



**Wandera v Republic (Criminal Appeal E023 of 2024)  
[2024] KEHC 15866 (KLR) (18 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15866 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL E023 OF 2024  
DR KAVEDZA, J  
DECEMBER 18, 2024**

**BETWEEN**

**KEN WANDERA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered on 26th February 2024 at Kibera Chief Magistrate's Court Sexual offence case No. E048 of 2022 Republic vs Ken Wandera)*

**JUDGMENT**

1. The Appellant was charged and after full trial convicted by the Subordinate Court of the offence of defilement contrary to section 8(1) as read with 8(3) of the *Sexual Offences Act* No. 3 of 2006 (the *Act*). He was also convicted on the alternative count of committing an indecent act with a child contrary to section 11(1) of the *Act*. The appellant was sentenced to serve 20 years imprisonment on the main count.
2. Being dissatisfied, he has filed an appeal against the conviction and sentence in line with his petition of appeal.
3. This is the first appellate court and in *Okeno v. R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence that was before the trial court, and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.
4. With the above, I now proceed to determine the substance of the appeal. In his Petition of Appeal and written submissions, the appellant has raised four grounds of appeal. The appellant complains that the prosecution failed to prove its case beyond reasonable doubt. He further challenges the voir dire examination. The appellant also complained that court failed to consider his defense and that the conviction was harsh and excessive.



5. The appeal was canvassed by way of written submissions. The submissions of the parties have been duly considered and there is no need to rehash them.
6. To succeed in a prosecution for defilement, it must be proven that the accused committed an act that caused penetration with a child. "Penetration" under section 2 of the [Act](#) means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person."
7. The prosecution called four witnesses in support of their case. PW1, S.M.O (name withheld) testified that she stays in Darajani Lindi area and is in class 4 at Ayany Primary School. She testified that she lived with her grandmother. She recalled that on 9<sup>th</sup> April 2022 at around 8 pm she met the appellant who sent her beans and gave her Kshs. 50. After she brought the food to him, he pulled her inside the house which was adjacent to their house. He started undressing her and threatened her against screaming. He placed her on the seat and inserted his penis into her vagina.
8. The complainant testified that during the first incident, she felt pain when the appellant defiled her, after which he instructed her to dress and leave. She did not immediately disclose the assault to anyone. On 13<sup>th</sup> March 2022, while using the outside toilet, she heard someone opening the door and found the appellant, who began undressing. Neighbours arrived, finding him naked, which caused the appellant to flee. The complainant later revealed to her sister and aunt that the appellant had locked her in the toilet. She was then taken to Nairobi Women's Hospital. During cross-examination, she confirmed knowing the appellant and clarified that during both incidents, she was in pain there was no bleeding, and that it was her first sexual encounter. She further testified that there was enough light during the second encounter for clear identification.
9. PW1's testimony did not require corroboration within the proviso of section 124 of the [Evidence Act](#) (Chapter 80 of the Laws of Kenya) if there are to believe that the minor was telling the truth. I have also thoroughly gone through the testimony of PW1 and found that she was consistent throughout her narration, despite being subjected to rigorous cross-examination by counsel for the appellant.
10. PW1 gave a clear and graphic testimony on the series of events and remained steadfast that the appellant was the one who had sex with her. The appellant, being their neighbour, was someone well-known to her. I therefore hold that the appellant was positively identified.
11. PW2, Serah Okute, testified about the events on the material day. She explained that she lived with her three grandchildren, one of whom was hers. On the evening in question, at 8 pm, she found the door open and no one around. Later, her daughter arrived with PW1, who informed her of the incident. PW1 revealed that they had found the appellant with her in the toilet. After physically reprimanding PW1, she confessed to the events of 9 April 2022. PW2 then took appropriate actions, including reporting the matter to Nairobi Women's Hospital and Kibera Police Station. During cross-examination, PW2 stated that PW1 had been threatened by the appellant to keep the incident secret.
12. Dr. John Njuguna, PW3, from Nairobi Women's Hospital, provided medical evidence. He examined the victim on 14/4/22 at 5:45 pm after she reported defilement on 13/4/22 by someone known to her. He testified that the victim appeared calm and had no visible physical injuries. However, her hymen was torn and showed old remnants. He noted bruises on her right shoulder and confirmed evidence of penetration. He produced the PRC and GVRC forms.
13. During cross-examination, he reaffirmed the presence of shoulder bruises and penetration, supporting the history of defilement.



