



**Kayugira alias Baba Pina v Republic (Criminal Appeal E112 of 2024)
[2025] KEHC 2417 (KLR) (10 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2417 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E112 OF 2024
DR KAVEDZA, J
MARCH 10, 2025**

BETWEEN

PETER KAYUGIRA ALIAS BABA PINA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered on 9th March 2024 by Hon. E. Boke (SPM) at Kibera Chief Magistrate's Court Sexual Offences Case No. E016 of 2021 Republic vs Peter Kayugira alias Baba Pino)

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(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 23rd January 2021 at Kibera Lindi Area in Kibera Sub-County within Nairobi County, the appellant intentionally and unlawfully caused his genital organ (penis) to penetrate into the genital organ (vagina) of BA a child aged 4 years. He was sentenced to 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 he was not properly identified. He urged the court to quash his conviction and set aside the sentence.
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. 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."
5. 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.
6. The prosecution case was as follows: The complainant B.A. (PW2) provided an unsworn testimony after voir dire examination. She testified that the appellant had put his hand in her clothes, and further that he put his thing into her thing referring to his male genitalia and her female genitalia. At first instance, when she was asked whether she knew the appellant, she refused, but after it was discovered that she was afraid of the appellant, she looked away from the dock and whispered that she knew the appellant.
7. 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”
8. The complainant's testimony required corroboration considering that it was unsworn evidence of a minor. That notwithstanding, the trial magistrate noted that the complainant was consistent and steadfast in her testimony. In addition, her evidence which was subjected to cross-examination remained consistent throughout.
9. To corroborate the complainant's evidence, PW1, PA, the complainant's mother, testified that on 23rd January 2021, Rozelyne visited her home in Sihanga at 6:00 PM to collect PW2. Rozelyne took PW2 to her residence in Lindi to play with her sister, Gloria. At 7:00 PM, Rozelyne returned, stating she did not know PW2's whereabouts, as Gloria reported that PW2 had been collected by her uncle.



10. PW1 and Rozelyne searched for the complainant and found her 500 metres from Rozelyne's house, distressed. The complainant alleged an unknown man had inserted his "dudu" (male genitalia) into her "dudu" (female genitalia). PW1 observed blood and white stains on the complainant's underwear. A samosa vendor informed Rozelyne that she had seen the complainant with the appellant. They proceeded to the appellant's house, where the complainant identified him.
11. The complainant was taken to Royal Hospital and then referred to Nairobi Women's Hospital for tests and treatment. A Post-Rape Care (PRC) form was completed, and medication was administered. The matter was reported at Kilimani Police Station. Meanwhile, the appellant was held at the District Commissioner's office. PW1 produced the complainant's birth certificate in court, confirming her birth on 24th September 2016.
12. PW3, Rozelyne Awuor, supported PW1's account. At the appellant's house, she noted cobwebs in the complainant's hair, matching those on the appellant's purple shirt. A public altercation followed, and three women, in addition to the samosa vendor, confirmed seeing the complainant with the appellant.
13. PW4, John Njuguna, a clinician at Nairobi Women's Hospital, presented the complainant's PRC form on behalf of a colleague. He testified that on 23rd January 2021, the complainant exhibited tenderness and a laceration in her vaginal area, with no other physical injuries. The PRC form noted injuries consistent with attempted penile-vaginal penetration. He also produced a P3 form dated 28th January 2021.
14. PW5, PC Dooren Wakhungu, the investigating officer, testified that on 24th January 2021, the complainant and her mother reported an alleged defilement at Kilimani Police Station. She recorded their statements, advised hospital attendance, and issued a P3 form. The appellant, transferred from Kibera DC to Kilimani, was interrogated and charged. PW5 produced the complainant's birth certificate in court, confirming her birth on 24th September 2016. On cross-examination, she explained amending the charge from attempted defilement to defilement, citing partial penetration per the medical report.
15. In this case, the doctor gave evidence that there was tenderness on the genitalia, with lacerations on the labia minora at 12 O'clock. The evidence pointed to a case of partial penetration.
16. Partial penetration constitutes penetration under section 2 of the *Sexual Offences Act*. It should therefore be understood that partial penetration with a child does not mean attempted defilement. See the case of *Mark Oiruri Mose v R* [2013]eKLR where the Court of Appeal stated thus:

'...Many times the attacker does not fully complete the sexual act during the commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ....'.
17. Further explanations by the Court of Appeal- differently constituted- was that even the slightest penetration is penetration. See the case of *Erick Onyango Ondeng v Republic* [2014] eKLR that:

"In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."
18. In these cases, the court concluded that penetration, as defined by law, was sufficiently proven despite the hymen remaining intact. This finding affirms that full penetration is not required to meet the legal threshold for penetration.



19. In this case, the evidence supporting this conclusion came from two key sources: the complainant's testimony, which provided a firsthand account, and the medical records presented by PW4, the medical officer, which corroborated the physical findings. The reasoning hinges on the presence of lacerations on the labia minora, which were determined to result from partial penetration. Thus, the court determined that these elements together established penetration beyond reasonable doubt, aligning with the legal standards applicable in this context. Therefore, it is my finding that the evidence adequately demonstrated partial penetration occurred.
20. In his defence, the appellant testified that on 23rd January 2021, he arrived home at 4:00 PM and asked his neighbour, DW2, to help dispose of dirty sacks. At 6:00 PM, they went to a bar in Lindi, returning home by 8:00 PM. Shortly after, his wife called him outside, where two unknown women accused him of being with their child. He denied this. One woman made calls, and three men soon arrived, arrested him, and took him to Kibera DC. He was later transferred to Kilimani Police Station and charged.
21. DW2, Vincent Wanzala, supported the appellant's account. He added that, upon returning home, he heard a commotion outside. He saw a large crowd beating the appellant, alleging he had been with the complainant. The crowd then took the appellant to the chief.
22. On the age of the complainant, the trial court considered the complainant's birth certificate. The birth certificate indicated that the complainant was born on 24th September 2016. She was, therefore, four (4) years old at the time of the offence. There is therefore no doubt that PW2 was a child.
23. On identification of the appellant, the complainant who had accompanied both her mother and Rozelyne to the appellant's house asserted that it was he who had picked her up as she was playing with Gloria, Rozelyne's sister. Additionally, she identified the appellant in court as the perpetrator.
24. This court finds that the appellant was positively identified as the perpetrator of the offence herein by the consistent and well-corroborated testimonies of the prosecution witnesses. The conviction for the offence of defilement is therefore affirmed.
25. 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.
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 10TH DAY OF MARCH 2025

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D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Mutuma for the Respondent

Tonny Court Assistant

