



**Republic v Omar (Criminal Case E001 of 2025)
[2025] KEMC 204 (KLR) (21 August 2025) (Judgment)**

Neutral citation: [2025] KEMC 204 (KLR)

**REPUBLIC OF KENYA
IN THE LAMU LAW COURTS
CRIMINAL CASE E001 OF 2025
FM MULAMA, RM
AUGUST 21, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

GALOLE OMAR ACCUSED

JUDGMENT

A. Introduction.

1. Galole Omar is charged with defilement contrary to section 8(1) as read as section 8(3) of the *Sexual Offences Act*. He is also charged with the alternative count of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.
2. The particulars were that on the 13th day of February 2025 at around 0200hours at (particulars withheld) area of Langoni in Lamu county the accused intentionally and unlawfully caused his penis to penetrate the vagina of H.M.O a child aged 12 years.
3. In the alternative count, the particulars were that on the said, time and place the accused unlawfully and intentionally caused the contact between his genital organ namely penis and genital organ namely vagina and also touched the breasts of H.M.O a child aged 12 years.
4. 6 witnesses were called by the prosecution whereas on the other hand the defence, the accused gave sworn evidence after being found to have a case to answer and called 2 other witnesses in his defence.
5. In this judgment I have considered the testimonies of both sides, the exhibits produced as well as the submissions filed and dated 4/8/2025.



The Prosecution's case.

6. It is the prosecution's case through the victim pw1 that on 9/2/2025 she was at (particulars withheld) area with her father and siblings and went to visit their aunt but upon arrival they found that she had travelled but they found the accused. Her father then left her and her siblings in the accused's house and went to sleep at a friend's place.
7. It was her testimony that on 14/2/2025 while sleeping with her sister and 2 of the accused's children the accused came to the room and asked her to join him in his room and she responded that he had a wife in the room and the accused told her to let his wife alone as she's stupid and she had gone to give birth at their home and he then pulled her out of the bed and took her to his room and upon arrival he told her to sleep with him and in turn he will give her Kshs.200/= and he then forced her to have sex with her. To use her own words(kitendo cha ndoa)
8. She explained that the accused took his penis(tupu yake) and inserted in her vagina(utupu wangu wa mbele) and that she felt pain and after he was done he told her not to say anything as he will do something bad to her if she speaks out and he asked her to put on her clothes and go back to her room and the following morning despite promising to give her Kshs.200/= he gave her Kshs.50 and that the balance would be given to her later and she then went and gave her father the kshs.50 note and explained to him what had transpired and the case was reported to the police and she was later examined by the doctor.
9. Pw 2 confirmed that indeed he took the victim to the accused's house on 9/2/2025 to sleep at Dw 3's room and he did that but on 15/2/2025 which was on a Thursday (although the calendar says otherwise) Pw1 went and to him that he doesn't want to sleep at the accused's house again but she did not tell her exactly what the reason was. Later than evening she then opened up and told him that the accused had disturbed her the entire night but she didn't give much details and upon further interrogation she was not giving any information and he decided to take her to the police station and she was questioned and later referred to hospital for medical examination.
10. Pw 5 Dr. Kombo Mohamed Kibwana stated that the victim was examined on 15/2/2025 and gave a history of having been defiled on 14/2/2025 by the accused who had asked for sexual favours but she declined and that is why he forced her into sexual intercourse.
11. That upon examination her hymen was missing but it wasn't freshly torn and based on the history in the treatment notes it was his view that it had not been lost a while ago as there were no signs of inflammation, no lacerations and no bleeding.
12. Pw 5 noted that in the P3 the examining doctor confirmed that the hymen was missing and noted that it had been chronically perforated and in his view that meant it had not been recently torn. He also noted that the minor admitted to have engaged in a sexual act before.

Defence case

13. The accused in his sworn testimony while denying the charges and/or any wrong doing on his part stated that on 13/2/25 at 1800 hours he was in the house when Pw 2 came with his children including the victim and told him that he had brought them to sleep at his place. At that moment he was in the house with Dw 2, 3 and 2 others but the wife had travelled.
14. It was his testimony that their children share one room and him and the wife share the other room as the house has only 2 rooms so he informed Pw 2 to plan with DW 2 and 3 on how his children



would sleep and thereafter Pw 2 left and that meant that the children's room that evening would have 5 children sleeping therein.

