



REPUBLIC OF KENYA



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**Pchumba v Republic (Criminal Appeal E013 of 2024)
[2025] KEHC 13607 (KLR) (1 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 13607 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPENGURIA
CRIMINAL APPEAL E013 OF 2024
RPV WENDOH, J
OCTOBER 1, 2025**

BETWEEN

CORNELIUS PCHUMBA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Cornelius Pchumba, appeals against the decision of the Chief Magistrate Kapenguria, delivered on 23/8/2024 whereby the appellant was convicted of two offences.
2. He was charged with offence of defilement contrary section 8(1) as read with section 8(4) of the [Sexual Offences Act](#). The particulars of the charge were that on 5/9/2018 in West Pokot, intentionally and unlawfully caused his penis to penetrate the vagina of AC a child aged sixteen (16) years.
3. In the alternative, the appellant faced a charge of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) in that he touched the breasts, buttocks and vagina of AC a child aged sixteen (16) years.
3. The second charge was one of assault causing actual bodily harm contrary to section 256 of the Penal Code in that on 5/9/2016 in West Pokot willfully and unlawfully assaulted AC thereby occasioning her actual bodily harm.
4. After a full trial the court convicted the appellant on both counts and sentenced him as follows: -
 - Count 1 – ten (10) years imprisonment
 - Count 2 – six (6) months imprisonment.Sentences were ordered to run concurrently.



5. Aggrieved by the conviction and sentence, the appellant preferred this appeal based on the following grounds: -
 1. That the elements of the offence were not beyond reasonable doubt;
 2. That the appellant was not accorded a fair trial;
 3. That court failed to give reasons for rejecting his defence;
 4. That he was not supplied with witness statements;
 5. That the court erred by not considering the probation officers report.
6. He prayed that the conviction be quashed and sentence set aside.
7. This being a first appeal, it is expected of this court to re-examine all the evidence presented in the trial court, evaluate it and arrive at its own conclusions while making allowance for the fact that this court neither saw nor heard the witnesses testify. This court draws guidance from the case 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. The Prosecution called a total of five (5) witnesses in support of its case.
9. PW1 AC of [Particulars Withheld] testified that she was fifteen (15) years old having been born on 12/11/2004. She was living with Mama C when on 5/9/2018, about 1.00p.m. she was washing her uniforms at the home of the accused in company of the appellant’s sisters C and C; that the appellant’s sisters left and when she took their clothes to the room, the appellant closed the door, got hold of her neck threw her on the sofa, took the T.V remote and increased the volume, took her by the neck to his sister’s bedroom and threatened to strangle her; that the appellant removed his jeans, pants and had sex with her from 1.00p.m. to 3.00p.m.; she screamed but nobody came to her help. She managed to escape when a child knocked on the door, the appellant went to open and she managed to kick him and escaped. She informed C (PW2) and E. E went to look for the appellant while C escorted PW1 to Chepareria Police Station to report. She was treated at Chepareria Sub-county Hospital.
10. PW2 CC Identified the appellant as a neighbour whereas the complainant is her cousin. She recalled 5/9/2018, when she asked PW1 to go and wash her uniform and that PW1 returned about 2.00p.m. crying and reported to her and her brother EP PW2 what the appellant had done to her. PW2 reported to police and also took the complainant to Hospital where she was examined.
11. PW3 EP was with PW2 when the complainant informed them that the appellant had defiled her. He went in search of and arrested the appellant who tried to flee but was caught and handed over to the elder and Chief.



12. PW4 Clement Alesingor, a Clinical Officer at Kapenguria Hospital examined the complainant at the Hospital on 6/9/2018. The complainant was about sixteen (16) years old, had tenderness to the neck, the genitalia were perforated and there was redness on the vaginal walls.
13. PW5 PC Gilbert Rono of Kapenguria Police Station recalled that on 6/9/2018, the complainant reported that she had been defiled. She was sent to hospital. A P3 form was filled and age assessment done. By then, the appellant had been arrested. He charged the appellant.

