



REPUBLIC OF KENYA



**Osou v Republic (Criminal Appeal E035 of 2025)
[2025] KEHC 8389 (KLR) (17 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8389 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E035 OF 2025
DR KAVEDZA, J
JUNE 17, 2025**

BETWEEN

HENRY OSOU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered on
27th February 2025 by Hon. C.M Njagi (PM) at Kibera Chief Magistrate's
Court Sexual Offences Case No. 97of 2019 Republic vs Henry Osou)*

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 28th December 2018 at [Particulars Withheld] in Riruta Sub-County within Nairobi County, the appellant intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of SM a child aged 15 years. He was sentenced to serve twenty-five (25) 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.
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. PW1, S.M., the Complainant, testified that she was born on 20 February 2003, making her 15 years old in May 2018. She was invited by her neighbour, Rose, to assist with household chores. While Rose was bathing, Rose's husband, the appellant, questioned PW1 about her age, and relationship status,



- and advised her to date older men. He expressed disinterest in his wife and proposed secrecy to avoid detection.
5. The conversation resumed on a later occasion, with the appellant suggesting meetings on Wednesdays. In June 2018, he called PW1 to his house, touched her breasts, kissed her, and engaged in sexual intercourse. PW1, a virgin at the time, noticed blood stains on her underwear afterwards. She showered at home and initially avoided the appellant but later continued meeting him, fearing his wife's discovery. He promised to marry her after she had concluded her education. Their encounters persisted until December 2018.
 6. On 28 December 2018, they had sexual intercourse, and the appellant ejaculated inside her. Three weeks later, PW1 discovered her pregnancy and informed the appellant, who denied responsibility. Her mother learned of the pregnancy at eight months, leading to the appellant's arrest after PW1 identified him as the father. On cross-examination, PW1 stated she was not coerced and enjoyed the encounters, noting the appellant never questioned her about her age.
 7. PW2, JM, PW1's mother, reported the incident upon discovering her daughter's pregnancy. PW1 identified the appellant, known as "Baba Kao," as the father. PW2 confirmed that PW1 was 15 at the time of the incident.
 8. PW3, Nelly Papa, a government chemist, conducted a paternity test at the request of CPL Susan from Riruta Police Station. DNA analysis confirmed with 99.9% certainty that the appellant, Henry Osou, was the biological father of PW1's child.
 9. PW4, PC Linet Kirimo, the investigating officer from Riruta Police Station, recorded statements from PW1 and PW2, arrested the appellant, and produced PW1's birth certificate dated 20 February 2003.
 10. PW5, John Njuguna, from Nairobi Women's Hospital, examined PW1 on 5 September 2019, noting she was 38 weeks pregnant with no physical injuries, consistent with her account of impregnation by a neighbour.
 11. In his defence, the appellant claimed that on 28 December 2018, PW1 visited his house under the pretext of fetching water. She propositioned him, and despite his initial resistance, he engaged in sexual activity to "save his family." He was unaware of her age or pregnancy but supported the child. He denied using force.
 12. DW2, Rose Imali, the appellant's wife, testified that her husband confessed to the incident, and she had forgiven him.
 13. The appeal was canvassed by way of written submissions which have been duly considered and there is no need to rehash them.
 14. 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."
 15. 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.



16. The complainant, PW1, testified that she was born on 20 February 2003, establishing her age as 15 years during the incidents in 2018. This was corroborated by her mother, PW2, and substantiated by the birth certificate produced by PW4, the investigating officer. The complainant's age satisfies the statutory requirement which defines a child as any person under 18 years, thereby confirming her status as a minor for the purposes of the charge of defilement.
17. Penetration, as defined under Section 2 of the *Sexual Offences Act* to include partial or complete insertion of genital organs, was proven beyond reasonable doubt. PW1 provided a detailed account of an incident in June 2018, where the appellant summoned her to his residence, touched her breasts, kissed her, hugged her, and proceeded to engage in sexual intercourse. She testified that being a virgin at the time, she experienced bleeding, evidenced by blood stains on her underwear after the encounter. Additionally, PW1 described a further incident on 28 December 2018, during which the appellant again had sexual intercourse with her and ejaculated inside her. This encounter led to her pregnancy, which was verified after her medical examination.
18. The testimony of PW1 was supported by PW3, a government chemist, who conducted a paternity test. The results confirmed with 99.9% certainty that the appellant was the biological father of PW1's child. This scientific evidence unequivocally corroborates PW1's account of penetration and establishes the appellant's involvement in the sexual act resulting in the complainant's pregnancy.
19. The identification of the appellant was clear and consistent. PW1 identified him by name and as her neighbour, the husband of Rose, referring to him as "Baba Kao." She described multiple encounters, primarily at the appellant's residence, reinforcing her familiarity with him. PW2, PW1's mother, confirmed the appellant's identity as the person PW1 named as responsible for the pregnancy. The DNA evidence provided by PW3 further solidified the identification, linking the appellant directly to the child born to PW1.
20. In his defence, the appellant acknowledged engaging in a sexual encounter with the complainant, PW1 but claimed he was unaware of her age, asserting she was the one who had propositioned him. The trial court thoroughly assessed the appellant's defence and found it lacking merit. In addition, the ignorance of PW1's age does not constitute a valid defence under Section 8(1) of the *Sexual Offences Act*, which imposes strict liability for sexual offences against minors. In addition, the appellant's claim that PW1 initiated the encounter was deemed irrelevant, as a minor cannot legally consent to sexual activity under the Act. The court further considered the power dynamics, noting the appellant, a married adult neighbour, exploited PW1's vulnerability. PW1's detailed accounts of multiple encounters, including the June 2018 incident where she bled as a virgin and the December 2018 incident resulting in pregnancy, underscored the appellant's active role.
21. The testimonies of PW1 and PW2, combined with the documentary evidence of the birth certificate and the conclusive DNA results, form a cohesive and credible case. Accordingly, the conviction for defilement under Section 8(1) of the *Sexual Offences Act* is affirmed.
22. On sentence, the appellant was sentenced to serve twenty-five (25) years imprisonment. During sentencing, the court considered the pre-sentence and noted that the appellant was a first offender.
23. Although sentences are intended, inter alia, to punish an offender for his wrongdoing, they also aim to rehabilitate offenders to renounce their criminal tendencies and become law-abiding citizens. I have no doubt that the sentence imposed by the trial court, in this case, was lawful but considering that the appellant was a first offender, I am satisfied that the sentence was excessive.
24. For the above reason, I hereby set aside the sentence of twenty-five (25) years imposed by the trial court and substitute it with a sentence of twenty (20) years imprisonment provided under Section 8(3) of



the *Sexual Offences Act*, No. 3 of 2006. The sentence shall take effect from the date of the appellant's conviction by the trial court but shall be computed less by ten (10) months in consideration of the time spent in remand custody before his release on bail/bond.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 17TH DAY OF JUNE 2025

D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Mutuma for the Respondent

Tonny Court Assistant

