



**AA v Republic (Criminal Appeal E027 of 2025)  
[2025] KEHC 15202 (KLR) (23 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15202 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL E027 OF 2025  
S MBUNGI, J  
OCTOBER 23, 2025**

**BETWEEN**

**AA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence delivered by  
Senior Resident Magistrate G. OLLIMO on 20th September 2023)*

**JUDGMENT**

**Background**

1. The appellant herein had been charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *sexual offences Act* no. 3 of 2006.
2. The particulars of the offence are that on 26<sup>th</sup> day of November 2021, in Khwisero sub-county within Kakamega County, intentionally and unlawfully caused his penis to penetrate the vagina of AM, a child aged 4 years old.
3. He was charged with an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *sexual offences act* No. 3 of 2006. The particulars are that on the 26<sup>th</sup> day of November 2021, in Khwisero Sub-County, within Kakamega County, intentionally and unlawfully touched the vagina of AM, a child aged 4 years old.
4. The appellant took a plea and pleaded not guilty, and the prosecution called 5 witnesses in support of its case, while the appellant was the only witness in his defence case.
5. The trial court, upon analysis of the prosecution's case, found that the prosecution had proved its case beyond a reasonable doubt and found the appellant guilty and sentenced him to life imprisonment.



6. The appellant, being dissatisfied with the conviction and sentence, filed the above appeal based on the following grounds;
  - a. That the trial court erred in law in not proving the ingredient of the offence in the instant case beyond a reasonable doubt.
  - b. That the trial court erred in law and in fact in relying on fanciful and remote possibilities to convict the appellant.
  - c. That the trial court erred in law and in fact in not weighing the conflicting evidence in the prosecution case that was/is inconsequential to the conviction.
  - d. That the trial court erred in law and in fact in not appreciating the appellant's cognate defence that overwhelmed the prosecution's case.
7. He prays that the court quash the conviction and set aside the sentence, and set him free.
8. At the appeal, this court directed that the appeal be canvassed by way of written submissions.
9. At the time of writing this judgment, none of the parties had filed their submissions.

**Brief of the facts.**

10. PW1 was the complainant mother, AM. She testified that on 26<sup>th</sup> November 2021, her daughter, the complainant, who was aged 5 years, came home from school, had lunch and went to play.
11. She recalled that her daughter came home at 5.00 pm. Looking dull and crying. That she was carrying a paper bag with groundnuts, and when asked, claimed that the accused had given her the groundnuts.
12. She claimed that the complainant was pressed, and when she went to relieve herself in a tin, she screamed from the pain and confessed that the accused "A amechukua dudu yake akaniwekea sehemu yangu ya siri." She examined the minor and saw some blood on her vagina, and that her genitalia were torn. When they went to confront the accused with her husband, they found him in the company of their in-laws, and the minor was able to identify him.
13. They reported the incident to the sub-chief, and the accused was arrested and escorted to the police station, and the minor was taken to Khwisero hospital. She produced the treatment notes as MFi-1 and P3 form as MF1-2
14. On cross-examination, she denied escorting the accused for examination and stated that he reported the incident at the police station.
15. PW2 was the minor who testified after a voir dire was conducted, and she gave an unsworn statement.
16. The complainant was able to identify the accused as A and claimed that the accused "alichukua dudu yake akaniwekea", translating that "he took his penis and put it inside my vagina"
17. She stated that they were in a maize farm, and afterwards he gave her some groundnuts, and she later informed her mother.
18. During cross-examination, she confirmed that the accused had defiled her in the maize farm.
19. PW3 was the complainant's father. He identified the accused as his brother's son and recalled that on 26<sup>th</sup> November 2021, he came home at 6.00 pm. And found his wife and his children washing groundnuts, and when he came back from opening airtime, he found his wife distressed, and she later showed him the tears on PW2's genitalia and informed her that it was the accused who was responsible.



20. He claimed that he went to confront the accused and found him in the company of his in-laws, and the complainant was able to identify the accused, who denied defiling her.
21. The accused was escorted to the police station, and the complaint was taken to the Khwisero dispensary.
22. PW4 was the clinical officer from Khwisero health centre who testified that on 27<sup>th</sup> November 2021, they received the complainant, who was in the company of her parents, with a history of defilement.
23. She examined her and found that her genitalia had bruises in the opening, the hymen was missing, and there was blood in the vagina.
24. The complainant was taken to the lab, where they did a urine, HIV, and Syphilis test. In her urine, red blood cells and epithelial cells were noted that which indicates defilement.
25. She produced the P3 and the PRC form dated 29/11/2021.
26. During cross-examination, she confirmed that she only examined the minor, not the accused.
27. PW5 was the investigating officer who took over the case. He avers that the investigation revealed that on 27/11/2021, around 3.00 pm. The assistant chief came to the station with the accused, who was suspected of defiling the minor, and later the minor came with her parents, who were later escorted to Khwisero health centre, and the witness statement was recorded, and the accused was charged. He produced the complainant's birth certificate, indicating she was born on 19<sup>th</sup> January 2016 as PExh. 4.
28. On cross-examination, he confirmed that he took over the investigation from PC Pendo, but he concluded the investigation upon her transfer.
29. The prosecution closed its case, and the trial court ruled that it had proved a prima facie case. The accused was placed in his defence, who gave an unsworn statement.
30. He testified that he was 23 years old and a resident of Mundobelwa. he testified that the assistant chief, Mr Makomdo, came to arrest him at Mr. willy's home and escorted him to the police station at Khwisero and denied the allegation of defilement and maintained his innocence.
31. The trial court, upon analysing the evidence and witness statement, found that the prosecution had established their case beyond a reasonable doubt and, upon the accused's mitigation, considering the age of the victim, sentenced him to serve life imprisonment, for which he now appeals against the conviction and sentence.

