



REPUBLIC OF KENYA



**Busena v Republic (Criminal Appeal E083 of 2023)  
[2025] KEHC 10637 (KLR) (23 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10637 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL APPEAL E083 OF 2023  
RN NYAKUNDI, J  
JULY 23, 2025**

**BETWEEN**

**EDWARD ALVANZE BUSENA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal against the conviction and sentence in the Chief Magistrate Court in Eldoret by Hon. N. Barasa (PM), in Criminal Sexual Offence Case No. E068 of 2020 delivered on 29/8/2023)*

**JUDGMENT**

1. The Appellant herein, Edward Alvanze Busena was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences *Act No. 3 of 2006*. The particulars are that on 24<sup>th</sup> November 2020 at [Particulars Withheld] Village, Likuyani Sub County within Kakamega County, the Appellant unlawfully and intentionally caused his penis to penetrate the genital organ (vagina) of MMK, a child aged fifteen (15) years.
2. In the alternative, Appellant was charged with the offence of indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006 herein referred to as Sexual Offence Act.
3. The Appellant was tried and in the judgment delivered on 29<sup>th</sup> August, 2023, the trial court found the Appellant guilty of the offence of Defilement as charged. After considering the Appellant's mitigation, the court proceeded to sentence him to serve 50 years' imprisonment.
4. Being aggrieved by both his conviction and sentence, the Appellant filed the present appeal. Vide the Appellant's Petition of Appeal dated 28<sup>th</sup> February 2025, the Appellant set out some 5 grounds of appeal, which can be summarized as follows:
  - a. Defective Charge Sheet: The Charge sheet failed to indicate the date of commission of the alleged offence, thereby violating sections 134 and 137 (a)(ii) of the *Criminal Procedure Code*



and Article 50(2)(b) of *the Constitution*, which guarantees the right to be informed of the charge with sufficient detail to prepare a defense.

- b. Contradictory and Uncorroborated medical evidence: The Learned Trial Magistrate erred in law and fact by convicting the Appellant based on the medical evidence that was inconsistent and uncorroborated. Specifically, the testimony of the witness, K indicated the presence of a whitish discharge while the P3 form explicitly stated that there was no per vaginal (PV) discharge.
  - c. Failure to prove the Age of the Complainant: The prosecution failed to conclusively establish the age of the complainant. While the birth Certificate indicated that the child was born in 2005, the complainant's father stated that the child was born in 2003, creating a material discrepancy.
  - d. Excessive and Harsh Sentence: The sentence of 50 years imposed upon the Appellant was manifestly excessive and disproportionate in the circumstances.
  - e. Failure to consider the Appellant's Defense: The Trial Court erred by failing to conclusively analyze and consider the appellant's defense. As per the principles of criminal justice, any gaps or inconsistencies in the prosecution's case ought to have been resolved in favour of the Appellant.
5. The Appeal was disposed by way of written submissions.

#### **Appellant's Written Submissions.**

6. The Appellant filed his written submissions dated 28<sup>th</sup> February 2025 in which he submitted as follows:
7. On the issue of Burden and Standard of Proof not met, the Appellant submitted that the prosecution failed to prove the charge beyond reasonable doubt because the evidence of the complainant and the medical evidence were inconsistent and unreliable. The complainant's account was not corroborated by any independent evidence, and the trial court ignored these material inconsistencies.
8. On the issue of Failure to Conduct DNA Testing, the Appellant submitted that no DNA testing was done to scientifically link the Appellant to the offence. The Appellant emphasized that under Section 36 of the *Sexual Offences Act*, the court had discretion to direct DNA sampling to confirm or disprove the alleged offence, but failed to do so.
9. On the issue of Violation of the Right to a Fair Trial, the Appellant argued that the failure to conduct DNA testing and the reliance on contradictory evidence violated Article 50(2)(p) of *the Constitution*, which guarantees the right not to be convicted on uncorroborated evidence where corroboration is required.
10. On the issue of failure to Consider Defence Evidence, the Appellant submitted that the trial court only superficially considered the Appellant's sworn defence and shifted the burden of proof onto the Appellant, contrary to the law.
11. On the issue of Contradictory and Uncorroborated Medical Evidence, the Appellant pointed out that the P3 Form and the treatment notes did not conclusively prove penetration and materially contradicted the complainant's testimony. The Appellant cited: *Bukenya & Others v Uganda* [1972] EA 549 where it was held: "The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent." *Okethi Okale & Others v Republic* [1965] EA 555 stating: "Where the evidence relied on to implicate an accused is entirely of an identifying nature, it is evidence of the weakest kind and most unsatisfactory." *Keter v Republic* [2007] eKLR where the



