



**Lobaali v Republic (Criminal Appeal E019 of 2024)  
[2025] KEHC 11121 (KLR) (Appeals) (24 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11121 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ISIOLO  
APPEALS  
CRIMINAL APPEAL E019 OF 2024  
SC CHIRCHIR, J  
JULY 24, 2025**

**BETWEEN**

**ANDREW LOBAALI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the judgment of Hon. L. Mutai (CM) delivered on 22nd February 2023 in Isiolo Chief Magistrate's court sexual offence case No. 21 of 2019)*

**JUDGMENT**

1. Andrew Lobaali, the Appellant herein, was charged with the offence of defilement contrary to Section 8 (1) as read with section 8 (3) of the [Sexual Offence Act](#). (The Act).
2. The particulars of the charge are that on diverse dates between 30th August and 8th September 2019 at [particulars withheld] in Isiolo County, within Eastern Region, intentionally caused his penis to penetrate the vagina of SD a girl aged 16 years.
3. He faced an alternative charge of committing an indecent act with a child, contrary to Section 11(1) of the same [Act](#).
4. The particulars of the charge are that on diverse dates between 30th August and 8th September 2019 at [particulars withheld] in Isiolo County within Eastern Region intentionally touched the vagina of SD a child aged 16 years with his penis.
5. The prosecution called four 4 witnesses, while the Appellant gave unsworn statement and did not call a witness. At the conclusion of the trial, the Appellant was convicted of the main charge, convicted and sentenced to a prison term of 15 years .



## Petition of Appeal

6. Being dissatisfied with the outcome, the Appellant filed the Petition of Appeal on 7th March, 2025 and amended it on 25/02/2025. The grounds of Appeal are as follows:
  1. The Learned Trial Magistrate erred in both matters of law and fact for failing to note that the prosecution did not prove their case to the required standard of proof as required. Since the evidence of a broken hymen is not proof of defilement.
  2. The Learned Trial Magistrate erred in law by failing to consider that the legal provision for maximum/ minimum sentences under section 8 (4) of the *Sexual Offences Act* denies the judicial officers their legitimate jurisdiction to exercise of discretion in sentence not to impose an appropriate sentence in an appropriate case based on the scope of the evidence adduced and recorded on a case, which is unconstitutional, unfair and in breach of Article 27(1)(2)(4) of *the Constitution*. Hence, the sentence imposed on the appellant is unlawful.
  3. The Learned Trial Magistrate erred in both matters of law and fact for failing to note that the clinical report was questionable.
  4. The Learned Trial Magistrate failed to take into consideration the defense of the appellant.
7. The Appeal is proceeded by way of written submissions.

## Appellant's Submissions

8. It is the Appellant's Submissions that without any other supportive evidence, a broken hymen is no proof of penetration. He has relied on the finding in the case of *Daniel Mwingirwa vs R* (2107) eKLR to buttress his submissions.
9. The Appellant further submits that apart from the usual ingredients constituting the offence, other considerations that should be taken into account should include: whether the victim was forced, threatened, taken advantage of, lured into sex, whether the two were in a sexual relationship and the victim's general conduct. He takes issue with the conduct of the complainant which, he states, suggested that she willingly wanted to engage in sexual intercourse and that it is unfair for him to be punished when the complainant enjoyed the act.

## Respondent's Submissions

10. The Respondent has relied on the case of *Dominic Kibet Mwareng vs Republic* (2014) eKLR and argues that all the ingredients of defilement in this case were proved. On penetration, it is submitted that the evidence of PW4, the clinical officer, proved that defilement took place; that the Age of the complainant was proved by way of a Health certificate and the complainant positively identified the Appellant.
11. On the defence available to the accused under section 8(5) of the *Sexual Offences Act*, the respondent submits that defence is being raised for the first time on Appeal and the Appellant has failed to demonstrate how the complainant deceived him.

## Analysis and Determination

12. This being a first Appeal, this Court has a duty to evaluate the evidence, analyze it afresh and draw its own conclusion, while bearing in mind that it did not have the advantage of seeing and hearing the



witnesses testify as did the trial Court, and give due allowance for that (See *Okeno vs. Republic* [1972] EA 32).

