



REPUBLIC OF KENYA



**KENYA LAW**  
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**Aura v Republic (Criminal Appeal E045 of 2023)  
[2025] KEHC 3403 (KLR) (21 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3403 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL APPEAL E045 OF 2023  
DK KEMEL, J  
MARCH 21, 2025**

**BETWEEN**

**ERICK ODUOR AURA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. JP Nandi delivered  
on 22/08/2023 in Bondo PMCCr SO No. E006 OF 2023)*

**JUDGMENT**

1. The Appellant herein Erick Oduor Aura was charged at the lower court with the offense of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on the night of 30<sup>th</sup> January 2023 in West Yimbo location in Bondo Sub-county within Siaya County intentionally and unlawfully caused his penis to penetrate the vagina of E.A. a child aged 16 years.
2. The Appellant was likewise charged with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offense *Act No. 3 of 2006*. The particulars were that on the night of 30<sup>th</sup> January 2023 in West Yimbo location in Bondo Sub-County within Siaya County intentionally and unlawfully caused his penis to touch the vagina of E.A. a child aged 16 years.
3. After a full trial, the Appellant was convicted of the main count and sentenced to 15 years' imprisonment.
4. Aggrieved by the said conviction and sentence, the Appellant has appealed against the same on the following grounds of appeal:
  - i. That the trial magistrate erred in law and in fact by meting a mandatory sentence despite the weak circumstances of the case.



- ii. That the trial magistrate erred in law and in fact by meting a very harsh and excessive sentence not proportionate to the circumstances of the case.
- iii. The trial magistrate erred in law and fact by failing to consider both the defense and the mitigation of the Appellant.
- iv. The trial magistrate erred in law and fact by convicting and sentencing the Appellant by acting on wrong principles.

Based on the above grounds, he prayed that the sentence be set aside or that the sentence reviewed and substituted with a least punitive punishment.

5. This being a first appeal, this Court must re-consider and re-evaluate the evidence adduced before the trial Court to arrive at its independent findings and conclusion. (See Okeno vs. Republic [1974] EA 32) In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to make due allowance in that respect as was held in Ajode v. Republic [2004] KLR 81.
6. The prosecution called a total of five witnesses in support of its case.
7. PW1 AAO stated that she is the victim's grandmother and a resident of [Particulars Withheld] and that she sells omena fish. That on 30/1/2023 at 2330 hours, she was in her house when the victim's mother came and inquired on the whereabouts of the victim and who informed her that the complainant had gone for a call of nature but she had not returned. She informed the complainant's mother that the complainant was not in her house. That the complainant's mother came back at midnight and informed her that the complainant had returned and alleged to have been at her grandmother's house whereupon she denied the allegations.

She went on to state that the complainant later disclosed to her that when she went to the latrine, Erick came and took her to a certain tree nearby and had sexual intercourse with her and that it was not the first time to have sex with the Appellant, but the third time. That the Appellant is her neighbor. That in the morning she reported to the Beach Management Unit chairman, who went in search of the Appellant. That the Appellant admitted to having had sexual intercourse with the complainant. They called the police from Usenge police station who re-arrested the Appellant. That they then went to Got Agulu hospital for examination. That the complainant is aged 16 years old.

8. PW2 JAO stated that she is a resident of [Particulars Withheld], an omena seller and that the complainant is her daughter. That her daughter is 16 years old and that she produced her birth certificate serial no. 755XXXX as Exhibit 1. That on 30/1/2023 at 10.00pm as she prepared to sleep, the complainant informed her that she wanted to use the latrine. She went out and locked the door from behind. That she later called N to open the door for her and that upon inquiring from her about the whether the complainant was in her house, she denied. That she informed her that the complainant had disclosed to her that she had been with the Appellant and had had se and that the Appellant was their neighbour. They went to the Beach Management Unit chairman and later reported to Usenge police station.

On cross examination she stated that it is the police who arrested the Appellant.

