



REPUBLIC OF KENYA



KENYA LAW
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**Sambaya v Republic (Criminal Appeal E079 of 2024)
[2025] KEHC 3275 (KLR) (18 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3275 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E079 OF 2024
DR KAVEDZA, J
MARCH 18, 2025**

BETWEEN

WYCLIFFE ONG'ONDO SAMBAYA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered on 31st October 2022 by Hon. E. Riany (SRM) at Kibera Chief Magistrate's Court Sexual Offences Case No. E056 of 2022 Republic vs Wycliffe Ong'ondo Sambaya)

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(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on the 28th of May 2022 in Westlands Sub-county within Nairobi County, the appellant unlawfully and intentionally caused his male genital organ (penis) to penetrate the female genital organ (vagina) of MAI a child of 13 years. He was sentenced to serve twenty (20) 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 learned magistrate erred by disregarding his cogent defense.
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. The prosecution availed three (3) witnesses in support of their case. PW1, MAI gave sworn evidence after a voir dire testimony. She recounted that on 28th May 2022, while heading to the toilet, the



- appellant dragged her inside, locked the door, and demanded she say she loved him. When she refused, he silenced her with his hand, pulled down her trousers and underwear, and penetrated her with his penis. His wife's call startled him; he told MAI to stay quiet, locked the door from outside, and left.
5. Soon after, his wife opened the door and alerted MA's parents, who took the appellant to Kabete Police Station. PW3, PC Irene Mutie, the investigating officer, recorded statements and referred MAI to Nairobi Women's Hospital for treatment. Medical forms (PRC and P3) were completed, and PW3 produced MAI's birth certificate, confirming her age as 13 at the time. MAI identified the appellant in court.
 6. PW2, John Njuguna a clinician at Nairobi Women's Hospital adduced the complainant's medical diagnosis on behalf of his colleague after seeking leave of court. He averred that the complainant had tenderness on her labia majora and labia minora, an old torn hymen scar, and lacerations on her genitalia. Further, he stated that the injuries were fresh and produced the complainant's PRC form and P3 form.
 7. At the close of the prosecution case, the court was satisfied that the prosecution had established a prima facie case. The appellant laid down his defence as follows; On the material day, he returned home from work when he found that his wife was not present. He proceeded to cook tea when two men knocked on his door and took him to Kabete Police Station. He called his sister who informed him that he was being accused of an alleged defilement. He denied ever knowing the girl and claimed that the complainant's father wanted to obtain a sum of KShs. 200,000 from him which he did not have.
 8. 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."
 9. 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.
 10. In this matter, the prosecution presented compelling evidence to establish the offence of defilement against the appellant, meeting the requisite standard of proof beyond a reasonable doubt. The critical element of penetration was substantiated through the testimony of PW1, the complainant. She stated that on 28th May 2022, the appellant dragged her into a toilet and inserted his penis into her vagina.
 11. This account was reinforced by PW2, a clinician from Nairobi Women's Hospital, who provided medical evidence of fresh injuries on the complainant's genitalia, including tenderness on her labia majora and minora, lacerations, and an old torn hymen scar. These findings aligned with PW1's narrative, lending significant weight to the claim of penetration.
 12. The age of the complainant was unequivocally resolved. PW1 testified that she was born on 3rd April 2009, a fact corroborated by her birth certificate, which was produced in court by PW3, the investigating officer, PC Irene Mutie. At the time of the offence, PW1 was 13 years old, clearly a minor under the law. The trial court correctly determined that she fell within the legal definition of a child, a finding that was beyond contention given the documentary evidence.



13. Identification of the appellant posed no difficulty. PW1, who knew him as a neighbour, confidently identified him in court. The incident occurred during daylight, and the appellant's wife intervened after being alerted, further supporting the complainant's recognition of her assailant. A child of 13 is unlikely to misidentify someone familiar under such circumstances, bolstering the reliability of this evidence.
14. The prosecution thus discharged its burden comprehensively. The elements of penetration, the complainant's age, and the appellant's identity were each proven with clarity and precision. Despite the appellant's denial and claim of a financial motive, the evidence stood firm. Accordingly, the appellant's conviction is affirmed.
15. Regarding the sentence, the appellant was sentenced to serve twenty (20) 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.
16. 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

