



**Njiraine v Republic (Criminal Appeal E007 of 2024)
[2025] KEHC 7065 (KLR) (28 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7065 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL APPEAL E007 OF 2024
JK NG'ARNG'AR, J
MAY 28, 2025**

BETWEEN

DANIEL MURIMI NJIRAINÉ APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant, Daniel Murimi Njiraine, was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act*. The particulars of the offence were that on 4th February 2023 at [Particulars Withheld] Kirinyaga East sub county within Kirinyanga County, the appellant caused his penis to penetrate the vagina of YNW a child aged 14 years old. He also faced an alternative count of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. The particulars of the offence were that on the same day and place, the appellant caused his penis to come in contact and touched the vagina of YNW a child aged 14 years.
2. The appellant faced another count of defilement contrary to section 8 (1) as read with section 8 (4) of the *Sexual Offences Act*. The particulars of the offence were that on 4th February 2023 at [Particulars Withheld] Kirinyaga East sub county within Kirinyanga County, the appellant caused his penis to penetrate the vagina of JNM a child aged 15 years old. In the alternative, he was charged with committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. The particulars of the offence were that on the same day and in the same place, the appellant caused his penis to penetrate the vagina of JNM a child aged 15 years old.
3. The appellant pleaded not guilty to all counts when he was arraigned to take plea. After full trial, the appellant was convicted of both offences of defilement. He was sentenced to 15 years imprisonment on each count. The sentences were directed to be served consecutively.



4. The appellant is discontented with those findings. He filed his petition of appeal dated 8th February 2024 that raised six grounds disputing the findings of the learned magistrate. In summary, the appellant challenged the judgment by stating that the prosecution failed to discharge its burden of proof to the required standard. As a result, the trial magistrate convicted him on insufficient, contradictory and inconsistent evidence. He complained that the learned magistrate failed to consider his defence. Finally, he protested that the sentence meted out to have run concurrently rather than consecutively. For those reasons, the appellant prayed that his appeal be allowed, conviction quashed and the sentence be set aside.
5. The appeal was canvassed by way of written submissions. The appellant relied on his written submissions dated 17th March 2025 to submit that PW1 and PW2 could not explain why they opted to sleep away from home when they were very much afraid of the consequences of coming home late. They further could not justify why they didn't go home if they had the house keys.
6. He further pointed out significant contradictions between the two witnesses insofar as the identification of the appellant was concerned. While PW1 denied knowing him, PW2 testified that she was introduced to him by PW1. Another contradiction was to be found in how they met the appellant. On one hand, PW1 stated that they met at Kerugoya town while PW2 testified that they met at Kibingo town. That PW2 testified that they found no one home when they came back but PW3 stated that he was home and left the house at 8:00 a.m.
7. He propositioned that a visit to the crime scene ought to have taken place to establish the credibility or otherwise of the prosecution's defence. He questioned PW1's ability to tell the truth as she initially denied that the offence took place but later changed her mind after being shown her statement.
8. The appellant submitted that the complainants had a tendency to run away from home. That is why the medical evidence revealed that the hymen was old and there was no indicator of freshness. The appellant continued that his defence was cogent. The court erred in shifting the burden of proof to him instead of finding that the prosecution's case was inconsistent. Finally, he submitted that the imposition of a consecutive sentence was excessive. He prayed that his appeal be allowed.
9. The respondent vehemently opposed the appeal. In its written submissions dated 19th August 2024, it submitted that the prosecution had proved beyond reasonable doubt that the appellant had committed the offences he was convicted of. That all the witnesses corroborated the evidence as to establish that the appellant was guilty. Lastly, on the sentence, the respondent submitted that the consecutive sentence was legally tenable and justified. That the trial magistrate properly exercised her jurisdiction. For the reasons stated, the respondent prayed that the appeal be dismissed.
10. As a first appellant court, I am duty bound to re-evaluate, re-consider and re-analyse the evidence on record and arrive at my own independently conclusion. In so doing, I must bear in mind that I did not have the advantage of seeing the witnesses and hearing them give their testimony. [See *Okeno vs Republic* (1977) EA 32]
11. The prosecution marshalled six witnesses in a bid to establish that the appellant committed the offences that he was charged with. The evidence is as follows: PW1 JN, one of the complainants, testified that she was a sixteen-year-old class 8 student at [Particulars Withheld] born on 28th September 2007. Her evidence was that on 4th February 2023, she left home at 1:00 p.m. and visited her friend YN PW2. She had gone to school that morning. She arrived PW2's at 1:30 p.m. and stayed there until 7:00 p.m. They then left the house and took a walk to Kibingo where they met the appellant seated outside a shop. She then testified that they met at Kerugoya town.



