



REPUBLIC OF KENYA



KENYA LAW
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**RMM v Republic (Criminal Appeal E034 of 2024)
[2025] KEHC 1478 (KLR) (11 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1478 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E034 OF 2024
DR KAVEDZA, J
FEBRUARY 11, 2025**

BETWEEN

RMM APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered on 16th May 2024 by Hon. A. Mwangi (CM) at Kibera Chief Magistrate's Court Sexual Offences Case no. 28 of 2019 Republic vs Rehoboam Mwongela Muthenya)

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 particulars were that on diverse dates between 5th and 20th March 2019 within Nairobi county, he intentionally and unlawfully caused his penis to penetrate the vagina of M.C. a child aged 13 years. He was sentenced to serve fifteen (15) years' imprisonment.
2. Being aggrieved, he filed an appeal challenging his conviction and sentence. In his petition of appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted. He contended that the trial court failed to consider his alibi defence. He urged the court to quash his conviction and set aside the sentence.
3. 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."
4. Further, section 8(1) and (3) of the *Sexual Offences Act*, No. 3 of 2006 provides thus:
 8. Defilement



- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - (3) 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.
5. 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 which was before the trial court and 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.
 6. Bearing in mind the above provisions, I will now analyse the evidence on record to ascertain whether the essential ingredients of the offence preferred against the appellant were established to the required standard of proof.
 7. The prosecution case was as follows: M.C (PW1), a 14-year-old girl born on 24th October 2005, recounted that on 3rd March 2019, she left school after obtaining permission for medical care. She first stopped at her brother's shop, where he gave her money for transport. After visiting the hospital with her mother and receiving medication, she was dropped off at school but instead travelled to Kapsabet, following instructions from the appellant, who had used her mother's phone to contact her. In Kapsabet, she borrowed a phone from a stranger, through which the appellant sent her Kshs. 1,000. With the stranger's help, she withdrew the money and travelled to Nairobi, arriving at the appellant's home in Kawangware. There, she found the appellant, her brother-in-law, along with his sister and cousin, both of whom were adults.
 8. During her stay at the appellant's house, he often had sexual intercourse with her.
 9. One Monday, police, accompanied by her brother Jones and sister Diana, arrived at the appellant's house following a tip-off from Diana. Both she and the appellant were taken to the police station, and she was later treated at Nairobi Women's Hospital, where she received a Post-Rape Care Form. She stayed with her sister in Nairobi before returning to Nandi. At Kobujoy Police Station, her brother filed a missing person report. During cross-examination, she stated that she traveled from Kipsigat to Kapsabet by lorry and had visited the appellant's house before the December 2018 incident. She testified that the appellant slept with her when his sister was absent and identified him in court.
 10. As discussed in the *Kenya Judiciary Criminal Procedure Bench Book* 2018 paragraphs 94-96 no corroboration is necessary for the evidence of a child taken on oath although cross-examination is available for sworn or unsworn evidence of a child in the usual way.
 11. The complainant's testimony did not require corroboration in accordance with the proviso to section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) if there are reasons to believe that the child was telling the truth. In this regard, the trial magistrate noted that the complainant was consistent and steadfast in his. In addition, their evidence which was subjected to cross-examination remained consistent throughout.
 12. The appellant was well known to the complainant and she recognised him as his brother-in-law. She could not have possibly pointed fingers at the wrong person for the act. I therefore hold that the appellant was properly identified.
 13. To corroborate the complainant's evidence, PW2, John Njuguna, produced the complainant's Post-Rape Care Form in court. He confirmed that her genitalia appeared normal, with a torn hymen, no bleeding, and no signs of sexually transmitted disease or pregnancy. He also submitted the appellant's



medical results, which showed no injuries or abnormalities. During cross-examination, he mentioned that the complainant had claimed her brother had beaten her, but there was no physical evidence to support this. He concluded that there was penetration. Therefore, given the history, it is my finding that penetration was sufficiently proven.

14. PW3, Corporal Simon Koech, recalled the appellant's arrest on 21st March 2019, after which he was medically examined at Nairobi Women's Hospital. The following day, Koech escorted the appellant to Kabujoy Police Station, where he was arraigned in Kapsabet Court. Koech also received the complainant's tracksuit and undergarments.
15. PW4, APC Churchill Anyul, testified that on 20th March 2019, Kemboi reported his missing sibling had been seen at the appellant's house. Along with PW5 PC Samuel Mutwiri, Anyul went to the house and found the complainant. The appellant claimed to have been living with her for some time. Both were taken to the police station, and the complainant was later examined at Nairobi Women's Hospital. PW5 described intervening when the complainant's brother tried to assault the appellant.
16. PW6, PC Nancy Gathoni, the investigating officer, confirmed the case was reported to Kabete Police Station on 28th March 2019. She reviewed witness statements from Kobujoi Police Station and the complainant's medical reports, which showed penile penetration. She also presented the complainant's birth certificate which indicated that she was born on 24th October 2005.
17. In his defence, the appellant, DW1, stated that on 6th March 2019, the complainant arrived at his house while he, his sister, and employee D were at work. She accessed the house using a key placed on top of the door. The complainant explained that she was there to pick up clothes left behind after her school burned down. That night, the complainant slept with his sister, D slept near his bed, and he slept alone. The appellant maintained that he left early for work and returned at 10:00 pm.
18. On 20th March 2019, the appellant's sister, DW2, called him to report that his former wife had broken into the house to take household items. When he returned home, five people, including police officers, the complainant's brother, and an unidentified man, were at his door. The complainant's brother slapped him and the complainant. The officers did not explain the arrest but handcuffed him and D, while his sister was not handcuffed. They were taken to the police station.
19. The next day, the appellant was examined at Nairobi Women's Hospital and later taken to Kobujoi Police Station before being arraigned in Kapsabet Law Court. He denied sending the complainant money or asking her to come to Nairobi. He produced Mpesa statements from 1st to 5th March 2019, which showed no transaction of Kshs. 1000. Additionally, he stated that he failed to contact the complainant's family since they had disagreed due to his separation from his wife who was the complainant's older sister.
20. The appellant's sister DW2 corroborated the appellant's account, stating that she was released after her boss paid a Kshs. 2000 fine.
21. The court considered his defence and found it to be incredible. Given the foregoing, I find that the appellant's defence did not dislodge the cogent evidence adduced by the prosecution. In my view, the appellant's defence was properly dismissed by the trial court as an afterthought aimed at exonerating himself from the offence.
22. On the age of the complainant, the trial court considered the birth certificate produced by the investigating officer PW6. The birth certificate indicated that she was born on 24th October 2005. She was therefore 14 years at the time of the offence. There is therefore no doubt that the complainant was a child.



23. With regard to his alibi defence, this Court agrees with the judgement of the trial court, that the failure of DW1, DW2 and the aforementioned employee, D, to inform the authorities of the whereabouts of the complainant is vexing. This only served to perpetuate the heinous acts by the appellant towards the complainant.
24. The upshot of the above analysis is that the prosecution proved their case beyond reasonable doubt. The conviction is hereby affirmed.
25. On sentence, the appellant was sentenced to serve fifteen years imprisonment. During sentencing, the court considered the pre-sentence report and exercised discretion. In the premises, I see no reason to interfere with the sentence.
26. In the end, the appeal is found to be lacking in merit and is dismissed in its entirety.
Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 11TH DAY OF FEBRUARY 2025

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D. KAVEDZA

JUDGE

In the presence of:

Mr. Mutuma for the respondent.

Mukuna for the appellant

Achode – court assistant

Appellant - present

