



**Pondi v Republic (Criminal Appeal E013 of 2025)
[2025] KEHC 4759 (KLR) (15 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4759 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E013 OF 2025
DR KAVEDZA, J
APRIL 15, 2025**

BETWEEN

GRADIUS PONDI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered by
Hon. C.M Njagi (P.M) on 16th December 2024 at Kibera Chief Magistrate's
Court Sexual Offences Case no. E009 of 2024 Republic vs Gradius Pondi)*

JUDGMENT

1. The appellant was charged with the offence of attempted defilement contrary to section 9(1) as read with section 9(2) of the *Sexual Offences Act*, No. 3 of 2006. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the same Act. After a full trial, he was convicted and sentenced to serve ten (10) years imprisonment on the main charge.
2. Aggrieved, he filed a petition of appeal challenging his conviction and sentence. In his appeal, he challenged the totality of the prosecution's evidence against which he was convicted. He urged the court to quash his conviction and set aside the sentence imposed.
3. As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial Court and come to an independent conclusion as to whether or not to uphold the convictions and sentences. This task must have regard to the fact that I never saw or heard the witnesses testify (see *Okeno v Republic* [1973] EA 32).
4. The prosecution's case was as follows: The complainant BW testified that she was a 15-year-old student, who alleged a relationship with the appellant, Gradius Pondi, since December 2023. BW claimed they had been intimate multiple times, describing visits to his residence under the pretence of revising. She told the court that they had sex multiple times. She stated that the appellant would undress her, touch



- her breasts and vagina, and attempt penetration, causing her pain, after which he would desist. The complainant admitted lying to her mother about her whereabouts and confirmed she went to the appellant's house willingly. She was later taken to hospital for examination.
5. JM, the complainant's mother (PW1), testified that on 13th January 2024, she returned home to find her absent. Informed that the complainant was at a man's house, she visited but found no one. She later learned from the complainant that the appellant had inserted his fingers into her vagina. Medical attention followed, with documents issued.
 6. John Njuguna (PW4), a clinician at Nairobi Women's Hospital, produced medical records (GRVC, P3, PCR forms). He noted the complainant was calm, with no physical or genital injuries, no pregnancy, and an intact hymen. He stated digital penetration might not cause injury, supporting the charge of attempted defilement.
 7. PC Bridgit Sifuna (PW3), the investigating officer, took over the case on 15 January 2024. With the appellant already in custody, she recorded statements from the complainant and her mother. BW alleged Pondi attempted penetration, stopping when she felt pain and touched her buttocks and breasts. The prosecution produced BW's birth certificate, confirming her age. No evidence suggested condom use or threats by her mother. BW's understanding of "sex" was questioned, possibly explaining her phrasing.
 8. In his defence, the appellant testified that on 13th January 2024, two men arrested him at home, taking him to Langata Police Station. He recounted meeting the complainant at a food vendor, lending her his phone to call her mother, JI, who sent money via M-Pesa to pay the vendor. The appellant produced an M-Pesa statement as evidence. He stated that after paying, they parted ways. Later arrested, the appellant denied attempting to engage in sexual activity with the complainant and denied the charges.
 9. The appellant was convicted and sentenced accordingly,
 10. The appeal was canvassed by way of written submissions which have been duly considered and there is no need to rehash. The starting point would be to look at what the law states in regard to the offence in question. Section 9(1) (2) of the *sexual offences Act* provides that;
 - “(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.
 - (2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years”
 11. The prosecution, in an offence of attempted defilement must therefore prove the other ingredients of the offence of defilement except penetration.
 12. The prosecution's case hinges on the testimony of the complainant, a minor who alleged multiple instances of inappropriate touching and attempted penetration by the appellant. Supporting this account, the complainant's mother (PW1) testified to the appellant's absence from home on 13th January 2024 and confirmed a subsequent hospital visit prompted by the complainant's disclosures. The clinician (PW4) who examined the complainant found no physical injuries, noting that digital penetration, as alleged, often leaves no visible trace. Additionally, the investigating officer (PW3) endorsed the charges, relying primarily on the complainant's statements to build the case.
 13. In contrast, the appellant firmly denied the allegations, offering a different narrative. He claimed a single, innocuous encounter with the complainant at a food vendor, where he assisted her with a phone call and paid the vendor via M-Pesa. To substantiate this, he presented an M-Pesa transaction record,



which documented the payment and aligned with his version of events. He maintained that no further interactions, let alone any of a sexual nature, took place between them.

14. For a conviction under Section 9(1), the prosecution must establish beyond reasonable doubt that the appellant committed an act with the clear intent to cause penetration with a child. This requires a robust and consistent body of evidence, free from significant doubts or contradictions. The Court has meticulously reviewed the evidence presented by both sides to determine whether this threshold was met.
15. The appellant's M-Pesa records play a pivotal role in this evaluation. These records, unchallenged by the prosecution, lend credibility to his account, suggesting that the interaction may have been limited to a transactional exchange at the vendor's stall. This evidence raises the possibility that the encounter was non-sexual, undermining the prosecution's portrayal of the appellant as a predator who exploited or coerced the complainant. The absence of any prosecution effort to discredit these records strengthens the appellant's position, casting doubt on the complainant's allegations.
16. Moreover, the complainant's testimony revealed inconsistencies that further weakened the prosecution's case. During cross-examination, her understanding of the term "sex" appeared vague and inconsistent, particularly given her age and maturity level. She claimed multiple instances of sex with the appellant, including digital penetration, yet the medical evidence provided no corroboration for these assertions. The clinician's findings revealed no physical signs of trauma or penetration, which, while not definitive proof of innocence, failed to support the complainant's account. These discrepancies raise critical questions about the reliability of her testimony and whether it accurately reflects the legal and factual elements required for a conviction under Section 9(1).
17. Given the complainant's age, her ambiguous use of language and the lack of medical corroboration introduce significant uncertainty. The Court must consider whether these gaps and contradictions can be overlooked in favour of a conviction. The law demands proof beyond reasonable doubt, a standard that leaves no room for unresolved ambiguities or unaddressed inconsistencies.
18. In light of these factors, the prosecution's case falls short of the threshold of proof beyond reasonable doubt, and the benefit of doubt ought to be extended to the appellant.
19. For the foregoing reasons, I find the appeal merited and hereby quash the conviction and set aside the sentence of ten (10) years imprisonment imposed by the trial court. The appellant is thus set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 15TH DAY OF APRIL 2025

D. KAVEDZA

JUDGE

In the presence of:

