



**Limo v Republic (Criminal Appeal E001 of 2025)
[2025] KEHC 13553 (KLR) (30 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13553 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL E001 OF 2025
RPV WENDOH, J
SEPTEMBER 30, 2025**

BETWEEN

GIDEON LIMO APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant herein, Gideon Limo was convicted for offence of defilement contrary to section 8(1) as read with Section 8(4) of the *Sexual Offences Act*.
2. The particulars of the charge were that on 4/6/2021 at [Particulars Withheld] in Trans Nzoia East Sub County, intentionally and unlawfully caused his genital organ, namely penis, to penetrate the genital organ, namely vagina, of MC ,a child aged sixteen (16) years.
3. In the alternative, he faced a charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* in that he intentionally and unlawfully touched the genital organ namely, the vagina of MC a child aged sixteen (16) years.
4. The appellant denied committing the offence and the case proceeded to full trial with the prosecution calling a total of four (4) witnesses. When called upon to defend himself, the appellant testified on oath and called one witness.
5. The appellant was convicted on the main charge and sentenced to serve fifteen (15) years imprisonment. The appellant is aggrieved by both the conviction and sentence. He has preferred the appeal based on the amended grounds of appeal which are as follows; -
 1. That the appellant’s Constitutional rights under section 134 and 137 of the Criminal Procedure Code were violated;
 2. That the prosecution evidence was marred with contradictions;



3. That the offence of defilement was not proved;
4. That the charge sheet was defective;
5. That the court failed to consider the appellant's defence.
6. The appellant therefore prays that the appeal be allowed, conviction quashed and sentence set aside.
7. This being a first appeal, it is required of this court to re-examine all the evidence tendered in the trial court afresh, analyse and evaluate it and arrive at its own conclusions. The court has however to bear in mind that it neither saw nor heard the witnesses testify and should make allowance for it. This court is guided by the decision of *Okeno -V- Republic* (1972) EA 32 where the court said "An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya -V- Republic* (1957) EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Ruwalla -V- Republic* (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions. I must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peter -V- Sunday Post* (1958) EA 424"

The Prosecution Case.

8. PW1, MC, recalled that on 4/6/2021, she was at home alone as her mother had gone to a meeting 'chama'. She was with her young brothers. About 3.00p.m. she took utensils outside when she saw Gideon standing inside their compound. She ignored him and entered the house but he followed her and stood behind the door. She ignored him again and took other utensils outside and that the appellant started to talk to her but she told him to respect himself as she was a student and too young for him. He released her hand which he had held and PW1 continued to do the cleaning. He suddenly got hold of her, pulled her to the corridor into the sitting room. She screamed and he caused her to hit her head, pushed her to the seat. He removed her pant and clothes, unzipped partially, undressed his trouser and inserted his penis in her vagina forcefully. She screamed loudly and the appellant ran away through the backdoor. PW1 knew the appellant because he had been working for the neighbour since she was young and sometimes came to their home when her father was home. She said that she was seventeen (17) years at the time of the incident and identified her birth certificate. PW1 later reported the incident to the mother and the matter was reported Sibanga police station. PW1 denied that neither she nor her parents had any dispute with the appellant.
9. PW2, DC, the mother of the complainant recalled that on 4/6/2021 about 10.00a.m., she left home to go to a 'chama' and returned home at 6.00p.m. PW2 found the complainant preparing food but she was in an unusual mood and did not want to be touched; that PW1 broke down and told her that Gidi had defiled her and she took PW1 to report at Sibanga Police Station where they were referred to Kitale District Hospital; that PW1 was examined and treated and her age assessed.
10. PW2 told the court that the appellant worked as a herder in the neighbourhood and the wife would milk for her. She denied that she had any conflict with the appellant and that delayed milk payments were normal. PW1 denied that she had had issues with the appellant over grass.
11. PW3 Peter Masaka a Clinical Officer at Kitale County Referral Hospital recalled examining the complainant on 5/6/2021 with a history of defilement. He found that her hymen was freshly torn and



the vulva had injuries -bruises. He sent her to the laboratory and the urine revealed epithelial cells and blood. He formed the opinion that there was penetration.