9. PW3 E.A. stated that she is a standard seven pupil at Rapogi primary school and aged 16 years. That on 30/1/2023 she went to the latrine when the Appellant followed her and held her breasts, then held her hand, led her to the bush and removed her inner pants, slept on top of her and had sexual intercourse with her. That the Appellant then allowed her to go. That the next morning, they went to report the incident to Beach Management Unit chairman. That later, Erick was brought to the chairman's office



and taken to Usenge police station. As for her, she was taken to Got Agulu hospital where she was examined. That she identified the treatment chit which was marked as MFI-2. That the P3 form was duly filled. That she had been having sexual intercourse with the Appellant before on three different occasions. That the Appellant was Erick in the dock.

On cross-examination, she stated that they went to the tree near the lake; that she did not scream as she was afraid to scream.

10. PW4 Raphael Oduor testified that he is a clinical officer at Got Agulu Sub County hospital. He had a P3 form in favour of the complainant. That he examined her on 31/1/2023. That as regards the genital examination, there was a bruised labia majora and a broken hymen, whitish discharge on the vulva. That the Appellant was not available for examination. That there was penetrative sexual defilement. That he signed the P3 form on 31/01/2023 which he produced as exhibit 3. That lab test was done on high vaginal swab which showed many epithelial cells meaning that there was friction. That he produced the same as exhibit 4 and the treatment notes as exhibit 5.

On cross examination, he stated that he did not examine the Appellant.

11. PW5 No. 113885 PC Irene Chepng'eno stationed at Usenge police station and is the investigating officer in the instant case. That on 31/1/2023 she received a defilement report from the complainant and her grandmother. She alleged that on 30/01/2023 at 10.30pm, she went to relieve herself at some bush and while in the process one Aura attacked and defiled her. She recorded the report and escorted the complainant and the Appellant to Got Agulu hospital. That they were both treated and a P3 form duly filled. They then went back to the station and recorded witness statements. She was not sure whether the Appellant was examined. That the Appellant was arrested and brought to the police station where he was re-arrested.

There was no cross examination.

12. The court then retired and ruled that the Appellant had a case to answer and was put on his defense. He opted to give a sworn testimony.
13. DW1 Erick Oduor Aura testified that he is a resident of [Particulars Withheld] and a fisherman. That on 31/1/2023 he was at the beach when he received word that the Beach Management Unit chairman was looking for him. He proceeded to his house after interrogating him on his whereabouts the previous night, he informed him that he was in his house. That he was later arrested and charged with the offense in court.

There was no cross examination.

14. The appeal was canvassed by way of written submissions. It is only the Respondent who complied.
15. The Respondent submitted on the elements to be proved for the offence of defilement namely; age of the victim, proof of penetration and the positive identity of the Appellant as the perpetrator. Reliance was placed in the case of Daniel Wambugu Maina versus Republic [2018] e KLR.
16. As regards the issue of age, it submitted that the minor was 16 years as per the minor's birth certificate produced by PW2 as exhibit one. Reliance was placed in the case of Omuroni v. *Uganda Criminal Appeal No. 2 of 2000* and Mwalango Chichoro vs. Republic Msa Criminal Appeal No. 24 of 20215 (UR).
17. On the element of penetration, they submitted on the definition of "genital" which meant as relating to human or animal reproductive organs according to Concise Oxford Dictionary. They relied on the case of Langat Dinyo Domokonyang v. Republic (2017) KLR where Githinji J held: "for the offense



of defilement it must be established by the prosecution beyond reasonable doubt that a male penis partially or fully penetrated the victim's vagina and or anus"

Learned counsel lifted the evidence of PW3 namely: "he removed my inner pants, slept on me and had sexual intercourse with me" (See pg 9-10 of the Record of Appeal)

It was further submitted that the evidence of PW4 who examined the victim and observed that there was bruised labia majora and a broken hymen, whitish discharge on the vulva and who concluded there was penetrative defilement was sufficient to prove the ingredient aforesaid.

