



REPUBLIC OF KENYA



**KENYA LAW**  
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**EKN v Republic (Criminal Appeal E045 of 2024)  
[2025] KEHC 9876 (KLR) (30 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9876 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CRIMINAL APPEAL E045 OF 2024**

**GL NZIOKA, J  
JUNE 30, 2025**

**BETWEEN**

**EKN ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against conviction and sentence from the judgment of Hon. Y. I. Khatambi (PM) delivered in Naivasha S/O No. E085 of 2021 on 18th December, 2024)*

**JUDGMENT**

1. The appellant was arraigned in court charged with the offence of defilement contrary to Section 8(1) (2) of the *Sexual Offences Act* (herein “the Act”).
2. The particulars of the charge are that on diverse dates between 14<sup>th</sup> and 15<sup>th</sup> November, 2021 at [Particulars Withheld] Village in Gilgil sub-County within Nakuru County, unlawfully and intentionally caused his penis to penetrate the vagina of DWM a child aged (8) years.
3. He was charged in the alternative charge, with the offence of indecent act with a child contrary to Section 11(1) of the Act.
4. The particulars of the charge states that on the diverse dates between 14<sup>th</sup> and 15<sup>th</sup> November, 2021 at [Particulars Withheld] Village in Gilgil sub-County within Nakuru County, unlawfully and intentionally touched the vagina of DWM a child aged (8) years with his penis.
5. The appellant pleaded not guilty to both charges and the case proceeded to full hearing. The prosecution case is that on the 14<sup>th</sup> day of November, 2021, (PW1) DWM aged eight (8) years old (herein “the complainant”) was at home in the company of her brother T and father, the appellant herein.



6. That the appellant went out to drink alcohol and returned home. That he told the complainant to have sex with him and threatened her that if she declined, he would punish her. That the complainant agreed, wherein the appellant removed her trouser, her top and directed her how to sleep.
7. The complainant testified that the appellant then removed his thing for urinating and inserted into her thing for urinating. That she felt pain and screamed but the appellant covered her mouth and nose using his hand, held of her neck and strangled her.
8. That after defiling her, he sent her back to the sitting room and after a while called her to his bed where she slept with the appellant and her brother.
9. That the following day, she went to AW, her auntie's and spent a night there but when her mother asked her to return home she declined and informed her that she had been defiled.
10. The matter was reported to the police station and the complainant taken for a medical examination. That after investigations, the accused was charged with the offences herein.
11. At the close of the prosecution case, the appellant was placed on his defence. He testified that on 14<sup>th</sup> November, 2021, he was at his place of work when three (3) police officers went and picked him over allegations that he had defiled a child known to him. That they wanted him to confirm that he had defiled the child but he declined.
12. The appellant further testified that the complainant's mother (PW3) RMK whom he had cohabited with for about one year was not happy with him as she used to leave the children unattended to indulge in alcohol.
13. Further, the complainant had become a street child and used to enjoy a free life style and when he corrected her, the mother felt that he was a stumbling block, and framed him with the charges herein. That he had even reported the matter to the village elder. In cross-examination, he confirmed that he had no grudge with the complainant and T (PW2).
14. The appellant also called (DW2) GWK a village elder who testified to the effect that, on 5<sup>th</sup> November, 2021, she received a report from the appellant that the wife had left home and did not return. That on 6<sup>th</sup> November, 2021, she learnt that the appellant had been arrested. That she knew the appellant as a neighbour and farmer since the year 2007.
15. In cross-examination, DW2 confirmed that she could not tell what may have transpired in the appellant's house in relation to this matter. Further that she was not aware of any marital problems between the appellant and the wife.
16. At the conclusion of the trial, the trial court delivered a judgment dated 18<sup>th</sup> December, 2024, found the appellant guilty of the offence of defilement, convicted him and sentenced him to serve thirty (30) years imprisonment with effect from; 17<sup>th</sup> November, 2021, when he was arraigned in court.
17. However, the appellant is aggrieved by the decision of the trial court and appeals against it on the following grounds verbatim reproduced:
  - a. That the appellant pleaded not guilty in the instant case.
  - b. That the learned trial magistrate erred in law and facts when she convicted the appellant in a prosecution case where age was not proved.
  - c. That the learned trial magistrate erred in law and fact when she convicted the appellant in the prosecution case where penetration case was not proved.



