



REPUBLIC OF KENYA



**KENYA LAW**  
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**Bosire v Republic (Criminal Appeal E041 of 2024)  
[2025] KEHC 11136 (KLR) (24 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11136 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CRIMINAL APPEAL E041 OF 2024  
WA OKWANY, J  
JULY 24, 2025**

**BETWEEN**

**PHILIP MBUNYA BOSIRE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment and Sentence in the Chief  
Magistrate's Court at Nyamira, CMCCR (SO) No. E016 of 2022  
delivered by Hon. W.K. Chepseba, Chief Magistrate on 15th August 2024)*

**JUDGMENT**

1. The Appellant was charged with the offence of Defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. The particulars of the charge were that on 11<sup>th</sup> March 2022, at Getare Sub-location, Kiabonyoru Location in Nyamira North Sub-County within Nyamira County, intentionally and unlawfully caused his penis to penetrate the vagina of TKM. (particulars withheld), a child aged 10 years.
2. The Appellant also faced the alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*. The particulars were that on the 11<sup>th</sup> March 2022, at Getare Sub-location, Kiabonyoru Location in Nyamira North Sub-County within Nyamira County, intentionally and unlawfully caused his penis to come into contact with the vagina of TKM (particulars withheld), a child aged 10 years.
3. The Appellant pleaded not guilty to both charges thereby setting the stage for a full trial in which the Prosecution presented the evidence of five (5) witnesses.



### **The Prosecution's Case**

4. On 11th March 2022, PW1, a 10-year-old girl, was at her grandmother's home when the Appellant, a neighbour and welder, called her into his shop, defiled her, and gave her Kshs. 20 while warning her not to speak of the incident. K, a third party, informed the victim's grandmother (PW2), who then questioned the child and learned of the defilement.
5. PW2 confirmed the victim's age using a birth certificate and testified that the Appellant, who lived about 15 meters away, had no prior conflict with their family. PW3, the victim's grandfather, corroborated PW2's account, stating he was informed of the rape upon arriving home later that evening.
6. PW4, the investigating officer from Getare Police Station, testified that the victim reported the defilement and that the family made an official report on 12th March 2022. They were referred to Ekerenyo Sub-County Hospital for medical examination, and a P3 form was filled.
7. PW5, a clinical officer, testified on behalf of a colleague who had examined the victim. The medical report indicated the victim had a broken but not freshly ruptured hymen, with no spermatozoa found, and although penetration could not be medically confirmed, the victim was given post-exposure treatment. The birth certificate confirmed the victim was born on 10th April 2012.
8. Bottom of Form
9. At the close of the Prosecution's case, the trial court found that the prosecution had made out a prima facie case against the Appellant who was consequently placed on his defence.

### **The Appellant's/Defence Case**

10. The Appellant, testifying as DW1, stated that he was a welder residing in Getare. He claimed that around 7:00 p.m. on the material day, he heard rumours that he had raped a child, although he had not seen the child himself. In response, he reported the matter to the area chief, who sent a village elder to investigate. Shortly afterward, the police arrived and arrested him.
11. DW2, Joseph Daniel Maroko, a village elder and relative of the Appellant, testified that although he was not present during the alleged incident, he heard about the allegations and spoke to both the Appellant and the complainant's mother, both of whom denied the accusations at that time. He later learned that the Appellant had been arrested.
12. At the conclusion of the trial, the court found the Appellant guilty of the offence of defilement under Section 215 of the [Criminal Procedure Code](#) and sentenced him to twenty (20) years imprisonment. Bottom of Form

### **The Appeal**

13. Aggrieved by the trial court's decision, the Appellant filed the present Appeal through his legal counsel vide Petition of Appeal dated 23<sup>rd</sup> August 2023 where they raised 13 grounds of appeal against. The Appellant contended that; the conviction and sentence was based on inconsistent and contradictory evidence, that the victim's testimony was unreliable as she had allegedly run away from home, alleged extortion of the Appellant by the victim's family, lack of consideration of the defence evidence, unreliable medical report and failure to meet the legal threshold of proof in criminal cases together with a sentence that was harsh and excessive.
14. The Appeal was canvassed by way of written submissions which I have considered.



15. This being a first appellate court, I am cognizant of the duty of a first appellate court as was stated in *David Njuguna Wairimu vs. Republic* [2010] eKLR, where the Court of Appeal held thus: -

“The duty of the first appellate court is to analyse 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 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.”

### **Analysis and Determination**

16. Having carefully considered the grounds of appeal, the evidence on record, and the applicable law, the key issues for determination in this appeal are:
- a. Whether the prosecution proved the charge of defilement beyond reasonable doubt;
  - b. Whether the trial court erred in its assessment of the evidence, particularly the credibility of the complainant and the reliability of the medical evidence;
  - c. Whether the Appellant’s defence was duly considered;
  - d. Whether the sentence imposed was harsh and excessive.

