



**Were v Director of Public Prosecution (Criminal Appeal
E044 of 2024) [2025] KEHC 8483 (KLR) (17 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8483 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E044 OF 2024
S MBUNGI, J
JUNE 17, 2025**

BETWEEN

DANIEL SHADRACK WERE APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

*(Being an appeal against the judgment of Hon. E.N. Wasike PM
in Butere S.O No. E011 of 2022 delivered on 24th April, 2024)*

JUDGMENT

Introduction.

1. The Appellant, DANIEL SHADRACK WERE was charged with two counts of defilement in the trial court.
2. The first count was Defilement contrary to Section 8 (1) as read with section 8(2) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars were in mid-December, 2021 at around 0700 hours at Ebutayi Primary School in Butere sub-county within Kakamega County, the accused person intentionally caused his penis to penetrate the anus of B.A.O a child aged 10 years.
3. 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 offence act No. 3 of 2006. The particulars were that in mid-December 2021 at around 0700 hours at Ebutayi Primary School in Butere sub-county within Kakamega County, the appellant intentionally touched the penis of B.A.O a child aged 10 years with his fingers.
4. The second count was Defilement contrary to Section 8 (1) as read with section 8(3) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars were that on 19th February 2022 at around 0900 hours at



Ebutayi Primary School in Butere sub-county within Kakamega County, the appellant intentionally caused his penis to penetrate the anus of D.W a child aged 15 years.

5. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the sexual offence act No. 3 of 2006. The particulars were that on the 19th day of February 2022 at around 0900 hours at Ebutayi Primary school in Butere sub-county within Kakamega County, the appellant intentionally touched the penis of D.W. a child aged 15 years with his fingers.

Facts at Trial.

6. The prosecution set out to prove its case and called eleven witnesses.
7. PW1, DW, testified that in February and March 2022, the appellant, then a teacher at Ebutayi Primary School, committed acts of defilement against him. He recounted an incident where the appellant instructed him to carry chairs to the teachers' office, followed him to the deputy headteacher's office, locked the door, applied jelly to his penis, and proceeded to penetrate his anus. PW1 stated that the appellant warned him not to disclose the incident. He further testified that the appellant had sodomized him multiple times before he reported the matter to his class teacher. He was subsequently taken to the hospital for examination and treatment, after which the matter was reported to Butere Police Station.
8. PW2, B.A., also a minor, testified that in mid-December 2021, the appellant, then his teacher, called him into the CBC office, ordered him to remove his shorts, and sodomized him. He stated that the appellant repeated the act on three separate occasions, each time warning him not to tell anyone. PW2 eventually disclosed the incidents to his mother, who reported the matter to the school administration, leading to the appellant's arrest. He was also taken to the hospital for medical examination.
9. PW3, Joan Mukoya, the deputy headteacher of Ebutayi Primary School, testified that on 23rd February 2022, she was informed by a fellow teacher that the appellant had been attempting to solicit a sexual relationship with a pupil, Allan Ashikoya (PW4). On the following day, another teacher reported that the appellant had been molesting boys. PW3 alerted the headteacher, who summoned the affected pupils, and upon interrogation, several boys, including PW1 and PW2, admitted to being sodomized by the appellant. A staff meeting was convened, during which the appellant confessed to being in a relationship with PW1 and another pupil, sought forgiveness, and requested a transfer.
10. PW4, Allan Ashikoya, a pupil at Ebutayi Primary School, testified that on 25th May 2022, the appellant propositioned him for a sexual relationship, asking if he knew about a place called 'Jordan' and whether he was aware of boys who engaged in sexual acts with each other. PW4 refused the advances and reported the incident to a teacher, Mercy Makokha (PW9), who had overheard part of the conversation.
11. PW5, Shem Chirande Were, the father of PW1, testified that in February 2022, he learned of allegations that a teacher at Ebutayi Primary School had been sodomizing pupils, including his son. Upon confronting PW1, the minor confirmed that the appellant had defiled him. PW5 took his son to Shiraha Health Centre for examination and later joined other parents in reporting the matter to the school and authorities.
12. PW6, Truphena Andeyo, the mother of PW2, testified that on 4th March 2022, after hearing rumors about a teacher sodomizing pupils, she questioned her children, and PW2 disclosed that the appellant had defiled him in the CBC classroom. She reported the matter to the school and took PW2 for medical examination before lodging a complaint with the police.



