



**Mumachi v Republic (Criminal Appeal E034 of 2024)
[2025] KEHC 13832 (KLR) (3 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 13832 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E034 OF 2024
WM MUSYOKA, J
OCTOBER 3, 2025**

BETWEEN

JAVAN AYOTI MUMACHI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal against conviction and sentence, in Busia CMCSOC No. 15 of 2020, of 28th August 2024, by Hon. Nyaloti, Chief Magistrate, CM)

JUDGMENT

1. The appellant was convicted of defilement, contrary to section 8(1)(3) of the *Sexual Offences Act*, Cap 63A, Laws of Kenya. He had denied the charge, and a trial was conducted, where the prosecution presented 5 witnesses.
2. PW1 was the minor complainant. According to her, the appellant lured her to his house, instructed her to undress, which she did, and he inserted his penis into her vagina. When she got home, at 3.00 AM, she found her mother waiting for her, and she was forced to disclose what had happened. The matter was reported at a police station, and she was taken to hospital. PW2 was the stepmother of PW1. PW1 had disappeared from home, in February 2020, according to PW2, and they searched for her in vain. She later came home at 3.00 AM, and disclosed that she had been with the appellant. A report was made to the police, and PW1 was taken to hospital. PW3 was the uncle of PW1, and the husband of PW2. PW1 came home at 2.00 AM, and informed him that the appellant had defiled her. The appellant was arrested, and PW1 taken to hospital. PW4 investigated the matter. PW5 was the clinician who attended to PW1.
3. The appellant was put on his defence. He gave a sworn statement. He denied committing the offence.
4. Judgement was delivered on 28th August 2024. It was found that the offence had been proved to the required standard. The appellant was sentenced to serve 20 years' imprisonment.



5. The appellant was aggrieved, hence the appeal. The grounds are that the evidence was insufficient and the case did not reach the threshold for conviction; material contradictions in the evidence were not resolved; the age of the complainant was not ascertained; overreliance on uncorroborated circumstantial evidence; and there were contradictions in the medical report and the P3 form.
6. The appellant filed written submissions. He submits that the charge was defective, to the extent that it omitted the word “unlawfully,” in the statement of the offence. He also argues that it was unbelievable that a 15-year-old would not recall the date of the defilement. There was no eyewitness evidence to corroborate the testimony of the complainant, he says. It is also submitted that the prosecution did not discharge its onerous duty of proof beyond reasonable doubt. He relies on *Matata vs. Republic* [2021] KEHC 9811 (KLR) (Onyiego, J) and *Omurwa Dancas Ogoro vs. State* [2017] KEHC 845 (KLR) [2017] eKLR (Nagillah, J).
7. 3 issues arise for determination: whether the charge was defective, whether corroborative evidence is mandatory in sexual offence cases, and whether lack of certainty was fatal to the case.
8. On the first issue, the starting point should be with the statutory provisions on the drafting of a criminal charge. Section 134 of the Criminal Procedure Code, Cap 75, Laws of Kenya, is on what should be contained in a charge. It should carry a statement of the specific offence charged, and such particulars of the charge as may be necessary for giving reasonable information as to the nature of the offence charged.
9. There are 2 elements to a charge, a statement of the specific offence charged, and the particulars. The statement is usually a one-liner, indicating the specific offence charged. The specificity is indicated by citation of the provision creating the charge and prescribing the sentence or punishment. That would be critical, for the accused should be charged with a known offence in law. The particulars are usually a statement, in summary form, of the circumstances, in terms of the date when the offence was allegedly committed, the location or place where it happened, and the specific act or omission that constitutes the offence alleged.
10. In this case, I note that the statement of the offence indicates the offence alleged to be defilement, and sets out the provision of the law creating the offence and prescribing the sentence to be section 8(1)(3) of the *Sexual Offences Act*. Defilement is a criminal offence known in law in Kenya, for it is created by section 8(1) of the *Sexual Offences Act*, and the penalty for it, upon conviction, is spelt out in section 8(3) thereof. To that extent, I see no default or defect in the charge, so far as the statement of the offence is concerned.
11. The particulars of the offence allege that the same was committed by the appellant between 5th and 6th February 2020, in Samia Sub-County, within Busia County, when he caused his penis to penetrate the vagina of the complainant, PW1, identified as BK, a child aged 15 years. That would appear to suffice, for compliance with section 134 of the Criminal Procedure Code, in terms of providing particulars of the charge as may be necessary for giving reasonable information as to the nature of the offence charged. The time, the place, the victim and the alleged outlawed conduct or omission were set out.
12. The complaint, by the appellant, is that the particulars omitted to indicate that the alleged misconduct or omission was unlawful. Particulars of offences are usually aligned to the language of the provision creating the offence and prescribing sentence. So that where the targeted conduct is described, in the provisions, as intentional and unlawful, the particulars of the charge ought also to make those allegations, as indicators to the accused, of the extent of the contours of the case he would face, and the scope of the defence he would be expected to mount, to surmount the charge.



