



**Republic v Makada (Sexual Offence E018 of 2024)
[2025] KEMC 143 (KLR) (9 June 2025) (Judgment)**

Neutral citation: [2025] KEMC 143 (KLR)

**REPUBLIC OF KENYA
IN THE SIAYA LAW COURTS
SEXUAL OFFENCE E018 OF 2024**

**JP MKALA, RM
JUNE 9, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

PAUL OMONDI MAKADA ACCUSED

JUDGMENT

1. The accused is charged with the offence of defilement contrary to Section 8 (1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The Particulars are that on 11th March, 2024 at [particulars withheld] village Central Alego location in sub county of the Siaya County, he intentionally caused his penis to penetrate the vagina of L.A.O. a child aged 13 years old.
2. He is further facing an alternative charge of indecent act contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The Particulars are that on 11th March, 2024 at [particulars withheld] village Central Alego location in sub county of the Siaya County, he intentionally touched the vagina of L.A.O. a child aged 13 years with his penis.
3. The accused person pleaded not guilty to both charges. The prosecution called five witnesses to prove their case.

Prosecution Case

4. The case for the state is that the child compliant had been sent to the shop when she encountered the accused who her from the market. That he laid the child down undressed and had penetrative per-vagina intercourse with her before giving her 5/- to buy juice cola. That when she returned home her mother heard queefing sounds from her vagina and inquired if she had sex and she confirmed. Her mother examined her and reported the matter to police that night. The next morning, she was taken to the hospital.



5. PW2 and Pw4 are the minor's parents who told the court that they had sent the child to the shop and she delayed in returning. That later they saw her walking with difficulty and when her mother inquired she disclosed the defilement.
6. PW3 is the clinical officer. Her evidence is that the child reported that a known perpetrator had coaxed into sex severally and on examination she saw fresh bruises at 9.00 and 3.00 o'clock area. The clinical officer concluded that there were features consistent with penetration.
7. The state produced the following exhibits: -
 1. PRC form
 2. P3 form
 3. Lab request form
 4. Age assessment report.

Defence case

8. The accused person testified as the only defence witness. He stated that this is a fabricated case and it is a lie. He stated that the complainant testified that he carried her on his bicycle and took her to the toilet at the market. The toilet is at the middle of the market. That on 11.3.2024 was a market day so people were many, he could not take her into the toilet without other people seeing her.
9. He states that the complainant was seen putting juice cola in her porridge, she was beaten to tell where she got the money to buy the juice cola from, that's when she mentioned his name.
10. He claims that he does not know the complainant and her claim that he slept with her twice was not true. That there was no identification parade to identify him since the alleged time of offence was dark. That the complainant testified that she was 12 years.
11. He claims that this case is forged because of another case CR. No. 21 of 2020 against the complainant's uncle one EO who was found guilty of defiling his (accused) daughter and sentenced to ten years imprisonment.
12. The accused asks why did PW2 not notice the changes when he (accused) allegedly slept with the complainant the first time before she was forced to mention him? He claims that the girl was walking fine as she was taken to the police station and she boarded the police motor vehicle with no difficulties by herself.

Analysis and determination

13. Section 8(1) of the *Sexual Offences Act* (No. 3 of 2006) provides that a person who commits an act which causes penetration with a child is guilty of an offence termed defilement. Sub-section 3 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.
14. The point for determination is whether the prosecution has proved their case beyond reasonable doubt.
15. In these kinds of offences, the prosecution is duty bound to prove beyond reasonable doubt that the victim was a minor, there was penetration of the victim's genitalia and the penetration was by the accused person.



Penetration

16. Section 2 of the *Sexual offences Act* (No.3 of 2006) has defined penetration as the partial or complete insertion of the genital organs of a person into the genital organs of another person.
17. The question is therefore, whether there was penetration of the victim's genital organ with the genital organ of the accused person.
18. The evidence of PW1 is that the accused person forcefully took her into the bush when she was sent to buy sugar and kerosene from the market. PW3 on the other hand testified that the complainant was brought to the hospital with history of being defiled by a person known to her. Upon examination, she noticed some bruises on labia minora at 9.30 and six o'clock with tenderness. The hymen was torn with an old scar. This is confirmed by the medical examination form (P3) which was produced as exhibit 1 and PRC form as exhibit 3a&b.
19. From the above reason I find and hold that penetration has been proved beyond reasonable doubt.

