



**Pelele v Republic (Criminal Appeal E006 of 2025)  
[2025] KEHC 9857 (KLR) (4 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 9857 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
CRIMINAL APPEAL E006 OF 2025  
WM MUSYOKA, J  
JULY 4, 2025**

**BETWEEN**

**BRIAN PELELE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from conviction and sentence, by Hon. Tirop Sheila  
Chepchumba, Resident Magistrate, of 27th January 2025 and 3rd  
February 2025, respectively, in Port Victoria SRMCSOC No. 2 of 2023)*

**JUDGMENT**

1. The appellant had been convicted of the offence of defilement of a minor of thirteen years, contrary to section 8(1)(3) of the *Sexual Offences Act*, Cap 63A, Laws of Kenya. He denied the charges, and a trial was conducted. Five witnesses testified for the State.
2. PW1 was the complainant. She stated that she was chased away by her mother and ended up hiding at a kiosk at night. The appellant took her to his house where she spent the night. He had sexual intercourse with her twice that night. The following morning the matter was reported to the local authorities, who escorted her to the police and later to hospital. PW2 was the mother of PW1. She testified that PW1 had disappeared and had spent the night away from home. When she was later traced, the local Sub-Chief was involved, to establish where she had spent the night. She narrated how they went to the police and later to hospital. PW3 was the Sub-Chief. He got intelligence that PW1 had been defiled, and he got involved in tracing the whereabouts of the appellant. PW1 confirmed to PW3 that the appellant was the perpetrator. He then took both PW1 and the appellant to hospital. PW4 was the doctor who attended to PW1. He testified that his examination revealed that PW1 had been defiled. PW5 was the investigating officer. She detailed the steps she took during the investigations.



3. The appellant was put on his defence, in a ruling delivered on 27<sup>th</sup> November 2024. He made a sworn statement, on 10<sup>th</sup> December 2024. He said that he met PW1, at night on 27<sup>th</sup> January 2023, stranded, and took her to the home of the liguru, where she could spend the night. PW4 then arrested him the following morning. He called DW2, the liguru. He testified that PW1 was brought to him, by the appellant, and that she spent the night at the home of his first wife.
4. At the conclusion of the trial, the trial court was persuaded that the appellant was guilty as charged, and it convicted him accordingly. He was sentenced to serve twenty years in prison.
5. He was aggrieved, hence the appeal. His appeal, as per the petition of appeal, on record, revolves around the prosecution failing to prove its case beyond reasonable doubt; the defence evidence not being considered; the court arriving at wrong conclusions; and erring in finding that there was penetration, and that the penetration was by him.
6. Directions were taken on 26<sup>th</sup> April 2025, for disposal of the appeal by written submissions.
7. Only the appellant filed written submissions. He submits around the time when the offence allegedly happened, the age of the complainant and penetration. On the time of the commission of the offence, he argues that the same was not proved. On penetration, doubts are raised, as to when the alleged penetration happened, on account of the inconsistencies cited.
8. On contradictions and inconsistencies, the starting point should be with the position that they would only matter if they ought to go to the core or heart of the matter, for they are to be expected, for they are an ordinary occurrence in everyday life.
9. The charge alleges that the offence was committed on 27<sup>th</sup> January 2023, at around 23.00 Hours. According to the complainant, PW1, it happened between 2.00 AM and 5.00 AM. She talked of the appellant taking her to his house on 27<sup>th</sup> January 2023, at about 10.00 PM. He left her sleeping, then came back at 2.00 AM, and according to her, that was when the defilement happened. The corroborative evidence came from PW2 and PW3. PW2 was the mother of PW1. She said that PW1 disappeared from home, the day before 27<sup>th</sup> January 2023. She found her on 27<sup>th</sup> January 2023 and established that she had been defiled. PW3 was an Assistant Chief. He testified that he met PW1 and PW2 on 28<sup>th</sup> January 2023, and PW2 told him that PW1 had run away from home, on 27<sup>th</sup> January 2023, and that she had been defiled at Bulemia.
10. The testimony of PW1 was at odds with the particulars in the charge. The charge was that the offence was committed on 27<sup>th</sup> January 2023, at 23.00 hours. The complainant said it happened on 28<sup>th</sup> January 2023, between 2.00 AM. and 5.00 AM. PW5, the investigator, gave an account that tallied with that of PW1 at examination-in-chief, about the appellant taking PW1 to his house on 27<sup>th</sup> January 2023, leaving her there at 11.00 PM, and then coming back at 2.00 AM, when the defilement happened. Then PW5 contradicted herself, at cross-examination, when she said the defilement happened at 23.00 Hours on 27<sup>th</sup> January 2023.
11. PW1 also stated that, on the morning of 28<sup>th</sup> January 2023, she met a woman, who was making chapati, who then called PW3. PW3 came and found PW2 and that woman. The woman then called another woman, who then telephoned PW2 to tell her where PW1 was, and PW2 went there. They interrogated PW1, about where she had slept, and PW1 said that she spent the night at the house of the appellant. That narrative is also mixed up.
12. PW2 testified that it was PW3 who told her that PW1 had been defiled. That was inconsistent with the narrative that PW1 gave, that it was a certain woman who called PW3 to the scene, and that the issue of defilement arose only after PW3 interrogated PW1. There was no indication that PW3 had prior



