



**Aura v Republic (Criminal Appeal E094 of 2024)
[2025] KEHC 15177 (KLR) (28 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15177 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL APPEAL E094 OF 2024
JK NG'ARNG'AR, J
OCTOBER 28, 2025**

BETWEEN

OBED NYAKAWA AURA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence of the Chief Magistrate's Court at Ogembo (P.C. Biwott, CM) delivered on 5th September 2024 in Criminal Case (SO) No. E061 of 2023)

JUDGMENT

1. Obed Nyakawa Aura was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act*. The particulars of the offence were that on the night of 20th and 21st May 2023 at Rionyero market Nyachogochogo sub-location within Nyamache sub-county of Kisii County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of DGO a girl child aged 15 years. He also faced an alternative count of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. The particulars of the offence were that on the same dates and place, the appellant intentionally and unlawfully touched the vagina of DGO a girl child aged 15 years.
2. The appellant was arraigned before the trial court to answer to the charges brought before him. He entered a plea of 'not guilty' to both counts. After a full trial, the appellant was convicted of the main charge of defilement. He was sentenced to 10 years imprisonment.
3. The appellant is aggrieved by these findings. In his petition of appeal dated 12th September 2024, the appellant raised the following six grounds, disputing the findings of the trial court, which I have summarized: the trial court erroneously sentenced the appellant without considering the circumstances of the offence and PW3's (sic) medical report; the sentence meted out was manifestly harsh and punitive failing to give him the benefit of doubt; and he was a young boy of 23 years whose



life would be ruined by incarceration. For those reasons, the appellant prayed that his appeal be allowed and his sentence be set aside, reviewed or reduced.

4. The appeal was heard on 10th September 2025. Parties elected to rely on their respective written submissions. The appellant filed his dated 13th August 2025. He challenged the evidence of PW2 stating that it was not credible enough to sustain a finding that penetration was proved beyond reasonable doubt. He observed that PW1's account of events was not the same as that narrated to PW2 casting doubt on her credibility. He argued that from the evidence of PW3, the complainant was beaten because she was framing the appellant. Finally, since the complainant's parents were reluctant to testify, it was ascertainable that he was innocent. He prayed that his appeal be allowed, the conviction be quashed and the sentence be set aside so that he is set at liberty.
5. Opposing the appeal, the respondent filed written submissions dated 28th August 2025. Learned Prosecution Counsel Ms. Nora Rono submitted that all the ingredients to a charge of defilement namely, the age of the complainant, the aspect of penetration and the identity of the culprit, were all proved beyond reasonable doubt. On sentence, the respondent submitted that the sentence meted out was lenient since the law prescribed a minimum sentence of 20 years imprisonment. She urged this court to uphold the conviction and affirm the sentence.
6. I have considered the submissions, examined the record of appeal and analyzed the law. The duty of this court as a first appellate court is well settled by a wealth of authorities known in our jurisdiction. Briefly put, this court is required to re-examine, re-consider and re-analyze the evidence tendered afresh while bearing in mind that it did not have the advantage of hearing or seeing the witnesses testifying and should make due allowance in that regard.
7. From the proceedings captured in the record, the following evidence is recorded: PW1 LM the complainant's mother testified that the complainant was born on 27th January 2007 as recorded in her clinic card that was produced in evidence. She testified that she did not know the appellant before the incident occurred. It was the complainant's uncle who arrested him on claims that he had defiled her daughter at the shopping centre. Bodaboda operators assaulted the uncle. She testified that she took the complainant to Magena Hospital for examination and was referred to Nyamache Hospital. She denied framing the appellant.
8. PW2 Irine Maoko a clinical officer at Nyamache Hospital testified that the complainant was brought to their facility on 21st May 2023 with complaints that she had been defiled. On observation, the complainant had whitish discharge. Her hymen was broken and old looking. She had no injury to her genitalia or spermatozoa. She produced the complainant's treatment notes, PRC form and P3 forms in evidence.
9. PW3 Benard Omweri a bodaboda rider testified that on 21st May 2023, he was near his home when he received reports that the complainant was missing. He then found her at 7:30 p.m. Upon interrogation, the complainant stated that she was taking slippers for repairs as sent by her grandfather. He took her to her mother who was surprised. The mother informed him that the complainant had visited them the previous day. The complainant then confessed that she had slept the previous night at the appellant's house.
10. The complainant took them to the appellant's house. On arrival, they did not find him. He was later seen gambling. On interrogating the appellant, it was denied that he was with the complainant that night. PW3 summoned the complainant and her mother. The complainant was identified as the man she had been with the previous night. PW3 asked that the complainant and the appellant be examined in hospital. However, the appellant's brothers and some motorcycle operators attacked him leading



