



REPUBLIC OF KENYA



KENYA LAW
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**Kaikai v Republic (Criminal Appeal E091 of 2025)
[2025] KEHC 8155 (KLR) (12 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8155 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKADARA
CRIMINAL APPEAL E091 OF 2025**

**J WAKIAGA, J
JUNE 12, 2025**

BETWEEN

ROSE DIANA KAIKAI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence in criminal case no E092 of 2008 of the Chief Magistrates Court at Makadara)

JUDGMENT

1. The place of the domestic workers in Kenya is one fret with challenges and opportunities as the appeal herein will show. They go by various titles and names. Often referred to as: nanny, maids, house girl/boy, Auntie, house manager, household assistants, house help or simply servant. They play an important role in our lives by taking care of various household tasks, allowing families to focus on work, education and wellbeing. Some are so good that they end up being part of the family, while others are so evil that they cause untold suffering to the families they serve.
2. We live with them in our homes (live-in) while some are day “scholars”(live-out). Some are temporary/seasonal workers, full time and or part time workers. We lock all our valuables from them ,while at the same time leave them with our children, many who have been initiated to the sexual world by them, a fact that we tend to ignore by looking on the other side. Some have taken over our better halves both male and female as we are busy looking for bread and butter, by playing the role of assistant spouse .
3. While some are trustworthy, offering companionship, maintaining the home and contributing to the wellbeing of the family and society, there are horror stories of some who have infected the enter household as they are shared by both the parents and the children. Some have stolen from their employers or aided and abated the same. Most are poorly paid and overworked causing them to take out revenge on the household. They are none the less un-necessary evil in the modern world.



4. In addition to bathing, dressing and feeding the children, some sleep with them in the same room and bed, the bond and the trust built over the years between them is a story for another day and this appeal forms a chapter thereof.
5. The appellant was employed by the mother of the complainant in the month of March 2018 in a complex family in which as a second wife, she was living with the children of the first wife who were older than the complainant, with whom they shared bed and the appellant to add to the mix.
6. The appellant was charged with the offence of defilement of a child contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* the Particulars of which were that on diverse dates between the month of April and May 2018, at Kayole Junction in Embakasi Sub_ County within Nairobi County, unlawfully and intentionally committed an act which caused the penis of a child SM aged 8 years to penetrate into her own vagina. She faced an alternative charge of indecent act with a child contrary to section 11(1) of the act, the particulars of which were that she unlawfully and intentionally touched the penis of SC.
7. She denied the said charges, was tried, convicted and sentenced on the alternative charge, to a five-year imprisonment and being dissatisfied by the said conviction and sentence filed this appeal and raised the following grounds of appeal:
 - a. That the trial court erred in finding that the prosecution case was proved beyond reasonable doubt on the alternative charge
 - b. That the trial court erred in convicting the appellant without any independent corroborative evidence
 - c. That the prosecution case was full of inconsistencies and contradictions which could not secure a conviction
 - d. That the trial court erred in failing to consider the evidence that suggested that the complainant had been sodomized as per the evidence of PW3 and PW5 thereby casting doubt on the complainant's testimony.
 - e. That the court erred in convicting the appellant on the second count in view of the inconclusive investigation by the police.
8. This appeal was initially filed at the Criminal registry at Milimani before being transferred to this registry.

Submissions

9. Directions were given on the disposal of the appeal by way of written submissions. On behalf of the appellant it was submitted that there was no evidence tendered to support the charge of indecent assault as the charge was that the appellant touched the penis of the complainant with her vagina and that this contrary to the initial report made to the police to the effect that the complainant had been defiled several times and infected with gonorrhoea and that the appellant had been inserting his penis into her vagina.
10. It was contended that there was evidence on record to the effect that the victim had anal injury which was caused by penetration which was not caused by the appellant and whose source was not proved thereby casting doubt on the prosecution case the benefit of which should have been accorded to the appellant. In support of the submission, reference was made to the case *Richard Munene v Republic*



[2018] eKLR on the contradictions and discrepancies being resolved in favour of the accused and *Mary Wanjiku Gichira v Republic* to the effect that suspicion cannot form the basis of conviction .

11. On the identification of the perpetrator, it was contended that the initial complaint was that the appellant had infected the minor with STI but no evidence was tendered to connect the appellant with the same as the medical tests conducted on both the complainant and the appellant were omitted. It was therefore submitted that the appellant was not positively identified as the perpetrator.
12. On behalf of the respondent, it was submitted that all the ingredients of the offence were proved through the testimony of PW1 the minor to the effect that the appellant used to remove his clothes and put her leg a part and rub his penis unto her vagina which was corroborated by the medical evidence that his scrotum was swollen and he had STI. The age was proved and the appellant was positively identified as was stated in *Mercy Chelangat v Republic* [2022] eKLR.
13. It was submitted by the respondent that the Court of Appeal in *Lydia Achieng Juma v Republic* stated that it was hard to prove penetration for a male complainant and that indecency occurred and that the assault as per the evidence of PW3 was on a male gender. The appellant was identified by PW1 and PW2 and that her defence was properly dismissed. It was submitted that failure to call the complainant's teacher was not fatal to the prosecution case in view of section 124 of the [Evidence Act](#) and the holding in *Issa Jomo Sewediv Republic* [2016] eKLR where it was held that the prosecution is not required to bring a specific number of witnesses.
14. On sentence, it was submitted that the same was so lenient as section 11(1) provides for a term of not less than ten years. The court was therefore urged to enhance the same in view of the current jurisprudence of the Supreme Court.

