



**EK v Republic (Criminal Appeal E098 of 2024)
[2025] KEHC 3269 (KLR) (18 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3269 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E098 OF 2024
DR KAVEDZA, J
MARCH 18, 2025**

BETWEEN

EK APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered
on 30th August 2024 by Hon. S. Temu (SPM) at Kibera Chief
Magistrate’s Court Sexual Offences Case No. E081 of 2023 Republic vs EK)*

JUDGMENT

1. The appellant EK 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(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 14th July 2024 in Kibera Sub-County within Nairobi County, the appellant intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of AKM a child aged 10 years. He was sentenced to serve thirty (30) 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 prosecution did not adequately prove that he had defiled the complainant and that he was convicted on the complainant’s single evidence without giving the reasons for believing the said testimony.
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 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.



4. A.K., the complainant, and PW2 testified that she was acquainted with the appellant, who previously resided at her grandmother's home in Kibra, where they all lived together. She stated that the incident took place in her grandmother's house while her aunt was also present. The appellant had threatened to kill her if she refused to engage in "bad habits" with him, a threat overheard by Judy.
5. She recounted that on the same day, they engaged in "tabia mbaya" (bad behaviour) on a mattress. The appellant removed her clothes, then his trousers and underwear, before lying on top of her. She informed I about the incident, who had witnessed it herself. Later that evening, A.K. ate supper and slept alongside I.
6. The next day, she reported the incident to her grandmother, who informed her father. Subsequently, she was taken to SHOFCO, then to the police station and hospital. The complainant confirmed she was born on 5th September 2013, with her birth certificate produced as a prosecution exhibit.
7. During cross-examination, she clarified that I, another child present, was awake during the incident and both saw and heard the appellant's actions. She explained that she did not scream because the appellant was armed with a knife.
8. Loreen Mwendu (PW1) a clinical officer at Coptic Hospital produced the Post-Rape Care (PRC) form. The complainant, a Lindi resident, visited the hospital on 15th July 2024, alleging defilement on 14 July 2024 at 9 a.m. Examination revealed no external injuries, but her private parts showed irregularities, tears, and redness on the vaginal wall at the 6 o'clock position, indicating penetration by an object. The victim had not bathed, and PW1 confirmed penetration occurred. She produced the PRC, treatment notes, and medical results.
9. PW3, I.M., testified that the appellant was her uncle and PW2 her cousin. On the incident night, while asleep, PW2 mentioned ironing clothes. Waking to assist, I.M. found PW2 missing. She checked behind the curtain where the appellant slept and saw PW2 dressing, visibly shaken. The next morning, I.M. urged PW2 to tell their grandmother, noting PW2's fear due to the appellant's knife threat. On cross-examination, I.M. confirmed seeing PW2 leave the appellant's mattress but did not see him on her.
10. PW4, Ali Ibrahim, received a report of defilement in Lindi. The family attempted to conceal the appellant by covering his head, but he was apprehended and taken to the police station. On cross-examination, he denied soliciting money from the appellant, affirming the arrest was for defilement.
11. PW5, Investigating Officer Esther Kagera, handled the case reported on 17 July 2024. She recorded the complainant's statement, visited the scene, and confirmed the appellant lived with the complainant and relatives. She produced the minor's birth certificate proving she was 10 years old.
12. The appellant provided an unsworn defence, denying the charges against him. He claimed that the complainant was ironing clothes while he slept in the house. He stated that she had merely passed by his area after using the toilet, and he did not interact with her. He alleged that his family members were framing him to force him to return home. Additionally, he denied threatening the complainant with a knife, pointing out that others were present in the room at the time.
13. The appeal was canvassed by way of written submissions which have been duly considered and there is no need to rehash them.
14. 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."



15. Further, section 8(1) and (2) 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.
- (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.

16. In this case, the element of penetration was Penetration was substantiated, firstly, by the testimony of the complainant, who recounted the appellant's act of inserting his penis into her vagina at night while they were in her grandmother's house. Following her refusal to do tabia mbaya, he threatened to kill her with a knife.

17. This was corroborated by medical records adduced by PW1, Loreen Mwendu, a clinician at Coptic Hospital, who detailed the examination of the complainant on 15/7/2024. She noted that the minor had variations on her private parts. The private parts were irregular with tears. There was redness on her vaginal wall at 6 o'clock which she said meant that an object had penetrated her vagina. She noted that the victim had not taken a bath. She averred that as per the examination, there was penetration.

18. The complainant's age was incontrovertibly established by her birth certificate, tendered by PW5, the investigating officer. The certificate confirmed her birth on 5/9/2013, rendering her 10 years old at the time of the offence. The trial court thus rightly concluded that PW2 was a child within the meaning of the law.

19. Identification of the appellant posed no uncertainty. PW2 and PW3 both testified that the appellant was their relative. They also said that they all used to reside in the grandmother's house. They both identified him in court. Such recognition, stemming from a prior acquaintance and the evident family tie, precluded any prospect of mistaken identity.

20. The foregoing analysis demonstrates that the prosecution discharged its burden, proving the case beyond reasonable doubt. The elements of penetration, the complainant's minority, and the appellant's identity were each established with requisite particularity. Accordingly, the conviction stands affirmed.

21. On sentence, the appellant was sentenced to serve thirty 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.

22. 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 18TH DAY OF MARCH 2025

D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Mutuma for the Respondent



Tonny Court Assistant