- d. That the learned trial magistrate erred in law and fact by applying wrong standards of proof in criminal case which was a standard of probability instead of reasonable doubt.
  - e. That the learned trial magistrate erred in law and fact by convicting the appellant but did not consider the appellant's defence of alibi.
  - f. That he prays to be present during the hearing of this appeal.
18. However, the respondent opposed the appeal based on the following grounds of opposition dated 11<sup>th</sup> April 2025:
- a. That the ingredient of age was proved.
  - b. The ingredient of penetration was proved.
  - c. The case was proved beyond reasonable doubt by the prosecution.
  - d. The appellant's defence of alibi was considered before conviction.
19. The appeal was disposed of vide filing of submissions. The appellant submitted that, in order to secure a conviction, the prosecution was required to prove the ingredients of the offence of defilement being; that the victim was a minor, there was penetration, and the identity of the assailant as laid out by the High Court in the case of, *Charles Wamukoya v Republic* Criminal Appeal No. 72 of 2013.
20. That the prosecution failed to discharge its burden as the age of the complainant was not proved. That, proof of the age of the victim is an important aspect in the trial as the sentence to be meted out is dependent on it and it must be proved by credible evidence as was held by the Court of Appeal in the case of; *Kaingu Elias Kasomo v Republic* Criminal Appeal No. 504 of 2010 (unreported).
21. That, the age of a victim may be proved by way of a birth certificate, school documents, baptismal card or any similar document, but, no such document was produced during the hearing of the case in the trial court.
22. The appellant argued that the birth certificate produced was registered on 23<sup>rd</sup> September 2023 and issued on 9<sup>th</sup> October 2023, during the pendency of the trial, and was tailor made to fit the prosecution's case. Furthermore, it was produced in court by PW3 who was not the maker and that the prosecution ought to have called the registrar who issued it. That, the failure to call the registrar prejudiced him as he was unable to cross examine PW3 on the contents of the birth certificate.
23. That in addition there were contradictions on the age of the complainant as the charge sheet and the P3 form indicated she was 8 years old, while the complainant testified she was 11 years old, and the birth certificate indicates that she was born on 7<sup>th</sup> November 2012. That it was important for the prosecution to procure an age assessment report to prove the complainant's age.
24. The appellant further submitted that penetration was not proved to the required standard. He relied on the definition of penetration under section 2 of the Act and argued that the evidence presented by the complainant PW2 TK and PW5 Dr. Edwin Bett was not sufficient to prove even partial penetration. That the evidence of PW5 Dr. Bett that the complainant had vaginal lacerations, a broken hymen and her urine had pus cells was not sufficient proof of penetration.
25. The appellant submitted that the trial Magistrate placed undue and undeserved weight on the lack of hymen and referred the Court to the case of; *P.K.W v Republic* [2012] KECA 103 (KLR) where the Court of Appeal noted that the two courts below had placed a high premium on the fact that the



- victim's hymen was broken stating that it is erroneous to assume where the hymen is missing in a girl child that it proves defilement
26. Furthermore, that the trial court failed to take into consideration the evidence of his witness (DW2) GWK that the complainant had left her home with the mother and brother and it was therefore not possible that he defiled the complainant.
  27. The appellant further submitted that the trial court did not consider his defence that the complainant's mother had framed him that he committed the offence and the fact that the complainant was roaming around. Further, that he had separated with the complainant's mother in November 2021 and she had moved out with the complainant. Furthermore, DW2 GWK corroborated his defence that he had reported that the complainant's mother had left home and her whereabouts were unknown.
  28. He argued that having raised a defence of alibi he had no duty prove his innocence rather the prosecution had the duty to prove its falsity as was held by the Court of Appeal in the case of *Victor Mwendwa Mulinge v Republic* [2014] KECA 710 (KLR).
  29. Further, in the case of *Karanja v Republic* [1983] eKLR the Court of Appeal stated that a trial court may test the defence of alibi by weighing it against all other evidence to establish the accused's guilty beyond reasonable doubt even where the accused had not put forth the defence at an earlier stage.
  30. The respondent submitted that even if he raised his defence of alibi during the defence hearing, the prosecution was required to invoke the provision of section 309 of the *Criminal Procedure Code* to seek leave to adduce further evidence to rebut his defence. That the trial Magistrate dismissed his defence as an afterthought stating that he failed to raise the defence during cross examination.
  31. The appellant relied on the case of, *Ouma v Republic* (1986) KLR 619 where the Court of Appeal stated that when evaluating the prosecution case, the trial court must have in mind the defence and satisfy itself that the prosecution evidence left no reasonable possibility that the defence was true and if there was doubt the benefit goes to the accused.
  32. However, the respondent in response submissions dated 11<sup>th</sup> April 2025, argued that the prosecution had proved all the ingredients of the offence before the court. That the age of the complainant was proved by the production of her birth certificate produced as exhibit (1) indicating that she was 11 years which was corroborated by her mother, PW3.
  33. Further, penetration was proved through the evidence of the complainant who testified how the appellant on the night of 14<sup>th</sup> November 2021 ordered her to go into his room, undressed her and defiled her and when she attempted to scream he covered her mouth and strangled her.
  34. That the complainant's evidence was corroborated by the evidence of PW5 the medical doctor who examined her and observed that the complainant's hymen was broken and she had bruises on her vagina walls and neck which was also tender.
  35. That in addition, the complainant's brother PW2 T confirmed that he saw the complainant enter the appellant's bedroom on the material day, and on the following day, the complainant informed him that the appellant had defiled her.
  36. On identification, the respondent submitted that, it was the appellant, who she referred to as her father, who instructed her to go into his bedroom where he defiled her. Further, the complainant's brother testified that he heard the appellant order the complainant to go into his room.



