



REPUBLIC OF KENYA



KENYA LAW
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**Andrew v Republic (Criminal Appeal E010 of 2024)
[2025] KEHC 15181 (KLR) (28 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15181 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL APPEAL E010 OF 2024
JK NG'ARNG'AR, J
OCTOBER 28, 2025**

BETWEEN

BERNARD MISIAN ANDREW APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence of the Chief Magistrate's Court at Ogembo
(C.N. Sindani, PM) delivered on 19th April 2023 in Criminal Case (SO) No. 65 of 2022)*

JUDGMENT

1. Bernard Misian Andrew, the appellant herein, was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *akn ke act 2006 3 Sexual Offences Act*. The particulars of the offence were that on 9th August 2022 at Mogonga market Kenyena sub-county within Kisii County, the appellant intentionally caused his penis to penetrate the vagina of P.K., a child aged 11 years old. He also faced an alternative count of committing an indecent act with a child contrary to section to section 11 (1) of the *akn ke act 2006 3 Sexual Offences Act*. The particulars of the offence were that on the same day and place, the appellant intentionally touched the vagina of P.K., a child aged 11 years with his penis.
2. The appellant was arraigned before the trial court. He pleaded 'not guilty' to both counts. After a full trial, the appellant was convicted on the main charge. He was sentenced to 15 years imprisonment.
3. The appellant is dissatisfied with those findings. He filed an undated petition of appeal that raised seven grounds impugning the findings of the trial magistrate. In summary, the appellant lamented that the offence of defilement was not proved beyond reasonable doubt. In light of this, the sentence meted out was harsh and excessive. Finally, the investigations conducted were shoddy and the evidence was marred with contradictions. For those reasons, the appellant prayed that the appeal be allowed, the conviction be quashed and the sentence be set aside.



4. The appeal was canvassed by way of written submissions. However, as at the time of writing this judgment, I had not been impressed with the appellant's written submissions. The respondent opposed the appeal through the written submissions filed by Principal Public Prosecution Counsel Githere Mwangi dated 14th August 2025. It was submitted that all the ingredients to a charge of defilement were proved beyond reasonable doubt. Furthermore, there were no inconsistencies in the evidence of the witnesses that affected the main substance of the prosecution's case. Lastly, it was submitted that the sentence was lawful. It prayed that the appeal be dismissed.
5. I have considered the submissions, examined the record of appeal and analyzed the law. This being a first appeal, the Court must re-evaluate the evidence and make its own findings. See [Bethwel Wilson Kibor vs. Republic [2009] KECA 143 (KLR)]. According to the evidence laid out by the prosecution, PW1 P.K. the complainant herein testified that she was 12 years old when testifying. She was born on 16th January 2011 as stated in her birth certificate that was produced in evidence. She testified that she was at her mother's home on 9th August 2022. She was home alone when the appellant asked her to give him water to take to his child. He was their neighbour. The appellant then turned on her, followed her, grabbed her mouth, pushed her to the bed, removed her underwear and defiled her. After he was done, he asked PW1 not to tell anyone. PW1 however told her mother when she came back home. She was taken to hospital and later to the police station.
6. PW2 Irine Nyaboke Nyakwara, the complainant's mother, testified that the complainant was 11 years old. Her evidence was that on the fateful day, she had gone to vote. On return home at 5:00 p.m., PW1 informed her about what had transpired. When she inquired from the appellant if he committed the offence, PW2 testified that the appellant admitted that he committed the offence. PW1 was examined the next day as the doctors were on strike. The matter was thereafter reported at the police station. PW2 knew the appellant who was married to her cousin. He was also their neighbour.
7. PW3 Erick Ombogo a clinical officer at Kenyena Hospital, examined PW1 at the facility on 10th August 2022. On observation, he noted the presence of spermatozoa. Though her genitalia were normal and had no lacerations on her labia, her hymen was missing. He produced her treatments notes, lab request form, P3 form and PRC form.
8. PW4 PC Mathews Masibu, the investigating officer received the report on 9th August 2022 at 5:00 a.m. He conducted his investigations, collected evidence and recorded witness statements. He then caused the arrest of the appellant who was charged with the present offence. He produced the minor's birth certificate.
9. At the close of the evidence of the prosecution, the trial court formed the opinion that the appellant had a case to answer. He was placed on his defence. His evidence was that he was at home the whole day on 9th August 2022 together with his son. Later at 7:00 p.m., the appellant was accused by PW2 of defiling PW1. He was arrested and charged with the present offence. He denied the offence maintaining that he had been famed because of a grudge PW2 held against him.
10. In order for the prosecution to succeed, it must establish beyond reasonable doubt the age of the complainant, penetration and identity of the perpetrator; the ingredients to the offence of defilement. On the complainant's age, her birth certificate mathematically confirmed that as at the time of the offence, the minor was 11 years, six months old. Her age was corroborated by her mother. I therefore find that the age of the complainant was proved beyond reasonable doubt.
11. On penetration, PW3 noted the presence of spermatozoa on the minor's private parts. Her hymen was torn. PW1 testified that she was sexually assaulted. That evidence confirms that the aspect of penetration was proved in line with section 2 of the *akn ke act 2006 3 Sexual Offences Act*.



12. The last ingredient is the identity of the perpetrator. According to PW1, the appellant came to their home asking for water. He would then take advantage of her forlorn presence and sexually assaulted her. He then cautioned her against telling anyone. The proviso to section 124 states that a conviction can be sustained on the evidence of a victim solely if the court is satisfied that she is telling the truth. Was the complainant truthful?
13. PW1 knew the appellant very well. He was their neighbour. The offence took place during the day when there was no case of mistaken identity. She was medically examined the following day and the appellant subsequently arrested. When cross examined, PW1 maintained her testimony; informing that she was deliberate with the truth. I therefore find that the appellant was the perpetrator of the offence.
14. In his defence, the appellant stated that he had been framed. However, he did not put it to the prosecution witnesses. It was therefore an afterthought. In addition, his defence was not cogent. It shall therefore be dismissed. Ultimately, I find that the prosecution discharged its burden of proof to the required standard. The appeal on conviction lacks merit and it is hereby dismissed.
15. On sentence, the trial court observed that the minor was 12 years old when she was testifying. He thereafter sentenced the appellant to 15 years imprisonment. With due respect, I find that the trial court erred in assessing the age of the complainant. What is apparent is that the minor was not 12 years of age but certainly above 11 years during the commission of the offence. To be precise, at the time the offence had been committed, the minor was 11 years 6 months old.
16. Section 8 (2) of the *Kenya Act 2006 Sexual Offences Act* provides that 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. Indeed, this court finds that the minor was still eleven years as she had not attained the age of 12 years. The trial court thus entered an illegal sentence.
17. Even if this court were to take the other school of thought that the minor ought to be treated as above 11 years old as in exactitude, she was above eleven years, and therefore the appellant be convicted under section 8 (3), the trial court still gave an illegal sentence because the minimum sentence prescribed is 20 years imprisonment. The appellant is therefore serving a lenient unlawful sentence. However, the prosecution failed to file a notice of enhancement of sentence. Accordingly, I will not interfere with the sentence and dismiss the appeal on sentence. I also direct the sentence to run from the date the appellant was arrested.

It is so ordered.

JUDGEMENT DELIVERED, DATED AND SIGNED VIRTUALLY THIS 28TH DAY OF OCTOBER, 2025.

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HON JULIUS K. NG'ARNG'AR

JUDGE

Judgement delivered in the presence of:

Siele Kipchirchir (Court Assistants)

Appellant present

Koime for the Respondent