13. PW7, William Amboye, the Board of Management Chairperson at Ebutayi Primary School, testified that on 4th March 2022, the headteacher convened a meeting to address allegations against the appellant. During the meeting, the appellant initially denied the accusations but later admitted to defiling PW1 and PW2, pleaded for forgiveness, and requested a transfer. A report was forwarded to the Teachers Service Commission, and the matter was escalated to the Ministry of Education.
14. PW8, Ann Saya, the headteacher of Ebutayi Primary School, testified that in December 2021, PW3 informed her of the appellant's misconduct. She conducted investigations and found that twelve pupils, including PW1 and PW2, had accused the appellant of sodomy. PW1 alleged six incidents of defilement, while PW2 reported two. A staff meeting was held, during which the appellant confessed to defiling PW1 and sought a transfer. The matter was later referred to the County Education Office and the police.
15. PW9, Mercy Makokha Ochere, a teacher at Ebutayi Primary School, testified that in December 2021, she overheard the appellant making inappropriate advances toward PW4, including references to a homosexual relationship. She reported the incident to the deputy headteacher.
16. PW10, Rebecca Matilda Omukholo, a clinical officer at Butere Sub-County Hospital, produced medical evidence in respect of PW1 and PW2. She testified that while no visible signs of penetration were found, the medical reports indicated alleged attempted defilement based on the victims' histories.
17. PW11, Corporal Emmanuel Emaila, the investigating officer, testified that he took over the case after initial investigations were completed. He confirmed that the appellant was charged based on the victims' statements and the recovered exhibits, including milking jelly allegedly used in the commission of the offences.
18. The court considered the evidence adduced in support of the charge and found that a prima facie case had been established and the accused was put on his defence.

Defence Case.

19. DW1, was the appellant denied the charges, stating that it was impossible for the alleged acts to have occurred due to the constant presence of teachers and pupils in the school. He claimed that on 10th March 2022, he was coerced by the headteacher into attending a meeting where he was confronted by angry parents before being arrested. He denied ever using the deputy headteacher's office or the CBC room for unlawful acts and alleged that the case was instigated by PW1 due to a personal vendetta.
20. DW2, Godfrey Okeno, a teacher at Ebutayi Primary School, testified that pupils arrived at school between 6:30 a.m. and 7:00 a.m., and the administration block remained locked unless accessed during cleaning sessions. He stated that he had only heard of the allegations but had no direct knowledge of the incidents.
21. The trial court proceeded to convict and sentence the accused to an imprisonment term of thirty(30) years on the first count and twenty (20) years on the second count.

The Appeal.

22. Aggrieved by the conviction and sentence, the Appellant has filed this appeal based on the following grounds;
 - i. THAT, the learned trial Magistrate erred in reaching the decision to convict the Appellant when the medical evidence adduced before the court did not support the charges before Court.



- ii. THAT the learned trial Magistrate erred both in law and Facts in making a finding that the Appellant used petroleum jelly which were never produced as exhibits and whose recovery and handling was doubtful
 - iii. THAT the learned trial Magistrate erred in Law by finding to consider the defence adduced by the Appellant at all.
 - iv. THAT the trial learned Magistrate erred in law in failing to apply the
 - v. "beyond reasonable doubt" standard of proof in criminal proceedings.
 - vi. THAT the learned trial Magistrate erred in Law by passing a harsh sentence
23. The court directed that the appeal be disposed off by way of written submissions. At the time of writing this judgment, only the appellant's submissions dated 7th May, 2025 are on record.

Appellant's Case.

24. Counsel for the Appellant submitted that the conviction was not safe as it was based on uncorroborated evidence and contradictory testimonies of minors, whose credibility was not properly interrogated by the trial court. It was argued that the medical evidence presented by PW10 did not conclusively prove penetration as required under section 8 of the *Sexual Offences Act*. The clinical officer confirmed that there were no physical signs of penetration or injury on either complainant, and the findings were largely based on the complainants' history. Counsel contended that such evidence fell short of the threshold for proof beyond reasonable doubt.
25. It was further submitted that the prosecution failed to produce any forensic or scientific evidence such as DNA analysis to link the Appellant to the offences. The petroleum jelly, allegedly recovered and said to have been used in the commission of the offences, was neither produced nor examined in court to establish any connection with the Appellant or the complainants.
26. On the issue of the alleged confession at the staff meeting, counsel submitted that the same was obtained in a coercive and informal setting, outside the legal procedures provided under section 25A of the *Evidence Act*. As such, the purported admission lacked evidentiary value and ought not to have been relied upon by the trial court.
27. The defence also faulted the trial court for disregarding the Appellant's sworn testimony and the evidence of DW2, which demonstrated that the school compound, including the administration block, was always populated and that such acts as described by the complainants would have been difficult to conceal or execute unnoticed.
28. On sentence, counsel submitted that the trial court imposed harsh and excessive terms without due regard to mitigating circumstances and the age of the Appellant, who was a first offender and a young professional at the time of conviction. It was urged that the sentence be set aside or reviewed to reflect the principles of proportionality and rehabilitation.

Analysis and Determination.