18. On identity of the perpetrator, they submitted that the victim testified that they had been having sexual intercourse with the Appellant on three occasions. That the Appellant was recognized by the victim.
19. On the issue of sentencing, it was submitted that the sentence meted by the trial court was sound and that the same should not be interfered with.
20. Finally, they submitted that all the elements of the offence were well proved beyond every reasonable doubt and prayed that the court upholds the conviction and affirm the sentence.
21. I have given due consideration to the record of the trial court, proceedings, submissions and authorities cited. I find the issue for determination is whether the elements for the offence of defilement were proved beyond reasonable doubt against the Appellant by the Respondent.
22. The Appellant herein had been charged under section 8(1) as read with section 8 (4) of the [Sexual Offences Act](#) No. 3 of 2006 which stipulates as follows:
  - (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
  - (4) person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.
23. The elements that must be proved in a defilement case are, age of the complainant/victim, penetration and the identity of the perpetrator. (See Daniel Wambugu Maina v. Republic [2018] eKLR)
24. On the element of age, PW2 produced the birth certificate of the minor namely serial number 755XXXX as exhibit 1. The same indicated that the minor was born on 12/06/2006 thus she was about 16 years old at the time of the offence. In the case of Omuroni [versus Uganda Criminal Appeal No. 2 of 2000](#), the court held that a birth certificate was a prima facie proof of age; and it was sufficient as proof of age. (see also Mwalango Chichoro vs. Republic MSA C. Appeal no. 24 of 2015). I find that the Respondent proved this ingredient beyond reasonable doubt.
25. On the element of penetration, the complainant (PW3) stated that "he removed my inner pants, slept on me and had sexual intercourse with me" (See pg 9-10 of the Record of Appeal). The complainant confirmed that she had had sexual intercourse with the Appellant on two other occasions. The clinical officer (PW4) examined the complainant and observed that there was bruised labia majora and a broken hymen, whitish discharge on the vulva. He concluded that there was penetrative defilement. There was therefore sufficient evidence of penetration of the complainant's genital organs and that the same tallied with the description provided by section 2 of the [Sexual Offences Act](#) namely the complete or partial insertion of the genital organs of a person into the genital organs of another person. I am satisfied that this ingredient was proved by the Respondent beyond reasonable doubt.
26. On the element of identity of the Appellant as the perpetrator, the complainant stated that she had had sexual intercourse with the Appellant on three occasions. Further, PW1, PW2 and even DW1



testified that they were neighbours meaning that the conditions were favourable for recognition of the perpetrator. The complainant had known the Appellant before the incident and that they both hailed from the same area and thus she had no difficulty in recognizing him. Indeed, the complainant gave out the name of the Appellant soon after the incident and who was apprehended by the chairman of the Beach Management Unit and members of public and handed over to the police at Usenge Police station. I find that this ingredient was proved beyond any reasonable doubt.

27. After an analysis of the evidence as a whole, I find that all the elements of the offence of defilement have been proved by the Respondent against the Appellant beyond reasonable doubt. The Appellant's defence alibi did not shake the evidence of the Respondent which was overwhelming against him. Consequently, I find that the finding on conviction by the learned trial magistrate was quite sound and which must be upheld.

28. On the issue of sentence, Section 8(1) as read with 8 (4) of the Sexual Offence [Act No. 3 of 2006](#) stipulates as follows:

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(4) person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

29. It is noted that the trial magistrate passed a sentence of 15 years' imprisonment. It is my humble view that the sentence is lawful and the minimum possible in law. The Supreme Court in *Petition No.18 of 2023 Republic Vs Stephen Gichuki and others* [2023] eKLR held that the minimum sentences under the [Sexual Offences Act](#) No. 3 of 2006 are lawful until the Act is amended or declared as unconstitutional. It is also noted that the Appellant posted bail soon after taking plea and thus did not remain in custody during his trial. I find no reason to interfere with the sentence. I hereby affirm the sentence of the trial court.

30. In the result, I find the appeal is devoid of merit. The same is hereby dismissed.

It is so ordered.

**DATED SIGNED AND DELIVERED AT SIAYA THIS 21<sup>ST</sup> DAY OF MARCH, 2025**

**D. KEMEI**

**JUDGE**

In the presence of:

Erick Oduor Aura.....Appellant

Soita.....for Respondent

Mboya.....Court Assistant