### **Analysis and Determination**

32. I have considered the petition of appeal, the proceedings before the trial court, and the evidence on record. As this is a first appeal, this court is under a duty to re-evaluate and re-analyse the evidence afresh and draw its own conclusions, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify. This principle was well stated in *Okeno v Republic* [1972] EA 32, where the Court of Appeal held that the first appellate court must subject the evidence as a whole to fresh and exhaustive scrutiny and draw its own conclusions, though it should give allowance for the trial court's advantage of observing the witnesses.
33. The appellant was charged and convicted of defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#) No. 3 of 2006, which prescribes a sentence of life imprisonment where the child is under eleven years of age. To sustain a conviction for defilement, the prosecution must prove three essential elements:



- a. The age of the victim;
  - b. Proof of penetration; and
  - c. Positive identification of the perpetrator.
34. The first element for determination by this appellate court is whether the prosecution proved the age of the complainant. The age of the complainant is a crucial element because it determines both the charge and the applicable sentence. The prosecution produced a birth certificate (PEXh. 4) by Pw5, who was the investigating officer, showing that the complainant was born on 19th January 2016, which made her about five years old at the time of the offence. This evidence was not disputed by the appellant.
  35. In *Fappyton Mutuku Ngui v Republic* [2012] eKLR, the Court of Appeal emphasised that documentary evidence such as a birth certificate, age assessment report, or the testimony of the parent is sufficient proof of age. Accordingly, the trial court correctly found that the complainant was a child of tender years within the meaning of Section 2 of the *Sexual Offences Act*.
  36. That being the case, this court finds that the prosecution was able to prove the age of the complainant.
  37. The second issue for determination was on penetration. Penetration is defined under Section 2 of the *Sexual Offences Act* as the partial or complete insertion of the genital organ of one person into the genital organ of another. The complainant, PW2, in her unsworn testimony, gave a clear and consistent narration that the appellant “alichukua dudu yake akaniwekea,” meaning he inserted his penis into her vagina.
  38. Her testimony was corroborated by the medical evidence of PW4, the clinical officer, who examined the minor and found bruises on the vaginal opening, a torn hymen, and the presence of blood on her vagina. The P3 form and PRC form confirmed recent penetration and trauma consistent with defilement.
  39. The Court of Appeal in *Mohammed Abdalla v Republic* [2016] eKLR reaffirmed that medical evidence is not mandatory to prove penetration if the testimony of the victim is credible and reliable. In this case, both medical and oral evidence were consistent, leaving no doubt that penetration occurred.
  40. In *Dominic Kibet v Republic* [2013] eKLR, the Court of Appeal in Nakuru, it was equally stated that the medical evidence of a broken hymen and vaginal trauma sufficed to prove penetration. The Appellant’s unsworn denial does not rebut this consistent evidence.
  41. The third issue for determination was on the identification of the accused person. It was the evidence of the complainant that she knew the accused person as “A,” a relative and neighbour during the confrontation at Mr. Willy’s home, where the complainant was with her parents, the complainant identified the Appellant in the presence of her in-laws, which reinforces her recognition. In *Anjononi & Others v Republic* [1980] KLR 59 (Court of Appeal), the Court held that recognition by a familiar person is more reliable than stranger identification. No evidence suggests mistaken identity or malice.
  42. The offence occurred in broad daylight in a maize farm. PW1 and PW3 testified that when they confronted the appellant, the complainant immediately identified him as the assailant.
  43. The Court of Appeal in *John Muiruri v Republic* [1983] KLR 445 held that evidence of recognition is more reliable than that of identification of a stranger.
  44. The complainant’s recognition of the appellant as a known relative eliminates any possibility of mistaken identity. The trial court was therefore justified in finding that the appellant was the person who defiled the minor.



45. The appellant raised a ground on the credibility of the complainant, although he never expounded further on the ground. From the trial court record, the trial court conducted a voir dire examination and found that the complainant was intelligent enough to testify and understood the duty of truth. Her unsworn statement was coherent and consistent. Section 124 of the *Evidence Act* allows a conviction based on the uncorroborated evidence of the victim of a sexual offence if the court believes the complainant to be truthful and records reasons for that belief.
46. In *Keter v Republic* [2007] 1 EA 135, the Court of Appeal held that minor inconsistencies do not affect the credibility of a witness if the substance of the evidence remains intact. The child's testimony in this case was straightforward, and the corroboration by medical and parental evidence made it credible.
47. On his defence, the accused gave an unsworn statement and denied the allegations by the complainant, maintaining his innocence. He did not call any witness. In *David Ochieng v Republic* [2014] eKLR, the Court of Appeal held that a bare denial, when weighed against strong prosecution evidence, cannot raise a reasonable doubt.
48. The defence did not challenge any of the key prosecution witnesses nor cast doubt on the medical findings or the identification evidence. The trial court rightly dismissed the defence as a mere denial.
49. In view of the above analysis, this court finds that the prosecution's evidence was consistent, corroborated, and uncontroverted, meeting the threshold of proof beyond a reasonable doubt and thus the Appellant's grounds lack merit, as the ingredients of defilement were proven, no material contradictions existed, and the defence was rightly dismissed.

#### Orders

- a. The appeal is dismissed.
- b. The conviction and sentence of life imprisonment imposed by the Senior Principal Magistrate's Court at Khwisero in Criminal Case No. E025 of 2021 are upheld.
- c. It is so ordered.
- d. Right of Appeal 14 days.
- e. This file is closed.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 23<sup>RD</sup> DAY OF OCTOBER, 2025**

**S.N. MBUNGI**

**JUDGE**

In the presence of:

Court Assistant: Elizabeth Agong'a

Ms Osoro for ODPP present.

Appellant present online.