Court of Appeal stated: “The burden of proof in criminal cases lies squarely on the prosecution and never shifts to the accused.”

12. It was the Appellant’s final submission that the conviction and sentence be quashed and that he be set at liberty.

#### **Analysis and Determination.**

13. This being a first appeal, this court is guided by the principles set out in the case of David Njuguna Wairimu v Republic [2010] eKLR where the Court of Appeal stated: -

“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 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.” See also Okeno v Republic [1972] EA 32

14. The Appellant cited 5 grounds of Appeal from which I deduce 4 issues for determination as follows;
  - a. Whether the charge sheet was defective?
  - b. Whether the medical evidence was contradictory and uncorroborated?
  - c. Whether the Age of the Complainant was proved?
  - d. Whether the sentence was excessive and harsh.

#### **Whether the Charge Sheet was Defective.**

15. From the Grounds of Appeal, the Appellant stated that the Charge sheet failed to indicate the date of commission of the alleged offence, thereby violating sections 134 and 137 (a)(ii) of the *Criminal Procedure Code* and Article 50(2)(b) of *the Constitution*, which guarantees the right to be informed of the charge with sufficient detail to prepare a defense. However, the charge sheet presented reflects a legally recognized offence with clearly stated particulars that align with the elements of defilement under the *Sexual Offences Act*. In particular, the charge sheet indicates as follows;

“Edward Alvanze Busena on 24<sup>th</sup> day of November 2020 at [particulars withheld] Village, Likuyani Sub County within Kakamega County, the Appellant unlawfully and intentionally caused his penis to penetrate the genital organ (vagina) of MMK, a child aged fifteen (15) years.” From the above, it is clear that the charge specifies the offence of defilement, the date of occurrence, and the relevant age of the complainant, thereby fulfilling the requirements necessary to inform the accused of the charges against him. This Court therefore finds no defect in the charge sheet that would invalidate the trial proceedings.

#### **Whether the Age of the Complainant was proved.**

16. The Appellant stated from the grounds of appeal that the prosecution failed to conclusively establish the age of the complainant and that while the birth Certificate indicated that the child was born in 2005, the complainant’s father stated that the child was born in 2003, creating a material discrepancy.



From the look at the trial court's record, the prosecution proved the complainant's age with certainty. The birth certificate, produced as Prosecution Exhibit MFI 1, indicates that the complainant was born on August 17, 2005. The incident occurred on November 24, 2020, confirming the complainant's age as fifteen (15) years at the time of the offence. This satisfies the age requirement under Section 8 of the *Sexual Offences Act*. I take note that from the reading of the proceedings of the trial court and in particular the evidence adduced by PW2- Josephat Kapteka, the father of the complainant, there is nowhere in the record where the witness testified that the complainant was born in 2003 and this statement is thus misleading to this Honourable Court.