15. Contrary to the testimony of the victim, the accused stated that at no time that evening or night did he enter their room as the door has a lock and it is always locked from inside and they slept until morning. On the following day on 14/2/2025 in the evening while on his way to the shop, the victim's brother (particulars withheld) told him that he had heard that the accused had intercourse with the victim but he was tight-lipped on further details and the accused told him that he will sort the issue with Pw2 so he proceeded with his journey to the shop only for the victim's brother to hit him on the head with a wooden stick and he was rushed to Jambo hospital. He produced treatment notes and P3 to support this.
16. Pw 2 then approached the accused and sort to have the issue of assault settled out of court and he initially agreed but a neighbour advised him to get better first before he could have any talks however, on 18/2/2025 he was arrested by the police. He insisted that he did not do anything to the victim and that the case is motivated by malice since he has a report case of assault against the victim's brother.
17. Dw 2 in his sworn testimony stated that the victim came to their house and in their room, he would sleep on the bed with Mwanajuma and Umu whereas Dw 3 and victim would share the mat on the floor and on the material day that is how they slept as the accused slept in his room.
18. He testified that their room has a lock on the door and on the particular night the accused did not knock or gain entry into their room as he did not hear anyone in the room that particular night and in the morning he woke up and found the victim still sleeping and the door was still locked.
19. Dw 3 gave unsworn evidence but largely corroborated the evidence of DW2 and further stated that the victim never complained to her about anything.

Accused's submissions

20. It is the submissions of the accused that the prosecution's case was watered down by the evidence of the defence and most importantly that the victim never narrated to the court how the accused gained entry into their room and as such there in no way the accused gained entry to the room that had been locked from inside hence no incident of such a nature occurred on the material day.
21. That the victim upon examination hours after the alleged incident and all appeared normal to the extent that there were no injuries, lacerations or forced penetration and as such penetration was not proved.
22. I have considered the exhibits, the testimonies for both sides as well as the submissions by the accused person.

B. Issue For Determination.

23. The following issue is in my view for determination in this matter;
 - a. Whether the offence of defilement was proven to the required standard.

C. Analysis And Determination.

- a. Whether all the 3 ingredients to prove defilement were proved beyond reasonable doubt.



24. In the case of *Dominic Kibet Mwareng v Republic* [2013] eKLR the High Court observed thus:

“The critical ingredients forming the offence of defilement are; the age of the complainant, proof of penetration and positive identification of the assailant”.

25. Similarly, in the case of *CWK v Republic* [2015] eKLR, Kimaru J (as he then was) held that for the prosecution to sustain the charge of defilement, the prosecution must establish penetration, the perpetrator of the offence and the age of the victim.

26. In the case of *George Opondo Olunga vs Republic* [2016] eKLR the court held on appeal that each of the 3 ingredients named above must be proved for a conviction to ensue.

27. Section 8(1) of the *Sexual Offences Act* provides as follows:

“ 8.

- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
- (3) 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.
- (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.
- (5) It is a defence to a charge under this section if -
 - (a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
 - (b) the accused reasonably believed that the child was over the age of eighteen years.
- (6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.
- (7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the *Borstal Institutions Act* and the Children’s Act.



(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees.

28. The first element is age. The importance of proving age in a sexual offence case cannot be gainsaid. In the case of *Kaingu Kasomo vs Republic*, Criminal appeal No. 504 of 2010, the court of appeal stated as follows;

“Age of the victim of sexual assault under the *sexual offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.”

29. In this quest a birth certificate was produced as Pexh 3. It belongs to the victim and shows that she was born on 5/8/2012. The incident happened on 13th February 2025. It therefore follows that by the time the incident happened she was 12 years and some months. Her age was thus proved beyond reasonable doubt and for all intents and purposes she is a child.

30. The second ingredient is penetration. Penetration is defined under Section 2 of the *Sexual Offences Act* as follows:

“The partial or complete insertion of the genital organ of a person into the genital organs of another person.”

31. Penetration is ordinarily to be proved through the evidence of the victim herself corroborated by medical evidence and in other circumstances through the sole evidence of a child and this is governed by section 124 of the *Evidence Act*.

32. The victim told the court that on the material day the accused went to her room where she was sleeping with her sister and the accused’s children and he woke her up and asked him to join him in his room and the victim reminded him that he has a wife but the accused rubbished that off and told her to let her alone as she is stupid and infact she has gone to their home to give birth and she then pulled her out of the bed and took her to his room and promised to give her Kshs.200/= then forced her to have sex with her where after he removed his penis and inserted in her vagina. To use her exact words she stated, “alichukua tupu yake akaweka kwa utupu wangu wa mbele”.

33. She stated that it was painful and told her not to say anything and if she dares say anything he will do bad thing to her. The matter was finally reported despite the alleged threats and upon medical examination Pw5 noted from the medical notes that the victim’s hymen was missing and was not freshly torn and, in his view, the same might have been torn a while ago and not within a day or 2.

34. The P3 on its part indicated that the hymen was not intact indicating chronic perforation. This word perforation rubbed the accused the wrong way and upon the doctor being cross examined, he was unable to clearly explain what it actually meant. The P3 further noted that the victim in her history had agreed to have had several consensual intercourse before the day she was examined.

