

KENYA / JUDGMENT

Ndere v Republic [2026] KEHC 3906 (KLR)

[2026] KEHC 3906 (KLR)**COURT**

High Court

BEFORE

JN Kamau

CASE / FILE NUMBER

Criminal Appeal E031 of 2023

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Ndere v Republic (Criminal Appeal E031 of 2023) [2026] KEHC 3906 (KLR) (24 March 2026)
(Judgment) Neutral citation:

[2026] KEHC 3906 (KLR) Republic of Kenya In the High Court at Vihiga Criminal Appeal E031 of 2023 JN Kamau, J March 24, 2026 Between Joel Oyiengo Ndere Appellant and Republic Respondent (Being an Appeal from the Judgment of Hon W. K. Cheruiyot (SRM) delivered at Vihiga in the Principal Magistrate's Court in Sexual Offence Case No 12 of 2018 on 25th January 2019)

Judgment

Introduction

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act . 2. The Learned Trial Magistrate, Hon W. K. Cheruiyot (SRM) convicted him of the main charge and sentenced him to twenty (20) years imprisonment. 3. Being dissatisfied with the said Judgement, on 1 st February 2022 he lodged an appeal herein. His Petition of Appeal was undated. He set out four (4) grounds of appeal. On 30 th April 2025, he filed undated Amended Grounds of Appeal. Although he listed seven (7) Amended Grounds of Appeal, they were not numbered. They were indicated as bullet points. 4. His undated Written Submissions were filed on 30 th April 2025 while those of the Respondent were dated 24 th June 2025 and filed on 26 th June 2025. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety. Legal Analysis 5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify. 6. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by

the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify, and thus make due allowance in that respect. 7. Having looked at the Appellant's Grounds of Appeal, Supplementary Grounds of Appeal, his Written Submissions and those of the Respondent, this court noted that the issues that had been placed before it for determination were as follows:- a. Whether or not the Appellant was accorded a fair trial; b. Whether or not the Charge Sheet was defective; c. Whether or not the Prosecution proved its case beyond reasonable doubt; and d. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted. 8. The court therefore dealt with the said issues under the following distinct and separate heads. I. Right to Fair Trial and Charge Sheet 9. Although the Appellant did not disclose the infringement of his right to fair trial and defectiveness of the Charge Sheet for omitting to include the Occurrence Book (OB) number as grounds of appeal, he submitted that he was not accorded a fair trial pursuant to Article 50(2) of the Constitution of Kenya, 2010. He did not expound how his right to fair trial had been infringed. However, his submissions appeared to have a connection to the Charge Sheet. This court, therefore, found it prudent to address the two (2) issues together. 10. Notably, Section 134 of the Criminal Procedure Code Cap 75 (Laws of Kenya) provides as follows:- "Every charge or information shall contain and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged." 11. In addition, it was held in *Sigilani vs Republic* (2004) 2 KLR, that the principle of the law governing charge sheets was that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence. 12. Applying the test above and upon keenly perusing the Charge Sheet, this court found that the particulars of the offence of defilement were clearly spelt out, and these included the section of the law creating the offence, the date of the offence, the place of the offence, the act constituting the offence and the name and age of the victim. 13. The Appellant did not raise any objection before the Trial Court or any contention that the Charge Sheet was defective. He fully participated in the trial in clear demonstration that he understood the charge. He cross-examined the witnesses and was able to put an appropriate defence. This was sufficient indication that he understood the particulars of the charge he faced. 14. The offence was disclosed and stated in a clear and unambiguous manner. He did not inform the Trial Court that he was unable to plead to a specific charge that he could not understand or that he was unable to prepare his defence because of the way that the Charge Sheet was drafted or framed. In the circumstances, the Appellant could not be said to have been prejudiced due to the omission of the OB Number in the Charge Sheet. 15. Even assuming that there was some defect or omission in the Charge Sheet, the same was still curable under Section 382 of the Criminal Procedure Code which provides as follows:- "Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent

jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.” 16. In the premises, the Appellant’s assertions that the Charge Sheet was defective, therefore, fell on the wayside. I. Proof of Prosecution’s Case 17. Amended Ground of Appeal No (1), (2), (3), (5), (6) and (7) were dealt with under this head. 18. In determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases was proof beyond reasonable doubt, this court considered the ingredients of the offence of defilement. 19. It is now settled that the ingredients of the offence of defilement are proof of complainant’s age, proof of penetration and identification of the perpetrator as was held in the case of *George Opondo Olunga vs Republic* [2016] eKLR. This court dealt with the same under the following distinct and separate heads. A. Age 20. The Appellant submitted that before the age assessment was done the Complainant, CO (hereinafter referred to as “PW 1”) and her father had indicated that she was sixteen (16) years old. He questioned how that changed to thirteen (13) years. He disputed the age of PW 1 stating that there was a calculated move to have him charged under Section 8 (3) instead of Section 8(4) of the Sexual Offences Act . 21. On the other hand, the Respondent submitted that the Charge Sheet indicated that PW 1 was thirteen (13) years of age at the time of the commission of the offence. It relied on the case of *Musyoki Mwakavi vs Republic*[2014]eKLR where it was held that in a charge of defilement, age of the minor could be proved by medical evidence, baptism card, school leaving certificates, by the victim’s parents and/or guardians, observation or common sense. 22. It pointed out that PW 4 (sic) testified that PW 1 was thirteen (13) years old and produced her Age Assessment Report dated 9 th March 2018. 23. Notably, No 91xx1 PC Phoebe Owang (hereinafter referred to as “PW 5”) produced the said Age Assessment Report as evidence in this case. A perusal of the same showed that the doctor examined PW 1 and noted that she had permanent molars which had fully erupted occlusion. He concluded that she was approximately thirteen (13) years old. 24. The Appellant did not challenge the production of the aforesaid Age Assessment Report and/or rebut the said evidence by adducing evidence that PW 1 was not thirteen (13) years. Even so, this court was cautious about adopting her age as thirteen (13) years for the simple reason that she was emphatic that she knew that was sixteen (16) years at the time that she testified. The P3 Form showed her approximate age as sixteen (16) years. 25. In view of the fact that punishment under Section 8 of the Sexual Offences Act was dependent on the age of the victim, this court was persuaded to resolve the contradiction of PW 1’s age in the Appellant’s favour by adopting her age as sixteen (16) years as she was best placed to know what her age was. Her evidence that she was sixteen (16) years at the time of testifying and thirteen (13) years at the time of the incident was not cogent and/or consistent as she testified approximately five (5) months after the incident. 26. This court was, therefore, not satisfied

that PW 1's age of thirteen (13) years was proven beyond reasonable doubt. Instead, this court found in favour of the Appellant and adopted sixteen (16) years as PW 1's age. B. Identification 27. The Appellant did not submit on this issue. On its part, the Respondent averred that PW 1 testified that it was the Appellant who defiled her. It added that MA (hereinafter referred to as "PW 2") testified that PW 1 ran towards her while crying and upon interrogating her, PW 1 told her that she had been defiled and pointed to the Appellant's home as the place she was defiled. 28. It argued that, therefore, there was no contention that the Appellant was well known to PW 1 and she could not have been mistaken as to his identity. It asserted that the incident happened during daytime and PW 1 was able to see the Appellant. 29. It submitted that that was the evidence of recognition which was held by courts to be more reliable and weightier than that of identification of a stranger as was held in the case of *Anjononi & Others vs Republic* (1976-80) 1 KLR 1566, 1568. It was emphatic that there was proper identification as there was prior knowledge of the Appellant. 30. A perusal of the proceedings showed that PW 1 testified that on the material day of 3rd March 2018, she went to school but was sent home to collect money required in school. She said she went to Madam N at Ekwamba who used to pay her fees but she did not find her. On her way back to school, she used a short cut which passed through the Appellant's home. 31. It was her further testimony that she saw the Appellant tethering his cows and he called her saying he wanted to send her to his child in school. She informed the court that on reaching the door step, the Appellant held her hand, pulled her inside the house and locked the door. She stated that his house had two (2) rooms and that he took her to a room which had a bed. 32. She averred that she struggled to free herself and wanted to scream but he put a bottle in her mouth, tied her hands using cloths and put her on the bed. She said that the Appellant then removed her uniform and pant and his short and he inserted his penis into his vagina. She said that she felt pain, she pushed him and he fell down. She then ran to his neighbour, PW 2, who took her to the AP Post. PW 2's testimony corroborated that of PW 1 as she confirmed that PW 1 ran to her house crying and told her that the Appellant had raped her. 33. This court noted that PW 1 was the only identifying witness. Having said so, under Section 124 of the Evidence Act Cap 80 (Laws of Kenya), a trial court could convict a person on the basis of uncorroborated evidence of the victim if it was satisfied that the victim was telling the truth. 34. Notably, the proviso of Section 124 of the Evidence Act states that:- "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)." 35. Even so, a trial court was required to exercise great caution before relying on the evidence of a single witness to convict an accused person as it would be one person's word against the other. Other corroborating evidence such as proof of penetration

