



**Plaka v Republic (Criminal Appeal E003 of 2025)
[2025] KEHC 13681 (KLR) (1 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 13681 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPENGURIA
CRIMINAL APPEAL E003 OF 2025
RPV WENDOH, J
OCTOBER 1, 2025**

BETWEEN

MARTIN PLAKA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

- 1 Martin Plaka, the appellant, was charged with the offence of defilement contrary to section 8(1) as read with Section 8(3) of the *Sexual Offences Act*.
- 2 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*.
- 3 The particulars of the charge were that on 21/8/2022 at (Particulars withheld) Centre in Pokot South, intentionally caused his penis to penetrate the vagina of EL a child aged fifteen (15) years or that, he intentionally touched the vagina of the child, EL
- 4 The case proceeded to full trial and the appellant was convicted of the main charge and sentenced to twenty years imprisonment. No finding was made on the alternative charge.
- 4 The appellant being dissatisfied with both the conviction and sentence, filed this appeal based on the following amended grounds,
 1. That the conviction was based on a non existent provision of the law being Section 8(1) (3) of the *Sexual Offences Act*;
 2. That the charge was defective because the word ‘unlawfully’ was omitted;
 3. That the appellant’s right under Article 50(2) (g) were violated;
 4. That the offence of defilement was not proved.



- 5 He therefore prays that the conviction be quashed, sentence set aside and he be set at liberty
- 6 This being a first appeal, this court has the duty to examine the evidence tendered in the trial court afresh, evaluate it and arrive at its own findings but bearing in mind that this court neither saw nor heard the witnesses testify. The court draws guidance from *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:

- 7 The Prosecution called a total of five (5) witnesses.
- PW1 Jane Kolima, an employee of [Particulars Withheld] school at Kabichbich recalled that on 21/8/2022 about 10.00p.m., the students were released to go and sleep and about 10.45p.m. one JN went to inform her that EL the complainant herein was not in the dormitory. PW1 enquired from the watchman whether he had seen her, they searched the school but did not find her; that the complainant was found the next day when the principal reported to the Police Post.
- 8 PW2 Hellen Rono is the Principal of St. [Particulars Withheld] School Kabichbich. She testified that on 21/8/2022, the Matron PW1 called to report to her that EL the complainant, was missing after preps. Efforts to trace EL that night were fruitless. Next day PW2 reported to the OCS Kabichbich at 6.00a.m. who told her that they had a girl at the police station who had been defiled and that she had led them to the house where she was defiled.
- 9 PW3 E.L. testified that she was born on 6/9/2006; that on 21/8/2022 about 10.00p.m. after school preps, she was unwell and decided to go home, at Kitale. She went through the fence and met the appellant who asked where she was going and she told him and he told her that he would take her back to the school or she goes to his house. She agreed to go with him; that the appellant put his genital organ in her genital organ. She remained in his house till 6.00a.m. when he told her to leave.
- 10 PW4 Jeremiah Kisang, a Clinical Officer at Kapenguria Referral Hospital recalled that on 22/8/2022 EL a child aged thirteen (13) years was taken to the Hospital with a history of defilement. On examination, he found that the complainant had inflammation to her private parts, bruises to the minora and majora, signs of blood, and minimal discharge in form of blood and the hymen was freshly torn. He formed the opinion that the child was defiled and he put her on treatment.
- 11 PW5 P.C Sifuna Geoffrey Simiyu of DCI Pokot South recalled that on 22/8/2022, he was assigned this case to investigate. He recorded statements and escorted the minor to hospital, and a P3 form was filled; that the minor had ran away from school, met somebody who took her to his house and defiled her. Police found her at the stage and she explained to them what had happened and they went to the appellants house and the minor identified him; that his family was away by then.
- PW5 produced the age assessment report (P.Exh.3).



Defence Case: -

- 12 When called upon to defend himself, the appellant testified on oath as DW1. He recalled that on 22/8/2022 about 10.00a.m., he was woken up by police officers who were in company of a girl. He denied knowing the girl but that he had met her the previous night and requested her to return to school but she requested him not to report to the police; that the girl alleged to have slept with him; that the girl was taken to hospital and he was asked for Kshs.300,000/=, by the Investigating Officer so that the matter could be settled out of court but he did not have it. He was then charged.
- 13 DW2 Monica Lokale of Kabichbich told the court that she was with Martin on Monday at night from the Centre and they parted and next day when she heard that he was arrested, she went to see him and found the girl who was crying. She did not know whether the appellant met the girl after they parted.

