



**Thiguku v Republic (Criminal Appeal E040 of 2024)
[2025] KEHC 6993 (KLR) (28 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6993 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL APPEAL E040 OF 2024
JK NG'ARNG'AR, J
MAY 28, 2025**

BETWEEN

JOHN KARIUKI THIGUKU APPELLANT

AND

REPUBLIC RESPONDENT

*(From the conviction and sentence in Sexual Offence Case Number 15 of
2021 by Hon. Kabaria L.W in the Principal Magistrate's Court at Gichugu)*

JUDGMENT

1. John Kariuki Thiguku (now Appellant) was charged with the first count of defilement contrary to Section 8 (1) as read with section 8(3) of the *Sexual Offences Act*. The particulars of the charge were that on diverse dates between 12th and 19th December 2020 in Kirinyaga East Sub County within Kirinyaga County, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of J.M.W, a child aged 13 years.
2. The Appellant 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 charge were that that on diverse dates between 12th and 19th December 2020 in Kirinyaga East Sub County within Kirinyaga County, he unlawfully and intentionally and unlawfully came into contact with the vagina of J.M.W, a child aged 13 years.
3. The Accused/Appellant pleaded not guilty to the charges before the trial court and a full hearing was conducted. The prosecution called four (4) witnesses in support of its case. At the close of the prosecution case, the trial court ruled that a prima facie case had been established against the Appellant and he was put on his defence. The Appellant gave unsworn testimony and closed his defence.



4. At the conclusion of the trial, the Appellant was convicted of defilement and sentenced to serve twenty (20) years in prison.
5. Being dissatisfied with the Judgment dated 28th August 2024, the Appellant appealed against his conviction and sentence and wanted the conviction and sentence quashed and he be set at liberty.
6. This being the first appellate court, I am conscious of the duty to re-evaluate the evidence given at the trial court. See *Pandya vs. Republic* (1957) EA 336.
7. I now proceed to summarize the prosecution's case and the Appellant's defence in the trial court and their respective submissions in the present Appeal.

The Prosecution's/Respondent's Case.

8. It was the Prosecution's case that the Appellant defiled J.M.W (PW2) on diverse dates between 12th to 19th December 2020. PW2 testified that the Appellant defiled her in his house and threatened to beat her if she told anyone.
9. David Fredrick (PW3) who was the clinical officer at Kianyaga Sub County Hospital testified that he examined PW2 on 2nd June 2021 and found that she had an old broken hymen, had no lacerations and her labia majora and minora were fine. PW3 further testified that he was unable to determine whether PW2 had been penetrated or not.
10. Through their written submissions dated 17th March 2025, the Respondent submitted that they had proved their case beyond reasonable doubt. That the victim was aged 13 years and it was proved by the Birth Certificate (P. Exh 1). They further submitted that the victim's (PW2) testimony that the Appellant penetrated her. That PW2's testimony was coherent, consistent and firm and did not contradict herself.
11. It was the Respondent's submission that the trial court did not err in its analysis of the circumstances of the case and it relied on section 124 of the *Evidence Act*. That defilement could be proved through oral evidence. They relied on *AML vs Republic* (2012) eKLR and *Kassim Ali v Republic* [2006] KECA 156 (KLR).
12. The Respondent submitted that the Appellant was positively identified as the perpetrator of the offence. That the Appellant worked at the victim's grandmother's home and further that the Appellant in his defence confirmed that he worked at the victim's grandmother's home and knew each other well. That there was no possibility of mistaken identity.
13. It was the Respondent's submission that the delay in reporting the case was explained by the victim. That the Appellant had warned her not to tell anyone. It was their further submission that it was reasonable to expect such non-disclosure and that the delay did not prejudice or jeopardize their case.
14. The Respondent submitted that the Appellant gave unsworn testimony which was not subjected to cross examination. That the Appellant's defence was a mere denial and did not create doubt in the trial court's mind. They further submitted that the sentence was fair, lawful and ought not to be disturbed.

The Accused's/Appellant's Case.

15. The Appellant, John Kariuki Thiguku (DW1) denied committing the offence. He testified that PW2's mother (PW1), used to seduce him and he turned her down leading to him being framed. DW1 further testified that if indeed he committed the offence, PW2 should have reported the incident earlier.



