



REPUBLIC OF KENYA



KENYA LAW
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**Pande v Republic (Criminal Appeal E034 of 2023)
[2025] KEHC 6913 (KLR) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 6913 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E034 OF 2023
AB MWAMUYE, J
JANUARY 23, 2025**

BETWEEN

DAVID WERE PANDE APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal against the Judgment, Conviction and Sentence of the Hon.
S.O. Temu (SRM) delivered on 5th May, 2022 in S.O Case No. E022 of 2022)*

JUDGMENT

1. The Appellant, David Were Pande, was charged with the offence of Defilement Contrary to section 8(1), as read with Section 8(3) of the *Sexual Offences Act*, 2006. The particulars of the offence as stated on the Charge Sheet were that on the 25th May, 2022 at Tura Sub location, Kakola location within Nyando sub-county in Kisumu County, intentionally and unlawfully caused his penis to penetrate the vagina of C.O.O, a child aged 12 years. The appellant was also charged, with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the alternative count was that on the 25th May, 2022 at Kakola location within Nyando sub-county in Kisumu County, intentionally and unlawfully touched the buttocks, breasts and Vagina of C.O.O, a child aged 12 years with his penis.
2. The Appellant pleaded not guilty. The prosecution called 4 witnesses; the Appellant was put to his defence. The Appellant was subsequently convicted and sentenced to serve 20 years imprisonment for the offence of defilement.



3. Having set out the background to the matter, this Court's duty is to evaluate and scrutinize the evidence and proceedings on record and reach its own independent conclusion as espoused in *David Njuguna Wairimu V Republic* [2010] where the court of appeal held: -

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.

4. I have considered the Trial Court's proceedings, the Petition of Appeal dated the 29th June, 2023, the Appellant's submissions dated 20th February, 2024 and the Respondent's undated Submissions and I identify issues for determination as follows: -
 - a. Whether the elements of the offence of defilement were proved beyond reasonable doubt as required in law;
 - b. Whether the sentence was harsh and excessive under the circumstances.

Whether the elements of the offence of defilement were proved beyond reasonable doubt as required in law

5. To sustain a conviction in a charge of defilement, the prosecution is required to prove elements of age of the complainant, penetration and identification of the assailant beyond all reasonable doubt. This position was held in the case of *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013 where it was held: -“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”
6. Additionally, Section 8 (1) and (2) of the [Sexual Offences Act](#) provide as follows: -
 1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 2. A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
7. On the age of the complainant, PW1 testified that the child was 12 years old. It was further confirmed from the age assessment report dated 27/5/2022 prepared by Dr. Onyango Paul. This was also not contested at the trial Court. The age of the complainant was therefore properly proved and the charge under Section 8 (1) and (2) of the [Sexual Offences Act](#) properly preferred.
8. On the element of element of penetration, the Complainant narrated how the appellant held her, removed her pant and pushed her to the ground. That the appellant touched her thighs, removed his trouser and pant and lied on her and inserted his penis to her vagina.
9. Further the medical reports corroborated this. PW2, a Clinical officer confirmed that when he examined the complainant's private parts the labia manora and majora were swollen and the hymen was not intact. The minor was actively bleeding from her private parts and the private parts were painful. He concluded that there was actual penetration. Therefore, the second element of penetration was proved beyond reasonable doubt.



10. Regarding the identification of the perpetrator, it was not disputed that the appellant was well known to the victim. The appellant was the complainant's uncle and they stayed together in the same house. The appellant also confirmed that he was the only adult in their said house. There is therefore no doubt that the Appellant was properly identified as the perpetrator of the offence of defilement.
11. I therefore find that all the elements of the offence of defilement were proved beyond all reasonable doubt and the evidence tendered was sufficient to sustain a conviction.

Whether the sentence was harsh and excessive under the circumstances

12. The appellant contended that the sentence was excessive given the circumstances of the case herein. Section 8 (3) of the *Sexual Offences Act* No. 3 of 2006 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.

13. I find that the sentence of 25 years imprisonment meted upon the appellant by the trial court was neither harsh nor excessive considering the aggravating factors of the case. The appellant was the complainant's uncle, a trusted family member entrusted with the minor's care and protection but violated the trust in the most abhorrent manner. Furthermore, the appellant's actions were particularly egregious as he was HIV Positive and his actions endangered the life and well-being of the minor.
14. From the foregoing analysis, I am satisfied that the appellant was convicted on strong evidence and the prosecution discharged the burden of proof beyond reasonable doubt. I therefore find no merit in the appeal. In the result, I affirm the judgement of the court below and dismiss the appeal in its entirety.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 23RD DAY OF JANUARY, 2025.

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BAHATI MWAMUYE

JUDGE

In the Presence of:

Counsel for the Appellant – Unrepresented, present in person

Prosecution – Ms. Kathali

Court Assistant – Mr. Guyo