Defence Case: -

14. After the close of the prosecution case, the appellant (DW1) testified on oath and called three (3) witnesses. He stated that on 4/9/2018, he left with his wife C to and mother C for Lomut to introduce the wife to his uncle; that they returned home on 5/9/2018 evening. They alighted at [Particulars Withheld] and he was accosted by the KPR who took him to the station. He was not told the reason for his arrest. He denied knowing AC and that he had just been married for four (4) days in September 2018.
15. DW2 Susan Daniel, is the mother of the appellant. She stated that she was at home and the appellant had gone to visit his aunt and uncle and that they came back on 5/9/2018. She later learnt that the appellant had been arrested.
16. DW3 Ziporrah Cheruto is the appellant's wife. She testified that on 5/9/2018, they went to visit the appellants uncle and when returning home, he was arrested.
17. DW4 Petronilla Chesang, a sister to the appellant testified that on 5/9/2018 they returned back home from visiting their uncle; that they had gone there on 4/9/2018 and that at the stage, a KPR arrested the appellant. She denied knowing the complainant.
18. The appellant made oral submissions in which he requested for a retrial because he proceeded without an advocate and that later when he got one, the court declined to recall the witnesses; that the lower court did not give him a fair hearing.
19. The appeal was opposed and the prosecution Counsel submitted that the appellant was informed of his right to counsel, was given witness statements to prepare his case; that the appellant waited till only one witness was left to be heard to ask for adjournment to get Counsel; that the trial court gave a reason in writing as to why the case could not be reopened; i.e to avoid trauma to the minor victim. The Prosecution Counsel urged this court to dismiss the appeal.

Determination: -

20. After considering the grounds of appeal, the evidence on record and submissions of both parties, the issues for consideration are;
 1. Whether the court did not accord the appellant a fair trial;
 2. Whether the offence of defilement was proved beyond reasonable doubt;

Whether the appellant's right to fair trial was violated:

21. The appellant complained that he was denied the right to recall witnesses and upon perusal of the proceedings in the trial court, the appellant took plea on 10/9/2018 and denied committing the offence. Witness statements were issued to the appellant on 12/9/2018. On 14/9/2018, he was released on bond. When the case came up for hearing on 12/11/2018, the appellant agreed to an adjournment



to enable him engage Counsel. The case was adjourned to 28/11/2018, but the appellant was absent and a warrant of arrest was issued. He showed up on 7/12/2018 and claimed to have been unwell. Thereafter the case was adjourned for various reasons including the trial court being on transfer. The hearing commenced on 28/8/2019.

22. By this time which was nearly a year after plea, the appellant had not engaged any Counsel. He confirmed to the court that he was ready to proceed. After hearing three (3) witnesses, Mr. Samba Advocate came on record for the appellant and asked to recall PW1,2, and 3 which was not opposed by the prosecution. The matter was adjourned for various reasons including Covid till 24/9/2020 when the appellant failed to attend court and a warrant of arrest was issued. The appellant's brother attended court on 16/11/2020 to report that the appellant was admitted at Chepareria Hospital.

Thereafter he was absent and a warrant of arrest was issued for him and summons for his surety till 3/12/2022 when the Investigating Officer informed the court that the appellant had been arrested by his own father who was the surety and presented to the state. The bond was cancelled and the appellant then applied to the court to start the matter afresh because another Magistrate had taken over following the transfer of the first Magistrate. The Court declined to grant the application for reasons that the appellant had caused a delay of two (2) years when he absconded, and urged the case to proceed from where the transferred Magistrate had stopped. On 8/6/2021 Ms. Opondo Advocate came on record for the Appellant and the court allowed Counsels request to have the complainant and witnesses to be recalled for cross examination. After several attempts, the Investigating Officer informed the court that he was unable to trace the witnesses and that some of the dates fixed for hearing, the complainant was said to be in school. On 16/2/2022 however, the complainant attended court but the defence Counsel was said to be unwell but the court insisted that due to the age of the case, it must proceed or he would vacate the order to recall witnesses. When Counsel did not appear in court later in the day as promised, the order to recall witnesses were vacated, the case was adjourned and the appellant granted bond again. The witnesses who attended were released. PW4 and 5 were heard in the presence of the appellant's Counsel. The appellant renewed the application to recall the PW1 and 3 but the court totally declined that application due to the age of the case and the fact that PW1 would be further traumatized by another court appearance. Counsel again applied for recall of PW4 which the court granted them.

23. I have set out the history of this case to dispel the appellants allegations that he was denied fair hearing. He was aware of his right to Counsel and was advised to get one right from the onset of the case. He did nothing. After a year, the appellant hired one Counsel, absconded for nearly two years before his arrest. It is not true that he was unwell because his own father who was the surety had to look for him, arrest him and avail him in court. He was allowed a chance to recall witnesses. The complainant, a minor attended court after several attempts, only for Counsel to fail to attend. After a careful consideration of the court record, the appellant set out to delay the hearing of this case. Justice cuts across both ways. Whereas the appellant expects a fair hearing, this court cannot continue harassing witnesses to come to court due to the appellants own faults. The court was patient with the appellant and upheld his rights to fair hearing.

Whether the offence of defilement was proved

24. In the case of Dominic Kibet Mwareng -V- Republic (2013) eKLR the Court said "the critical ingredients forming the offence of defilement are;-the age of the complainant;-proof of penetration;Positive identification of the assailant".



Proof of complainant's age.

25. In Joseph Kiet Seet -V- Republic (2014) e KLR the court held that “it is trite law that the age of a victim can be determined by Medical evidence and other cogent evidence”.
26. In the Francis Omuroni -V- Uganda CRA 2/200, the Court of Appeal of Uganda had this to say “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 also be proved by birth certificate, the victim's parents or guardian and by observation and common sense.”
27. In the instant case, the complainant told the court that she was sixteen (16) years and that she was born on 12/11/2004. PW1's testimony was corroborated by PW4's testimony that he assessed the complainant's age to be sixteen (16) years. In my view the age of the complainant was satisfactorily proved.

Proof of Penetration

28. The term Penetration is defined in section 2 of the [Sexual Offences Act](#) to mean “the partial or complete insertion of the genital organs of a person into the genital organs of another person”.
29. In the case of Mark Oiruri Mose -V- Republic (2013) e KLR, the Court of Appeal in defining penetration said thus “..... 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”.
30. Again, in Eric Onyango Ondeng -V- Republic (2014) eKLR the court held as follows “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”.
31. In this case the complainant told the court that the assailant held her by the neck, in the process, she hit a flask which broke, and he held her by the neck and took her to the bedroom, removed his jeans trouser and her pants and had sex with her. PW1 did not explicitly say what she meant by sex but being a sixteen (16) year old girl, this court is convinced that she knew what she was talking about. The assailant could be undressing himself and the complainant only to expose his genital organ. It must have been in the process of taking part in a sexual act. I find that PW1's testimony was corroborated by the testimony of PW4 who examined PW1 the next day after the ordeal on 6/9/2018 and found the hymen to be perforated, redness to the vaginal walls and he formed opinion that there was penetration because of the redness of the vaginal walls which was a result of friction. The complainant also suffered tenderness to the neck because of the force that was used in trying to subdue her. From an analysis of the complainant's testimony and findings of PW4 this court has no doubt that there was proof of penetration.

Whether the appellant was the perpetrator.

32. PW1 told the court that she knew the appellant together with his sisters and was washing clothes at their home when she was attacked. PW2 and 3, PW1's cousins with whom PW1 lived, confirmed that the appellant is their neighbour and that evidence was not rebutted or shaken. Soon after the incident, PW1 reported to PW2 and 3 who in turn reported to the police station. Infact, PW3 said that upon PW1 reporting to him about her ordeal, he went to the appellants home and on seeing them, the appellant took off but they chased and caught him and handed him to the elder, Chief and later to the police. From a consideration of the evidence its totally this court is satisfied that the appellant was the perpetrator.



33. PW1 knew the appellant. The incident took place in broad daylight and the appellant was arrested soon thereafter. There is totally no reason why PW1 would have framed the appellant.
34. The appellant raised an alibi defence to the effect that he left home on 4/9/2018 and returned on 5/9/2018 when he was arrested. He called DW2, 3, and 4 to confirm that they indeed the appellant was not home on 5/9/2018. In *Karanja -V- Republic (1983)501* the Court of Appeal held as follows “the burden of proving the falsity of the defence lay wholly on the prosecution in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused’s guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.”
35. In *Ssentale -V- Uganda (1968) EA 365*, the court held that an accused does not assume the burden of proving the truth or falsity of an alibi.
36. In *Sukha Singh s/o Wazir & others(1939) 6 EACA 145* the Court of Appeal of Eastern Africa upheld the decision on alibi defence of the High Court when it said, “if a person 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 the prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness, proceedings will be stopped”
37. 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”.
38. In this case, the appellant raised his alibi defence for the first time during his defence on 12/12/2024 about six (6) years after his arrest. The delay in raising this alibi defence goes to question the credibility of the defence. Further, the appellant was adamant that he went with his mother to introduce his wife to the uncle.
39. However, DW2 the appellants mother, was categorical, that she never went with DW1 to visit the uncle and that contradiction in the two testimonies, raised a doubt in the alibi defence. All the evidence weighed together; this court does not believe the alibi being an afterthought. The appellant denied knowing the complainant. As observed earlier, there was no reason for PW1 to frame the appellant. The defence was a mere denial and not believable.
40. As regards count 2, I find that the complainant was injured during the commission of the offence of defilement and the appellant should not have been charged with the offence of assault as it amounts to duplication of the charges. I therefore quash the conviction on count 2 and set aside the sentence.
41. As regards Count 1, I find no merit in the appeal. The conviction is sound and I affirm it. As for the sentence, I find that it was a slap on the wrist. The court will not interfere. The appeal is dismissed in its entirety.



**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAPENGURIA THIS
1ST DAY OF OCTOBER, 2025.**

R. WENDOHO

JUDGE

In the Presence of :-

Appellant – present in person

Majale for Respondent -Prosecution Counsel

Juma/ Hellen Court Assistants

