



REPUBLIC OF KENYA



**SMS v Republic (Criminal Appeal E027 of 2025)
[2025] KEHC 8388 (KLR) (17 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8388 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E027 OF 2025
DR KAVEDZA, J
JUNE 17, 2025**

BETWEEN

SMS APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered on
30th January 2025 by Hon. C. Njagi (PM) at Kibera Chief Magistrate's Court
Sexual Offences Case no. E026 of 2020 Republic vs Shem Mogaka Sibuta)*

JUDGMENT

1. The Appellant was charged and after full trial convicted by the Subordinate Court of two counts of offences, the first being the offence of defilement contrary to section 8(1) as read with 8(2) of the [Sexual Offences Act](#) No. 3 of 2006, while the latter was sexual assault contrary to section 5(1)(a)(ii) as read with 5(2) of the [Sexual Offences Act](#) No. 3 of 2006. He was sentenced to serve forty (40) years' imprisonment and fifteen (15) years' imprisonment respectively. The sentences were set to run consecutively.
2. Being aggrieved, he filed an appeal challenging his conviction and sentence. He contended that the learned magistrate erred by wrongfully convicting the appellant based on the prosecution evidence that failed to substantiate the ingredients of the offence beyond a reasonable doubt.
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, M.K.'s gave evidence after voir dire examination. She told the court that the appellant, her father, repeatedly touched her breasts and vagina and, on multiple occasions, penetrated her vagina with his



- penis and forced her to perform oral sex while her mother was at work. PW1 reported the abuse to her mother in 2019, but her concerns were dismissed until 2020.
5. PW2, a friend of PW1, testified after a voir dire examination. She stated that in 2020 while visiting PW1's home after church, the appellant attempted to forcibly penetrate her vagina with his penis. When unsuccessful, he inserted his fingers, showing her pornographic material on his tablet during the sexual assault.
 6. As discussed in the Kenya Judiciary Criminal Procedure Bench Book 2018 paragraphs 94-96 no corroboration is necessary for the evidence of a child taken on oath although cross-examination is available for sworn or unsworn evidence of a child in the usual way:
 - “ 94. No corroboration is required if the evidence of the child is sworn (Kibangeny arap Kolil v R 1959 EA 92). Unsworn evidence of a victim who is a child of tender years must be corroborated by other material evidence implicating the accused person for a conviction to be secured (Oloo v R (2009) KLR).
 95. However, in cases involving sexual offences, if the victim's evidence is the only evidence available, the court can convict on the basis of that evidence provided that the court is satisfied that the victim is truthful (s. 124, *Evidence Act*). The reasons for the court's satisfaction must be recorded in the proceedings (Isaac Nyoro Kimita v R Court of Appeal at Nairobi Criminal Appeal No. 187 of 2009; Julius Kiunga M'birithia v R High Court at Meru Criminal Appeal No. 111 of 2011).
 96. The evidence of a child, sworn or unsworn, received under section 19 of the *Oaths and Statutory Declarations Act* is subject to cross-examination pursuant to the right to fair trial, which encompasses the right to adduce and challenge the evidence produced against the accused (art. 50(2)(k), CoK”
 7. Corroboration of the complainant's evidence was therefore essential in this case. PW3, NN, PW1's aunt, corroborated the testimonies of PW1 and PW2. She had previously cautioned PW1's mother against leaving PW1 alone, as PW1 disclosed the appellant's inappropriate touching.
 8. Accompanied by PW1's mother, PW3 reported the matter to the local chief, who referred them to Nairobi Women's Hospital. PW3 produced PW1's birth notification dated 13 March 2010. Medical examination revealed that PW1 had multiple old hymenal tears, while PW2's external genitalia and hymen were intact. PW4, John Njuguna, produced PRC and P3 forms, noting that finger insertion would not typically injure PW2's hymen.
 9. PW5, PC Ruth Nanjala the investigating officer recorded statements from PW1 and PW2, visited the crime scene with colleagues, and arrested the appellant.
 10. In his defence, the appellant denied committing the offences against PW1 and PW2. DW2, GM (PW1's mother), claimed the complainants never reported the incidents to her and attributed the allegations to a grudge held by her sister, PW3, against her.
 11. The appeal was canvassed by way of written submissions which have been duly considered and there is no need to rehash them.
 12. In count I, the appellant was charged with the offence of defilement. 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."

13. Further, section 8(1) and (2) 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.

(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.

14. PW1's birth notification dated 13th March 2010 produced by PW3 confirmed that PW1 was 9 years old at the time of the incidents which occurred between 2019 and 2020. The ingredient of age satisfied the statutory age requirement for defilement.

15. Penetration, as defined under Section 2 of the Act, was proven beyond reasonable doubt. PW1's sworn testimony, following a voir dire examination, detailed repeated penile penetration of her vagina by the appellant, her father. Medical evidence from PW4, including PRC and P3 forms, revealed multiple old hymenal tears, corroborating her account of defilement.

16. The appellant's identity as the perpetrator is undisputed. PW1 identified him as her father, corroborated by PW3, her aunt, and the domestic setting of the offences. The court finds no doubt as to his identity.

17. In count II, the appellant was charged with Sexual Assault against PW2. The offence of sexual assault is created by Section 5 of the *Sexual Offences Act* which provides that:

"(1) Any person who unlawfully:

(a) penetrates the genital organs of another person with—

(i) any part of the body of another or that person; or

(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;

(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault."

18. The Court of Appeal in the case of *John Irungu V Republic*, [2016] eKLR pronounced itself on the essential ingredients of the offence of sexual assault as follows:

".... Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim's genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose."

19. From the foregoing, it is clear that to establish the offence, the prosecution must prove that there was penetration into the genital organs of the victim by any part of the body of the person accused of the offence or any other person or objects manipulated by the accused person for that purpose.

20. PW2, M.N., testified after voir dire examination that in 2020, the appellant forcibly inserted his fingers into her vagina while showing pornographic material. PW3 corroborated PW2's disclosure, and PW4's



medical evidence noted no hymenal injury, consistent with finger insertion. For the charge under Section 5, the court finds unlawful sexual contact was established.

21. The act was unlawful, as PW2, a minor, could not consent. Her testimony of coercion satisfies this element. The appellant's identity was confirmed by PW2's recognition of him as PW1's father, supported by the occurrence of the incident at his residence.
22. The appellant's denial and DW2's claim of a grudge by PW3 lack credibility against the consistent, corroborated testimonies of PW1, PW2, and PW3, supported by medical evidence. The defence failed to raise reasonable doubt.
23. From the foregoing, the prosecution proved beyond reasonable doubt the elements of defilement against PW1 under Section 8(2) and sexual assault against PW2 under Section 5 of the same Act. The appellant's conviction on both counts is therefore affirmed.
24. The appellant was sentenced to serve forty years in Count I and fifteen years imprisonment in Count II with the sentences running consecutively. During sentencing, the court considered the pre-sentence report, that he was a first offender and the appellant's mitigation and exercised discretion. In the premises, I see no reason to interfere with the sentence.
25. In the end, the appeal is found to be lacking in merit and is dismissed in its entirety.

Orders accordingly.

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

D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Ong'aya for the Appellant

Mutuma for the Respondent

Tonny Court Assistant

