



**Machora v Republic (Criminal Appeal E167 of 2022)
[2025] KEHC 2406 (KLR) (Crim) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2406 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL APPEAL E167 OF 2022**

**CJ KENDAGOR, J
FEBRUARY 20, 2025**

BETWEEN

STEPHEN NYANGAU MACHORA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal against conviction and sentence in Makadara Chief Magistrates Courts S.O No. 143 of 2019 delivered on 14th July, 2022 by Hon. H. Onkwani (SPM.)

JUDGMENT

1. Stephen Nyangau Machora, the Appellant, was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act*.
2. The particulars of the offense are that the Appellant on the 5th day of June, 2019 at [particulars withheld] within Nairobi County, intentionally caused his penis to penetrate the vagina of M.W., a child aged 8 years.
3. He faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No. 6 of 2006, which particulars of the offence are that on 5th day of June, 2019 at [particulars withheld] within Nairobi County, intentionally touched the vagina of M.W., a child aged 8 years with his penis.
4. The prosecution called 4 witnesses, the Appellant opted to remain silent when he was placed on his defence. After trial, the Appellant was found guilty of the main count, and no finding was made on the alternative count, and he was thereby sentenced to life imprisonment.
5. The Appellant, aggrieved by the conviction and sentence, has filed this appeal. He argues that the trial magistrate made errors in law and fact by convicting him based on a defective charge sheet. He



also contends that the magistrate failed to establish the crucial elements of the offense against him. Additionally, he states that the sentence imposed was harsh, excessive, and discriminatory.

6. The appeal was canvassed by way of written submissions.

Written submissions

7. The appellant contends that the evidence was not cogent to convict him. Further that, the charge sheet having omitted the word 'unlawful' was defective. He further submitted that the critical elements of the offense of defilement, specifically age, penetration, and identification, were not proved against him due to the lack of corroborative evidence supporting the prosecution's case. In relation to identification, he argued that PW1, PW3, and PW4 provided conflicting statements about the identity of the assailant; with PW2 identifying the assailant as 'Austine,' while PW1 referred to the Appellant as 'Steve.'
8. As to the legality of the sentence, he submitted that the learned trial magistrate failed to consider the Appellant's mitigation, including his age upon sentencing him to life imprisonment, thus depriving him of the benefits of Section 46 of the *Prisons Act*, contrary to Article 27 (1) (2) (4) (6) of the COK, rendering him ineligible for remission.
9. The Respondent submitted that the prosecution established the charge of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act*. It was argued that all elements of penetration, age and identification, were proven beyond reasonable doubt. The cogent testimony of the victim as corroborated by the doctor; PW3 established penetration, the birth certificate established that the minor was 8 years at the material time, and she positively identified the appellant as the assailant. They also submitted that the sentence was appropriate.

Determination

10. It is the duty of the first Appellate court to carefully examine and analyze afresh the evidence presented from the trial court and draw its own conclusion. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination. (See *Pandya v Republic* [1957] EA 336).

Whether the charge was defective as particularized?

11. The Appellant argued that the charge sheet was defective for giving a misdirection of the offence by failing to use the word "unlawfully", before the phrase '...intentionally caused his male genital organ...'.
12. On the issue of a defective charge sheet, this court would have to direct itself as to whether or not the charge sheet did not specify the offence with which the Appellant had been charged: whether it did not give information as to the nature of offence charged and whether the Appellant was prejudiced or the same occasioned any miscarriage of justice.
13. Section 134 of the *Criminal Procedure Code* 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.”



14. Dealing with the issue of the omission of the term ‘unlawful’ in the charge sheet in Daniel Oduya Oloo v Republic [2018] eKLR the Court held that: -

“On the same issue the Appellant submitted that the particulars of the offence were fatally defective as they failed to disclose that the act of defilement was unlawful. It is true that the word unlawful was not included in the particulars of the offence. The offence of defilement represents a situation in which the key elements requiring proof are age of the victim, identification of the perpetrator and penetration. It is an offence perpetrated to children. Given the fact that children cannot consent to the acts that form the basis of the offence implies that as long as the elements of the offence are proved, the offence itself is deemed unlawful. Therefore, the mere omission of the word “unlawful” does not, in the circumstances, render the charge sheet defective.”

15. The charge sheet outlines the elements of the offence; the evidence that was presented on record aligns with what was indicated in the charge sheet. The Appellant was present at the trial and actively engaged in the cross-examination of witnesses regarding the evidence presented against him; he understood the charge, and the omission does not cause him any prejudice. The charge sheet is not defective simply because it is not indicated ‘unlawfully’. The Appellant’s appeal on the grounds of a defective charge sheet similarly fails.

Whether the prosecution established its case against the appellant beyond reasonable doubt?

16. The offence of defilement is rooted on three main ingredients being the age of the victim (must be a minor), penetration and the proper identification of the perpetrator. These ingredients are provided for under Section 8(1) of the [Sexual Offences Act](#) No. 3 of 2006 and must each be proven for a conviction to issue. (See George Opondo Olunga vs. Republic [2016] eKLR.)
17. Section 8 (1) of the [Sexual Offences Act](#) provides as follows:
- a. “8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - b. ...
 - c. (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.
 - d. ...
 - e. (5) It is a defence to a charge under this section if –
 - a. it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
 - b. the accused reasonably believed that the child was over the age of eighteen years.
18. The first element is age. The Court of Appeal in Edwin Nyambogo Onsongo v Republic [2016] eKLR stated as follows in respect of proving the age of a victim in cases of defilement:
- a. “... 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." (emphasis added).

