



**Ndunde v Director of Public Prosecutions (Criminal Case  
E063 of 2024) [2025] KEHC 6333 (KLR) (20 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6333 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE E063 OF 2024**

**S MBUNGI, J**

**MAY 20, 2025**

**BETWEEN**

**JOSEPH OCHANGO NDUNDE ..... APPELLANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT**

*(Being an appeal against the decision in Butere CRC NO. E036 OF 2022)*

**JUDGMENT**

**Introduction**

1. The Appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* of 2006. The particulars were that on the 7<sup>th</sup> day of October, 2022 at [Particulars withheld] sublocation in Butere subcounty within Kakamega County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of J.M a child aged 14 years.
2. In the alternative the Appellant was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* of 2006. The particulars were that on the 7<sup>th</sup> day of October, 2022 at [Particulars withheld] sublocation in Butere subcounty within Kakamega County, the appellant intentionally and unlawfully touched the vagina on J.M a child aged 14 years with his penis.
3. During trial the prosecution called four witnesses who testified in support of their case. The appellant was placed on his defence and the defence called three witnesses. The trial magistrate considered all the evidence adduced and found the Appellant guilty of the offence of defilement and proceeded to sentence him to 20 years imprisonment.



## Facts at Trial

4. PW1 was the complainant JM. She told the court where she went to school and that she was 15 years old. She testified that she knew the appellant since they drew water from the same waterpoint and that the appellant's homestead was across the river. She recalled that on the particular day at 8:00 am, she had gone to fetch water with her younger sister aged 5 years. The appellant called out her name requesting her to go to where he was but she declined. PW1 recalled that as she bent down to fetch water, the appellant emerged and held her by the neck. He wanted PW1 to go with him to his house.
5. It was her further testimony, the appellant held her by the throat, thus she couldn't scream. She stated that the accused then removed her innerwear, pinned her to the ground, lay on top of her and started having sexual intercourse with her. She testified that thereafter, the appellant finished and took off, disappearing into a Napier grass farm. PW1 then left and proceeded home where she reported to her grandmother. She in turn reported to PW1's uncle, who called her father and together they proceeded to Butere Hospital for treatment, and to the Police Station where they filed a P3 form. Her birth certificate was produced showing that she was born on 22.08.2008.
6. In cross-examination, PW1 denied that this was a mere frameup by her father. She further denied having gone to the appellants person's home. She told the court that the appellant person went to her school and attempted to bribe her with Kshs. 500 so that she could plead with the court to drop the charges. When asked by the court, the accused/appellant denied having gone to the complainant's school.
7. PW2, Matisela Atsole, PW1's parent. He recalled that on that particular day while at wok, he received a call informing him that her daughter had been defiled and was unable to walk. He rushed home and upon interrogation, PW1 informed him that she had been defiled by 'Amos' who was also known to PW2. report to the chief's office, and proceeded to the hospital where PW1 was treated.
8. Upon cross examination, he denied that he had sent PW1 to collect money from the appellant a day prior to the incident.
9. PW3 was Rebecca Matilda Omuhulo, a clinician at Butere Sub-County Hospital. She stated that PW1 was brought to the facility in the evening on the basis that she had been defiled by a person who was well-known to her. She stated that her hymen was freshly broken. There was bleeding at the cervix at 3 o'clock. The lab investigations the syphilis test was positive. PW1 had epithelial cells and pus cells in urine. There was no blood in the urine.
10. She stated that the appellant was brought to hospital the next day on allegations that he had defiled a 12-year-old girl. PW3 testified that the appellant's urine had ketones in it. She testified that the urine sample examined in the lab showed that there was no blood. However, the examination by the doctor showed that there was blood which was controversial. She also testified that the UDRL test for PW1 came out positive for syphilis, whereas the appellant's was negative. She produced the treatment notes in court.
11. Upon cross examination, PW3 confirmed the officer had indicated that PW1 is 12 years, but the clinician who attended to PW1 indicated in the P3 form that she was 14 years old.
12. PW4 was PC Nancy Kaei (No. 245785) from Butere Police station. She recalled that at around 3:00pm on 07.10.2022, PW1 and PW2 reported that PW1 had been defiled by someone who was known to her at the riverbed while she was fetching water. She stated that she visited that scene the same day. She told the court that they met the accused along the road, he was positively identified by PW1 and they effected arrest.



13. The court considered the evidence adduced by the prosecution and found that a prima facie case against the accused had been established.