could assist the trial or appellate court to come with a determination as to who between the opposing witnesses was being truthful. 36. PW 1 positively identified the Appellant as the perpetrator of the offence. She was emphatic that it was him who defiled her. She said she used to see the Appellant and attended the same school with his child. The incident happened during daytime, thus, there was enough lighting for identification. 37. There could not, therefore, have been any possibility of a mistaken identity of the Appellant. This court thus came to the firm conclusion that the Prosecution proved the ingredient of identification which was by recognition. C. Penetration 38. The Appellant placed reliance on the Canadian case of *Queen vs Manual Vincent Quintanilla*, 1999 ABQB 769 where it was held that broken hymen was not proof of defilement as the hymen could be broken by other factors such as riding a bicycle, playing and doing physical exercises, other than sexual intercourse. 39. He questioned how PW 1 escaped without injuries if she was tied and struggled to free herself from him. He asserted that the evidence showed that the approximate age of the injuries was three (3) days and another version said that the P3 Form was filed (sic) just a day after the alleged injuries. 40. He was categorical that this case was marred with contradiction, inconsistencies and discrepancies, therefore, was unsafe for conviction. He explained that although most of the Prosecution witnesses testified that they were told of the occurrence of the incident by PW 1, their testimonies were contradictory in nature. He added that it was difficult to distinguish the truth from the untruth and who was telling the truth and who was lying. 41. In this regard, he relied on the cases of *Richard Aspela vs Republic Appeal No 45 of 1981*, *Ramkrishna Denkerrai Pandya vs Republic Criminal Appeal No 06 of 1990 EACA 93* and *John Mutual Musyoka vs Republic (1917) CA 11/2016* without highlighting the holding he relied therein. 42. On its part, the Respondent invoked Section 2 of the Sexual Offences Act and placed reliance on the case of *Mohammed Omar Mohammed vs Republic [2020]eKLR* where it was held that the key evidence relied upon by the courts in rape and defilement cases in order to prove penetration was the complainant's own testimony which was usually corroborated by the medical report presented by the medical officer. It submitted that PW 1's evidence was corroborated by that of the Clinal Officer, Evans Hasaga (hereinafter referred to as "PW 4") and that penetration was, therefore, proved. 43. It was emphatic that in sexual offences cases the victim was normally the only witness as the offence was normally committed in secrecy. It placed reliance on the case of *Charles Wamukoya Karani vs Republic Criminal Appeal No 72 of 2013 (eKLR citation not given)* where it was held that the critical ingredients forming the offence of defilement were age of the complainant, proof of penetration and positive identification of the assailant. It was categorical that it had proved all the ingredients of the charge of defilement beyond reasonable doubt. 44. It asserted that the inconsistencies and contradictions did not go into the core of the case and that the variance in itself did not in any manner distort or dislodge the commission of the offence as was held in the case of *S.O.O vs Republic[2018]eKLR* which cited the Tanzanian case of *Dickson Elia Nsamba Shapwata & Another vs The Republic Criminal App No 92 of 2007*. 45. It further submitted that pursuant to Section 211 of the Criminal Procedure Code, the Appellant chose to give an unsworn statement and called two (2) witnesses. It asserted that the Appellant denied the