- the appellant to run away. Later, police officers came to the scene. PW3 informed them what had transpired. The complainant was then taken to Magena police station. Later, the appellant was arrested by PW3's stage chairman. That he was traced in Kisumu on 23rd May 2023. He maintained that he was not lying.
11. PW4 DGO the complainant testified that she was a class 8 pupil at Igorera Primary School. She added that she knew the appellant and referred to him as Nyakwana. Her evidence was that on 20th May 2023, the appellant met the complainant while she was heading to her grandmother's place. He was in the company of another person. He then took her to his house, put her on his bed, removed his clothes and had sexual intercourse with her. They slept together till morning when the appellant left her at his house.
 12. PW4 later left the house and locked the doors. It was 7:00 a.m., on her way home, when she met her uncle who was looking for her. They arrested her and beat her up. She then showed them where the appellant's house was as she had spent the night with him. PW4 testified that her uncle found him. She positively identified him as the culprit. The appellant escaped arrested and went into hiding. Meanwhile, the appellant's friends attacked her uncle.
 13. Thereafter, police officers took her and her uncle to the police station. The appellant was arrested on the 3rd day. She added that the appellant's relatives threatened to harm her if she testified against the accused. For that reason, she went into hiding as she wanted safety. She was later arrested at Mananasi children's home. PW4 denied that she had been coached. She maintained that she was being truthful.
 14. PW5 PC Lilian Akinyi was the investigating officer assigned this case. She testified that she received the report and commenced investigations. She interrogated the witnesses, recorded witness statements, collected the evidence and preferred the charges against the appellant after he was arrested and brought to the police station by bodaboda men.
 15. At the close of the prosecution's case, the trial court found that the prosecution has established a prima facie case against the appellant. He was placed on his defence. His sworn testimony was that on he met the complainant the first time after he was arrested and arraigned in court. his evidence was that he was working throughout as a bodaboda operator. He was then lured into detention by another bodaboda rider. He was then taken to Magena police station. He claimed that he was arrested alongside three men who paid Kshs. 20,000.00 each and were released. However, since he could not raise those funds, he was detained at the police station. He was then brought to court to answer to the charges to which he denied committing the offence. In his view, the complainant's uncle framed him so that he could win some elections at the stage.
 16. As earlier stated, the ingredients to a charge of defilement are the age of the complainant, the identity of the assailant and the aspect of penetration. These crucial ingredients must be proved beyond reasonable doubt to sustain a conviction. Was the conviction by the trial court safe? On the complainant's age, the minor's clinic card revealed that she was born on 27th January 2007. This fact was corroborated by PW1, the complainant's mother. As at the time the offence was committed, that is 20th/21st May 2023, the complainant was 16 years old.
 17. On penetration, the evidence of PW2 confirmed that the minor's hymen was torn and old looking and she had a whitish discharge. PW4 also testified that the assailant had sexual intercourse with her. In PW2's opinion, there was reason to believe that there was penetration. I therefore find that penetration was proved in line with section 2 of the *Sexual Offences Act*.
 18. On the identity of the culprit, PW4 testified that the appellant was very well known to her. She met him on 20th May 2023 while on her way to her grandmother's place. The appellant took her to his



house, put her on his bed, removed his clothes and had sexual intercourse with her. They slept together till morning when the appellant left her at his house. PW3 who was aware that the complainant was missing found her on the way. After interrogating her, together with her mother, the appellant's home was shown. When the appellant was identified as the culprit, his cronies descended on PW3 and attacked him. At this point, the appellant took the initiative to run away.

19. PW4 was the sole eye witness to the offence. Section 124 of the *Evidence Act* provides that a court shall not convict an accused person for a criminal offence on the evidence of a single identifying witness. However, the exception is that if the witness is a minor, the court must be satisfied that the witness is telling the truth. In this case, I am satisfied that PW4 was not lying. She was credible in her evidence and was not shaken during her cross examination. It appears from the looks of things that the complainant and the appellant may have been having a romantic relationship. However, our jurisdiction affirms that minors have no capacity to consent to matters of a sexual nature, including sexual intercourse. I therefore find that the appellant was positively identified as the culprit. Accordingly, I find that the trial court properly convicted the appellant.
20. This court has also considered the appellant's defence. I find that it was a sham and did not explain what transpired on the night in question. I find that his defence was not cogent and did not shake the evidence of the prosecution. His appeal on conviction is therefore dismissed.
21. On sentence, the appellant was condemned to serve a 10-year imprisonment. In his mitigation, the appellant stated that he was innocent. The trial court considered that he was a first offender. Section 8 (4) of the *Sexual Offences Act* provides that a person convicted under that section shall be sentenced to at least 15 years imprisonment. The sentence given to the appellant is therefore unlawful. However, since the prosecution failed to file a notice of enhancement, I will also not interfere with the sentence. The appeal is also hereby dismissed.

It is so ordered.

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

.....

HON JULIUS K. NG'ARNG'AR

JUDGE

Judgement delivered in the presence of:

Siele/Kipchirchir (Court Assistants)

Appellant Present

Koime for the Respondent