Identity

20. PW1 told the doctor that she had been defiled by a person known to her. When she testified before court, she told the court that she had been defiled by the accused person. She testified that she was sent to the shop by her mother. The accused person took her on his bicycle to the bush next to a toilet and had penetrative sex with her. She stated that it was not his first time to have had penetrative sex with her.
21. PW2 testified that when the complainant ran late from the shop and upon arriving home, she noted that she was having difficulty walking she also had queefing sound from her vagina. Upon inquiring she stated that she had been defiled by a photographer who is the accused person. This is confirmed by PW4 who is the complainant's father.
22. The accused person submits that the complainant was forced to name him after being beaten by her parents. That the case is a forgery and driven by vendetta and want to get even since PW2 brother by the name EO had been jailed for 10 years imprisonment after being found guilty of defiling his (accused) daughter. However, the accused person does not deny that he is a photographer neither does he deny that he owns a bicycle.
23. Further, it is the accused person's evidence that the market is well lit, this means that the complainant saw him and she could not have mistaken him for another person. The complainant testified that the accused person defiled her several times and that the accused person is well known to her. Further, PW3 testified that the hymen was torn but old scar, this therefore, corroborates the evidence by the complainant that the accused person had defiled her not once but twice.
24. The accused person avers that no identification parade was conducted to identify him. Identification parade is relevant only when the identity of the perpetrator of the offence is not well known to the victim.
25. Even though PW1 testified as the only witness who identified the accused person. This court believes the complainant positively identified the accused person even without corroboration. The accused is well known to her and also to the complainant's family. The accused used to photograph the complainant's and her family, she cannot therefore confuse him with someone else. In *Mungania & 2 others v Republic & 2 others (Criminal Appeal 21 of 2020 & E003 & E068 of 2021 (Consolidated))* [2022] KEHC 167 (KLR) (4 March 2022) (Judgment) the judge held as follows: -



52. Evidence from eyewitnesses plays an important role in all contested cases. However, as alluded to earlier, the memory is a fragile and malleable instrument, which can produce unreliable yet convincing evidence. Because mistaken witnesses can be both honest and compelling, the risk of wrongful conviction in eyewitness identification cases is high, and can result in injustices. Our system of justice is deeply concerned that no person who is innocent of a crime should be convicted of it. In order to avoid that, a court must consider identification testimony with great care, especially when the only evidence identifying the accused as the perpetrator comes from one witness. However, the law is not so much concerned with the number of witnesses called as with the quality of the testimony given. A guilty verdict is permitted, only if the evidence is of sufficient quality to convince the court beyond a reasonable doubt that all the elements of the crime have been proven and that the identification of the accused is both truthful and accurate.
53. As was held in *Charles O. Maitanyi v Republic*,²⁰ it is necessary to test the evidence of a single witness respecting to identification, and, absence of collaboration should be treated with great care. In *Kariuki Njiru & 7 others v Republic*²¹ the court held that evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.
54. To determine whether identification is truthful, that is, not deliberately false, the court must evaluate the believability of the witness who made an identification. In doing so, the court may consider the various factors for evaluating the believability of a witness's testimony. Regarding whether the identification is accurate, that is, not an honest mistake, the court must evaluate the witness's intelligence, and capacity for observation, reasoning and memory, and be satisfied that the witness is a reliable witness who had the ability to observe and remember the person in question. Further, the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person, and whether the victim knew the accused before.
26. During voir dire the court observed that although the complainant was 13 years, she was well oriented and also possesses knowledge. Further the offence was discovered only a few minutes after its commission, therefore the complainant's mind was still fresh and could remember vividly events leading to her defilement and the perpetrator of the offence.
27. From the above analysis it is my holding that the accused person has been positively identified as the person who defiled the complainant herein.