37. That the identification of the appellant was through recognition held by the High Court in the case of; *Anjononi & others v Republic* (1976-1980) KLR 1566 to be more satisfactory, assuring and reliable than identification of a stranger.
38. The respondent further submitted that the appellant's defence of alibi was weak and a mere afterthought as the prosecution witnesses (1), (2) and (3) placed the appellant at the scene of the crime on the night of 14<sup>th</sup> November 202. That, the defence was not plausible enough to dislodge the prosecution's evidence. Further, the prosecution proved its case beyond reasonable doubt and urged the court to dismiss the appeal and uphold the trial court finding on conviction and sentence.
39. At the conclusion of the arguments on appeal, I take note of the fact that the role of the 1<sup>st</sup> appellate court is to re-evaluate the evidence adduced in the trial court afresh and arrive at its own conclusion taking into account the fact that this court did not have the benefit of the demeanour of the witness.
40. In this regard, the court thus stated in the case of *Okeno v Republic* (1972) EA 32; -
- “An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R.*, [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v R.*, [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post*, [1958] EA 424.”
41. To revert back to the matter herein, I note that the appellant was convicted of the offence of defilement which is provided for under Section 8(1) of the Act as follows: -
- “A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”
42. Pursuant to the aforesaid provisions and case law, the ingredients of the offence of defilement are settled. In the cases of; *Agaya Roberts v Uganda*, Criminal no. 18 of 2002, and *Bassita Hussein v Uganda* Criminal Appeal No. 35 of 1995, the Supreme Court of Uganda court stated that, in order to constitute the offence of defilement the following ingredients must be proved: (i) the facts of the sexual intercourse (ii) the age of the victim being under 18 years (iii) participation by the accused in the alleged sexual intercourse.
43. As regards the element of age in the instant matter, I note from the trial court's record that the complainant's birth certificate was produced as (P exhibit 1) through the evidence of the complainant's mother (PW3) RK and (PW4) Corporal Paul Mutinda. The same indicates that the complainant was born on 7<sup>th</sup> October, 2012 and the offence herein is stated to have occurred on diverse dates in the month of November, 2021. Therefore, at the alleged time, the complainant had just turned nine (9) years by one month.
44. The appellant has raised several issues on the evidence adduced on the age of the complainant and I find that most of those issues were not raised during the trial. The appellant did not object to the production of the birth certificate on whatever ground and neither did he even cross examine the witnesses on the age of the complainant.



