

KENYA / JUDGMENT

Ndaikwa v Republic [2026] KECA 512 (KLR)

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COURT

Court of Appeal

BEFORE

AK Murgor, F Tuiyott, P Nyamweya

CASE / FILE NUMBER

Criminal Appeal E049 of 2023

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Ndaikwa v Republic (Criminal Appeal E049 of 2023) [2026] KECA 512 (KLR) (13 March 2026)
(Judgment)

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[2026] KECA 512 (KLR)

Republic of Kenya

In the Court of Appeal at Malindi

Criminal Appeal E049 of 2023

AK Murgor, F Tuiyott & P Nyamweya, JJA

March 13, 2026

Between

Antony Ndaikwa

Appellant

and

Republic

Respondent

(An appeal against the judgment of the High Court of Kenya at Malindi (R. Nyakundi J.) delivered on 21st October 2021 in Criminal. Appeal No. 74 of 2019)

Judgment

1. Antony Ndaikwa, the appellant herein, was, together with two other co-accused persons, convicted of the offence of gang defilement contrary to section 10 of the Sexual Offences Act and sentenced to fifteen (15) years imprisonment by the trial Magistrate (Hon. S. K. Ngii SRM) in Mariakani SPM Criminal Case No. S.O 27 of 2019. The trial Magistrate in this respect heard and the appellant also gave unsworn testimony in his defence. Upon hearing an appeal lodged by the appellant at the High Court at Malindi, the said conviction and sentence were upheld by R. Nyakundi J. in a judgment delivered on 28th October 2021 in Criminal Appeal No. 74 of 2019. The appellant has now lodged a second appeal in this Court, in which he has raised three grounds in his amended grounds of appeal, namely that the age of the complainant was not proved beyond doubt, there was no proper identification of the assailants, and that the medical evidence was scanty and insufficient to sustain a conviction.

2. We heard the appeal on this Court's virtual platform on 26th March 2025 and the appellant, Mr. Antony Ndaikwa was present, appearing virtually in person from Manyani maximum prison, and he relied on his undated written submissions. The learned Assistant Director of Prosecutions, Ms. Ngina Mutua, appeared for the respondent, and equally relied on written submissions dated 11th March 2025. As we proceed with our determination, we are mindful of our role as a second appellate Court, as set out in *Karani v R* (2010) 1 KLR 73: "This is a second appeal. By dint of the provision of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with decision of the superior Court on fact unless it is demonstrated that the trial court and the first appellate Court considered matters, they ought not to have considered or that they failed to consider matter they should have considered or that looking at the evidence as a whole they were plainly wrong decision, in which case such omission or commission would be treated as a matter of law."

3. Three issues of law have in this respect been raised by the appellant, that of the age of the complainant, his identification as the perpetrator of the crime, and whether his conviction was based on sufficient evidence. On the first issue on the age of the complainant, the appellant submitted that the age of the victim was not proved because, the Child's health card that was produced in evidence was not a birth certificate or age assessment card, and in addition was a photocopy and not an original document as required by section 66 of the Evidence Act.

4. The appellant referenced the evidence of PW 1, PW 4 and PW 5 during the trial, and while citing the decisions in *Hillary Nyongesa v Republic* (Eldoret Cr. App. No 123 of 2009) and *Francis Omuroni v Uganda C.A. Cr. App No. 2 of 2000*, submitted that that the age of the victim is a necessary ingredient for the offence and determinant factor in the sentence to be imposed, and a doctor is the only person who could professionally determine the age of the victim in the absence of other evidence. Ms. Mutua on her part submitted that the victim's age was conclusively proved by the Child Health Card produced as an exhibit during trial and that she was fifteen (15) years five (5) months during the material incident.

5.As earlier indicated, the prosecution called five witnesses during the trial. UT (the victim) testified as PW1 and recounted the events that unfolded at 3.00 am on 9th March 2019, when the offence was committed, as did CM (PW3) who was PW1's cousin and was with PW1 at the material time. HNS (PW4) who was PW1's father testified as to receiving the information of the assault on PW1 and that he took her to hospital, where PW1 was examined by Mary Mwaka (PW2), a clinical officer, who produced a P3 form and the results of the medical examination of PW 1 which was conducted on 10th March 2019. The last prosecution witness (PW5) was PC Loice, the investigating officer, who detailed the investigations after receiving the report of the offence and arrest of the appellant. In his defence, the appellant stated that he was at his home when some people came on a motorcycle, arrested him and took him to the police station where he was later charged with the offence, which he denied committing.

6.It is notable that the appellant did raise the issue of proof of the age of the complainant during his first appeal to the High Court, and the learned Judge of the High Court found as follows:“On the element of age, the clinical officers finding on examination that the complainant was aged fifteen years and six months remains undisturbed by the defence. The grievances by the appellants on the probative value and admissibility criteria of the health card in consonant with the express provisions under Section 64 and 66 of the Evidence Act is plausible. In the usual circumstances of the case, the evidence of the child health card did not meet the legal qualifications and requirements of the Law as espoused under the aforesaid stated provisions in the Evidence Act. I am not aware of any legal provision or the much-cherished Section 48 on expert evidence which can elevate child health card as an instrument made to proof the age of a child.The conversation we must have as actors in the criminal justice system is on the veracity, credibility and authenticity of that piece of evidence as a symbolic model to proof (sic) age beyond reasonable doubt. While conceiving that the child health card might contain useful information but my strong disagreement comes from the nature of its source and the giver of the information which goes to the entries sufficient to prove age. In some cases, guardians or house help tasked with the duty of taking minors for immunization may not have the critical facts on the exact date of birth. The statute itself on registration of births did not mandate this tool. Fortunately, there was no legal argument over whether (PW2) piece of evidence on the age of the complainant was potentially and blatantly untrue. On appeal, the appellants have not presented credible evidence of rattling off the examination ordained on proof of age as the. time the complainant was defiled. That issue is also quickly dispensed with in favor of the prosecution as against the appellants.”