35. The question that begs an answer is whether the accused actually penetrated the victim. In order to answer this question, I will look at the totality of the evidence of the victim that allegedly led to the occurrence of the incident.

36. It is not in doubt that by the time the alleged intercourse between the accused and the victim was happening she was not a virgin as she admitted to have had previous engagements before this alleged one. It was her testimony that the accused took his penis and inserted in her vagina and it was painful.



- This piece of evidence is not to be looked in isolation in order to gauge whether the victim was telling the truth or not.
37. The victim stated that before sex happened, she engaged the accused in a conversation in the room when the accused went to pick her and even discussed about the accused's wife (in bad light I should say if its true). Dw 2 and 3 were clear that they never saw or heard the accused get into their room leave alone him speaking to anyone including the victim.
 38. The time the accused and the victim had and the discussion that ensued was enough to catch the attention of the other children who were in the room sleeping. It is not said whether they were whispering or not. It is not therefore inconceivable that they had that discussion in the room and the other children did not hear them till the time she was picked out of the bed and taken out of the room. Further if at all the accused indeed entered their room, it is the evidence of Dw 2 and 3 that was not controverted and/or challenged that the door makes some noise when it is opened and locked and none of them heard the noise of the door when opened and locked.
 39. In addition, she stated in court that the accused threatened her not to disclose what had happened after the act as he released her back to her room. On the other hand, on cross examination she changed tune and stated that during the act she did not scream as she had been threatened. As if that is not enough she further states that the following morning she was given Kshs.50/= and she was told that the balance will be given to her later and that she then went to his father (Pw 2) and informed him what had transpired that night and Pw 2 advised that the Kshs.50/= would be used as an exhibit and they went and reported the matter to the police and were referred to hospital.
 40. On the same issue, Pw 2 on his part stated that the victim told him that on 15/2/2025 which he vividly remembers as a Thursday although it was not as per the calendar, that she does not want to sleep at the accused's house again but she didn't tell him the reasons why. Pw 2 went to work and in the evening, she opened up to him and told him that the accused had disturbed her the entire night and she did not explain what she meant and this prompted them to head to the police and at the police she was interrogated and referred to hospital.
 41. At the hospital she told the treating nurse that the perpetrator asked the girl for sexual intercourse and she refused and that is when the perpetrator threatened her and defiled her against her wish.
 42. All these depict the victim as a chameleon in the sense that she changes her story according to the environment she is in. When she was first reporting to the father a different story, with the police a different story yet again in court and at the hospital different account of what really transpired. All these make her an unreliable witness and her evidence is not trustworthy and of less probative value. She has mastered the art of lying albeit at an early age and she is not afraid she does so after taking an oath. I really pity her.
 43. As though that is not enough, the doctors did not make it any better. A look at the treatment notes it is indicated on the 1st page that her hymen was not intact, no signs of inflammation, no lacerations, no bleeding. The doctor then formed the impression/opinion that there was "defilement in a chronic perforated hymen". In the PRC and P3 forms the same examining doctor indicates that hymen is not intact. Come Pw5 who neither examined nor attended to the victim stated that according to the comments of the examining doctor the hymen had not been torn a while ago and not within a day or 2. I have perused all the treatment notes and no such comments were ever made. It is thus not clear where Pw 5 got those comments from and it is not possible for him to make and/or give such an opinion when he neither saw nor examined the victim.



