

KENYA / JUDGMENT

Lidigu alias Chale v Republic

[2026] KEHC 13497 (KLR)

[2026] KEHC 13497 (KLR)

COURT

High Court

CASE / FILE NUMBER

Criminal Appeal E033 of 2025

Source: new.kenyalaw.org · Research copy typeset by Esheria. Not court-issued or certified.

REPUBLIC OF KENYA IN THE HIGH COURT OF KENYA AT KAKAMEGA HIGH COURT CRIMINAL
APPEAL NO. E033 OF 2025 DAVID LIDIGU Alias CHALE.....
APPELLANT VERSUS REPUBLIC..... RESPONDENT
(Being an appeal from the judgment of Hon. J.R.NDURURI dated 2nd October 2024).

JUDGMENT

The appellant was convicted and sentenced to imprisonment for 20 years for the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. The appellant challenged the conviction and sentence upon the grounds set out in his memorandum of appeal as follows:

- 1) That the trial magistrate misdirected himself when he failed to critically analyse the entire evidence and realize that the inconsistencies could not sustain a conviction
- 2) That the learned trial magistrate disregarded all open discrepancies in the evidence of the complainant thereby occasioning an injustice
- 3) That the trial magistrate erred in law and fact in failing to appreciate that the prosecution case lacked corroborative evidence to support the charge In his submissions the appellant stated that penetration was not proved as is required. The appellant in particular referred to the evidence of PW1 in which she stated that there was no penetration. The appellant submitted that the minors age ought to have been declared to be 16 years and not 15 as stated on the record. The appellant further submitted that his right to legal representation was not explained to him and that this offended the provisions of Article 50(2)(g) and (h) of the constitution. The respondent opposed the appeal. The respondent submitted that all the key ingredients of the charge of defilement were proved beyond reasonable doubt as required. In support of its case, the respondent cited the case of Mwalango Chichoro Mwanjembe v Republic (2016) eKLR on how the age of the victim ought to be proved. That a birth certificate was produced as evidence of age. That the P3 form and the evidence of PW1 and PW4 proved that there was penetration between the genitals of the victim and the

appellant. The prosecution further submitted that there was overwhelming evidence that the appellant was positively identified by the victim. The prosecution's (respondent's) case in summary was as follows; PW1, GML, a minor testified that on a day in February 2023 she went to a river to wash clothes. The accused person found her by the river asked her to be his girlfriend, and she agreed. The 1 accused person then gave her a bottle of beer to keep for him. She testified that she later went to the house of the appellant on the 5th March, 2023. During the night, the appellant asked her to have sex with him but she refused. The appellant asked her how old she was and she responded that she was 15 years old. In her evidence, PW1 testified that the appellant tried to have sex with her by putting his penis on her vagina but did not penetrate her. The appellant left the house at 5.00 am the following morning. A certain lady arrived at the appellant's home and informed her that there was a search going on for her. She met her mother on her way home, she started beating her but neighbours urged her to escort PW1 to the police station, which she did. The mother escorted her to the police station where a report was made². She also escorted her to Shibwe Health Centre where she was examined. PW2, GML's mother, testified that on 5th March 2023, the minor disappeared from home and did not return. The next day, she reported to Malinya police station. On her way back home, she met GML in the company of a lady, who briefed her that she found her in a nearby shopping centre. PW2 started beating GML but those nearby advised her to take her to the police station, which she did. She also escorted GML to Shibwe Health Centre where she was examined. PW3, Douglas Maonga of Shibwe health Centre testified that he did examine GML on 7th March 2023 and found bruises on the labia minora and labia majora. There was bloody discharge from the vulva and urinalysis disclosed that there were pus cells and epithelia cell. High vaginal swab revealed presence of blood stains and spermatozoa in the vulva. PW3 concluded that there was penetration. PW4, PCW Joan Onyango of Malinya police station, investigated the case after it was reported to the police station. She also obtained GML's birth certificate, and it confirmed that she was 15 years old. The trial court in its ruling on case to answer found that a prima facie case had been established against the appellant. He was placed on his defence and the electives under section 211 of the Criminal Procedure Code were explained to him. He elected to give sworn evidence and called no witness. In his defence the appellant admitted that he spent the night of 5th and 6th March 2023 with GML in his house. His evidence was that he tried to have sexual intercourse with her but stopped when he learnt that she was 15 years old and a virgin.