Proceedings Before the Lower Court

15. This being a first appeal the court is required to re-evaluate the evidence tendered before the lower court and to come to its own conclusion thereof while giving allowance to the fact that unlike the trial court it did not have the advantage of seeing and hearing the witnesses See *Okeno v Republic*
16. PW1's evidence was that he was living with the appellant who was cleaning their house, wash utensils and cook for them. They shared a bedroom with his sisters and brothers sleeping two per a bed and that on the material day the appellant who was in his bedroom called him in and told him to remove his clothes which he did as she wanted to bath him, she then held his private part and rubbed to her private part. It was his evidence that they had a disagreement with the appellant and that he started feeling pain and was taken to hospital and later on circumcised.
17. In cross examination he stated that he shared the room with his brothers M B and J who were also in the house and that the appellant had chased them out of the house to go and play football and that the appellant used to rub his 'dudu' to her "dudu" every day from the 1st of May and that he first told the teacher of what had happened . it was his evidence that he had injuries in his anus which was caused by penis.
18. PW2 stated that in the month of March the appellant told her that the complainant was sick and was taken to hospital where he was treated. In the month of April, he failed to urinate and was taken to hospital and that upon completion of medication, the problem did not go away. The doctor then advised her to investigate the cause thereof upon which the teacher informed her that the complainant had indicated that the appellant used to engage him in "tabia mbaya"
19. In cross examination she stated that the incidence occurred when her eldest son was a round and that he thereafter went to the rural home for one month and that it is the appellant who reported to her of



the inability of the complainant to urinate and that she has suspected the school toilet as the cause of the infection. She confirmed that both the appellant and PW1, were examined and that at the time she owed the appellant salary which she sent to her mother through Mpesa.

20. PW3 Doctor Maundu examined the complainant on 12th June on an allegation of defilement on 24th May 2018 and that no injuries were noted on the anal and genital region .PW4 PC Joy Miriti produced the copy of the birth certificate confirming the age and treatment note and that the complainant stated that the appellant used to touch his private part when washing him and insert it her part when they go to bed , which the appellant denied. In cross examination she stated that she did not get any evidence that connected the appellant to the offence since the doctor had stated that the child had gonorrhoea and that she did not investigate sodomy .
21. PW5 Dr. Farah Mohammed stated that on examination , the complainant had normal external genitalia with a slight swollen scrotum and a slight lose splinter tone and classified it as an attempt sexual activity but at that age could not sustain erection .
22. When put on her defence, the appellant stated that the complainant fell sick on 24th May 2018 and was taken to hospital and upon his return home she was arrested on allegation of having infected the child. She demanded to be taken for examination which turned out negative upon which the victim's mother changed her testimony. It was her evidence that the mother used to bring men to the house and that the older child used to sleep with PW1 , so she could not tell what happened between them.

Determination

23. From the proceedings herein I have identified two issues for consideration: a) whether the alternative charge was proved and b) whether the appellants defence was considered and properly rejected?
24. It is not disputed that the charge of defilement was properly rejected by the court having taken into account the gaps in the prosecution case as identified by the appellant, which included the failure to present the medical report which would have either connected the appellant to the offence of defilement and or exonerated her as it was her evidence that she was tested and found negative. It is so clear from the proceedings as pointed out by the appellant that the issue of the injury to the complainant's anus was never pursued by the prosecution and eliminated, thereby raising doubt on the prosecution case.
25. As submitted rightly by the appellant, the charge of indecent act with a child was problematic, based in the evidence on record that the appellant used to bath the compliant and there was no way she would have done so without touching his genitalia. If the evidence of the prosecution to the effect that she rubbed his penis onto her vagina, we believable then failure to produce the medical report confirming that the appellant had no Sexual Transmitted Diseases logically lead to an adverse inference that was against the prosecution case the benefit of which should have been accorded to the appellant.
26. There was the evidence that the victim used to share a bed with his brother and that he had injuries to his anal area coupled with the appellant's evidence that the house was open to other male person, which evidence when looked at against the medical reports tendered raised the possible of a perpetrator either then the appellant as the complaint evidence on record was that the appellant never touched his anal area.
27. I therefore find and hold that there were contradiction and inconsistencies on the prosecution case the benefit of which should have been accorded to the appellant, noting that the same was convicted on the strength of the suspicion that she was the only female none relative living with the compliant but



in view of the medical report on the injury to the complainant's anal area, which was not investigated, her conviction was not safe and is therefore set aside.

28. The appellants defence was dismissed on the standard claim of being a mere denial which was in error the appellant having raised the issue of being framed up for demanding her salary arrears which the complainants mother confirmed by stating that she used to send money to the appellants mother and that at that time a sum of kshs 1000 was due and owing. The compliant in his innocence also confirmed that there was a dispute which was never interrogated by both the prosecution and defence.
29. I have taken into account the fact that the appellant was a mother of two children, one who was in the same age set with the compliant and that even if the appellant was starved sexually, there were other older males within the household, one who left for rural home for reason which was not made clear to the court only to come back upon the appellant being charged .
30. Having set aside the conviction I shall not comment on the sentence herein as the appellant did not appeal against the same.
31. In the final analysis I allow the appeal herein, set aside the conviction and quash the sentence thereon. The appellant shall be set free forthwith unless otherwise lawfully held and it is ordered.

DATED SIGNED AND DELIVERED AT MAKADARA THIS 12th DAY OF JUNE 2025

J. WAKIAGA

JUDGE

In the presence of:

Mr. Masavilu for the appellant

Ms. Kariuki for the state

Irene – Court assistant