45. Further, the argument that the age assessment report was required fails in the presence of the birth certificate which is prima facie evidence of age of a person.
46. Furthermore, the disparity on the age of the complainant as stated in the charge sheet and evidence produced is not prejudicial to the appellant, as the age of complainant in such cases is to determine the sentence to be meted out upon conviction of an accused person. The age(s); eight (8) and nine (9) fall under the provisions of, section 8(2) of the Act. Consequently, it is the finding of this court that the complainant's age was adequately proved.
47. The next ingredient to determine is whether penetration was proved. In that regard, penetration is defined under section 2 of the Act as follows: -
- “penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person.”
48. In this matter, the complainant testified that the appellant defiled her on 14<sup>th</sup> November, 2021. That, after ordering her to remove her clothes, “he removed his thing for urinating and inserted into her place of urinating.” That evidence supports an act of penetration.
49. But even more so, the complainant's brother (PW2) testified that he heard the complainant screaming while in the appellant's bedroom. That she when she emerged therefrom she was naked and was looking for petroleum jelly.
50. That earlier he heard the complainant screaming while in the appellant's bedroom and when she came out, she told him that the appellant had defiled her. Doesn't this evidence support penetration?
51. It sufficed to note that, PW5 Dr. Edwin Bett testified that, when the complainant was examined, she was found to have an injury on the neck, that the hymen was broken and there were injuries on her vaginal area. That the injury was fresh.
52. The questions that arise are: doesn't the doctor's evidence corroborate the evidence of the complainant and her brother (PW2) on penetration? Doesn't it corroborate the complainant's evidence that the appellant placed his thing of urinating into hers? Doesn't it prove that the complainant was actually assaulted on the neck by strangling to subdue her keep quiet during the defilement?
53. Based on the afore I find that the argument by the appellant that penetration was not proved and that undue weight was placed on the broken hymen per se does not hold water. To the contrary the evidence adduced is adequate that penetration took place as testified by the complainant.
54. As regards the last element as to who defiled the complainant, I note that the complainant testified that she was defiled by her “father” whom she identified as the appellant herein. It is noteworthy that the complainant and appellant were staying in the same house.
55. Furthermore, the complainant's brother (PW2) who was also staying in the same house testified that he heard the complainant screaming while in appellant's bedroom. That she emerged from that bedroom while naked and later told him that the appellant had defiled her. From the evidence of T (PW2) it is clear from the outset that, the complainant stated that it was the appellant who defiled her.
56. Furthermore, it is in evidence that, the complainant declined to go back home when her mother told her to return from her auntie's place. That she declined as she was afraid of the appellant who had defiled her. The question would the complainant fear returning home if the appellant had not defiled her? Unlikely!



57. The appellant in his evidence alleged inter alia that PW3, his wife, was framing him. However, several questions arise: -
- a. If the wife is framing him, then who defiled the complainant?
  - b. If the wife is framing him, did the complainant and the brother PW2 conspire with their mother to fix him. If so, for what reason?
  - c. Does the evidence of the complainant and the brother taken wholly support the alleged framed charges to fix the appellant?
  - d. Did the appellant cross-examine the complainant and the brother (PW2) on the frame up allegations? If not as evidently herein, how could they confirm or deny his allegation of frame up?
  - e. If it's true the wife (PW3) was framing him, how come he did not cross-examine her on the same.
58. It is the finding of this court that the defence adduced on frame up charges and a loose child is not tenable.
59. Further, the defence of alibi does not arise as it was not only raised too late in the day but was completely unsubstantiated. It fails in the light of the evidence of the complainant and the brother (PW2) that the appellant was home on the material night in question. The appellant did not challenge that evidence. Consequently, the entire defence raised is a mere denial and an afterthought as held by the trial court.
60. Pursuant to the afore, it is the finding of this court that the appellant was positively identified as having been involved in the commission of the offence of defiling and the conviction herein is upheld.
61. As regards sentence, for defilement of the complainant aged below eleven (11) years is life imprisonment. The appellant was sentenced to thirty (30) years based on the decision of the Court of Appeal that life imprisonment is equivalent to thirty (30) years.
62. However, that decision has since been reversed by the Supreme Court of Kenya in the case of *Republic v Ayako* [2025] KESC 20 (KLR) which held that it was role of the Legislature to prescribe what constitutes life imprisonment and the parameters applicable if any.
63. Be that as it were, there is no cross-appeal or an application for enhancement of the sentence. Furthermore, the Supreme Court of Kenya decision came into play after the appellant had been sentenced. Therefore, I shall not interfere with the sentence herein.
64. Furthermore, sentence meted out is lenient taking into account the fact that the appellant defiled a young child entrusted to his care. His conduct was very cruel and inhuman and deserved a stiff sentence.
65. The upshot is that the appeal is dismissed in its entirety.

**DATED, DELIVERED, SIGNED ON THIS 30<sup>TH</sup> DAY OF JUNE, 2025.**

**GRACE L. NZIOKA**

**JUDGE**

In the presence of:

Ms Chepkonga for the Respondent



The appellant present virtually  
Ms Hannah – Court Assistant