13. On consideration of the trial court record, the grounds of Appeal and parties' submissions I have identified the following issues for determination:
  - a. Whether the offence of defilement was proved.
  - b. Whether there was a defence under section 8(5) of the [Act](#)
  - c. Whether the sentence imposed was lawful.

#### **Whether the Offence was Proved.**

14. The offence of defilement is made up of three ingredients, namely the age of the child,, positive identification of the perpetrator and penetration. (See [CWK v Republic](#) [2015] eKLR).

#### **Age of the Minor**

15. The prove of age in defilement cases is mandatory. In *Kaingu Kasomo vs. Republic* Criminal Appeal No. 504 of 2010 the Court of Appeal at Malindi held

“Age of the victim of sexual assault under the [Sexual Offences Act](#) is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim”.

16. In the present case what was produced as proof of age was the complainant's Health card issued by the Ministry of health. It indicates that the complainant was born on 2nd December 2003. The face of the document shows that it was issued for immunization. It is trite law that proof of age can be by a birth certificate, immunization or baptismal cards or even the evidence of the child or parents/guardians. The production of the health card therefore constituted sufficient proof of Age. The date of birth placed the complainant's age at 16 years during the time of defilement. In any event , I have taken note of the fact that the age of the complainant was not contested during trial and is not an issue either on this Appeal.

#### **The Identity of the Perpetrator**

17. It was the complainant's evidence that the Appellant was her friend; that after a fight with her sister , he called him and he came for her; that they met at the complainant's shop. I have further looked at the evidence of the complainant during cross-examination and noted that she was not questioned on the identity of the Perpetrator. The complainant further stated that she was with the Appellant when he was arrested. It is evident that the Appellant and the complainant knew each other well. The identity of the perpetrator was therefore equally proved.

#### **Penetration**

18. The element of penetration was contested. Section 2 of the [Act](#) defines penetration to entail:

“partial or complete insertion of a genital organ of a person into the genital organ of another person.”



19. The complainant told the court that they had sexual intercourse for the whole week. The complainant's testimony in this regard was simple and straightforward making her testimony believable. At cross-examination her answer to the Appellant's question was also instructive; she stated:

“you did not force me”.

The inference from her response is that there was intercourse only that

“it was consensual.”

20. The Appellant's submissions too is instructive in regard to penetration. The gist of his submissions is not that there was no penetration. Rather he has urged the court to consider for instance whether the sex was forced; whether the complainant was threatened or whether there pre-existed a sexual relationship between the parties. In other words the Appellant is questioning the rationale of being punished when the sex was consensual, and not that he is being wrongly accused.

21. On the medical evidence the Clinical Officer (PW4) told the court that he formed an opinion that there was penetration consistent with rape. However on cross-examination he told the court that he concluded there was penetration due to the broken hymen. However a perusal of the P3 form shows that the breakage was old (see paragraph 2 of section “C”), and hence could not have been evidence of a recent penetration. Further, as correctly submitted by the Appellant a broken hymen is not evidence of penetration.

22. Nevertheless, for reasons earlier given, I am satisfied that the evidence of the complainant was sufficient to prove penetration.

23. I have considered the Appellant's defence. He denied everything. His testimony was not subjected to cross-examination and thus carries less probative value (see *Amber May vs. Republic* (1999) KLR 38 as cited in *Mercy Kajuju & 4 others vs. Republic* (2009) KEHC 2951 (KLR)).

24. In the end I am satisfied that the offence of defilement was proved beyond reasonable doubt and the findings of the trial court are hereby upheld.

#### **Whether the Sentence Was Lawful.**

25. Section 8(4) of the *Sexual Offences Act* provides as follows: -

“A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years”.

The sentence is thus founded on law and is lawful.

26. In conclusion, I do not find any merit in this Appeal. It is hereby dismissed.

**DATED, SIGNED AND DELIVERED AT ISIOLO THIS 24<sup>TH</sup> DAY OF JULY, 2025.**

**S. CHIRCHIR**

**JUDGE**

In the presence of:

Roba Katelo - Court Assistant

Andrew Lobaali - Appellant



Mr. Ngetich for the Respondent.

