



REPUBLIC OF KENYA



**Wasike v Republic (Criminal Appeal E044 of 2024)  
[2025] KEHC 1584 (KLR) (25 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1584 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL E044 OF 2024  
DR KAVEDZA, J  
FEBRUARY 25, 2025**

**BETWEEN**

**MICHAEL ZAKAYO WASIKE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered on 20th Feb 2023 by Hon. C. Mwaniki (S.R.M) at Kibera Chief Magistrate's Court Criminal Case no. 18 of 2017 Republic vs Michael Zakayo Wasike)*

**JUDGMENT**

1. The appellant Michael Zakayo Wasike was charged and after a full trial convicted for 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 sentenced to serve fifteen (15) years imprisonment. Being aggrieved, he filed an appeal challenging his conviction and sentence.
2. In the petition of appeal and amended grounds of appeal, he raised the following main grounds:  

The appellant challenged the totality of the prosecution's evidence against which he was convicted; the appellant challenged the truthfulness of the victim; he challenged the inconsistencies and contradictions in the prosecution's evidence thereby prejudicing his right to a fair trial.
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 analyze and re-evaluate the evidence that was before the trial court, and itself come to its conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.



4. To succeed in a prosecution for defilement, it must be proven that the accused committed an act that caused penetration with a child.
5. "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."
6. 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.

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. Regarding the ingredients, I wish to state at the outset that the importance of proving the age of a victim, proof of penetration, and positive identification of the assailant in sexual offences is paramount.
8. PW1, SC, the complainant, testified that she was familiar with the [Particulars withheld] church, as it was close to her home. On 26th February, while playing on the swings at the church, the appellant, a church guard, approached her. He took her to his house within the church compound, where he began to caress her breasts, then undressed her, and touched her groin area. He then pulled down her trousers and panty. He then pulled her to the back of the house and put his 'bone' on her 'thing' (touching her groins). She slapped him and told him to stop. He gave her Kshs. 20 and sent her away.
9. Later, PW1 told her mother, who took her to Nairobi Women's Hospital. She described the appellant's actions as putting "germs" on her using his genitals. PW1 also revealed that this had occurred before at a neighbor's house and in a bush, with the appellant giving her Kshs. 20 each time.
10. Upon cross-examination, PW1 confirmed she knew the appellant, Michael, the church's security guard. She also provided details of his residence. The incident took place during the day, and PW1 identified the appellant by recognition, as he was a familiar figure at the church. Thus, the appellant was positively identified.
11. 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:

“94. No corroboration is required if the evidence of the child is sworn (Kibangeny arap Kolil v R 1959 EA 92). Unsworn evidence of a victim who is a child of tender years must be corroborated by other material evidence implicating the accused person for a conviction to be secured (Oloo v R (2009) KLR).

95. However, in cases involving sexual offences, if the victim's evidence is the only evidence available, the court can convict on the basis of that evidence provided that the court is satisfied that the victim is truthful (s. 124, [Evidence Act](#)). The reasons for the court's satisfaction must be recorded in the proceedings (Isaac Nyoro Kimita v R Court of Appeal at Nairobi Criminal Appeal No. 187 of



2009; Julius Kiunga M'birithia v R High Court at Meru Criminal Appeal No. 111 of 2011).

