



**Karugu v Republic (Criminal Appeal E005 of 2025)
[2025] KEHC 9038 (KLR) (Crim) (26 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9038 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
CRIMINAL
CRIMINAL APPEAL E005 OF 2025**

KW KIARIE, J

JUNE 26, 2025

BETWEEN

DAVID NDIRANGU KARUGU APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in the S.O.A. case NO. E022 of 2023 of the Principal Magistrate's Court at Engineer by Hon. E.N. Wanjala-Principal Magistrate)

JUDGMENT

1. David Ndirangu Karugu, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars of the offence are that on the 14th day of September 2023 at Nyandarua County, he intentionally and unlawfully caused his penis to penetrate the vagina of F.W, a child aged thirteen years.
3. The appellant was sentenced to serve twenty years' imprisonment. He was aggrieved and filed this appeal against the conviction and sentence. He was represented by Njihia Njoroge & Company Advocates. He raised the following grounds of appeal:
 - a. The learned trial magistrate erred in law and fact by convicting and sentencing the appellant on evidence manifestly laden with inconsistencies going to the root of the respondent's case, which inconsistencies should have led to the appellant's acquittal.
 - b. The learned trial magistrate erred in law and fact by declining an application on the part of the defence counsel to recall the complainant for further cross-examination, thus denying the Appellant his inalienable right to be granted a fair trial.



- c. The learned trial magistrate erred in law and fact by shifting the burden of proof from the respondent to the appellant and caused a miscarriage of justice to the detriment of the appellant.
 - d. The learned trial magistrate erred in law and fact by finding and holding that the Appellant bore the evidentiary burden to prove his alibi.
 - e. The learned trial magistrate erred in law and fact by finding and holding that though the complainant had lied severally to both her mother (PW3) and her teachers the said lies were justifiable in view of her age a finding if she had not arrived at would have led to the acquittal of the appellant.
 - f. The learned trial magistrate erred in law and fact by failing to find and hold that there was no direct or circumstantial evidence linking the Appellant to the alleged offence, a factor that, if she had addressed herself to, would have led to the appellant's acquittal.
 - g. The learned trial magistrate erred in law and in fact by rejecting the defence of alibi and considering the same in its totality, and the impression of the witnesses, factors which had she addressed herself to would have led to the acquittal of the appellant.
 - h. The learned trial magistrate erred in law and fact by failing to find and hold that the Appellant was entitled to the benefit of doubt not as a matter of grace and concession, but as a matter of right, a factor which had she addressed herself to, and in light of all the evidence on record, would have led to the appellant's acquittal.
 - i. The learned trial magistrate erred in law and in fact by rejecting the appellant's position that he had not been positively identified as the assailant, a factor which, had she addressed herself to, would have led to the appellant's acquittal.
 - j. The learned trial magistrate erred in law and fact by rejecting the evidence of the doctor (PW2), which evidence was inconsistent with the evidence of the complainant (PW1) as to the nature and age of the alleged injuries
 - k. The learned trial magistrate erred in law and fact by invoking a technicality With regard to the admissibility of the documentary proof to the effect that the appellant was at his place of work at the time of the commission of the alleged offence, instead of disregarding the said technical procedure for the sake of administering substantive Justice- a factor which had she properly directed herself to would have led to the appellant's acquittal.
 - l. The learned trial magistrate erred in law and fact by imposing a manifestly excessive sentence given all the case circumstances, even assuming that the appellant had indeed committed the alleged offence.
4. The state did not file any grounds of opposition and submissions.
 5. This is the first appellate court. As expected, I have analyzed and evaluated all the evidence adduced before the lower court afresh. I have drawn my conclusions, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of *Okeno v Republic* [1972] EA 32.
 6. An offence of defilement is established against an accused person when the prosecution has proved the following ingredients:
 - a. That there was penetration of the complainant's genitalia;



- b. That the accused was the perpetrator and
- c. The victim must be below eighteen years old.

This position was echoed in the case of *Fappyton Mutuku Ngui v Republic* [2012] eKLR.

Ngugi J. (as he was then) said:

Going by this definition of defilement... the issues which the court needs to determine...first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child, and finally, whether the penetration was by the Appellant."

- 7. I will determine if the prosecution proved these ingredients to the required standards.
- 8. F.W. (PW1), the complainant, said she was 13. A copy of her Certificate of Birth indicates that she was born on the 13th day of April 2010. As of the 14th day of September 2023, she was 13 years and 5 months old. Her age was, therefore, proven.
- 9. Doctor Patrick Maina Wakahiu (PW2) presented the medical evidence. When he examined the complainant on September 18th, 2023, he established that she had a broken hymen with old tags. He added that it was impossible to deduce the injury's age.

There is no doubt from the medical evidence that the complainant had been defiled.

- 10. According to the complainant, she was defiled in the house of Sandra, the appellant's sister. Before the defilement, the appellant and Sandra took her to a woman they claimed was their mother. These were very material witnesses who were not called to testify. These two could have provided evidence to link the appellant to the offence. The investigating officer did not explain why the two were omitted as witnesses. The Court of Appeal in the case of *Bukenya v Uganda* [1972] EA 549 (Lutta Ag. Vice President) held:

The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

- 11. The complainant portrayed herself as a witness who cannot be relied upon to tell the truth. In the history she gave to Doctor Patrick Maina Wakahiu (PW2), she said she had sexual intercourse on 14th September 2023. This is what she testified to. If indeed this was her first sexual intercourse, the finding of old tags on her broken hymen on September 18th, 2023, is baffling.
- 12. When the complainant was found at school with a phone, she claimed that the appellant bought it for her; she lied multiple times to her teachers and mother. During her testimony in court, she continuously changed her account regarding whether the appellant defiled her. This is the sort of witness that the Court of Appeal in the case of *Ndungu Kimanyi v Republic* [1979] KLR 283 (Madan, Miller and Potter JJA), described as follows:

“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a



person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."

Her evidence required corroboration.

13. David Ndirangu Karugu maintained an alibi, asserting that he was at his workplace in Naivasha. He reported for duty at 7 a.m. and left at 4 p.m. for his rented house in Naivasha. PC Esther Ashaba (PW4) went to confirm this. When an accused raises an alibi defence, they do not assume any burden to prove that it is the truth. This was stated in the case of *Kiarie v Republic* [1984] KLR, where the Court of Appeal held:

"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable."

In the instant case, the prosecution did not displace the alibi defence of the accused.

14. The proviso to section 124 of the *Evidence Act* states:

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.

15. The complainant's evidence was not corroborated. There are numerous points that needed to be connected before the trial court could conclude with confidence that the appellant defiled her. Therefore, it was unsafe to rely on it for a conviction. The conviction is quashed, and the sentence is set aside. The appellant is set at liberty unless lawfully detained otherwise.

DELIVERED AND SIGNED AT NYANDARUA ON THIS 26TH DAY OF JUNE 2025

KIARIE WAWERU KIARIE

JUDGE

