



REPUBLIC OF KENYA



**KENYA LAW**  
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**RJ v Republic (Criminal Appeal E067 of 2023)  
[2025] KEHC 6784 (KLR) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6784 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL APPEAL E067 OF 2023  
WM KAGENDO., J  
MAY 15, 2025**

**BETWEEN**

**RJ ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Appellant was convicted for the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* on 31/07/2023 in Criminal Case S.O. 785 of 2017 and was sentenced to life imprisonment. He filed the Appeal challenging the conviction and sentence on 04/08/2023 and it is on that basis that we wish to respond.
2. He raised the following grounds:-
  - i. That, the learned magistrate erred in law and fact by convicting him in absence of any cogent and tangible evidence.
  - ii. That, the learned trial magistrate erred in law and fact by forming a conviction in reliance of a single witness testimony that was not substantiated by an independent witness.
  - iii. That, the learned trial magistrate erred in law and fact by relying on contradictive, inconsistent and unsubstantiated witness' account of the allegation levelled against him.
  - iv. That, the learned trial magistrate erred in law and fact by failing to put into consideration the period he spent in remand while on trial.
  - v. That, the learned trial magistrate erred in law and fact in finding his conviction and sentence by failing to take into consideration his unshaken defense.



3. The background information of this case emanates from original Criminal Case SOA Case No. 785 of 2017 at Mombasa Law Court where upon conviction, the appellant was sentenced to life imprisonment. That prompted this appeal before this Honorable Court with regard to the decision passed by the trial Court.

#### **Ingredients of the Offence:**

4. For the offence of defilement, according to the case of Charles Wamukoya Karani v Republic, criminal appeal no. 72 of 2013, the following ingredients need to be proved;
  - i. Age of the complainant
  - ii. Proof of Penetration
  - iii. Positive identification of the perpetrator
5. The role of this court being the first appellant court is now settled as was stated in the case of Odeno Versus Republic (1977) EALR32 and later Mark Oiruri Mose Versus Republic (2013) e KLR among other decisions that this court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own conclusion on the matter but bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.
6. In the above matter, the court held that “an Appellant on first appeal is entitled to expect the evidence as a whole to be subject to a fresh and exhaustive examination (Panda versus Republic 1975) E.A 336 and to the Appellant court’s own decision on the evidence. The first appellant court must weigh conflicting evidence and draw its own conclusions (Shantilal M Ruwala Versus Republic (1957)) E.A 570.
7. It is not the function of the Appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court findings and conclusions. It must make its own findings and draw its own conclusion. 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 witnesses (Peter vs Sunday Post 1978) E.A. 424”

#### **Appellant’s Case:**

8. The Appellant does not dispute the first and second elements of defilement however bases their appeal on the fact that the prosecution failed to meet the third element of the offence of defilement, that being identification of the perpetrator. The appellant claims that there are inconsistencies as to the guardianship of the victim, with the paternal grandmother and uncle of the victim having guardianship and not the appellant. This claim is buttressed by DW2 page 28 when he states, “the child was not living with the accused”. Based on this evidence, the appellant claims that they were convicted based on circumstantial evidence that did not prove beyond a reasonable doubt that they were the perpetrator of the crime.

#### **Respondent’s Case:**

9. The Respondent concedes the appeal based on the third element of defilement. With regards to the positive identification of the perpetrator, the respondent submits that the complainant’s mother testified as to the custody of the child during the time that the defilement took place. The complainant’s mother (PW1) stated that she gave the victim to her paternal grandmother in good health in February of 2017. That without the victim’s mother’s (PW1) knowledge, the paternal grandmother gave the



child to the appellant. In May of 2017, the uncle of the victim gave the child back to the mother with suspicions as to the health and welfare of the child.

10. The respondent correctly conceded that the complainant's paternal grandmother was a crucial witness who unfortunately, was not called to testify. On this basis, the respondent concedes the appeal on the 3<sup>rd</sup> element of defilement.