The Appellant's Submissions:

- 14 The first ground; the appellant submitted that the foundation of any criminal proceedings is the charge sheet and that the charge sheet as framed is non-existent i.e 8(1) (3) SOA; that the charge does not accord with section 134(1) of the Criminal Procedure Code; that the court went ahead to sentence the appellant under the same non-existent section which was prejudicial to the appellant.
- 15 The appellant also submitted that failure to include the words 'unlawfully' in the particulars of the charge renders the charge defective. For both grounds the appellant relied on the case of Jason Akumu Yongo- V- Republic (1983) eKLR where the Court of Appeal considered what constitutes a defective charge sheet.
- 16 The appellant also blames the court for violating his right to fair trial in that Article 50(2) and (h) of *the Constitution* were not complied with; that the court failed to inform the appellant of the said right before commencing the hearing. He relied on the decisions of JOO -V- Republic (2021) eKLR and K.O. -V- Republic E020/2021 where the court declared the proceedings a nullity for failure to comply with the said provisions.
- 17 Lastly, it was the appellants submission that the complainant's age was not conclusively proved and relied on the case of Alfayo Gombe Okello -V- Republic (2010) eKLR where the Court of Appeal held that the complainant's age ought to be proved beyond reasonable doubt because it is what determines the sentence to be meted upon conviction.
- 18 Reliance was also made on Dominic Kibet -V- Republic CRA.155/2011 where the Court held that proof of age is one of the critical ingredients in a charge of defilement.

Respondent's submissions: -

- 19 The appeal was opposed. The prosecution Counsel argued that the charge sheet was not defective because the charge of defilement is 'unlawful' by its very nature and failure to include the word unlawfully does not render the conviction fatal.
- 20 As regards the complainant's age the counsel submitted that the complainant told the court that she was fifteen (15) years old and born on 6/9/2006 and the same was corroborated by the age assessment report produced by the Investigating Officer.
- 21 In response to the allegation of breach of right to fair trial, Counsel submitted that the court record shows that the appellant was informed of his right especially the right to legal representation; that later, the appellant applied for adjournment to engage an advocate. He was granted the adjournment but he did not avail any advocate; that the appellant cross examined the witnesses and even called a witness



to support his case. Counsel argued that the right to fair trial was not violated. He urged the court to dismiss the appeal.

22 I have now considered the grounds of appeal, the evidence tendered in the trial court and the rival submissions of both parties.

The issues for determination are as follows: -

1. Whether the appellants rights to fair hearing were violated;
2. Whether the charge sheet is defective;
3. Whether the offence of defilement was proved.

Whether the appellants rights were violated.

23 Article 50 of *the Constitution* guarantees an accused person's right to fair hearing.

24 Article 50(2) (g) & (h) proved as follows, "every accused person has the right to a fair trial, which includes the right—

(g) to choose, and be represented by an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly";

25 The court has the duty to inform an accused person of these rights promptly. I have looked at the court record and I note that on 20/9/2022, the court recorded that the appellant had been informed of his right to representation under Article 50 of *the Constitution*. The appellant was out on bond and the hearing of the case did not commence till 28/11/2023. He had ample time to prepare for his defence. In addition, he applied for an adjournment to engage Counsel after he testified and the court was gracious enough to accord him that opportunity and adjourned. However, at the next hearing, the appellant did not have Counsel and the court proceeded with the hearing. The trial court did not violate the appellants right to fair trial and that ground must fail.

Whether the charge is defective.

26 Section 134 of the CPC provides on how a charge should be framed. It provides as follows:

27 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"

28 In determining whether or not a charge sheet was defective, the Court of Appeal in Sigilani -V- Republic (2004) 2 KLR 480, where it said "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"

29 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 sheet is fatal as to render any conviction a nullity has been established i.e that the defect must be substantive rather than being inform.