- knowledge. PW3 testified that he was informed by a woman, that PW1 and PW2 were at her kiosk crying, as PW1 had been defiled. He went there and they narrated to him what had happened.
13. The sequence of events narrated by PW1, PW2 and PW3 all have inconsistencies. Who had arrived first, between PW2 or PW3, to the kiosk of the unknown woman? Who was the unknown woman, and why was she not called as a witness? It was her actions that ultimately led to the arrest of the appellant. She was the one who kept PW1 at her kiosk, feeding her with chapati, as she looked for PW2 and PW3. PW1 did not report to her that she had been defiled. She, the woman, was the one who initiated the discussion, and then called in PW2 and PW3, according to these witnesses. Her testimony would have been critical in unravelling what exactly happened.
  14. I agree with the appellant, all these contradictions and inconsistencies are unsettling, and should raise doubts, as to whether the offence was established beyond reasonable doubt. The doubts ought to have been resolved in favour the appellant.
  15. On the age of the complainant, I note that she said she was fourteen years of age, when she testified on 8<sup>th</sup> February 2024. Her mother, PW2, said she was born on 20<sup>th</sup> June 2009, and produced a certificate of birth, which was marked as P. Exhibit 1. The respondent prayed that the original be returned to PW2, and a copy be retained in the court record. The certificate of birth was properly produced, contrary to what the appellant has submitted. She was thirteen years seven months and seven days as at 27<sup>th</sup> January 2023. Her age was positively proved. PW2 was her mother. No one would know better than a mother when she gave birth to her child.
  16. On penetration, PW1 testified that it happened on 28<sup>th</sup> January 2023 at 2.00 AM, not at 23.00 Hours on 27<sup>th</sup> January 2023 as pleaded in the charge sheet. PW4 examined PW1, on 28<sup>th</sup> January 2023, and found external genitalia normal, with no physical injuries, and a torn hymen with old edges. He concluded, from the hymen with old edges, that there was penetration. However, what PW4 did not do is to estimate when the hymen was torn, given that it was the only factor that he was using to conclude that there was penetration. He only talked of a broken or torn hymen with old edges. What did he mean by that? Was it freshly torn? He did not say. A freshly torn hymen would suggest recent penetration. The reference to old edges, would suggest that the penetration was not recent. The other factors did not point to recent penetration, particularly the fact that there were no physical injuries on or in the vagina of the thirteen-year-old.
  17. I am persuaded, from the material before me, that the evidence adduced did not reach the threshold for proof of a case of defilement, beyond reasonable doubt. The medical evidence tendered, plus the contradictions and inconsistencies pointed out, suggested a doubt, which ought to have been resolved in favour of the appellant. His conviction was not safe.
  18. Consequently, I do hereby allow the appeal. The conviction of the appellant, on 27<sup>th</sup> January 2025, in Port Victoria SRMCSOC No. 2 of 2023, is hereby quashed, and the sentence imposed on him, on 3<sup>rd</sup> February 2025, is hereby set aside. He shall be set free, from prison custody, forthwith, unless he is otherwise lawfully held. Orders accordingly.

**DELIVERED, DATED AND SIGNED, IN OPEN COURT, AT BUSIA, ON THIS 4<sup>TH</sup> DAY OF JULY 2025.**

**WM MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.

Advocates



Mr. James Were, instructed by Fwaya Masakhale Were & Advocates, Advocates for the appellant.

Mr. Antony Onanda, instructed by the Director of Public Prosecutions, for the respondent.

