Okutoyi v Republic (Criminal Appeal E101 of 2024)
[2025] KEHC 13428 (KLR) (29 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13428 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E101 OF 2024

AC BETT, J

SEPTEMBER 29, 2025

BETWEEN

DANIEL NAMALE OKUTOYI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence of Hon. G. Ollimo (SRM) in Butere PMC Sexual Offence Case No. E020 of 2023 delivered on 24th January 2024)

JUDGMENT

1. The Appellant was convicted for the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act*. The particulars of the offence were that on the 25th day of March 2023 at (particulars withheld) within Kakamega County, the Appellant intentionally caused his penis to penetrate the vagina of FR, a child aged 5 years.

2. The matter proceeded to hearing after the Appellant had denied the charges and the prosecution adduced its evidence through four (4) witnesses.

3. PW1 was the victim who was first subjected to *voire dire* examination after which the trial Magistrate concluded that she was possessed of sufficient intelligence to testify albeit through an unsworn statement as she was too young to understand the meaning of an oath. She testified that she is a PP2 student and recognized the Accused, Baba Khuku whom she said is a neighbour she often sees in his homestead. She narrated that she was playing with her friends then decided to return home. Baba Khuku called her and instructed her to go to the bathroom where *"Akachukua dudu yake akaweka kwa yangu"* meaning, he inserted his penis in her vagina. He threatened to cane her if she screamed. She put on her panty which the Accused had removed. He ordered her to go home and take a bath which she went and did. She informed C what had transpired wherefore C called Mama who got a motorcycle to

escort them to Namasoli Hospital where on interrogation, she recounted the incident to the Doctor. She said that the Accused had defiled her twice, the first time at Kwa Shiko where jerricans are stored.

4. When cross-examined, PW1 stated that the Accused had no clothes while inside the bathroom and he made her lie on the ground then lay on top of her. She said she was not bleeding when she was examined at the hospital. PW2 was EM who stated that the victim is a daughter to her sister. She said that the victim is 5 years old and in her custody since the mother is in Saudi Arabia. She recalled that on 25th March 2023 she had attended a funeral in the village when at about 2.00 pm her two children and the Appellant's first born emerged. Her children who were crying reported that PW1 had been raped she dashed home where she found PW1 in the bedroom. She was not responsive. She took her to hospital where PW1 reported that the Appellant had defiled her. The Doctor examined the victim and admitted her for one night. PW2 identified the certificate of birth which was marked as MFI-1.

5. Cross-examined by the Appellant, PW2 confirmed that they were neighbours and that PW1 has been playing with her friends at his home. She said that the deceased was the Appellant's relative but she had not seen him at the funeral.

6. PW3 was PC Evans Otieno who recollected that on 25th March 2023, at around 9.00 pm, he was briefed by the deputy OCS who requested that he accompany him to (particulars withheld) where a child had been defiled. They proceeded to the Appellant's home, arrested him and escorted him to the police station. This was after first passing Namasoli Hospital where they found the victim undergoing treatment. The following day, he recorded a statement from the victim where she said that one "Matayo" passed by their home, found her playing with friends, then took her to the bathroom where he defiled her. The victim then asked to go for a short call and on coming back, informed the witness that she had seen the "Matayo". PW3 led the victim to the Accused who was in the police land cruiser where the Accused positively identified him. PW3 further stated that a site visit confirmed that the victim's home is in close proximity to the Appellant's home and they therefore decided to prefer the charges against the Appellant.

7. PW4 was Augustine Mukhwana, a Clinical Officer at Namasoli Health Centre. He testified that the victim was seen at the centre on 25th March 2023 accompanied by her mother. She reported having been raped in a toilet by a person known to her. She reported that she had been raped several times. On physical examination, the victim had no hymen with no sign of forceful penetration, no swelling, nor discharge. An HIV test turned negative. A high vaginal swab was done and the results showed epithelial cells and numerous pus cells. No abnormality was detected in the urine and tests for Hepatitis B, and C were negative. The Doctor concluded that the victim was defiled and gave her treatment. PW4 produced the P3, treatment notes and Post Rape Care (PRC) form which were marked as exhibits.

8. When placed on his defence, the Appellant gave a sworn statement. He maintained that he was innocent and invited the court to read the witness statements and compare with the evidence tendered in court as there were disparities.

9. The Appellant was aggrieved by the conviction and sentence and lodged his appeal in which detailed the following grounds:-

    1. That the trial court erred in law and facts in observing that the prosecution case was full of contradictions, discrepancies and inconsistencies which were inconsequential to conviction.

    2. That the trial court erred in law and facts in observing that the prosecution failed to prove its case beyond reasonable doubt as legally required by law.

3. That the trial court erred in law and facts in observing that the key ingredients of defilement were not proved beyond reasonable doubt.

4. That the sentence imposed is manifestly excessive in view of the circumstances of the case.

5. That the trial court erred in law in not admitting the Appellant's mitigation as provided for under Section 216 and 329 of *CPC* for proper sentencing pursuant to Section 323 of *CPC*.