12. PW4 PC Isaac Barasa Opondo testified on behalf of the Investigating Officer, one Teresia Njoki of Sibanga Police Station by reading her statement which was to the effect that a report of defilement was made to PC Mugendi on 4/6/2021 at about 7.00p.m; that the complainant was bleeding from her private parts; that the complainant was referred to hospital; that on 5/6/2021, the complainant was issued with a P3 form which was filled at Kitale County Referral Hospital; that on 11/6/2022, the complainant's mother called to inform the Investigating Officer that the suspect was in Soy and the Investigating Officer PC Mugendi and parents of complainant proceeded to Soy where the appellant was arrested; that the Investigating Officer found the complainant's pink blood stained pant at the scene. He produced the complainants birth certificate as P.Exh.2.

Defence Case: -

13. In his sworn defence, the appellant testified that he worked at Rono's place till 2015; that he used to sell fuel and was at Daniels on 11/6/2021 and was busy the whole day till 3.00p.m. when fuel got finished; His employer asked him to close down and just then two men emerged and arrested him. He denied committing the offence and said that PW2 had a disagreement with him over grass which was at the home he used to guard and PW2 would send someone to cut it; that PW2 had coached PW1 to come to tell court lies. He denied ever meeting the complainant since 2018, when he worked near their home.
14. DW2 Jimmy Rotich Barngetuny testified that he is the appellants friend and on 4/6/ 2021 he learned that his motorcycle had broken down and was kept at the petrol station where the appellant worked. He went there at 10.00a.m., collected the motor cycle and took it to the mechanic, then he went to buy spares at the market and stayed there till 5.30p.m. and went home; that he went to complainant's home, found Charles and did not witness any incident. In cross examination, he stated that he was aware of the disagreement between the appellant and PW2 over grass. He confirmed that the appellant lived near the complainant's home and worked about a kilometre away.

Appellant's submissions.

15. The appellant urged that his rights under sections 134 and 137 of the Criminal Procedure Code were breached and that PW1 told the court that she had testified earlier; that the complainant at the time she testified was not a child and the charge should have been one of rape and not defilement.
16. On ground 2, the appellants case is that the Prosecution case was full of contradictions because PW1 stated that she was seventeen (17) years old and that later she stated that when the Doctor did age assessment, he found her to be sixteen (16) years; that these contradictions should be resolved in his favour. The appellant also submitted that there was no proof of penetration and no DNA was done to prove that he was involved with the complainant.
17. He also submitted that no exhibits were produced in court to support the prosecution case for example the complainant's clothes. In conclusion, the appellant urged that for all the above reasons, the prosecution had not proved their case to the required standard.

Respondents Submission.

18. The Prosecution Counsel opposed the appeal
19. As regards contradictions, Counsel submitted that the appellant did not enumerate the alleged contradictions and that in any event, if there were any, they were minor and cannot be a basis of quashing the conviction. Counsel relied on Section 382 of the Criminal Procedure Code and the



decision in Philip Nzaku Watu -V- Republic (2016) eKLR where the court observed that no two testimonies can be exactly same. Reliance was also made on the decisions of Joseph Maina Mwangi -V- Republic (2000) eKLR and Sigei -V- Republic (2023) KECA 154 (KLR) where courts have held that “for the contradictions to be fatal, they must relate to material facts in the case or fundamental to the main issues. “

20. As regard proof of age, Counsel submitted that PW4 was not the Investigating Officer and his evidence was hearsay and his production of the birth certificate suffers the same fate; that however, both PW1 and 2 testified that PW1 was seventeen (17) years old at the time of the incident.
21. Counsel also submitted that penetration was proved because PW1 presented a case of defilement and upon PW3 examining the complainant, found that she had a freshly torn hymen and injuries to the vulva.
22. On defective charge sheet, Counsel relied on section 382 Criminal Procedure Code which provides that not all errors, omissions or irregularity in a charge sheet renders a conviction invalid. He also relied on the case of JMA -V- Republic (2009).