See case of Benard Ombina -V- Republic (2019) eKLR.



- 30 The first defect that the appellant complains of is that Section 8(1) (3) of the *Sexual Offences Act* does not exist, indeed, that section does not exist. The prosecution should have indicated that the charge was under section 8(1) as read with Section 8(3) of the Sexual
- 31 Offences Act. The trial court also erred by convicting the appellant under the said non-existent section. However, I find that the said defect cannot render the conviction a nullity in light of section 382 of the Criminal Procedure Code which provides as follows “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:
- 32 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.”
- 33 As to whether failure to include the word “unlawfully” in the charge sheet rendered the charge sheet fatally defective, the court has severally rendered themselves on the issue. In *Kaaka Masare*
- 34 *Mangeti -V- Republic* (2020) eKLR the Court of Appeal stated thus, “similarly, we reject the ground that the charge sheet was defective because the words ‘intentionally’ and ‘unlawfully’ were not included. The act of defilement in itself is unlawful. The words do not constitute any of the elements of the offence of defilement”.
- 35 The same view was accepted by the court of Appeal in *CRA 27/2015 Marindany -V- Republic* (2023) KECA 450. As held in the above case, the charge is not rendered invalid just because the word “unlawfully” was omitted from the charge sheet.

Whether the offence of defilement was committed:

- 36 In the 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; or

Positive identification of the assailant.

Proof of age,

- 37 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”
- 38 In the case of *Francis Omuroni -V- Uganda* CRA 2/2000, the Court of Appeal of Uganda 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 also be proved by birth certificate, the victim’s parents or guardian and by observation and common sense.”
- 39 See also *Mwalongo Chichoro Mwajembe -V- Republic* CA 24/2015 and *Edwin Masara Onsongo -V- Republic* (2016) eKLR



PW3 testified that she was born on 6/9/2006 and was fifteen (15) years and on 21/8/2022 when the incident occurred. PW3's testimony was corroborated by the age assessment report produced in evidence as P.Exh. 3. The complainant was examined on 25/8/2022 and found to be fifteen (15) years old. The ground that the complainant's age was not proved must fail.

Penetration,

- 40 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".
- 41 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".
- 42 Again, in Eric Onyango Ondeng – V- Republic (2014) eKLR, the court held; "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".
- 43 PW3 told the court that once she was in the appellants house, he inserted his genital organ into hers. Her testimony was corroborated by the testimony of PW4 who examined the complainant the next day on 22/8/2022 and found there was inflammation of the complainant's private parts, bruises to the minora and majora, signs of blood and bruises, minimal discharge of blood and had a freshly torn hymen. PW4 was of the view that there was defilement. There was indeed overwhelming evidence of penetration.

Whether the appellant was the perpetrator:

- 44 PW3 testified that she met the appellant when she escaped through the school fence. She denied knowing the appellant before. The appellant confirmed the same. According to PW3, the appellant told her to go with him or he returns her to school and she decided to go with the appellant. The appellant admits having met the complainant that night. He denied that he took her to his house. The court did not believe him. PW3 testified that when the appellant released her at 6.00a.m., she met police officers to whom she reported and she took them to the appellant's home. The appellant admitted that the complainant is the one who took police to his house following which he was arrested. One wonders how the complainant could have known his house if they had merely met on the road and parted. The court finds that the complainant led police where she had just been defiled. It was convenient for him because his family was away. DW2's testimony was not relevant because she did not know what happened to the appellant after they parted nor was, she present when the appellant met PW3. There is overwhelming evidence that the appellant met the complainant, lured her to his house and defiled her and was arrested soon after the incident. I find the conviction to be sound and affirm it.
- 45 The appellant did not challenge the sentence. The appellant took advantage of the complainant's foolishness of escaping from school at night and endangering her life. Instead of assisting her like a responsible adult by returning the girl to school or at least reporting to the school management, took advantage of the situation to defile the minor. The Court will not interfere with the sentence of twenty (20) years.
- 46 In the end the appeal is unmerited and is hereby dismissed in its entirety.

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

R. WENDOH



JUDGE

In the Presence of:-

Appellant – in person

Mr. Majale for Respondent - Prosecution Counsel

Juma/ Hellen Court Assistants