#### **Whether the medical evidence was contradictory and uncorroborated.**

17. The Appellant from the grounds of appeal stated that the Learned Trial Magistrate erred in law and fact by convicting the Appellant based on the medical evidence that was inconsistent and uncorroborated. Specifically, he stated that the testimony of the witness, Kibowen indicated the presence of a whitish discharge while the P3 form explicitly stated that there was no per vaginal (PV) discharge. From a look at the record of the trial court, PW3- Dr. Michael Kibowen testified as follows, "I have a P3 form for Milka Mukhwana Kaptoka aged 15 years at the time. The inner wear was black/white colour had whitish discharge though had foul smell. P3 form was signed and hospital stamp applied. On her private parts had several multiple hymenal tears with fresh abrasions. It was deeply reddened towards the backside. Urinalysis showed few epithelial cells and bacterial cells is a sign of abrasion on the urethra region. The doctor concluded that there were signs of defilement he signed and applied hospital stamp." Similarly, the P3 Form indicated as follows, "white and black underwear with white wet stain on the gown foul smelling."
18. I take cognizant note that the injuries to the minor's private parts were consistent with penetration. Penetration is defined in section 2 of the *Sexual Offences Act* as follows- "penetration' means the partial or complete insertion of the genital organs of a person into the genital organs of another person". The evidence of the complainant was thus corroborated by PW3 and the P3 medical examination report. When I add the evidence of PW3, I am left in no doubt about the veracity of the complainant's evidence. The totality of that evidence points strongly to the guilt of the appellant. It was preferable that the complainant was examined immediately. I have then considered the defence proffered by the appellant at his trial. He the appellant did not call any witness. I have not seen anything to suggest the complainant was an unreliable or untruthful witness thus, her evidence was clear and consistent.
19. From the passages of the judgment of the lower court I have set out, the appellant's defence was considered but rejected. The burden of proof, subject to section 111 of the *Evidence Act*, rested entirely with the prosecution. But from the totality of the evidence tendered at the trial, it pointed strongly to the appellant's guilt. The complainant's evidence was corroborated. All the ingredients of the offence of defilement, for the offence that took place on 24<sup>th</sup> November 2020, were thus proved beyond reasonable doubt. I have reached the same conclusion as the trial court that the evidence of defilement was clear-cut and pointed to the accused. That evidence was inconsistent with the innocence of the appellant.

#### **Whether the sentence was excessive and harsh.**

20. On whether the sentence meted on the appellant by the trial court was harsh and excessive, it is trite law that this court has supervisory jurisdiction over subordinate courts. The enabling law for revision is Article 165(6) and (7) of *the Constitution* and section 362 as read together with section 364 of the *Criminal Procedure Code*.



21. Sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. In the case of *Shadrack Kipchoge Kogo v. Republic* Criminal Appeal No. 253 of 2003(Eldoret), the Court of Appeal stated as follows; “Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred.”
22. Further, the Court of Appeal while dealing with the issue of sentence in the case of *Bernard Kimani Gacheru v. Republic* [2002] eKLR restated as hereunder: -
 

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”
23. In this case, the offence in which the Appellant was convicted of is the offence of defilement contrary to section 8(1) as read with Section 8(3) of the *Sexual offences Act* No. 3 of 2006. Section 8(3) of the *Sexual offences Act* provides that, “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.”
24. The appellant was sentenced to the minimum sentence of 50 years’ imprisonment. In this case, the complainant was of the age of 15 years at the time of the offence. Thus, the appropriate penalty clause is Section 8(3) of the Act which prescribes the mandatory minimum sentence of 20 years’ imprisonment where the victim is 15 years and below. I also take note of the fact that the appellant took an unfair advantage to secure and satisfy his sexual desires on the minor, a child of only 15 years. It bears repeating that the penalties enacted in the SOA reflect a deliberate intention by the legislature; (1) to protect the rights of the child; and (2) to signify the seriousness of the offence of defilement. Seriousness of the offence is a relevant factor in sentencing in sexual offences. Generally, it is worth to noting that, the assault leaves the innocent victim dramatized for the rest of her life time thus affecting her quality of life. To say the least, her self-worth and innocence is irreparably damaged by the beastly act which will affect her psychologically, emotionally and physically for the rest of her life. Deterrent sentence serves to deter other would be offenders in the same classification of wrong doing.
25. From the above cited cases, the law is very clear on how an Appeal’ court must go about to review or interfere with the sentence of the trial court. In addition to the principle’s in the Bernard case (supra) I also reiterate the principles in *Alister Alister Anthony Perera v State of Mahareshtrra* at paragraph 70-71 where the court held the following on sentencing: “ Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime



doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.”

26. Given this strength on the law, I review the sentence of 50 years and substitute it with 20 years imprisonment.

27. It is so ordered.

**DATED AND SIGNED AT ELDORET THIS 23<sup>rd</sup> DAY OF JULY 2025**

.....

**R. NYAKUNDI**

**JUDGE**