Determination: -

23. I have considered all the evidence on record, the grounds of appeal and submissions of both parties.
24. I think the issues that have been raised by the appellant are: -
 1. Whether the charge sheet is defective;
 2. Whether there were contradictions in the prosecution evidence;
 3. Whether the charge of defilement was proved to the required standard;
 4. Whether the appellants defence was considered.

Defective charge;

25. Section 134 of the Criminal Procedure Code provides on how a charge sheet should be framed. It reads “Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged”
26. In determining where or not a charge sheet was defective or not the Court of Appeal in Sigilani -V- Republic (2004) 2 KLR 480 said the following “The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable the accused to prepare his defence”
27. In the case of JMA -V- Republic (2009) KLR 671, the court observed that not all defects in a charge sheet will render a conviction invalid. The test determining whether a charge is fatally defective as to render any conviction a nullity has been established i.e that the defect must be substantive rather than being in form. See case of Benard Ombuna -V- Republic (2019) eKLR.
28. The appellant contends that the words ‘unlawful’ were not included in the charge, but that is not the case. The charge sheet as framed conforms with provisions of section 134 of the Criminal Procedure Code.



29. In any event, even if the word were excluded, the charge would not be fatally defective in view of the provisions of Section 382 of the Criminal Procedure Code the said defect would be caused.
30. Section 382 of the Criminal Procedure Code provides as follows:-
 82. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, Omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:
31. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.
32. If it is regarding the age of the complainant having been stated as sixteen (16) years, that cannot render the charge defective because it still remains for prosecution to prove the exact age of the complainant.

Whether the offence of defilement was proved:

33. In case of Dominic Kibet Mwareng -V- Republic (2013) eKLR, the court stated; the critical ingredients forming the offence of defilement are;-the age of the complainant;-proof of penetration; and- positive identification of the assailant.

Proof of complainant's age.

34. In the case of Joseph Kiet Seet -V- Republic (2014) eKLR the court held that "it is trite law that age of a victim can be determined by medical evidence and other cogent evidence." In Francis Omuroni -V- Uganda CRA.2/2000, the Ugandan Court of Appeal held thus, "In defilement cases medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may be proved by birth certificate, the victim's parents or guardian and by observation and common sense."
35. The courts were of the same view in Mwalongo Chichoro Mwajembe -V- Republic CRA. 24/2025 and Edwin Masara Onsongo -V- Republic (2016) eKLR.
36. In this case PW1 testified that she was born on 22/11/2004 and was therefore seventeen (17) years at the time of the incident. PW2, the complainant's mother also testified that the complainant was seventeen (17) years. Even though the birth certificate was not properly produced, I find that there was sufficient evidence that PW1 was about to turn seventeen (17) years as of 4/6/2021 because she was born in November 2004. Age was proved.

Penetration

37. Penetration is defined in section 2 of the Sexual Offence Act to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person".
38. In the case of Mark Oiruri Mose -V- Republic (2013) eKLR the Court of Appeal explained what amounts to penetration as follows "..... So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and penetration need not be deep inside the girl's organ".



39. In *Eric Onyango Ondong -V- Republic* (2014) eKLR the court held thus “in sexual offences, the slightest penetration of the female sex organ by the male organ is sufficient to constitute the offence. It is not necessarily that the hymen be ruptured.”
40. In the instant case, PW1 vividly explained how the appellant pushed her, removed her pant and inserted his male organ into her vagina. PW3 who examined PW1 the next day confirmed that PW1’s hymen was freshly torn and the vulva had bruises. That is evidence of penetration.
41. The appellant further argued that no DNA was conducted to prove that he was the assailant. It is trite law that defilement is not necessarily proved through medical evidence but by way of oral and circumstantial evidence. In *AML -V- Republic* (2012) eKLR. The court held “the fact of rape or defilement is not proved by way of a DNA test but by way of evidence.”
42. This was further affirmed in the case of *Kassim Ali -V- Republic* CR.Appeal. 84/2005 where the court said “.....the absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim or by circumstantial evidence.” This court is satisfied that penetration was proved.