ANALYSIS AND DETERMINATION

This being a first appeal, the duty of this court is as stated in the case of *Mark Oiruri Mose v R*

(2013) eKLR thus: "The court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that." ² The appellant herein has challenged both the conviction and the sentence. In a charge of

defilement, it behoves the prosecution to prove beyond reasonable doubt the key ingredients as envisaged in section 8(1) of the Sexual Offences Act thus; the victim was a minor, that there was an act of penetration and that there is evidence that the perpetrator was positively identified. In the present case, the charge sheet indicated the victim's age to be 15 years. In proof of age, the prosecution produced before court the victim's certificate of birth. The trial magistrate stated as follows: "On the ingredient of age, the prosecution relies on the birth certificate, which shows that GML was born on the 22nd November 2007. A birth certificate, in the absence of any other documentary evidence to the contrary, is conclusive evidence as to the age of a person in Kenya. The birth certificate herein proves that GML was 15 years and 4 months old as of 5th March 2023. Her age was within the age bracket provided for in S.8(3) of the ACT." I have perused the record and come to the conclusion that the victim's age was adequately proved. The second issue is whether penetration was proved. In her evidence, the victim (PW1) testified that she went to the appellant's house where she spent a night and that the appellant tried to have sex with her but did not succeed. Excerpts of her evidence as recorded reads as follows; "Yes, during the night David tried to have sex with him(sic). He put his penis on my vagina but didn't penetrate me. I was taken to the hospital the same day we went to the police station." The medical evidence by PW3 showed that the hymen was broken and that there were bruises on both labia minora and labia majora. High vaginal swab revealed that there was presence of spermatozoa. The examination was done a few hours after GML left the house of the appellant and I find no possibility that she may have suffered the injuries elsewhere other than in the house of the appellant. The evidence of PW1 was not challenged during cross examination. Penetration as defined in section 2 of the Sexual Offences Act includes the partial or complete insertion of the genital organs of a person into the genital organs of another person. I find that penetration was proved beyond reasonable doubt. The last element to be proved is the identity of the penetrator. The victim identified the appellant as a neighbor whom she knew well. Throughout the presentation of the prosecution's case there was no indication that PW1 may have been mistaken about the identity of the person who defiled her. She knew the appellant well. The appellant on his part confirmed that he knew the victim well, even admitting that she spent a night in his house. The identification of the appellant was by way of recognition and I find no error in identification. 3 The appellant challenged the finding of the trial court on the grounds that his evidence was ignored. In a charge of the nature facing the appellant, the proviso to section 124 of the Evidence Act provides: "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." From the evidence on record, the court did not conduct a voir dire examination of the minor (PW1) but the trial court in its assessment was satisfied that she understood the meaning of oath. The trial court concluded that she could give evidence on oath and I am unable to establish from the record that there is any error with that finding. In cross examination, the appellant never challenged the evidence by PW1 that he put his penis on

her vagina even if in her view he did not penetrate. The evidence of PW3 on the state of PW1'S genitalia was equally unchallenged. I find that from the totality of the evidence on record, the victim's evidence remained unimpeached. There is nothing to show that she was untruthful or that she had a motive to lie against the appellant. On the allegation that his right to legal representation was not explained to him, the record indicates that the appellant instructed an advocate who made an appearance on his behalf. However, on the date when the hearing commenced, he indicated that he was ready to proceed with the hearing and never gave any impression that he wished to have the hearing adjourned to allow an advocate to appear for him. The appellant did cross examine the prosecution witnesses save for PW1 whom he chose not to ask any question and I believe that in his view, PW1 gave evidence which he considered favourable. I do not find that substantial injustice did occur as a result of the appellant not being represented by counsel. The sentence meted against the appellant was the minimum provided in law for the offence with which he had been convicted. Based on the reasons foretasted, I find no merit in this appeal and I proceed to make the following orders: i) This appeal stands dismissed ii) The conviction is upheld and the sentence is confirmed iii) The sentence shall be computed from the date of conviction in the lower court, however the three (3) months when he was in custody prior to his release on bond shall be deducted from the sentence. DATED, SIGNED AND DELIVERED THIS 16th September 2026 D.O. ONYANGO JUDGE 4 5

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://new.kenyalaw.org/akn/ke/judgment/kehc/2026/13497>

CASE PAGE <https://chat.esheria.ai/case-law/kenya/david-lidigu-alias-chale-v-republic-2026>

Prepared on 26 October 2026 · Esheria