### **Defence Case**

14. DW1 was the appellant. He recalled that on the material day he left home for work where he was guarding some property belonging to a teacher. He testified that upon returning home, he was informed by his wife that a minor had come to their home the previous evening demanding Kshs. 50/-, failure to which the case would be escalated to the police. The appellant intended to call the minor's father later on in the course of the day to iron out the issue, but he was called for a chama meeting. He testified that while in the meeting, he received a call from a close relative who informed him that it was alleged that he had defiled a minor.
15. The appellant testified that he immediately proceeded home where he found his father who briefed him about the report. He proceeded to Marenyo Police Station and was informed that a report had been lodged against him. He then proceeded to Butere Police Station where he was arrested on the way. DW1 told the court that there was bad blood between him and the complainant's father as he had previously been married to PW2's sister but they separated. He insisted that he was innocent and the case was a frameup.
16. DW2, was Lukas Akala Namayi who stated that the accused was well known to him since they do casual jobs and security guard duties together. He testified that on the particular day at 6:00 am, he was with the accused person and another colleague. They left their security guard duties and proceeded to do some casual jobs at Shirotsa area. DW2 told the court that the whole case was fabricated since he was in the company of the accused at Mwalimu Mutuli's home.
17. On cross-examination, he stated that they started tilling at 7:00am. He stated that DW3 was also a security guard who performed casual jobs.
18. DW3 was Herbert Akhungu. He stated that the accused was well known to him as his neighbor. He further told the court that they performed casual jobs together. He recalled that on the material day, he was in the company of DW1 and DW2 at Mwalimu Mutuli's home where they were tilling a parcel of land. He stated that they parted ways at 3:00pm and that the allegations against the appellant were false.
19. Upon cross examination, he reiterated that he was in the company of the accused/appellant at Mwalimu Mutuli's home. He testified that he was the first to arrive, then the appellant and lastly DW2 arrived at the home.
20. The trial court considered the evidence adduced and found the Appellant guilty of the offence of defilement.
21. In mitigation, the prosecution submitted that the appellant had no previous record and thus was a first offender. The Appellant submitted that he was innocent, and that he was at work on the date of the alleged offence. He submitted that he had a young family and prayed for the court to pardon him. He submitted that the root of the case was family wrangles.
22. The court proceeded to sentence the appellant to serve twenty (20) years imprisonment.

### **The Appeal**

23. The Appellant being dissatisfied by the conviction and sentence filed this petition of Appeal dated 05.06.2024 on the following grounds:



- i. That, minimum mandatory sentence meted on the appellant is/was unconstitutional and not warranted on plea.
  - ii. That, the trial Court erred in law and facts in not weighing the conflicting evidence in prosecution case that were inconsequential to conviction.
  - iii. That, the trial magistrate erred in law and in facts by failing to make a finding that the case was not proved beyond reasonable doubt despite contradictory evidence.
  - iv. That, the trial magistrate erred in law and in facts by failing to observe that the medical report tendered in Court was scanty and shambolic which could not have been to secure conviction.
  - v. That, more grounds to be adduced after perusal and receipt of the trial Court proceedings.
24. The appellant prayed that the Conviction be quashed, the Sentence of 20 years be set aside and the appellant herein be set at liberty.
25. On 21.02.2025, The court directed that merits of this Appeal be canvassed by way of written submissions. At the time of writing this judgment, neither of the parties had filed submissions.

### **Analysis & Determination**

26. This being the first appeal, this court is expected to re-evaluate the evidence tendered before the trial court and to come up to its own logical conclusion by taking into account the fact that it did not have the advantage of seeing and hearing the witnesses and their evidence and/or see their demeanor.
27. This court is guided by The Court of Appeal case of Okeno – VS – Republic (1972) EA 32 where it was stated as follows: -
- “An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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. It is not the function of the 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 conclusions. Only then can it decide whether the magistrate’s findings can be supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses”.
28. In the case of Republic Vs Edward Kirui (2014) eKLR, the Court of Appeal quoted the Supreme Court of India case of Murugan & Another Vs State by Prosecutor, Tamil Nadu & Another (2008) INSC 1688 where the case of Bhagwan Singh Vs State of M. P. (2002)4 SCC 85 was cited as follows:-
- “The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view of ignoring the admissible evidence, a duty is cast upon the High Court to re-appreciate the evidence on appeal for the purpose of ascertaining as to whether all or any of the accused has committed any offence or not.”
29. Having considered the lower court record and the grounds of appeal, I find the following as issues for determination:
- i. Whether the prosecution proved its case to the desired threshold;



- ii. Whether the sentence meted upon the appellant was excessive/lawful.

### **Elements of offence of defilement**

30. The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* which provides:
  - 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.
31. The ingredients that ought to be established in an offence of defilement are: the age of the complainant, proof of penetration and the positive identification of the assailant. See Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013
  - i. Age of the complainant
32. In a charge of defilement, the age of the victim is important for two reasons:
  - i. defilement is a sexual offence against a child; and
  - ii. age of the child has also been used as an aggravating factor for purposes of determining the sentence to be imposed; the younger the child the more severe the sentence.

The Appellant never raised any issue on the age of the Complainant. So I find the prosecution proved that the complainant was aged 14 years.

