



**Nyeywo v Republic (Criminal Appeal 219 of 2019)  
[2025] KEHC 2601 (KLR) (Crim) (3 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2601 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL APPEAL 219 OF 2019  
CJ KENDAGOR, J  
MARCH 3, 2025**

**BETWEEN**

**SHADRACK BARAZA NYEYWO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against conviction and sentence arising in Makadara Law Courts Criminal Case S.O No. 5782 of 2013 delivered on 18th July, 2019 by Hon. A.R Kithinji, S.P.M.)*

**JUDGMENT**

1. The Appellant herein was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the [Sexual Offences Act](#) No 3 of 2006. The particulars of the offence are that; on 21<sup>st</sup> November, 2013 at [Particulars Withheld], within Nairobi County, he intentionally and unlawfully caused his penis to penetrate the vagina of L.M., a child aged 13 years. He was also charged with an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the [Sexual Offences Act](#). He was convicted on the main charge and sentenced to fifteen (15) years' imprisonment.
2. In his amended grounds of appeal, the Appellant faulted the trial Court's decision on the following grounds;
  - i. That, the learned trial magistrate erred in points of law and facts by failing to find that the elements of the offence of defilement were not conclusively proved to warrant a conviction;
  - ii. That, the learned trial magistrate erred in law and facts in failing to find that the medical evidence did not conclusively prove the offence of defilement;
  - iii. That, the learned trial magistrate erred in law and facts for failing to discern that PW3 was a minor and while adducing her evidence the *voire dire* was not conducted on her;



- iv. That, the honourable trial magistrate erred in matters of law and fact by violating Section 200 (3) of the *Criminal Procedure Code*;
  - v. That, the learned trial magistrate erred in matters of law and fact for failure to summon vital witnesses who could have shed light for just decision of the case;
  - vi. That, the learned trial magistrate erred in matters of law and fact by convicting on a matter that was not proved beyond all reasonable shadowy of doubts.
3. At the appeal hearing, the parties relied on the written submissions filed in court. The Appellant submitted that the Respondent failed to discharge its legal and evidential burden and that consequently, the conviction and sentence should be set aside. He also submitted that the *voire dire* was conducted improperly and that the new trial court failed to adhere to the provisions of Section 200 (3) of the *Criminal Procedure Code* when it took over the matter.
  4. On the other hand, the Respondent submitted that the appeal ought to be dismissed and the conviction and sentence upheld on the basis that the prosecution's evidence was substantive and sufficient to prove the offence beyond reasonable doubt.
  5. In determining this appeal, this court being a first appellate Court is alive to and considers the principles laid down in the case of *Okeno v Republic* [1972] EA 32 where the Court of Appeal for Eastern Africa stated that:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya v R* 1975) EA 336 and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M Ruwala VR* [1957] EA 570. It is not the junction of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see (*Peters v Sunday Post* 1978) EA 424.”
  6. The prosecution called six witnesses in support of its case. The Complainant stated that on the relevant date, she went to the Appellant's house, which was near their home, to watch GO TV. She stated that the Appellant lived with his brothers and sisters, and on the material date, the Appellant and Habi (later referenced with spelling as Abby in PW2 testimony), were at their residence. She explained that while they were watching television, the girl accompanying her, known as Sidney, left with her younger sister after being called by her elder sister, thereby leaving the Complainant alone in the house with the Appellant. She stated that after Sidney had left, she rose to leave but the Appellant got out of bed and pulled her back into the house where he took her to bed and forcefully removed her shorts, biker and pant. She described that the Appellant unzipped his shorts and partially inserted his penis into her vagina. She stated that as this happened, Alizen (PW2) who is Sidney's sister came into the house and found the Appellant lying on top of her and the Appellant got off when Alizen started making noise at the Appellant. She reported the incident to her mother and narrated the subsequent actions at the hospital and the police.
  7. PW2 was the mother of the Complainant. She stated that the Complainant was born on 10<sup>th</sup> July, 2000. She testified that she learned of the incident on 23<sup>rd</sup> November, 2013 when her neighbour informed her that her daughter (the Complainant) had been defiled by the Appellant in the Appellant's house. She



- stated that when she asked the Complainant about this, she confirmed that she was afraid of reporting the incident because she had warned her against visiting people's houses.
8. PW3 was a minor. She testified that she was in the company of the Complainant in the Abby's (referenced with spelling as Habi in PW1 testimony) house, along with her sister Sidney and Abby, when her elder sister called Sidney to go and clean dishes and she (PW3) remained in the house with the Appellant, L. (Complainant), and A. She narrated that Abby then left to brush her shoes and she also left to fetch water. She narrated that upon her return, she found the TV switched off and no one in the living room. She recounted that when she lifted the curtain separating the sleeping area, she saw the Appellant lying on top of the Complainant, who was half-naked. She then went outside and reported to S. She stated that a neighbour later called her, and she relayed what she had witnessed. In turn, PW2 was informed of the same, which led to the situation becoming a police matter, at which point she recorded her statement.
  9. PW4 was a clinical officer at the medical facility where the Complainant was escorted for examination. He testified that on examination the Complainant complained of pain inside the vagina but there were no other physical injuries. He stated that the hymen was partially broken and had a slight tear.
  10. PW5 was a medical doctor. She produced the P3 Form and gave similar findings to those elaborated on by PW4.
  11. The investigating officer testified as PW6. He stated that he arrested the Appellant on 8<sup>th</sup> December, 2013 and explained that the police had tried for a considerable time to locate him without success. He further stated that the report was made four days after the date of the incident complained about.
  12. In his defence, the Appellant stated that the allegations were false and asserted that there was a contradiction regarding the location of the alleged incident. He also mentioned that there were witnesses whom the prosecution had failed to call.
  13. DW2 testified that he was the Appellant's best friend and stated they were always together. He testified that the Complainant's mother used her to extort money from people by making false allegations against them. He narrated an incident in which he claimed that the complainant's mother sent her to seduce him and they made false accusations against him, demanding money from him. He stated that after he refused to pay, he remained in the station and was released after two days.
  14. I have considered and analyzed the evidence that was tendered before the trial Court by the appellant and the prosecution, the grounds of appeal, and the written submissions by the parties. The issues for determination in this appeal are;
    - i. Whether the appellant was afforded a fair trial;
    - ii. Whether or not the Prosecution proved its case beyond reasonable doubt;
    - iii. Whether or not the sentence meted out by the Trial Court was manifestly excessive.
  15. The record shows that two magistrates took the proceedings. There was compliance with Section 200 of the *Criminal Procedure Code* as per the proceedings of 23<sup>rd</sup> September, 2015. The trial Court considered the Applicant's request for the case to begin anew. By that stage, three witnesses had testified, and after due consideration, directions were given for the case to proceed from where it had reached. Three other witnesses subsequently testified before the trial Court, which determined the matter.
  16. In *George Opondo Olunga v Republic* [2016] eKLR, it was stated that the ingredients of an offence of defilement are identification or recognition of the offender, penetration, and proof of the victim's age.



17. The burden of proof rests with the prosecution to prove its case against the Appellant beyond reasonable doubt. In *Stephen Nguli Mulili vs Republic* [2014] eKLR, it was held that: -

“It is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of *DPP v Woolmington*, [1935] UKHL 1 where the court eloquently stated that the “golden thread” in the “web of English common law” is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See *Festus Mukati Murwa v R*, [2013] eKLR.”

18. The Complainant was a child of tender years who gave sworn evidence. The record shows that the trial court conducted a *voire dire* examination and recorded it in terms. I am satisfied that the trial Court employed the correct procedure in ascertaining the Complainant’s competence to give evidence.

19. The Appellant took issue with the absence of a *voire dire* examination of PW3. She testified that she was 12 years old and was thus a child of tender years. The record shows that the witness gave sworn testimony, but a *voire dire* examination was not conducted.

20. In the case of *Maripett Loonkomok v Republic* [2015] eKLR, the Court of Appeal had this to say in respect of *voire dire*:

“It follows from a long line of decisions that *voire dire* examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child’s intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this court recently found that;

“In appropriate cases where *voire dire* is not conducted, but there is sufficient independent evidence to support the charge ... the court may still be able to uphold the conviction”.

21. The Complainant’s age was verified through the presentation of a birth certificate. She was 13 years old on the relevant date in this case.

22. I am firmly convinced that the appellant was a familiar figure to the complainant. There was a highly descriptive reference to the appellant, identifying him as familiar to her, and including the specific mention of his short form name - Shaddy. They were neighbours living in close proximity as described by PW1, a relationship confirmed by the testimonies of witnesses PW2, PW3, and PW6 who was the Investigating Officer. They frequently interacted. This familiarity instils confidence in the complainant’s ability to identify the Appellant.