19. The age of the minor was established by production of the minor's birth certificate, which showed that the complainant was born on 17th October, 2011, and therefore, as at the time of the incident, she was 8 years old. This was corroborated by the complainant's mother, PW1.
20. The second issue is whether the prosecution established proof of penetration of the complainant, beyond reasonable doubt. Penetration is proved through the evidence of the victim corroborated by medical evidence. Nevertheless, this Court requires proof of facts that the offence was committed, the medical evidence notwithstanding. The provisions of Section 124 of the Evidence Act, informative to the end that a conviction can rest squarely on the sole testimony of the victim. See Daniel Maina Wambugu v Republic [2018] KEHC 5656 (KLR).
21. Section 124 of the Evidence Act, Cap 80 provides as follows:
 - a. "Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other 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 offense, 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."
22. The record before me, shows clearly that complainant was properly subjected to voire dire examination at the end of which, the learned Magistrate concluded that she was intelligent and understood the duty of speaking the truth and directed her to give sworn statement.
23. According to the Appellant the prosecution failed in its undertaking to prove its case beyond reasonable doubt. He argued that the corroborative evidence was not cogent to establish a conviction.
24. PW1; the Complainant's mother stated that she became concerned when the Complainant wasn't walking properly. When she went to bathe her, she discovered some red discharge on her private parts, which prompted her to take her to the police station, where she reported the matter and the complainant opened up that 'she was at Steve's house and that he had done bad manners to her.
25. PW2; the Complainant, gave a cogent testimony of how the Appellant, who was her neighbour, pulled her into his house as she was going to play and held her by force and took her to his bed where he removed her shorts, stockings and pants. She stated that he also opened his trouser zip and removed what she referred to as 'his thing which he uses to urinate' and inserted it 'in the place where she uses to urinate.' She stated that after the Appellant stopped, she went out and he warned her that he would kill her if she told anyone.
26. Her testimony of the ordeal was corroborated by PW3; Dr. Madula who produced the PRC report (P-exh2) and the P3 as (P-exh1). On genital examination it was evidenced that; her hymen was not intact, and she had active vaginal bleeding. The medical examination was done on the day that the incident is stated to have occurred.



27. In *Muganga Chilejo Saha v Republic* [2017], eKLR the Court of Appeal analyzed various cases where descriptive terms had been used to narrate sexual abuse;

“Naturally, children who are victims of sexual abuse are likely to be devastated by the experience, and given their innocence, they may feel shy, embarrassed, and ashamed to relate that experience before people and more so in a courtroom. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms like, “alinifanyia tabia mbaya” (IE V R, Kapenguria H.C Cr. Case No. 11 of 2016), “he pricked me with a thorn from the front part of this body.”, (Samuel Mwangi Kinyati v R, Nanyuki HC.CRA. No. 48 of 2015), “he used his thing for peeing” (David Otieno Alex v R, Homa Bay H.C Cr Ap. No. 44 of 2015), “he inserted his “dudu” into my “mapaja”, (Jose Kaburu v R, Meru H.C Cr. Case No. 196 of 2016), “he used his munyunyu”, (Thomas Alugha Ndegwa, Nbi H.C. Cr. Appeal No. 116 of 2011), as apt description of acts of defilement.

28. From the evidence of the complainant, I conclude that the reference of ‘his thing which he uses to urinate’ refers to penis while reference to ‘her thing which she uses to urinate’ refers to vagina. The Complainant described that the penis was inserted into her vagina, I conclude that the same amounted to penetration. The second ingredient, namely penetration, was sufficiently proven based on the victim’s evidence and the corroborating medical evidence.

29. On the identity of the perpetrator, PW1 testified that she knows the Appellant well because he is a neighbour in the plot where she works as a caretaker. PW2, the Complainant, stated that the incident occurred in their shared plot, during which the assailant dragged her into his house. She referred to the Appellant as Steve while recounting the ordeal.

30. Further, as to the alleged discrepancies in the purported name of the assailant where PW3 (medical doctor at the facility where the complainant was treated) in his testimony stated that the complainant called her assailant ‘Austine’ during her time of medical examination. PW2 referred to the appellant in Court as Stephen. PW1 (Complainant’s mother) stated that the Appellant was referred to as Steve and Stephen. The Complainant’s account of the fateful events, along with the identification as a neighbour, leaves no room for doubt. I have considered the alleged discrepancies and deem them inconsequential, as they neither undermine the veracity of the prosecution witnesses’ testimonies nor prejudice the appellant’s defence.

31. Thus, I have no reason to deviate from the findings of the trial magistrate, who had the opportunity to hear and see the Complainant as she testified, weigh her testimony against the cross-examination, and test both their demeanor.

32. For the above reasons, I find and hold that the prosecution proved its case against the Appellant beyond reasonable doubt. Accordingly, I uphold the conviction.

Whether the sentencing was grossly harsh and excessive?

33. It is trite that although sentencing is at the discretion of the trial Court, that discretion must be exercised judiciously in accordance with the law taking into account the facts and circumstances of each case.



34. The Appellant was sentenced to life imprisonment. The emerging jurisprudence is that life sentence is not left indeterminate. This view has been expounded by the Court of Appeal in *Ayako v Republic* (Criminal Appeal 22 of 2018) [2023] KECA 1563 (KLR) (8 December 2023) (Judgment) as follows:

“On our part, considering this comparative jurisprudence and the prevailing socio-economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the convict. Instead, we now hold, life imprisonment translates to thirty years’ imprisonment.”

35. I have considered the evidence presented and the mitigation offered before the trial Court, and I hereby translate the life imprisonment sentence in this case to 30 years. The period shall run, as per Section 333 (2) of the *Criminal Procedure Code*, from the date of arrest on 14th June, 2019.

It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 20TH DAY OF FEBRUARY, 2025.

.....

C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryly

Appellant present

For the Respondent - Ms. Arunga ODPP