14. This finding, in my view, is consistent with PW1's evidence that she had had there was penetration occasioned by the appellant. Therefore, given the history, it is my finding that penetration was sufficiently proven.
15. On the age of the victim, the baptism card produced by the investigating officer indicated that the complainant was born in 2009. This evidence was not refuted by the appellant. The complainant was therefore 13 years at the time of the offence and child within the meaning of the law.
16. In his defence, Ken Wandera Ouma, DW1, stated that on 9/04/22, his father was at home from 6 pm until morning. They cooked and ate supper together, then watched the news. He denied having sex with any girl and claimed his father was present throughout the evening. He further testified that on 13/04/22, he visited his aunt at Mlolongo and stayed there for three days before returning to Kibra. He claimed not to have been in Kibra during the toilet incident. He was arrested after returning from his aunt's place.
17. During cross-examination, DW1 confirmed knowing S.M.O for three months but denied any quarrels with her or her grandmother. He reiterated that on 9/4/22, his father was at home and that on 13/4/22, he was in Mlolongo at 11 am. He also mentioned his aunt had come from Saudi Arabia for a function on 6/4/22 and had photographs to support this.
18. DW2, William Ouma, testified that on 9/4/22, he was at home resting and was with the appellant, who was cooking. However, he had no knowledge of the events on 13/4/22. On cross-examination, DW2 acknowledged he could not provide any information about 13/4/22 but mentioned that he was with the appellant on 14/4/22.
19. DW3, a colleague of the appellant, testified that they were together at a ceremony in Kiambu on 13/4/22. However, she could not provide any details about the appellant's activities before noon on that day.
20. Notwithstanding the appellant's assertion of an alibi, the evidence provided in support of this defense lacks both credibility and substance. It is a well-established principle of law that the burden of proving an alibi lies squarely with the accused. The mere assertion of an alibi, without any corroborating or substantial evidence, is insufficient to discharge this burden. Consequently, the appellant has failed to establish a credible defence, and as such, the alibi defence is hereby dismissed.
21. The appellant contended that a voir dire examination was not conducted on the minor before the minor's testimony was admitted. However, the record indicates that on 12th July 2022, prior to the complainant giving evidence, the trial court conducted a voir dire examination to assess the minor's understanding of the oath. This ground of appeal is therefore without merit and fails.
22. The conviction on the main count of defilement is therefore affirmed.
23. However, the trial court convicted the appellant on both the main charge and the alternative charge. In doing so, the trial court fell into error. It is trite law that a conviction cannot be made on both the main



charge and the alternative charge. This position was stated by the Court of Appeal in David Ndumba v Republic [2013] eKLR thus:-

“On the issue of the alternative charge, we find that nothing turns on the fact that the trial court did not make a pronouncement on the same. In *M.B.O. v Republic*, Criminal Appeal No. 342 Of 2008, this Court held,

“The practice of charging offences in the alternative is one of abundant caution and that is why no finding is made on such charge once there is ample evidence to support the main charge.”

24. The charge is an alternative to and not an addition to the main charge and therefore once the trial court found that the prosecution had proved the main charge of defilement, the trial magistrate had no business in proceeding to convict the Appellant on the alternative.
25. For that reason, I partially allow the appeal on conviction by setting aside the conviction on the alternative charge of the offence of indecent act with a child, contrary to Section 11(1) of the Sexual Offences Act, No. 3 of 2006.
26. The primary objective of sentencing is not solely to punish but also to rehabilitate and reintegrate offenders back into society as responsible citizens.
27. The trial court sentenced the appellant to twenty years imprisonment, I have no doubt that the sentence imposed by the trial court on the main charge, in this case, was lawful.
28. For the above reasons, I hereby affirm the sentence of twenty (20) years imprisonment imposed on the main charge.

Orders accordingly.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 18<sup>TH</sup> DAY OF DECEMBER 2024**

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**D. KAVEDZA**

**JUDGE**

In the presence of:

Appellant present

Mburugu for the Respondent

Achode Court Assistant

