other witnesses including PW3, PW4 and PW5. Further, PW2 was categorical that he saw the appellant beating the minor herein. I do note that at no point did the appellant deny that he was at the river on the material day and time.
51. From the foregoing, there was overwhelming proof that the appellant was put on the scene of the incident by a live witness and that he was positively identified by both PW1 and PW2. I do note that it is PW1's description of the appellant that led to his arrest, and when called to the police station, he confirmed that the person who had been arrested was the same person that had attached and defiled him. I also emphasize that the appellant was not inly identified but was recognized by both PW1 and PW2 who had seen him previous to the incident.
52. I do find and hold that the ingredient of identification was proved to the required standard.
53. There was nothing to show that the minor was framing the appellant and there was no grudge that had been established to cast doubt on this court's mind on the minor's intention. The defense of mistaken identity was out ruled by the prosecution's strong case on positive identification. Further, the prosecution's case painted a picture of a man who preyed on male minors as they swam in the river and eventually got a chance to defile one of them in a horrific and violent manner. The intent to commit the act was there and I have no reason to doubt the minor and there is nothing to support the appellant's defense.

Whether there were contradictions and inconsistencies

54. Though the appellant submitted that the prosecution's case was marred with inconsistencies and contradictions, a careful consideration of the entire record revealed none of this and there was no justification to interfere on the trial's court conviction. Though the charge sheet initially referred to the minor herein as BMG, PW7 explained that the same was a typing error and the charge sheet had been amended. I do not find any contradictions and inconsistencies that go to the root of the case such that they would have an effect on the conviction herein.
55. The upshot is that the prosecution proved the ingredients of the offense to the required standard and the trial court's conviction of guilt on both counts is hereby upheld.

Whether the sentence was manifestly harsh and excessive

56. On the sentence meted out against the Appellant, I equally find that the trial court did not err as Section (3) states: -

“ a person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”



57. As regards the second count, Section 11(1) of the Act states that: -

“Any person who commits an indecent act with a child is guilty of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.”

58. The appellant was convicted and sentenced to thirty years in count one and ten years in count two concurrently. I find the sentence to be sound and the same is upheld.

59. The upshot is that the appeal is found to be without merit and the trial court’s decision both on conviction and sentence is hereby upheld.

60. It is hereby ordered that the time the Appellant spent in custody during trial be taken into consideration when computing his sentence as provided in Section 333(2) of the [Criminal Procedure Code](#) Cap 75 (Laws of Kenya).

It is so decreed.

JUDGEMENT DATED AND SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF MAY, 2025.

.....

J.K.NG'ARNG'AR

JUDGE

Judgement delivered in the presence of the Appellant and Mamba for the Respondent. Siele/Mark (Court Assistants).