### **1. Proof of Defilement**

17. To secure a conviction for defilement under Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, the prosecution must prove the following elements beyond reasonable doubt: \_
- (a) That the accused was the perpetrator.
- (b) That there was penetration; and
- (c) The age of the complainant;
18. On the first element, I find that the age of the victim was established through her birth certificate (P.Exh1), showing that she was born on 10th April 2012 and was therefore 10 years old at the time of the incident. This fact was corroborated by the victim’s grandmother (PW2) and was not challenged by the defence.
19. On the critical element of penetration, the Court finds that the prosecution fell short of discharging its burden beyond reasonable doubt. I say so because while PW1, the complainant, testified that the Appellant inserted his penis into her vagina, the medical evidence presented through PW5, who produced the report prepared by another officer, clearly indicated that the hymen was “broken but not fresh”, with no spermatozoa, no injuries, and no definitive evidence of penetration. The report concluded that penetration could not be ascertained.
20. In *George Ouma v Republic* [2016] eKLR, the Court of Appeal emphasized that penetration is a key ingredient of the offence of defilement and must be proved beyond reasonable doubt, not merely inferred or presumed. Similarly, in *Martinus Oduor Lango v Republic* [2014] eKLR, the Court held that although a broken hymen may be consistent with penetration, the absence of



corroborative medical findings may cast doubt on the occurrence of penetration, especially where there are inconsistencies or deficiencies in the prosecution's case.

21. Courts have taken the position that the absence of a hymen does not necessarily connote that there was penetration as the hymen can be ruptured in various other ways other than penetration. The Court of Appeal in *PKW v Republic* [2012] eKLR observed thus: -

“Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury and medical examinations can also rupture the hymen. When a girl engages in vigorous physical activity like horseback ride, bicycle riding and gymnastics, there can also be natural tearing of the hymen. (See the Canadian case of *The Queen –vs- Manuel Vincent Quintanila* (1999) AB QB 769.)”

22. The clinical officer testified as follows: -

“.....The patient was treated , sent to the Lab:

-HIV Test – Negative

-VDRL – Negative – Doctoral

-HVS – Cells (Normal ) – no spermatozoa.

The patient was treated accordingly. The hymen was broken but not fresh..... The P3 was filled. We could not ascertain penetration.”

23. This Court is alive to the provisions of Section 124 of the *Evidence Act*, which allows conviction on the basis of a victim's uncorroborated evidence in sexual offences, if the court believes the victim and records reasons. In this case, however, I find that the inconsistency between the complainant's testimony and the clinical findings, and the lack of fresh physical evidence, raise reasonable doubt as to whether the act of penetration occurred at all, or in the manner described.
24. As observed in *Jacob Odhiambo Omuombo v Republic* [2008] eKLR, "it is not sufficient for a trial court to believe the complainant alone where other material evidence renders that belief unsafe." In the present case, I find that the medical findings are not consistent with recent trauma, nor do they establish penetration. The trial court erred in failing to adequately consider this crucial gap.

## 2. Assessment of the Evidence

25. While the complainant's testimony was delivered with apparent consistency, it must be assessed against the totality of the evidence. The Court finds that the trial court erred by placing undue weight on the complainant's testimony, while downplaying the lack of medical confirmation of penetration. The defence raised legitimate concerns about this inconsistency, which were not properly addressed.

## 3. Consideration of Defence Evidence

26. The Appellant's defence, that he was arrested on the basis of mere allegations and had reported to the local chief, while not directly disproving the charges, introduced doubt about the integrity of the



investigation. I find that DW2, though not an eyewitness, supported the view that there may have been premature conclusions before proper verification.

#### **4. Sentence**

27. In view of the findings above, this Court finds that the conviction was not safe. The sentence of twenty (20) years imprisonment, imposed under Section 8(2) of the *Sexual Offences Act*, cannot stand when the offence of defilement has not been proved to the required legal threshold.

#### **Conclusion**

28. In light of the foregoing, this Court finds that penetration was not proved beyond reasonable doubt, as required under the law. The trial court erred in convicting the Appellant based on insufficient medical evidence and an overreliance on uncorroborated testimony without adequately addressing the contradictions in the prosecution's case.

#### **Disposition**

29. The Appeal is hereby allowed. The conviction is quashed, and the sentence of twenty (20) years imprisonment is set aside. The Appellant shall be set at liberty forthwith unless otherwise lawfully held.
30. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 24<sup>TH</sup> DAY OF JULY 2025.**

**W. A. OKWANY**

**JUDGE**