12. The appellant inquired why they were walking late at night and urged them to go home. PW1 had never known the appellant before that night. He then asked them to sleep at his house to which they agreed. They arrived his house at 8:30 p.m. and left the next morning at 6:00 a.m. No one saw them. On leaving the appellant's home, PW1 and PW2 went to PW2's home where they showered and went to church. They did not find anyone at home and did not meet their parents. They also did not tell anyone what had transpired.
13. Her evidence was that during the sleep over at the appellant's home, they slept in his bed. The appellant's parents were home but were unaware of PW1 and PW2's presence. She then stated that she slept in bed with the appellant while PW2 slept at the bottom. There was no sexual intercourse. PW1 later confessed that she had run away from home.
14. Later on, PW1 was taken to hospital to confirm if they had sexual relations. She was again emphatic that it did not happen. They were later taken to the police station. She added once more that it was not true that she slept with the appellant. The reason they went to the police station was because she ran away.
15. When PW1's statement was shown to her during her examination in chief, she confirmed that it was hers but could not read the handwriting. That it stated that she had sexual intercourse with the appellant together with PW2 in turns and it was true. During the ordeal, PW1 did not scream. None of them tried to stop the appellant. That the lights were off at that time. She maintained that she was telling the truth.
16. PW2 stated that she was a form 1 student at [Particulars Withheld]. She was born on 22nd February 2008. On 4th February 2023, she was visited by PW1 at their home. She did not go to school that morning. They left the house at 6:00 p.m. to buy oil. On return, PW2 found her father home and out of fear for being beaten for returning home late, PW2 agreed to run away with PW1. Her evidence was that they met Susan who refused to host them because they had run away from home. So, they went to Kibingo market; not Kerugoya. She stated that the appellant whistled inciting the attention of PW1. According to PW2, PW1 told her that the appellant "ni bae wake". This was the first time PW2 met the appellant.
17. The three walked together; though according to PW2, PW1's hand was held by the appellant. PW1 informed PW2 that they would sleep at the appellant's home since they had no place to sleep. They arrived at around 10: 00 p.m. She testified that they all slept in the bed; the appellant slept between them. Her evidence was that the appellant has sexual intercourse with them in turns. They did not scream and did not fight.
18. The next morning, PW1 and PW2 left. They bumped into the appellant's mother and sister. They were asked who among them was the appellant's girlfriend. On their way home, they bumped into PW2's father and PW1's mother at around 11:00 a.m. They did not tell anyone about what had transpired. When they arrived at PW2's home, there was no one there. They changed and went to church. They were later taken to the police station. PW2 recalled that she wanted to leave that night but she was advised by the appellant to leave the next morning. She stated that she was telling the truth.
19. PW3 AWK, PW2's father testified that on 4th February 2023, on his return home, he did not find his daughter. He confirmed that she was born on 22nd February 2008. He looked for her from 6:00 p.m. to 10:00 p.m. but could not trace her. He then reported her disappearance the following day at the police station. He clarified that she was not back home by 8: 00 a.m. when he went to continue searching for her. PW3's evidence was that he met her with mama Nyakio and took them to the police station. They