### **Penetration**

33. Section 2(1) of the *Sexual Offences Act* defines penetration as:

“The partial or complete insertion of the genital organs of a person into the genital organ of another person.”
34. According to the complainant the appellant called her telling her to go where he was but she declined as she was fetching water. The appellant emerged from behind and held her neck telling her they go to his home, he held her by her throat then he removed her inner wear pinned her on the ground and remarked “ I have found you today, I want to pour some water” he then lay on top of her and started having sexual intercourse with her after he finished he ran away.
35. Pw3 Rabeca Maltida Omollo a clinical officer said she filled the P3 form and she saw the accused. On examination the complainants hymen was freshly broken, she had bleeding on the cervix at 3.00 O'clock, she had Syphilis , epithelial cells and pus cells in urine.
36. The freshly broken hymen shows that there was penetration therefore the complainants evidence is supported by a medical evidence. I do find that the prosecution has proved this element.

### **Was the appellant the perpetrator?**

37. The minor stated that she has seen the appellant before and knows him as Amos Ochango , they normally fetch water from the same river , he comes from across the river. The trial court in finding that the appellant was the assailant stated that the appellant being a neighbor was corroborated by PW2.



38. In the case of R vs Turbull and Others (1976) 3 ALL ER 549. Lord Widgery C.J had this to say: -

“First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be convincing one and that a number of such witness can all be mistaken. Secondly the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation” At what distance” In what light” was the observation impeded in any way, as for example by passing traffic or press of people. Had the witness ever seen the accused before” How often” if only occasionally, had he any special reason for remembering the accused” How long elapsed between original observation and the reason for remembering the accused” How long elapsed between original observation and the subsequent identification to the police” was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance.”

39. The law requires the trial court to carefully scrutinize evidence of a single identifying witness and only convict if satisfied that it was free from possibility of error or mistake. In Wamunga versus Republic [1989] KLR 424 the Court of Appeal stated thus:

‘It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it the basis of a conviction’.

40. In my view, the evidence by the prosecution leaves no doubt that it was the appellant who caused his penis to penetrate the complainant’s vagina. He was very well known by the complainant as a person whom they fetch water with from the same river and who came across the river. She vividly described what happened.

41. In the upshot, I find that the Appellant was recognized by the complainant; there was no mistaken identity or error. Accordingly, I find that the prosecution proved its case beyond reasonable doubt and that the trial court did not commit any error in finding the appellant guilty and convicting him for the offence of defilement.

42. The appellant raised the defence of alibi in his defence, he did not raise it early enough during the trial. The prosecution did not have time to rebut. It is trite law that defence of alibi should be raised early enough during the trial so that the prosecution can have a chance to challenge it. Therefore, I find this ground has no merit.

43. The court in R v Sukha Singh S/o Wazer Singh & Others {1939} 6 EACA 145 held:

“If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there is naturally a doubt as to whether he has not been preparing it in the internal and secondly, if he brings it forward at the earliest possible moment it will give the prosecution



an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness, proceedings will be stopped.”

44. From the cross examination of the appellant and his witnesses contradicted themselves as the time they arrived at mwalimu Muturi’s home where they said they were working, this shows that accused defence of alibi is an afterthought for the contradictions makes one doubt if they were together. Further the appellant claim that he was framed up by the father of the complainant does not add up for there is no evidence of a pre-existing grudge. So I agree with the holding of the trial magistrate that there was no frame up.
45. From the foregoing, I find that the prosecution tendered a watertight case against the appellant on the charge of defilement. Therefore, the trial court cannot be faulted.
46. The appeal on conviction fails, I do uphold the conviction .

#### **On Sentence**

47. The appellant prayed that the sentence meted be set aside. Section 8 (3) of the *Sexual Offences Act* provides as follows:
  - (3) 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.The trial court in sentencing the appellant considered the mitigation advanced and sentenced the appellant to 20 years’ imprisonment.
48. In the “Muruatetu Case”, the Supreme Court various guidelines to be considered in sentencing:
  - “(a) age of the offender;
  - (b) being a first offender;
  - (c) whether the offender pleaded guilty;
  - (d) character and record of the offender;
  - (e) commission of the offence in response to gender-based violence;
  - (f) remorsefulness of the offender;
  - (g) the possibility of reform and social re-adaption of the offender;
  - (h) any other factor that the Court considers relevant.”
49. Also, we have the judiciary guidelines on sentencing. The victim was aged 14 years.
50. In my considered view, the objectives of sentencing were met in totality by the trial magistrate by imposing the sentence of 20 years given the age of the victim which is the lawful sentence allowed by the law.
51. In the upshot, the appeal on sentence also fails.
52. In totality I find the Appeal has no merit , it is dismissed.
53. 14 days Right of Appeal explained.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 20<sup>TH</sup> DAY OF MAY, 2025.**



**S.N MBUNGI**

**JUDGE**

In the presence of :

Court Assistant – Albright Sunguti.