96. The evidence of a child, sworn or unsworn, received under section 19 of the *Oaths and Statutory Declarations Act* is subject to cross-examination pursuant to the right to fair trial, which encompasses the right to adduce and challenge the evidence produced against the accused (art. 50(2)(k), CoK”
12. PW1'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 minor was telling the truth. In this regard, I note that PW1 was consistent and steadfast in her testimony. In addition, her evidence which was subjected to cross-examination remained consistent throughout.
  13. JM, PW3 mother of the complainant (PW1), gave evidence supporting her daughter's account. She told the court that PW1, aged 15 at the time, often played with other children at the church compound. On the day of the incident, around 6:30 pm, PW1 returned home and disclosed that the guard had assaulted her, indicating the act by touching her private parts. J went to the church but found the guard (the appellant) had already left his shift. She then took PW1 to Nairobi Women's Hospital.
  14. PW2 described PW1 as visibly shaken, unwilling to speak, and suffering from epilepsy and reduced mental capacity. At the hospital, PW1 had two epileptic fits triggered by stress. J also mentioned prior occasions when PW1 hinted at the appellant's actions, but she dismissed them, attributing them to her daughter's mental state.
  15. On cross-examination, PW3 recalled PW1 mentioning an earlier incident when the appellant took her to his house in Bulbul between 1 pm and 3 pm. She admitted her delayed response to PW1's reports, explaining she had mistaken "Michael" for another child PW1 knew.
  16. PW4 CW the aunt to PW1 told the court that received a call from PW3 who told her that PW1 had been defiled by a security guard at the church adjacent to their home. She rushed to the hospital on receiving the news. She went on to corroborate the evidence of PW3 on the occurrence at the hospital.
  17. Upon cross-examination, she said that PW1 was mentally challenged and that is why she had not reported the incidents. The child was epileptic and mentally retarded.
  18. PW2 Dr Joseph Maundu. He examined the minor aged 15 on 28/2/2017. She had come with a history of sexual assault on 26/2/2017. He noted scratches on her back. She also had lacerations on the outer labia. Her hymen was absent. He said that there was some whitish discharge in the vagina. He filled and signed the P3 Form on 28/2/2017 and produced it as an Exhibit.
  19. When cross-examined, he said that when the minor was brought by the police, she had changed clothes. He did not recover the clothing during the incident. According to the minor, the incident had occurred two days before she came to the hospital. He further noted that the minor had mental retardation.
  20. The hymen had an old tear. He further emphasized that the minor had scratches and tenderness on the back. He concluded by noting that the injuries were not consistent with epileptic fits.
  21. Therefore, given the history, it is my finding that penetration was sufficiently proven.
  22. Aron Mwau (PW5), a night guard at [Particulars Withheld] Church, worked alongside the appellant, the day guard. On 26 February 2017, arriving at 6 pm, he found the appellant waiting. A girl, about 12, approached the appellant, spoke briefly in English (which Mwau didn't understand), and left with him before parting ways. The next day, PW3 informed PW5 of the incident when the appellant didn't appear.



23. Cpl Fredrick Kwete (PW6), the investigating officer, took on the case after a defilement report on 26 February 2017 involving a 15-year-old. He observed the victim, born on 3 January 2002 (confirmed by birth certificate), seemed developmentally delayed. On 28 February 2019, he prepared an Exhibit Memo with the minor's clothes and samples and sent it to a government chemist, though results were pending.
24. In cross-examination, PW6 said nothing was found at the appellant's house, and samples from both the appellant and minor awaited analysis. On re-examination, he confirmed collecting the minor's clothing and blood samples on 3 March 2017, submitted with a receiving stamp, but noted no explanation for the delay in results had been provided.
25. On the age of the complainant, her birth certificate indicated that she was born on 03/1/2002. She was therefore 15 years old and a child within the meaning of the law.
26. The appellant, a day guard at [Particulars withheld] Church in February 2017, lived in Bulbul. He claimed the alleged incident happened on a Sunday when church members were present. The next day, his operations manager called him to the town office for NHIF and NSSF forms, where he was arrested. Officers searched the guardroom at the church before taking him to Karen Police Station.
27. On cross-examination, he admitted knowing the victim, often left with house help, and mentioned prior issues with her mother, but not her. On re-examination, he denied ever speaking to PW1 and maintained his innocence.
28. The trial court considered the appellant's defence and found it to be baseless and an afterthought. I have already found above that PW1's testimony was truthful and consistent all through. When weighed against the prosecution case, the appellant's defence did not raise any doubts thereof and it was rightly dismissed by the trial court. I therefore find that defilement was proved to the required legal standard.
29. Having analysed the totality of the prosecution's case, I find that the prosecution proved their case beyond reasonable doubt. The conviction on the charge of defilement is thus affirmed.
30. On the sentence, section 8(3) provides that 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.
31. The trial court exercised its discretion in sentencing and imposed the sentence of 15 years imprisonment. I therefore see no reason to interfere.
32. The upshot of the above analysis is that the appellant's appeal is dismissed in its entirety for lacking in merit.

Orders accordingly.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 25<sup>TH</sup> DAY OF FEBRUARY 2025**

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**D. KAVEDZA**

**JUDGE**

In the presence of:

Mr. Mutuma for the respondent

Appellant – present



Achode – court Assistant