6. That the trial court erred in law and facts in disregarding the Appellant's defence despite the same being worth of acquittal.

7. That further grounds to be adduced once the trial court records (proceedings) are receiving and after pursuant of the same.

10. The duty of the court as a first appellate court is well established. It is to review the evidence afresh with a view to arriving at an independent conclusion bearing in mind the fact that unlike the trial court, it did not have the opportunity to see and hear the witnesses first hand. See *Okeno v Republic* [1972] EA 132.

11. The issue before this court is whether the offence of defilement was proved to the required standard. It is therefore imperative that the court considers whether the three elements of the offence were proven. These are:- the age of the victim, proof of penetration and positive identification of the assailant.

12. It is well settled that there are various tools that the prosecution can use to prove the age of the victim. These tools were elucidated in the cases of *Edwin Nyambogo Onsongo v. Republic* [2016] eKLR and *Mwolongo Chichoro Mwanjembe v. Republic* [2016] eKLR where the Court of Appeal stated that age can be proven through documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if sufficiently intelligent, of the parents, guardian or medical evidence. The courts have even held that age can be proven by observation.

13. There was sufficient evidence in this case that the victim was aged 5 years old. Her birth certificate was produced. The P3 and PRC forms also indicated that she was aged 5 years having been born on 1st January 2018.

14. The other essential ingredient in a defilement case is proof of penetration. The P3 form and PRC form that were produced showed that the victim's hymen was broken though not forcefully penetrated. Despite the absence of swelling, bleeding or discharge, a high vaginal swab revealed the presence of numerous epithelial cells. The examining Clinical Officer concluded that the victim was defiled.

15. The victim's evidence was that "Baba Khaku" meaning the Appellant *"amechukua dudu yake akaingiza kwa dudu yangu"*. It is trite that the word *"dudu"* is widely used by Kenyan children to refer to one's genitalia. It is a term used by parents to preserve our cultural sense of modesty as referring to the genitalia and acts of sexual intercourse using its known names is considered vulgar. This cuts across all cultures of our society. In *Muganga Chilejo Saha v. Republic* [2017] eKLR, the Court of Appeal while acknowledging the use of euphemisms by children when describing acts of sexual intercourse held as follows:-

> "Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a court room. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms like, *"alinifanyia tabia mbaya"*, (*IE v R*, Kapenguria HC Cr. Case No. 11 of 2016), "he pricked me with a thorn from the front part of this body.", (*Samuel Mwangi Kinyati v R*,

Nanyuki HC.CrA No. 48 of 2015), "he used his thing for peeing", (*David Otieno Alex v R*, Homa Bay HC Cr Ap. No. 44 of 2015), "he inserted his *"dudu"* into my *"mapaja"*, (*Joses Kaburu v R*, Meru HC Cr. Case No. 196 of 2016), *"he used his munyunyu"*, (*Thomas Alugha Ndegwa*, Nbi HC. Cr. Appeal No. 116 of 2011), as apt description of acts of defilement. We, however, need to remind trial courts that the use of certain words and phrases like "he defiled me", which are sometimes attributed to child victims, are inappropriate, technical and unlikely to be used by them in their testimony. See *A M M v R* Voi HC Cr. App. No. 35 of 2014, *EMM v R* Mombasa HC Cr. Case No. 110 of 2015, among several others. Trial courts should record as nearly as possible what the child says happened to him or her."

16. I have carefully considered the victim's description of the act and the fact that despite having taken a bath, the high vaginal swab was positive for epithelial cells. The presence of epithelial cells in the vaginal wall is sufficient proof of penetration. This was held in the case of *Ogechi v. Republic* [2023] KEHC 24673 (KLR) where a Clinical Officer explained that:-

> " Epithelial cells are shed from the linings of the vagina. If someone has sexual intercourse, then the cells are shed in large quantities and are found in urine & HVS. The presence of numerous epithelial cells could indicate sexual penetration or inflammatory process from the sexual penetration or friction. Epithelial cells are shed and found in urine or during a HVS. In this case, both methods were used..."
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> The court then held that: "In this case there ..... any manner."

17. Penetration is defined under Section 2 of the *Sexual Offences Act* as:-

> " The partial or complete insertion of the genital organs of a person into the genital organs of another person."

18. The evidence of the victim, tied together with the evidence of PW4 point to the act of penetration having occurred.

19. Regarding the identity of the perpetrator, it is imperative that the prosecution proves that the victim positively identified the Appellant as being the perpetrator. One of the vital steps taken before receiving the evidence of a child of tender years is to conduct a *voire dire* examination to establish whether in the opinion of the court, the child is possessed of sufficient intelligence and understands the duty of speaking the truth. This was the position of the Court of Appeal in the case of *John Muiruri v. Republic* [1983] KLR 445 cited in *Ben Maina Mwangi v. Republic* [2006] eKLR. The Court of Appeal held that:-

> " 1. Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a *voire dire* examination, whether the child understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied, his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.
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> 2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.

4. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.

6. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to the conviction.