Age of the complainant

28. The age of the minor was in dispute. The minor who is the complainant in this matter is alleged to be aged 13 years. PW1 testified that she was 13 years of age, when this matter came up for hearing for the first time PW2 testified that the minor was 12 years before the court directed the matter to start *denovo* due to the disparity in the age of the victim.
29. The importance of the age of the victim cannot be overemphasised. In the case of *Kenneth Mutegi Kilonzo v Republic* [2021] eKLR it was held that:
22. Proof of a victim's age is a key ingredient to prove an offence of defilement given that the penalty is heavy depending on the complainant's age.



30. Rule 4 of the Sexual offences Rules 2014 provides

When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar documents.

31. Even though PW1 testified that she was 13 years of age, PW2 and PW4 did testify as to the age of the minor. It is worth noting that PW2 and PW4 are PW1's parents. When PW2 testified, she told this court that the minor had a birth certificate, and that she had given it to the police but they later returned it to her. I note that the birth certificate was not produced instead an age assessment was produced by investigating officer as Pex-5. Why did the state opt to conduct an age assessment instead of producing the birth certificate alluded to by PW2 who is the Claimant's mother? It is not known to this court.

32. According to the age assessment, the minor's age is estimated as 13 years. However, when the investigating officer testified as PW5 she stated that the minor was 14 years. Further, according to PW3 who is the clinical officer who examined the minor a day after the alleged offence, she testified that she was informed by the minor and her parents that the minor was 12 years. This is also corroborated by the P3 form produced as exhibit 1.

33. From the above, it is unclear how old the complainant is. This court cannot hold with certainty how old the minor could be. Is she 12, 13 or 14 years old?

34. The age assessment report was produced by the investigating officer. Section 77 of the [Evidence Act](#) provides: -

77. Reports by Government analysts and geologists

- (1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.
- (2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.
- (3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.

35. From the above section, this court may admit the age assessment report as genuine, however, admitting the said document without being subjected to cross examination as to its authenticity and veracity by the accused person will be against the tenets of right to fair hearing guaranteed under Article 50 of the [constitution](#) of Kenya and prejudicial to the accused person.

36. The maker of the document must appear and answer some questions unless the accused person waives that right by not asking any, which in this case he has not. This cannot be cured by section 33 of the [Evidence Act](#). The maker of the document is alive, the prosecution has not given reasons why the doctor who assessed and prepared the age assessment report for the minor's was not called to produce the same. They have not explained the difficulty they faced obtaining the attendance of the said doctor. See the case of Okumu [v Republic \(Criminal Appeal 178 of 2018\)](#) [2023] KECA 353 (KLR) (31 March 2023) (Judgment).



37. From the above analysis, it is my holding that the age assessment was produced by a person who had no capacity to produce, the investigating officer could not answer technical questions as regards the age assessment. Consequently, the said report be and is hereby expunged from the record.
38. Having expunged the age assessment, has the state provided enough evidence to prove that the complainant was between the age of 12 and 15 as at the time of the offence? Upon examining and considering the evidence on record in its entirety, I find and hold that the prosecution has failed to prove the age of the victim to the standard expected by law.
39. The prosecution has the burden of proving their case beyond reasonable doubt. In *Moses Nato Raphael vs. Republic* [2015] eKLR which was cited with approval by G. V. Odunga J in *Maurice Okello Kaburu & another v Republic* [2022] eKLR

What then amounts to “reasonable doubt”? This issue was addressed by Lord Denning in *Miller v. Ministry of Pensions*, [1947] 2 ALL ER 372 where he stated:-

That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

40. The prosecution has a duty to prove all the three elements of the offence of defilement, that is age, penetration, and identify the accused as the perpetrator of the offence. In our present case, the state has failed to prove the complainant was a minor as at the time of the alleged commission of the offence.
41. In the end I find that the prosecution has failed to prove their case beyond reasonable doubt. Consequently, the accused person is hereby acquitted under section 215 of the CPC and set at liberty forthwith unless lawfully held.

It is so ordered.

DATED AND DELIVERED IN OPEN COURT AT SIAYA THIS 9TH JUNE, 2025.

J. P. MKALA

RESIDENT MAGISTRATE

Delivered in the presence of:-

Mr. Kofa for state

Accused present

C/A John Okumu