13. Section 8(1) of the *Sexual Offences Act* defines defilement in these words, “A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.” The charge is brought under section 8(3) of the *Sexual Offences Act*, because PW1 was aged 15 years, and it 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.” These provisions do not incorporate the words intentionally and unlawfully in the definition of the offence or the prescription of the sentence.
14. Section 8 of the *Sexual Offences Act* contrasts with sections 3 and 4 of the *Sexual Offences Act*, which define the offence of rape and its attempt, and prescribe the sentences for those offences. The offences under sections 3 and 4 are committed where the sexual intercourse or its attempt is done intentionally and unlawfully, and without consent. Rape defines non-consensual sexual intercourse with an adult. Consent is at the heart of it. It is the consent which makes sexual intercourse with an adult lawful, and lack of it makes it unlawful. Intentional sexual intercourse with a consenting adult is permissible. Unintentional sexual intercourse would be without consent, but since it would occur inadvertently or accidentally, it would be excusable. Sexual intercourse between adults is permissible, so long as it happens with consent.
15. Defilement defines sexual intercourse WITH or penetration of a minor. The contrast between defilement and rape, besides one relating to adults and the other to minors, is that sexual intercourse with minors is outlawed or barred by the law. It is unlawful. It cannot be made lawful by consent. It remains unlawful, whether the child had purported to consent to the act or not. Consent is not a factor at all in sexual relations between adults and minors, and even between minors themselves. Those sexual relations are outlawed outrightly, and the issue of lawfulness, or otherwise, of defilement would not arise.
16. In view of what I have discussed above, there would be no basis for using the word unlawfully in the particulars, to describe the act of defilement, given that defilement, by its very nature, is unlawful, and the unlawfulness cannot be cured in any way, including by the presence of consent. The very allegation of defilement carries with it the tag of unlawfulness, and there would be no need to allege unlawfulness in the particulars. In any event, section 8, which creates the offence, does not utilise that word, and there would be no reason to import it into the particulars of the offence, in the charge. The charge, herein, as framed, was proper.
17. The next consideration should be whether, if the charge were to be adjudged defective, in the manner alluded to by the appellant, that defect would be fatal. I reiterate that there was no defect. However, even if there was a defect, it would have been curable under section 382 of the Criminal Procedure Code. Section 382 provides that no decision of a criminal court is to be reversed or altered on appeal or revision, on account of an error or omission or irregularity in any of the filings and processes, unless the error or omission or irregularity has occasioned a failure of justice, after considering whether the objection could or should have been raised at an earlier stage in the proceedings. See Peter Ngure Mwangi vs. Republic [2014] KECA 405 (KLR) [2014] eKLR (Nambuye, Maraga & Mohammed, JJA).
18. The appellant herein was represented by an Advocate at trial. The Advocate came into the matter when the trial commenced in earnest on 7th June 2021. Under section 382 of the Criminal Procedure Code, any defect or irregularity is curable, on appeal or revision, if it occasions injustice, and if it was something that could or should have been raised during the proceedings. The material before me is silent on whether that issue was ever raised at all at any of the stages of the trial, by the Advocate.



Secondly, the appellant has not sought to demonstrate how the omission of that word, from the particulars of the charge occasioned, injustice.

19. The second issue is about corroboration of evidence in sexual offence cases. In another era, corroboration was mandatory in sexual offence cases, particularly rape and defilement. That is no longer the case. The proviso to section 124 of the *Evidence Act*, Cap 80, Laws of Kenya, has changed everything. It states that "... where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth." The long and short of it is that the evidence of a victim of rape or defilement need not be corroborated, if it is the only evidence available, so long as the trial court believes it. Absence of corroboration, for that class of offences, is not fatal. See *Simon Mwiti vs. Republic* [2015] KEHC 4910 (KLR) [2015] eKLR (Wendoh, J). See also *Sahali Omar vs. Republic* [2017] KECA 357 (KLR) [2017] eKLR (Visram, Karanja & Koome, JJA).
20. In this case, however, there was corroboration, from the medical evidence tendered by PW5. There was a conclusion, in the medical treatment notes, that there had been vaginal penetration. Further corroboration came from PW2 and PW3, that PW1 had informed them that she had just come from the house of the appellant. PW3 was specific that PW1 informed him that the appellant had defiled her, which prompted their decision to take the matter to the police and hospital.
21. The third issue is lack of certainty of the dates when the incident happened, and whether that would be fatal. The record is clear, that PW1 was not certain of the date when the incident happened. She could not recall the date, but she was clear on the timing, in terms of hours. The charge alleged that it happened in February 2020. PW1 testified more than a year thereafter, on 7th June 2021, to be specific. There was delay in the commencement of the actual trial, and PW1 could be excused, for not recalling aspects of the evidence. The testimony on what exactly transpired was given in a clear flowing manner, and the lack of certainty, on the date when it happened, was not fatal.
22. The written submissions, by the appellant, centre on those 3 issues, but there are other issues raised in the petition of appeal, around contradictions in the medical evidence, age of PW1, and sentence.
23. On the medical evidence, it is alleged that the treatment notes and the P3 form were contradictory. Of the 2, the P3 form is what is tailored for use in criminal trials. The same is generated from the notes made during the treatment process. In this case, both were filled by the same person, who testified as PW5. I have perused both documents, PW5 recorded the same conclusion, in both, that there was vaginal penetration. I do not see any incidence of contradictions between the 2 documents.
24. The age of PW1 was said to be 15 years in the charge. A certificate of birth, in relation to PW1, was produced by PW2, her stepmother. It showed that PW1 was born on 28th July 2005. It meant that she turned 15 years on 28th July 2020. She was within the bracket envisaged in section 8(3) of the *Sexual Offences Act*. Under that provision, upon conviction, the perpetrator of the defilement is liable to imprisonment for a minimum of 20 years. The trial court sentenced him to the minimum.
25. Overall, I find no merit in the appeal herein. The same is for dismissal. I hereby dismiss it. The effect of the dismissal is that the conviction is affirmed, and the sentence confirmed. Orders accordingly.

DELIVERED, DATED AND SIGNED, IN OPEN COURT, AT BUSIA, ON THIS 3rd DAY OF OCTOBER 2025.

WM MUSYOKA

JUDGE



Mr. Arthur Etyang, Court Assistant.

Ms. Eva Adhiambo, Legal Researcher.

Advocates

Mr. Ashioya, instructed by Ashioya & Company, Advocates for the appellant.

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