#### **Issues for Determination:**

11. Seeing as both parties do not contest that the elements of the victim's age and the proof of penetration have been proven by the trial court beyond reasonable doubt, the court finds that the age of the victim has been established by medical evidence, the victim's parents or guardians through their testimony before the trial court.
12. The court also finds that the medical examination report and the PRC form indicate that there was proof of vaginal and anal penetration of the victim and that this evidence is further corroborated by testimony before the trial court. Therefore, the prosecution sufficiently discharged the burden to prove the age of the victim and proof of penetration of the victim.
13. This Honourable court notes that the issue for determination is:
  1. Whether there was a positive identification of the perpetrator.

#### **Analysis and Determination**

14. The appellant's first and second grounds of appeal are that the learned trial magistrate erred in law and fact by convicting him in absence of any cogent and tangible evidence and erred in law and fact by relying on contradictory, inconsistent and unsubstantiated witness accounts. It is on this basis that the appellant believes that the circumstantial evidence used to convict him is intangible unsubstantiated evidence.
15. It is noted by the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] e KLR, the Court of Appeal stated as follows on reliance on circumstantial evidence:

“However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence
16. In 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21:

“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence.”
17. The testimony of the a witness is a form of oral evidence, and from this evidence, the court can identify surrounding circumstances that can be used as evidence. In the present case however, the evidence presented by PW1 is hearsay evidence, which under evidence law is generally inadmissible.
18. PW1, according to their own testimony, states that they “never witnessed you[the appellant] committing the act”. Under Section 63 (1) of the *Evidence Act* 46 of 1963 CAP 80 Laws of Kenya,
  1. Oral evidence must in all cases be direct evidence.



2. For the purposes of subsection (1) of this section, "direct evidence" means—
  - (a) with reference to a fact which could be seen, the evidence of a witness who says he saw it;
  - b. with reference to a fact which could be heard, the evidence of a witness who says he heard it;
  - c. with reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner.
19. The fact that PW1 based their testimony on facts that they did not perceive would mean that the evidence they provided was hearsay evidence and is therefore inadmissible. Additionally, PW1 claimed that the paternal grandmother informed her that the victim was in custody of the appellant and that the grandmother could confirm this fact as well as the fact that the child was sleeping with the appellant. This evidence was unfortunately not corroborated by the grandmother, as she was never called to testify.
20. The lack of direct evidence from the paternal grandmother, therefore, renders the testimonies of PW1 to be hearsay and inadmissible. This would therefore mean that there is no direct evidence from which circumstantial evidence can be inferred. Therefore the circumstantial evidence is not cogent and tangible enough to be considered evidence to show identification of the perpetrator.
21. I have looked at the evidence afresh and I find that the first and second elements of defilement have been satisfied. The court is satisfied that the child was of the tender age of 2 years and that the child suffered through vaginal and anal penetration. This is evidenced by the PRC form and that the testimonies of the witnesses.
22. However, with regards to the positive identification of the perpetrator, I do not find that this element was not proved. This is based on the fact that there is no direct evidence or circumstantial evidence that puts the child in the custody of the appellant. The paternal grandmother, not being a witness in this case causes me to find that there is not enough evidence presented that positively identifies the appellant as the perpetrator.
23. Furthermore, I also note that there were issues between the parents of the victim, with threats from both sides and a case in FIDA showing that there is hostility between the parties which could cause the assumptions as to the identity of the perpetrator being the appellant.
24. I note that the child sustained some serious injuries and it would have been great if someone was put in to task for endangering the life of a vulnerable child.

She was an innocent two year child and the court is duty bound to protect vulnerabe members of society. In so doing, we however cannot throw all the rules of procedure and evidence out or ignore fatal procedural breached=s. here reliance on hearsay evidence was wrong
25. There was no one who testified to having seen the child in the custody of the father and eve the investigating officer who visited the home did not even get into his house. There was no oral or forensic evidence to point at the appellant as the perpetrator of this heinous act. The state was therefore right in conceding the appeal

**Orders:**

26. I therefore find that not all of the ingredients of a defilement were proved.



27. The conviction and sentence are quashed.
28. The upshot is that the appeal against both the conviction and the sentence is allowed.
29. It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,  
THIS .....15TH.....DAY OF .....MAY... 2025**

**HON. LADY JUSTICE W. K. MICHENI**

**JUDGE**

In the presence of: -

The Appellant... In Person

Ngiri.....for The State Bebora... Court Assistant

**SIGNED BY: HON. LADY JUSTICE WENDY MICHENI**