charges and stated that on the material day he left his home in the company of one Patrick to attend a funeral. It added that his daughters DO (hereinafter referred to as “DW 2”) and Lavender Amuse (hereinafter referred to as “DW 2”) contradicted his evidence by stating that he left home alone. It further pointed out that he failed to call the said Patrick as a witness and the Trial Court found that his defence was contradictory. 46. It contended that the governing principle on alibi defence was that a failure to disclose an alibi at a sufficient early opportunity to permit it to be investigated by the police was a factor which may be considered in determining the weight given to it as was held in the case of *Charles Kasena Chogo vs Republic*[2019]eKLR. It asserted that the Trial Court also warned itself on convicting on the evidence of a single witness and more specifically a minor and held that PW 1 understood the duty of telling the truth and was calm and composed even on intense cross-examination and concluded that her evidence was not shaken. 47. In his defence, the Appellant denied the charges and stated that on the material day he left home for a funeral with one Patrick and when he went back home, he was arrested. He called two (2) witness, his daughters, DW 2 and DW 3 to corroborate his evidence. 48. DW 2 and DW 3 testified that on the material day of 3rd March 2018, they were at home while the Appellant left them while preparing tea in the morning and said he was going to a funeral. They stated that they prepared tea and left to fetch water at their grandmother. It was their further evidence that later in the day, he came for them and the grandmother gave them a bag with githeri (sic). They contended that someone attacked the Appellant as they went back home and took him to the Chief’s office. 49. In ascertaining whether the Appellant’s defence of alibi had value, this court had due regard to the definition of “alibi” in the Black’s Law Dictionary, 10th Edition. It was defined as:- “ A defence based on the physical impossibility of a defendant’s guilt by placing the defendant in a location other than the scene of the crime at the relevant time”. 50. It was also trite law that once a respondent raised an alibi defence, the onus shifted to the prosecution to displace the same as was held by the Court of Appeal in the case of *Victor Mwendwa Mulinge vs Republic* [2014] eKLR. 51. In this case, the defence of alibi was raised at the defence hearing and not at the beginning of the trial. The Prosecution did not rebut the same despite having the option of doing so as provided in Section 309 of the Criminal Procedure Code Cap 75 (Laws of Kenya) that provides that:- “ If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.” 52. Weighed against the evidence that was adduced by the Prosecution witnesses, this court did not find the Appellant’s alibi evidence to have been watertight enough to have weakened the inference of guilt on his part. This is because the Prosecution had demonstrated the elements of the offence of defilement as was set out in the case of *George Opondo Olunga vs Republic*(Supra). 53. His argument that the case was full of contradictions thus fell by the wayside. As had been stated hereinabove, any contradictions or inconsistencies were insignificant and did not affect the inference of guilt on his part. The witnesses who were called by Prosecution adduced sufficient evidence to establish the charge. 54. Notably, PW 1’s evidence was corroborated by the scientific evidence of PW 4. PW 4 testified that on