16. It was DW1's testimony that Loise Wanjiku Karua (PW1) had been told to leave their home if she did not tell the truth. IT was his further testimony that when the victim (PW2) was questioned at home, she maintained that she was not defiled.
17. Through his undated written submissions, the Appellant submitted that the Prosecution failed to prove all the ingredients of defilement. That the clinical officer's (PW3) testimony did not establish penetration. The Appellant further submitted that the alleged blood seen by the victim (PW2) was not confirmed by the clinical officer. He relied on *Mushila Manga vs Republic* (2016) eKLR and *Mark Ouiruri Mose vs Republic* (2013) eKLR.
18. It was the Appellant's submission that the victim reported the matter after 7 months, contrary to the 72 hours provided by the law and this created reasonable doubt. That the trial court failed to address the delay in reporting the offence.
19. The Appellant submitted that the Prosecution failed to prove his positive identification. That the victim did not recognize him and the allegations that he was a neighbour were false. He further submitted that he was referred to as baba Nyakio yet he did not have a child called Nyakio. He relied on *Alex Wenua Chituno vs Republic* (2023) eKLR.
20. It was the Appellant's submission that the trial court failed to give its reasoning in its Judgement and this was contrary to section 169 (1) of the *Criminal Procedure Code*.
21. I have gone through and given due consideration to the trial court's proceedings, the home-made Petition of Appeal dated 22nd October 2024, the Appellant's undated written submissions and the Respondent's written submissions dated 17th March 2025. The following issues arise for my determination: -
 - i. Whether the Prosecution proved its case beyond reasonable doubt.
 - ii. Whether the Defence placed doubt on the Prosecution case.
 - iii. Whether the sentence preferred against the Appellant was harsh.

i. Whether the Prosecution proved its case beyond reasonable doubt.

22. It is trite law that for the offence of defilement to be established, the age of the victim, penetration and positive identification or recognition of the offender have to be proved.
23. Rule 4 of the *Sexual Offences Rules of Court 2014* provides that: -

When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document.
24. No. 10xxxx PC Dorcas Nyaga (PW4) produced the victim's Birth Certificate as P. Exh1. I have looked at the Birth Certificate and it indicated that PW2 was born on 29th January 2008. The production and authenticity of the Birth Certificate was not challenged by the Appellant during cross examination. It is my finding therefore that at the time the offence was committed, the victim (PW2) was aged 12 years old.



25. With regard to the issue of identification, the Court of Appeal in the case of *Wamunga v Republic* [1989] KECA 47 (KLR) expressed itself as follows: -

“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger.....”

26. The victim (PW2) testified that he knew the Appellant as the Appellant worked for her grandmother. PW2 further testified that the Appellant used to pick tea leaves and fetch fodder for the cows. When PW2 was cross examined, she reiterated that the Appellant used to visit and work for her grandmother. The victim’s mother, Loise Wanjiku Karua (PW1) also testified that the Appellant was their neighbour and close family friend. Additionally, in his defence, the Appellant admitted that the victim (PW2) and her mother (PW1) were his neighbours and that he used to help them with work.

27. From the evidence above, it is clear to me that the identification of the Appellant was recognition. The Appellant, PW1 and PW2 all knew each other by virtue of being neighbours and their constant interactions. Therefore, I have no reason to disbelieve or doubt that the Appellant was identified by the victim (PW2) as the perpetrator of the offence.

28. Flowing from the above, I am satisfied that the Appellant was positively identified by the victim (PW2). There was no possibility of mistaken identity.

29. With regards to penetration, Section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of genital organs into the genital organs of another person. The Prosecution has to prove penetration or act of sexual intercourse to sustain a charge of defilement.

30. Penetration can be proved through the evidence of the victim corroborated by medical evidence. In the instant case, I shall carefully evaluate the victim’s testimony and the medical evidence tendered.