29. This being a first appellate court, it is guided by principles set out by the court of appeal in the case of David Njuguna Wairimu vs Republic [2010] eKLR where the court stated as follows:

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without



overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

30. The court has carefully considered the entire lower court record, the trial court’s judgment, the petition of appeal, and the submissions filed.
31. The Appellant raised several grounds of appeal, chief among them being the failure of the trial court to properly evaluate the medical evidence, the lack of corroborative or forensic proof, and the trial court’s failure to give adequate consideration to the defence. The Appellant further argued that the sentence imposed was harsh and excessive, given the circumstances of the case.
32. To me, the main issue for determination is whether the prosecution proved the offence of defilement beyond reasonable doubt.
33. The appellant was charged with two counts of defilement contrary to Section 8(1) as read with Section 8(2) and 8(3) of the *Sexual Offences Act* No. 3 of 2006.
34. The essential ingredients of the offence of defilement are:
 - i. proof of the age of the complainant;
 - ii. proof of penetration; and
 - iii. positive identification of the perpetrator.
35. It is not disputed that the complainants, B.A.O and D.W., were minors at the time of the alleged offences, as evidenced by their birth certificates produced in court and corroborated by their parents who were also witnesses in the trial court. It is also uncontested that the appellant was known to them as their teacher at Ebutayi Primary School. The only disputed ingredient is whether there was penetration, which is the crux of this appeal.
36. Section 2 of the *Sexual Offences Act* defines “penetration” to mean the partial or complete insertion of the genital organs of a person into the genital organs of another. To prove this ingredient, the prosecution relied on the testimonies of the complainants and the medical evidence of PW10, the clinical officer.
37. PW10 testified that upon examining the complainants, she found no visible signs of penetration, bruising, or injury in their anal regions. She concluded that there was only an “alleged attempted defilement” based on the complainants’ histories.
38. The absence of medical evidence confirming penetration raises serious doubts as to whether the offence was committed. In *John Mutua Munyoki v Republic* [2017] eKLR, the Court of Appeal held that where there is no cogent evidence in defilement, the benefit of doubt must be accorded to the accused. The court ruled as follows:

“...It is quite clear that there was doubt as to whether the complainant was actually defiled by the appellant since there was no credible evidence as to the penetration of the complainant. It is trite that those doubts should have been resolved in favour of the appellant.”



39. Similarly, in *Khalif Haret v Republic* [2016] eKLR, the court emphasized that proof of penetration is a critical element in defilement cases, and its absence renders a conviction unsafe.
40. The prosecution further relied on the alleged confession by the appellant during a staff meeting. However, this purported confession was not recorded in compliance with Section 25A of the *Evidence Act*, which mandates that confessions must be made before a police officer of a certain rank or a magistrate. The circumstances under which the confession was obtained, amidst a confrontation with angry parents and school staff, cast doubt on its voluntariness and reliability.
41. In *Stephen Murimi Nguli v Republic* [2016] eKLR that articulates the same principle regarding the inadmissibility of informal confessions:
- “A confession must be made in accordance with Section 25A of the *Evidence Act* to be admissible. The law is now clear that a confession can only be made before a police officer (other than the investigating officer) of the rank of Chief Inspector and above, or before a magistrate. Any alleged confession made outside these parameters is inadmissible in evidence...”
42. The standard of proof in criminal cases is proof beyond reasonable doubt, as established in *Miller v Minister of Pensions* [1947] 2 All ER 372 where it was held thus:
- “That degree is well settled. It needs not reach certainly, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice.”
43. The medical examination report for the complainant B.A , explicitly states that the penile region was not lacerated or deformed. His anus was intact, no lacerations or bruises. There was no evidence of healing or healed bruises.
44. Similarly, the examination report for DW, dated 11.03.2022, showed that there was dryness at the peak of the buttocks, the anal region was clean and not bruised. No signs of penetration were noted. Neither were there any signs of healed bruises noted.
45. The prosecution’s case was largely based on the testimonies of minors, which cannot be corroborated by the medical evidence on record to conclusively prove penetration. The medical officer concluded that the history and the medical examination in both cases did not merge, therefore raising doubts as to whether the offence took place. I am of the view that despite the victims having been examined after a period of close to a month, the medical officer should have at the very least, been able to detect signs of healing or bruises in the anal area.
46. It is trite law that the burden of proving the charge falls on the prosecution in criminal cases throughout and does not shift to the accused person unless a statute provides so.
47. This principle was enunciated in the case of *Woolmington v DPP* [1935] AC 462 where the ‘golden thread’ principle was established that, the prosecution must prove the guilt of the accused beyond reasonable doubt. This is the ‘cardinal principle’ of the criminal law. The doubts in the prosecution case must be resolved in favor of the appellant.



48. In light of the foregoing analysis, the Court finds that the conviction of the Appellant was not supported by evidence that met the threshold of proof beyond reasonable doubt, particularly in relation to the element of penetration as required under section 8 of the *Sexual Offences Act*. The inconsistencies in the prosecution's case, the lack of corroborative medical and forensic evidence, and the failure to meet procedural safeguards in the alleged confession raise reasonable doubt in favor of the Appellant.
49. Consequently, the appeal is allowed. The conviction is quashed, and the sentences imposed by the trial court are set aside.
50. The appellant shall be released from custody unless otherwise lawfully held.
51. Right of appeal 14 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 17TH DAY OF JUNE, 2025

S.N MBUNGI

JUDGE

In the presence of :

Court Assistant – Elizabeth Angong'a