Identity of the perpetrator:

43. The appellant did admit that the complainant is not a stranger to him. He used to work for the complainant’s neighbour. Both PW1 and 2 told the court that the appellant used to visit their home and PW2 supplied milk to the wife. PW1 denied knowing if there existed any dispute between the appellant and PW2. PW2 also denied of there being any dispute over grass. The appellant was very vague as to when and how this dispute actually arose.
44. DW2 during cross examination at first said the dispute over grass arose in 2020. He however later changed to say between 2018 and 2021, there was no dispute between complainants’ family and the appellant. These contradictions in the defence evidence raise doubt in the defence and go to buttress PW1 and 2s testimonies that there was no dispute between PW2 and the appellant to warrant PW2 have PW1 frame him with a case of defilement.
45. The trial court observed that PW1 was candid and that the prosecution evidence was unshaken and he believed the Prosecution witnesses.

Whether the court considered the Alibi defence.

46. When a defendant raises an alibi, it means that he was not at scene but was elsewhere. In the case of *Karanja -V- Republic* (1983) KLR. The court of Appeal held as follows “.... The burden of proving the falsity of the defence lay wholly on the prosecution”
47. In *Ssantale -V- Uganda* (1968) EA 36 the court held that an accused does not assume the burden of proving the alibi.
48. In *R.V Sukha Singh s.o Wazir & others* (139) 6 EACA 145 the former Court of Appeal of East Africa upheld the decision by the High Court when it said “if a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can, because, firstly, if he does not bring it forward until months afterwards, there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly; if he brings it forward at the earliest possible moment, it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness, proceedings will be stopped”



49. Again in *Festo Androa Asenua -V- Uganda* CR.App 1/1998, the court said as follows; “we would point out that in our experience in Criminal proceedings in this country, It is the tendency for accused persons to raise some sort of alibi always belatedly when such accused person give evidence. At that stage, the most the prosecution can do is to seek adjournment of the hearing of the of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK, cited above, such belated disclosure must go to the credibility of the defence”.
50. In this case, the appellant (DW1) raised his alibi defence for the first time when he gave his defence, over three years after he was charged. The prosecution did not seek an adjournment to inquire into the alibi. He called DW2 as a witness. The appellant stated that he was at work up to 3.00p.m. when fuel got finished and his employer told him to leave. DW2’s testimony was totally contradictory. At first, he told the court that he went to collect his motor cycle from DW1’s place of work at 10.00a.m. and left for the market and only returned at 5.30p.m. However, in cross examination he changed the narrative and said that he was repairing his motor cycle about seventy (70) metres from where DW1 worked. He did not tell the court when DW1 left his place of work. If DW1 left work at 3.00p.m. as he told the court, then he had the opportunity to commit the offence because PW1 told the court incident occurred about 3.00p.m. Weighing the alibi against the complainant’s testimony, I find that the complainant was truthful. The alibi is contradictory, an afterthought and unbelievable.
51. As regards, contradictions in the prosecution case, no material contradictions were alluded to and this ground fails.
52. In the end, I find that the conviction is well founded and I affirm it. The appellant was given the minimum sentence under section 8(4) of the *Sexual Offences Act*.
53. The appeal lacks merit and is dismissed in its entirety.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAPENGURIA THIS 30TH DAY OF SEPTEMBER, 2025.

R. WENDOH

JUDGE

In the Presence of :-

Appellant – in person Virtual

Mr. Majale holding brief for Mr. Mugun for Respondent

Juma/ Hellen Court Assistants