31. On the medical evidence, David Fredrick (PW3), a Clinical Officer at Kianyaga Sub-County Hospital testified that he examined the victim (PW2) on 2nd June 2021 and found that she had an old broken hymen. He also found that the victim’s genitalia had no lacerations and her labia majora and minora were fine. It was PW3’s professional opinion that having examined the victim much later after the commission of the offence, he could not determine whether there was penetration. Having considered the medical evidence in totality, it is my finding that the medical evidence had no probative value and was thus immaterial. This is so because the offence was reported to have been committed between 12th to 19th December 2020 yet the victim was examined on 2nd June 2021. I therefore disregard the medical evidence.

32. The above finding however is not fatal as the law allows the court to base a conviction solely on the testimony of the victim if the court is convinced and satisfied in the victim’s truthfulness. Such testimony need not be corroborated. Section 124 of the *Evidence Act* provides: -

Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

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. (Emphasis mine)



33. I have keenly gone through the victim's evidence. She testified that on diverse dates between 12th to 19th December 2020, the Appellant led her to his house and later his bedroom where the Appellant undressed her and penetrated her. It was the victim's further testimony that the Appellant threatened to beat her should she tell anyone of the incident. When she (PW2) was cross examined, she testified that it was the Appellant who defiled her and that she did not have sexual relations with anyone else. It was her further testimony upon cross examination that she did not report the matter earlier as the Appellant had threatened to beat her. The victim was later recalled for further cross examination on 17th August 2023 and confirmed that it was the Appellant who defiled her. Additionally, I have gone through the Judgement dated 28th August 2024 and I have noted that the trial court believed the victim's evidence and stated that the victim's testimony was coherent and consistent.
34. Flowing from the above, I have no reason to disbelieve the victim's testimony on penetration. Much like the trial court found, I find the victim's testimony cogent and it was uncontroverted in the face of two cross examination sessions. In light of the above, it is my finding that the victim (PW2) was penetrated by the Appellant.
35. It was a ground of the Appeal that the trial court did not give reasoning in its Judgement dated 28th August 2024. The contents of a Judgement are provided for under section 169 of the [Criminal Procedure Code](#) provides: -
- (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.
 - (2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the [Penal Code](#) (Cap. 63) or other law under which, the accused person is convicted, and the punishment to which he is sentenced.
 - (3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty.
36. I have perused the Judgment dated 28th August 2024 and noted that the Judgement addressed all the ingredients of defilement i.e. age, positive identification and penetration. The trial court analysed the facts against the ingredients of the offence to determine whether they were proved or not. In my view, such analysis clearly brought out the points of determination. The trial Magistrate proceeded to make her finding that the offence had been proved.
37. It is my finding that the trial Magistrate gave a well-reasoned Judgement which was in compliance with section 169 of the [Criminal Procedure Code](#). I therefore dismiss this ground of Appeal.
38. Based on the totality of the evidence before me, it is my finding that the Prosecution satisfactorily established the age of the complainant, proof of identification and penetration. It is also my finding that Prosecution proved its case against the Appellant beyond reasonable doubt.

ii. Whether the Defence placed doubt on the Prosecution's case.

39. The Appellant's (DW1) defence was aptly captured in detail earlier in this Judgment. He denied committing the offence. His testimony majorly focused on the events leading to the commission of the offence, events that went far as back as the years 2005. Other than denying committing the offence, the



Appellant did not address the allegations with specificity to the material dates being 12th to 19th December 2020.

40. I have considered the unsworn testimony of the Appellant and it is my finding that it is weak and did not cast any doubt on the Prosecution's case which I have already found proven.

iii. Whether the sentence preferred against the Appellant was harsh.

41. Sentencing is at the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles.

42. The penal section for this offence is found in section 8(3) of the Sexual Offences Act which states that: -
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.

43. As earlier stated, the trial court sentenced the Appellant to serve 20 years imprisonment.

44. I have considered the circumstances of this case and the fact that the victim was aged 12 years old at the time the offence was committed. The Appellant was rightly convicted and sentenced.

45. Flowing from the above, it is my finding that the Appeal against conviction and sentence has no merit. I hereby affirm the Appellant's conviction and sentence. Appeal is dismissed. In accordance to section 333(2) of the Criminal Procedure Code, the sentence shall run from 7th June, 2021 being the date the Appellant was arraigned in court.

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).