23. The complainant was specific about the relevant date and the events that transpired at the appellant’s house, where he stated he lived with his siblings. She testified that she was left alone in the house with the appellant. PW 3 recounted the same but said that the house was Abby’s. The complainant refers to the same Abby with whom the appellant lived in the same house as his brothers and sisters. I do not find any contradiction in this, as the appellant stated in his defence that there was a contradiction regarding where the incident is alleged to have occurred. The appellant and his siblings occupied the residence, and the reference to the house being the other’s refers to the same thing.

24. After determining the scene of the incident and the familiarity between the Appellant and the Complainant, I then proceeded to examine what truly transpired in the house.



25. Section 8 of the *Sexual Offences Act* defines defilement as;
- “ 8 (1) A person who commits an act which causes penetration with a child is guilty of an offence termed as defilement.
- Penetration is defined as; ‘means the partial or complete insertion of the genital organs of a person into the genital organs of another person.’”
26. The complainant stated that the appellant partially inserted his penis into her vagina. She provided details that as he did so, PW3 appeared and the appellant disengaged from her. The medical reports indicated that the hymen was normal but exhibited a slight tear, and the complainant’s vagina was reported to be internally painful. The examination took place four days after the incident. According to the report, it corroborates the evidence provided by the complainant that the insertion of the penis was partial.
27. The Appellant maintains that he did not commit the offence and presents a line of defence suggesting that the Complainant was being used by her mother (PW2) to extort money under the pretext of having been defiled. The Complainant’s testimony was quite elaborate and credible. I perceive no ill intent on the part of the Complainant; there was a lack of clear justification for such an accusation during the cross-examination of the Appellant and his witness by the prosecution. The trial Court extensively considered the Appellant’s defence in its judgment, and I concur with the findings.
28. The testimony provided by PW1 was compelling and robust enough to uphold a conviction, even in the absence of PW3’s testimony, which would be disregarded due to the oversight of not conducting a proper *voire dire* examination to assess its admissibility and reliability. The credibility of PW1’s account is pivotal evidence in this case.
29. It is well established that a single witness’s oral evidence is sufficient to warrant a conviction. See *George Kioji v R Nyeri Criminal Appeal No. 270 of 2012* (unreported). The Court held as follows:
- “Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”
30. The failure to take the Appellant for a medical examination does not render the prosecution’s case invalid. It was not of a mandatory nature in this case, nor does the failure cast doubt on the prosecution’s case.
31. Partial insertion satisfies the ingredient of penetration. I find that the prosecution discharged its burden of proof beyond reasonable doubt. The trial court correctly directed itself on this principle, and I see no reason to depart from the findings. No finding is made for the alternative charge.
32. The Appellant was afforded a fair trial, despite the fact that the witnesses who had initially testified were not recalled after the newly assigned magistrate took over the proceedings. A careful examination of the circumstances surrounding the case reveals that the omission of recalling these witnesses did not cause any injustice. I have reviewed both the case proceedings and the judgment; the trial Court assessed



the evidence already presented fairly. Ultimately, the integrity of the trial process remained intact, and the Appellant's rights were not violated.

33. I uphold the conviction for the offence of defilement contrary to Section 8 (1) as read together with Section 8(3) of the *Sexual Offences Act*.
34. On sentence, under Section 8 (3) of the *Sexual Offences Act*, 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. The trial Court considered the Appellant's mitigation and the social inquiry report dated 8<sup>th</sup> August, 2019 and sentenced the Appellant to 15 years' imprisonment. The sentence was in 2019, and the Supreme Court's guidance in the case of Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment) had not yet been issued regarding the matter of minimum sentences under the *Sexual Offences Act*.
35. I find no reason to interfere with the sentence of 15 years. However, I note that the learned trial magistrate did not consider the period the Appellant had been in custody during sentencing as stipulated under Section 333 (2) of the *Criminal Procedure Code*. The Appellant could not raise bond and remained in custody between 8<sup>th</sup> December, 2013 and 28<sup>th</sup> August, 2015. The prison authorities shall take into account the period spent in custody in computing the sentence imposed on the appellant.
36. The upshot is that the appeal on conviction is hereby dismissed. The sentence is set aside and substituted with the sentence outlined above.
37. It is so ordered.

**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 3RD DAY OF MARCH, 2025.**

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**C. KENDAGOR**

**JUDGE**

In the presence of:

Court Assistant: Beryl

Appellant: Shadrack Barasa Nyeywo

Respondent: Mr. Omondi, ODPP