examining PW 1, he observed that she had a laceration on her genitalia and that her hymen was torn. He added that the tear was fresh and that she had a whitish discharge in the vagina. He produced the P3 Form, Post Rape Care (PRC) Form and treatment notes as exhibits during trial. 55. This court, therefore, found and held that the Prosecution had proven its case to the required standard, which in criminal cases, was proof beyond reasonable doubt that the Appellant defiled PW 1 on the material date as there was proof of defilement as PW 4 testified. His assertions that he was not accorded a fair trial, therefore, were rendered moot. 56. In the premises foregoing, Amended Ground of Appeal No (1), (2), (3), (5), (6) and (7) were, therefore, not merited and the same be and are hereby dismissed. II. Sentence 57. Amended Ground of Appeal No (4) was dealt with under this head. 58. The Appellant submitted that his sentence was harsh and excessive. He pleaded with the court to consider that having been in prison from 2018, he was transformed, reformed and well rehabilitated. 59. On its part, the Respondent cited Section 8(3) of the Sexual Offences Act and placed reliance on the case of Supreme Court Petition No E018 of 2023 Republic vs Joshua Gichuki Mwangi (eKLR citation not given) where it was held that although sentencing was an exercise of judicial discretion, it was Parliament and not the Judiciary that set the parameters of sentencing for each crime. 60. It also relied on the case of Shadrack Kipchoge Kogo vs Republic Criminal Appeal No 253 of 2003 (eKLR citation not given) where it was held that sentencing was an exercise of the trial court and for an appellate court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those, the sentence was so harsh and excessive that an error in principle must be inferred. 61. It further referred to Section 329 of the Criminal Procedure Code and noted that the Trial Court took into account the evidence, the nature of the offence and the circumstances of the case in arriving at the appropriate sentence. It asserted that the sentence was safe and proper and should be upheld. 62. The Appellant herein was sentenced under Section 8(3) of the Sexual Offences Act Cap 63 A (Laws of Kenya). The same provides as follows: - “ 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” 63. This court could not therefore fault the Trial Court for having sentenced him to twenty (20) years imprisonment as that was lawful. However, having taken PW 1’s age to have been sixteen (16) years at the time of the incidence, this court found that fifteen (15) years was the appropriate sentence under Section 8(4) of the Sexual Offences Act that stipulates as follows:- “ A person who commits an offence of defilement with a child between the age of fifteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years” 64. Notably, in the case of Joshua Gichuki Mwangi vs Republic [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR where it held that Section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing offences and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence. 65. However, in a decision that was delivered on 12 th July 2024, the Supreme Court overturned the decision of

the Court of Appeal in the case Joshua Gichuki Mwangi vs Republic (Supra) and stated that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence. The Supreme Court directed the relevant organs to abide by its decision noting that the appellant therein had since been released from prison. 66. As this court was bound by the decisions of courts superior to it, its hands were tied as regards the exercising of its discretion to reduce the Appellant's sentence. It had no option but to mete out against the Appellant herein a sentence of fifteen (15) years as was prescribed by the law. 67. Although Ground of Appeal No (3) was not merited, this court was mandated to consider the period that the Appellant spent in remand while his trial was on going as provided in Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya). 68. Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) provides that:- "Subject to the provisions of section 38 of the Penal Code (cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody" (emphasis court). 69. Further, Clause 4.6.20 (ix) of the Judiciary Sentencing Policy Guidelines provides that:- "The Sentencing Court shall be guided by the sentencing principles and objectives set out in Part I of these the Guidelines in all resentencing hearings. The following mitigating factors were set out by the Supreme Court as particularly relevant in a resentencing hearing:... Time already spent in prison by the convict..." 70. The requirement under Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in Ahamad Abolfathi Mohammed & Another vs Republic[2018]eKLR. 71. A perusal of the Charge Sheet indicated that the Appellant was arrested on 3 rd March 2018. Although he was granted bail, he did not appear to have gone out on bond. He was sentenced on 25 th January 2019. 72. A perusal of the Trial Court proceedings showed that the Trial Court directed that his sentence run from 6 th March 2018 which was when he was first arraigned in court. It had left out about three (3) days from when he was arrested. The entire period that he spent in custody while his trial was ongoing, therefore, ought to have been taken into account in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

Disposition

73. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Amended Grounds of Appeal filed on 30 th April 2025 were partially merited. While his conviction be and is hereby upheld as it was safe, his sentence of twenty (20) years imprisonment was unsafe and the same be and is hereby set aside and replaced with a sentence of fifteen (15) years imprisonment from the date of sentence of the Trial Court. 74. For the avoidance of doubt, the period that the Appellant spent in custody between 3 rd March 2018 and 24 th January 2019 be and is hereby taken into account in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) while computing his sentence. 75. It is so ordered. DATED AND DELIVERED AT VIHIGA THIS 24 TH DAY OF

MARCH 2026 J. KAMAU JUDGE

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