- stated that they did not know the appellant's name but PW3 knew him. He recalled that it was the first time she ran away. He also stated that he did not see her when she came home that day.
20. PW4 FW testified that on 4th February 2023, she left with her daughter PW1 who went to school as she retreated to work. On returning home, she did not find her. She also confirmed that PW1 did not return home that night. She looked for her but was not successful. She did not report to the police station that her daughter was missing. The next day, PW4 saw her at Kibingo with PW2. PW3 then took the minors to the police station as soon as he found them.
 21. PW5 Hezron Macharia Maina, a clinical officer at Kerugoya County Referral Hospital testified that he received a request from the police officers concerning the examination of PW1 on claims of defilement the previous night. He observed that she had an evasive demeanour and was avoiding to answer some questions clearly. She admitted and denied that defilement took place. He observed that her hymen was broken, perforated and old; not fresh. There were no other injuries. There was a foul-smelling whitish discharge. There was also the presence of epithelial cells. He filled the P3 form on 6th February 2023 that was produced in evidence.
 22. PW5 also produced the outpatient treatment notes filled by his colleague Humprehy Ngugi working in the same hospital. He recognized his signature and handwriting. He also produced the lab test and the PRC form that he filled. His conclusion from the foul smell was that there was penetration and could be an exchange of body fluids.
 23. PW5 also saw PW2 on 6th February 2023 on allegations of defilement. PW5 stated that PW2 informed her that she had been sexually assaulted by a person well known to her on 4th February 2023. He confirmed that her hymen was broken and old. There were no other obvious injuries. She had a cream-whitish discharge emanating from her vagina. She also had a high number of epithelial cells. He filed the P3 form dated 6th February 202. He also relied on the lab notes and treatments notes from Mr. Lincoln Mwangi who was his colleague. He was conversant with his handwriting. He produced the P3 form, treatment notes and lab tests. He concluded that the discharge showed exchange of body fluids and a broken hymen; indicative of sexual penetration from defilement.
 24. PW6 PC Egesa Justus Wanjala, the investigation officer, recalled that on 5th February 2023 at 6:00 p.m., two parents namely PW3 and PW4 came with their daughters PW2 and PW1 respectively. They reported that the two went missing after leaving school on 4th February 2023. They did not know their whereabouts. That they later met the two at midday on 5th February 2023. PW6 interrogated the minors, recorded witness statements and gathered evidence. The appellant was later arrested. PW6's evidence was that the appellant did not resist the arrest and admitted to have committed the offence but that was not captured in their records. She produced the minors' birth certificate in evidence. Her evidence was that the minors knew him very well but did not know his name.
 25. At the close of the prosecution's case, the trial court found that the prosecution has established a prima facie case against the appellant. He was placed on his defence. His evidence was that he was at work selling meat on 4th February 2023 and returned home to sleep. He denied committing the offence and stated that he met the minors the first time at the police station on 5th February 2023. He maintained that he was wrongly implicated and questioned why it took long for the police to arrest him.
 26. The appellant also called DW2 Purity Mumbi Njiraini to the stand; the appellant's mother. Her evidence was that he was a meat seller at Kibingo. He was home on 5th February 2023 that night and slept after eating. The next morning, she maintained that she did not see him in the company of any minors. She however stated that she would not know if the appellant would have any visitors since they live in different houses.