44. On the hymen, the examining doctor states it was not intact and it was chronically perforated. Pw5 in his understanding of the word perforated stated that it would mean many holes and that an imperforate hymen is one that has blocked the pathway for the menses and imperforate is the opposite of perforate.
45. The ordinary meaning of a perforated thing is one which has been pierced with a hole or holes. That would suggest that that thing has to be present in the first place before it is said to be perforated. The same examining doctor on one hand tells us that the hymen is not intact, meaning it is not there. On the other hand, the same doctor tells us that it is there but perforated. Pw 5 a professional like the examining doctor was not even able to explain with clarity what that meant.
46. However, of importance to note was that while the victim stated that when the accused inserted his penis in her vagina, it was painful but upon examination, there were no signs of inflammation, no lacerations and no bleeding. It is not logical and normal that one especially a child of her age would feel that kind of pain and upon examination there are no laceration, inflammation or bleeding.
47. Ordinarily the pain would be caused in the circumstances with the forceful entry of the penis into the vagina possibly because it is not well lubricated or better still because the penis is bigger than the vagina given the fact that the part has not grown to maturity and any attempts to force entry into would result to a painful experience and as a result of that pain there must be either lacerations or inflammation and in the case of lacerations, bleeding would ordinarily occur in the affected region. It is therefore not possible that the victim felt that pain and upon examination no inflammation or lacerations were seen considering she was taken to hospital within 24 hours.
48. Another glaring contradiction is the date the incident is alleged to have happened. The charge sheet speaks of 13/2/2025 at 0200hours. The victim and Pw 2 speak of 14/2/2025 at night. Given the said timelines, it cannot be mistaken given the times at night as the charge sheet is clear that the incident happened 2 hours into 13/2/2025. Furthermore, as I have already alluded to elsewhere, Pw 2 made it even worse with his assertion that the 15/2/2025 was a Thursday when in actual sense it was on a Saturday. He could not get right even the date how about the evidence he purports to give?
49. Given the contradictions aforementioned, I cannot in good conscience and based on the evidence tendered be convinced that there was any penetration on the victim on the material night. That element is thus not proved.
50. The last ingredient is identification. In this ingredient the evidence of the victim is very crucial. The victim in this case acknowledged knowing the accused as she had slept in his house.
51. It is also not in doubt that this alleged incident happened at night and as per the charge sheet the date notwithstanding at 0200hours. There was no explanation whatsoever as to the status of the lighting in both rooms first where the victim was picked from and secondly where she was allegedly defiled from.
52. The law on identification especially where it takes place in difficult circumstances such as what happened herein is that it should be treated with a lot of care so as to avoid convicting the accused person on evidence of mistaken identity. As already observed no evidence was led as to the status of lighting in the house let alone both rooms.
53. In *Francis Karuiki and 7 others v Republic Cr. Appeal No 6 of 2001 [200] eKLR* cited with approval in the case of *LSA v Republic (Criminal Appeal E035 of 2024) [2025] KEHC 6356 (KLR) (14 May 2025) (Judgment) (Justice JN Njagi sitting at Garsen)* it was held that;

“The law on identification is well settled and this court has from time to time said that the evidence relating to identification must be scrutinized carefully and should only be accepted



and acted upon if satisfied that the identification is positive and free from possibility of error.”

54. In *Wamunga v Republic* [1989] KLR 424 at 426 the Court of Appeal had this to say on the subject:
- “Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from the possibility of error before it can safely make it the basis of a conviction.”
55. Finally in *Kimea v Republic (Criminal Appeal 010 of 2020)* [2022] KEHC 104 (KLR) (18 February 2022)(Judgment) the court enumerated the factors to be considered in identification to include such factors as the lighting conditions under which the witness made his/her observation; the distance between the witness; the period of time the witness actually observed the perpetrator and whether the witness had an unobstructed view of the perpetrator.
56. In this case none of the witnesses but especially the victim never told the court how she was able to identify the accused person as the perpetrator. She did not lead evidence as to the status or the lighting conditions of the room or infact both rooms. The state was under an obligation to describe the lighting condition of the rooms and draw a nexus as to how the accused was identified with the aid of the light.
57. In the absence of such evidence, it will be unsafe to find that it was the accused who was the perpetrator when the only identification evidence is that done at the dock.
58. In the circumstances, I find and hold that the accused was not properly identified and the 3rd element similarly fails.
59. I now move to consider whether the charge of committing an indecent act with the child was disclosed as per section 11 of the SOA. Section 2 thereof provides as follows;
- “indecent act” means an unlawful intentional act which causes
- a. Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.
 - b. Exposure or display of any pornographic material to any person against his or her will.”
60. From the definition it is clear that an indecent act does not include an act that causes penetration. In my finding on the element of penetration, I have held that penetration was not proved. The question that then begs an answer is since penetration was not proved, did the accused then commit an indecent act with the victim?
61. There is no evidence that the accused touched her breasts and given that penetration was not proved in the circumstances I have discussed above it is not possible that the accused used his penis to cause contact with the victim’s vagina but most importantly the accused was not properly identified as the person who defiled or was with the complainant on the material night and time.
62. Consequently, and based on those grounds, the alternative count also fails.



D. Conclusion And Disposition.

63. To this end therefore the charge of defilement contrary to section 8(1) as read with 8(3) of the *Sexual Offences Act* has not been proved to the required standards.
64. I make no finding on the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.
65. The accused person is thus not guilty for the said offences and he is acquitted in the said offences under Section 215 of the Criminal Procedure Code.
66. He is at liberty unless otherwise lawfully held.
67. Those shall be the orders of the court.
68. Right of appeal 14 days.

DATED, SIGNED AND DELIVERED AT LAMU LAW COURTS THIS 21st DAY OF August 2025.

F.M. MULAMA

RESIDENT MAGISTRATE

In the presence of:

Ahmed Omar for DPP.

Court Assistant:- Fathiya Loo.

Galole Omar-virtually