7.It is on the basis of these findings that the issue of the victims age has found its way to this Court. It is also notable in this respect that the trial Court had found that PW1 did state in her testimony that she was born on 29th September 2003, which testimony was corroborated by the contents of the Child Health Card which was produced as an exhibit, and that the victim was therefore 15 years 5 months as at 9th March 2019 . The issue of proving the age of a victim in defilement was in this respect addressed by this Court in Edwin Nyambogo Onsongo v Republic (2016) eKLR as follows: -“...the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth

certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

8. Accordingly, the age of a complainant on a charge of defilement is not only proved by way of a birth certificate or age assessment report, but can also be proved by other credible and reliable documents and testimony. In the present case, the complainant (PW1) stated under oath that she was born on 29th September 2003, which date of birth was confirmed by PW4 in his testimony, and corroborated by the Child Health Card produced as an exhibit by PW5. None of these witnesses were cross-examined on the date of birth and Child Health Card. Finally, PW2 who filled the P3 form also established the age of the complainant as at the time of examination to be fifteen (15) years and six (6) months old. This evidence, whose credibility and reliability was not impugned in any way, established beyond reasonable doubt, without the need to rely on a birth certificate or age assessment report, that the complainant was fifteen (15) years and six (6) months old at the time of the commission of the offence.

9. On the second issue of identification, the appellant submits that the victim testified that she knew him from a previous incident, and while citing various decisions including *Nzaro v Republic* (1991) KAR 212 and *Joseph Muchangi Nyagah & another v Republic* [2013] eKLR, argued that this evidence required to be tested in order to rule out the possibility of mistaken identity, which the trial Court and High Court failed to do. Furthermore, that the complainant alleged that the incident took place at night, and that no one can make a positive identification in the night without a source of light of any kind prevailing at the scene of crime. Additionally, the victim alleged that she was able to identify the assailants with the source of moon light, and that the two Courts did not test the evidence of identification on that capacity. Therefore, that his identification was not safe as the possibility of mistaken identity was not ruled out.

10. In reply, Ms. Mutua submitted that the appellant was positively identified by recognition by PW1 and PW3. Counsel cited the decision in *Anjononi & Others v. Republic* (1980) KLR 59 that "recognition of an assailant is more satisfactory, more reassuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another."

11. The identification of the appellant was made by both PW1 and PW3 who stated they saw and heard him talk during the attack on PW1, and recognised him since they had known him "for a long time". Therefore, this was a case of both visual recognition which was augmented by voice recognition, which has been held by this Court in *Yaa Baya v. R* [2017] eKLR and *Karani v Republic* [1985] KECA 91 (KLR) to be just as good and safe. We therefore do not have any reason to fault the finding by the learned Judge of the High Court that evidence that the complainants had prior knowledge of the appellants proved the element of recognition.

12.The last issue raised by the appellant is that of the sufficiency of the evidence, and in particular the medical evidence, which according to him is the evidence that proves an offence of defilement. It is his case that PW 2 who examined the complainant, deposed that the examination occurred on 10th March 2019, however, that according to the P3 form, it was indicated that the victim was examined after 61 hours, which meant the examination was done after 3 days which was not on 10th March 2019, and this destroyed the credibility and ethnicity of the medical evidence by PW 3 and he should be given the benefit of doubt.

13.Ms Mutua submitted that penetration was proved by the testimony of PW1, and corroborated by the medical evidence produced by PW2 as well as by PW3 who was an eyewitness to the ordeal she faced. Further, that this evidence was unshaken by the cross examination of the said three witnesses and the unsworn testimony by the appellant.

14.The only remaining ingredient of the offence of defilement that remained to be proved after proof of the age of the complainant and identity of the appellant is that of penetration. PW1 in this regard gave a detailed account of how the appellant and others felled her and held her hands and legs while on the ground, undressed her and raped her in turns on 9th March 2019. Some of these actions were witnessed by PW3 before she ran away. The P3 form, that was filled, signed and stamped by PW2 on 10th March 2019 confirmed that upon examination, PW1 had had a freshly torn hymen and lacerations the labial minora with mild bleeding. The role of the medical evidence was only to corroborate the primary evidence of PW1, which would have been sufficient on its own under the proviso to section 124 of the Evidence Act. Any inconsistency or contradiction in the evidence of PW2 as regards the time of the medical examination was therefore not fatal in this regard, nor did it in any way materially change the findings of the examination, or evidence by PW1 and PW3.

15.In the end, we find that the appellant is clutching at straws in this appeal, and his grounds have no merit. We are satisfied that all the ingredients of the offence of defilement were established to the required standard and that the concurrent findings of the two courts below were based on credible evidence. Lastly, given that the minimum sentence for gang defilement under section 10 of the Sexual Offences Act is 15 years' imprisonment, the sentence was also lawful. For these reasons, we uphold both the conviction of the appellant for the offence of gang defilement, and sentence of 15 years' imprisonment. This appeal is accordingly dismissed in its entirety.

16.It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 13TH DAY OF MARCH, 2026A.K.

MURGOR.....JUDGE OF APPEALF. TUIYOTT.....JUDGE OF
APPEALP. NYAMWEYA.....JUDGE OF APPEALI certify that this is the true
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