27. The following crucial elements must be established in order for a conviction to be sustained: the age of the complainant, penetration and the identity of the perpetrator. On the age of the complainant, PW1 testified that she was born on 28th September 2007. Her birth certificate was adduced in evidence. At the time of the offence, she was approximately 15 years 5 months old. PW2's evidence was that she was born on 22nd February 2008. Equally, her birth certificate was adduced in evidence. At the time of the offence, she was 15 years of age. I find that age of the minors was proved beyond a shadow of a doubt and I therefore see no reason to interfere with those findings.
28. The next ingredient is that of penetration. Section 2 of the *Sexual Offences Act* defines penetration to mean the partial or complete insertion of the genital organs of a person into the genital organs of another person. The evidence of PW3 was that the hymens of the complainants were broken and old. They were not fresh. There were no injuries but a foul-smelling whitish discharge; indicative of penetration. His conclusion was that there was the likelihood that there was exchange of body fluids. Based on the medical evidence, I find that penetration was established beyond reasonable doubt.
29. The last ingredient is that of the identity of the perpetrator. The summary of the evidence of the prosecution has been ably captured where both PW1 and PW2 stated that they were both sexually assaulted by the appellant on the night of 4th February 2023. The following day, they were apprehended by their parents who took them to the police station.
30. Section 124 of the *Evidence Act* provides that an accused person shall not be liable to be convicted on the evidence of the alleged victim without corroboration provided that in cases involving a sexual offence, the only evidence of the alleged victim shall be received without corroboration and can convict the accused person if the court is satisfied that the alleged victim is telling the truth. Were PW1 and PW2 truthful witnesses?
31. According to PW1, she did not know the appellant as at 4th February 2023; a fact refuted by PW2 who stated that while she had never met him before, the appellant was well known to PW1 as her lover. Did PW1 know the appellant prior to the offence or was PW2 lying? Conversely, is it possible that PW1 knew him and was the one lying in court.
32. PW1 then stated that they had gone to Kerugoya after stating that they were in Kibingo, to which PW2 stated that they were in Kibingo. In the same vein, PW2 stated that after running away from home, they bumped into Susan who refused to accommodate them for the night. I think this was a crucial event that occurred that night; something that PW1 never mentioned in her evidence. If they were indeed together, it is my finding that they ought to have both corroborated their evidence in this aspect. We also cannot tell to conclusion whether they went to Kibingo or Kerugoya.
33. At her initial testimony, PW1 was categorically ardent that there was no sexual encounter the two minors had with PW2. She only changed her narrative when she was shown her statement all the while stating that she could not read it. PW2 all along stated that they had been sexually assaulted. Looking at this piece of evidence alongside the medical evidence, I cast doubt that the offence of defilement took place on the night alleged. The medical evidence further did not indicate whether there was presence of spermatozoa as to safely conclude that penetration occurred on that night. Similarly, their private parts were not swollen or injured. Was PW1 really truthful taking into account that she had conflicting testimonies about sexual intercourse? I think not. It is possible that both minors had experienced sexual relations but it is doubtful whether that took place on that day. I further find it strange that PW1 said that her statement was true when she could not read it. What was the basis of her concession?
34. Another discrepancy is found in the minors' departure from the appellant's home. Though PW1 stated that they bumped into no one, PW2's evidence was that they bumped into her father PW3 on their



way home. They went home and left for church. Interestingly, PW3 stated that he only saw PW2 at midday. It is also instructive to note that the minors stated that they arrived at PW2's home at 6:00 p.m. where they found no one home. On the other hand, PW3 stated that he was home that morning and by 8:00 a.m., when was leaving his house to look for PW2, he had not seen the complainants.

35. Finally, PW2 testified that they also met DW2 and the appellant's sister on their way out of his house. That was however not PW1's evidence; again, something that PW1 would have remembered without hesitation. This especially taking into account the fact that they had allegedly sneaked into the appellant's home.
36. In my view, the totality of the evidence tilts in favour of the appellant's innocence. It is possible that the appellant may have been framed but we do not know why. However, what is apparent is that the identity of the perpetrator was not established to the required standard proof being beyond reasonable doubt. There are too many gaps and loopholes in the prosecution's evidence. It is for this reason that I find that the appeal herein succeeds.
37. The upshot of the above is that the trial magistrate erred in convicting the appellant. Accordingly, the appellant's conviction on both counts of defilement is set aside and substituted with an order acquitting the appellant. His sentence is furthermore set aside. I direct that the appellant shall be immediately released from custody and be set at liberty unless otherwise lawfully held.

It is so ordered.

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

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J.K.NG'ARNG'AR

JUDGE

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