9. The correct procedure for the court to follow is to record the examination of the child witness as to the sufficiency of her intelligence to satisfy the reception of evidence and understanding of the duty to tell the truth."

20. The trial Magistrate conducted a *voire dire* examination and held that the victim possessed sufficient intelligence but was too young to understand what an oath entails. The court did not determine whether the victim understood the duty of speaking the truth. None of the questions posed during the *voire dire* examination were aimed at finding out if the child could distinguish between truth and lies and understood that she ought to tell the court the truth. This was important in view of the nature of the offence. Yet the nearest that the court asked is what action does you mother/guardian take when you make a mistake?" To which the victim responded that she would be caned. To my mind, and I am sure even to a child, a mistake is not synonymous with lying. Whether or not a child of tender years knows the importance of telling the truth is vital because at times a child may be coached to lie.

21. Having reviewed the *voire dire* examination, I find and hold that it was not conducted in the manner envisaged by the law.

22. I have dealt with the manner in which the *voire dire* was conducted and its implications in view of the victim's evidence. Her evidence concerning the act raises more questions than answers. Considering the age of the child, if she was defiled as stated clearly in her evidence, it would be naturally expected that she would be in pain. An act of penetration is intrusive and for a child of tender years to be penetrated by an adult male, one would expect pain and injury to the genitalia of the child. Yet the victim did not complain of any pain at all either to the Doctors or to the court. I have perused the treatment notes in PEx 2, where the history of the patient, the complaints and the treating clinician's findings on examination are first recorded. I will reproduce a portion of the notes which are as follows:-

" Raped 1/7 (meaning within a day).

A five year old child was brought to the hospital accompanied by her mother at 4.40 pm on 25/3/2023. Mother alleged that her child was raped by person well known to her. The child reported that she was raped in toilet by person well known to her. The child reported that the said person had raped her several times. The time the child was brought to the hospital, the child has no underwear, but had clothes. She had worn when ordeal happen. The child had bath when I examined her (sic).

Sexual ht (meaning history)

The child had been engaged in sexual act as reported.

Vaginal examination
Hymen brokenNo swellingNo bleedingDx (Diagnosis) Defilement."

23. From the history and evidence, one would expect that the victim would have sustained some bruises on her back after being made to lie down as she was being defiled. Further, the act of defilement itself would have led to injury to her genitalia. A man's erect penis cannot penetrate a five year old's

vagina and only break the hymen. Considering the Clinical Officer concluded that the victim had been defiled two hours before the examination, there ought to have been at least some bruising or laceration of the labia, the bath notwithstanding. From my interpretation of the treatment notes, it appears the Clinician concluded that the complainant had been defiled by her history and not her physical examination.

24. A further perusal of the Appellant's treatment notes produced as P.Ex 5 reveals that the Appellant was found to be having an infection as a urinalysis established that he had numerous pus cells. The P3 form, P.Ex 3 confirms the findings that the Appellant had an infection and was placed on treatment. Conversely, the PW1's laboratory test showed only the presence of epithelial cells. According to PW1, the Appellant had defiled her several times. If the Appellant had defiled PW1 previously, it would be most likely that PW1 whose genitalia is still immature, would have been suffering the same infection as the Appellant. That the victim did not have an infection while the Appellant did, raises doubt as to whether it is the Appellant who defiled her.

25. Despite the Doctor concluding that the Complainant had been defiled, the P3 form noted that there was no trauma or injury while the Post Rape Care (PRC) form noted that the hymen was not forcefully penetrated. All the medical evidence produced do not point to the positive conclusion that the Complainant was defiled on the material date as nothing abnormal was detected save for the broken hymen and the presence of epithelial cells.

26. In the case of *Ben Maina Mwangi v. Republic* [2006] eKLR, Lesiit J, stated as follows:-

> "I considered the evidence adduced and nowhere did the Complainant claim that the Appellant did anything that can be construed as defilement. She did not even express being caused any pain during the ordeal. All she said was that the Appellant undressed her by removing her under pant and then removed his before telling the Complainant to lie on the mattress which she did. The Complainant did not talk of an interruption or intrusion during the incident or tell how it ended. Bearing in mind she was a child of tender years being only 4 years at the time, for the offence to be proved there should have been evidence adduced to show that the Appellant used some force on her or something tending to show an assault or infliction of pain. At least some evidence needed to be adduced from which it could be construed that defilement took place. Considering the Complainant's age as compared to the Appellant, if any attempt was made to penetrate the Complainant's private parts it would be expected that the Complainant must have felt pain, if not excruciating pain. There is no way the Complainant would forget the experience or that detail in her evidence."

27. After carefully reviewing the evidence as a whole, I find that the prosecution failed to prove its case beyond reasonable doubt. The conviction against the Appellant was not safe. I therefore allow the appeal, quash the conviction and set aside the sentence. The Appellant shall be set free forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 29TH DAY OF SEPTEMBER, 2025.

A. C. BETT

JUDGE

In the presence of:

Appellant in person

Ms. Chala for the Respondent

Court Assistant: Polycap