



REPUBLIC OF KENYA



KENYA LAW
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**Fundi v Republic (Criminal Appeal E021 of 2024)
[2025] KEHC 15242 (KLR) (27 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15242 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E021 OF 2024
S MBUNGI, J
OCTOBER 27, 2025**

BETWEEN

EMMANUEL LIKABO ALIAS FUNDI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal arising from the decision of Hon. Eric Malesi (P.M) in the Chief Magistrate's court at Kakamega Criminal Case No 36 of 2020 delivered on 9Th February 2022)

JUDGMENT

1. The appellant was charged before the Principal Magistrate's Court at Kakamega with the offence of defilement contrary to section 8(1)(2) of the *Sexual Offences Act*, 2006, the particulars being that on 23rd February 2020, he caused his penis to penetrate the vagina of SK, a child aged eight (8) years.
2. Upon full trial, the learned trial magistrate found the appellant guilty, convicted him, and sentenced him to life imprisonment, as provided under section 8(2) of the Act.
3. Being dissatisfied, the appellant lodged the present appeal dated 14th April 2024, raising seventeen grounds which, in summary, challenge: Proof of age, penetration, and identification Alleged fabrication and malice by PW3 Contradictions in medical evidence and prosecution procedure Alleged failure to consider the alibi defense Delay in arraignment The constitutionality and harshness of the sentence.
4. The appellant submitted that the prosecution failed to prove the essential ingredients of defilement, namely; age, penetration, and identity beyond reasonable doubt. He claimed the birth certificate produced bore different names from those of the complainant. He further argued that the treatment notes and post-rape care (PRC) forms were filled by different clinicians, raising doubts about authenticity.



5. He also contended that he was held in custody beyond the constitutional limit before being arraigned, that the magistrate ignored his alibi, and that the sentence imposed was harsh and unconstitutional.

Summary of the prosecutor's Response

6. The respondent opposed the appeal. Prosecution counsel maintained that the prosecution proved all elements of the offence beyond reasonable doubt.
7. It was submitted that the birth certificate, corroborated by a baptism certificate, established the complainant's age at 8 years. The minor's testimony, after a proper voir dire examination, was credible and consistent. Further, the medical evidence adduced (treatment notes and P3 form) confirmed penetration consistent with defilement.
8. The prosecution acknowledged minor procedural lapses such as different clinicians filling the PRC and P3 forms, but urged that these were not fatal to the case, as held in *Kadima v Omumu* (Civil Appeal 50 of 2023) 2024 KLR, where the court accepted the medical evidence from two different doctors, even though their reports were from two different facilities, because their reports were on the nature of the same injury.
9. On the child's inconsistency during cross-examination, the prosecution argued that minor contradictions are expected of a child of tender years due to fear, trauma, or lapse of time, relying on *BKW v Republic* (2020) eKLR, where the court observed that "a child's variation in testimony due to trauma does not necessarily discredit the truthfulness of their account."

Issues for Determination

10. Whether the prosecution proved the ingredients of defilement beyond reasonable doubt;
11. Whether the alleged procedural and evidentiary irregularities were fatal to the conviction; and
12. Whether the sentence imposed was lawful.

Proof of the Ingredients of Defilement

(a) Age of the Complainant

13. The age of the complainant is central, as it determines the gravity of the sentence under section 8 of the *Sexual Offences Act*.
14. The record shows that the prosecution produced a birth certificate and a baptism certificate. Although the appellant challenged the birth certificate on account of a name variance, the baptism certificate clarified the issue. As held in *Moses Otieno Odhiambo v Republic* [2013] eKLR, "slight discrepancies in documents proving age do not negate the fact of minority if the cumulative evidence is clear." Further, the case of *MW v Republic* (2020) KLR held inter alia that the age of the victim can be established by medical evidence, birth certificate, the victim himself or herself, parents or guardians through their testimony before the trial court.
15. I therefore find that the age was properly proved. The complainant was 8 years old at the time of the offence, squarely bringing the case under section 8(2) of the *Sexual Offences Act*.

(b) Proof of Penetration

16. Penetration, as defined under section 2 of the *Sexual Offences Act*, is the partial or complete insertion of the genital organ of one person into that of another.



17. The medical report (P3 form) indicated presence of hymen remnants and bruises on the perineum consistent with recent vaginal penetration. PW2, the clinician, confirmed these findings. The treatment notes and post-rape care form were also produced and admitted without objection.
18. Medical evidence need not always be produced by the same clinician, provided the evidence is properly admitted as illustrated in *Kadima v Omumu (Civil Appeal 50 of 2023) 2024 KLR*, where the court accepted the medical evidence from two different doctors, even though their reports were from two different facilities, because their reports were on the nature of the same injury.
19. Accordingly, I am satisfied that penetration was proved beyond reasonable doubt.

(c) Identification of the Appellant

20. The complainant testified that the appellant, a person well known to her, lured her and committed the act. The trial court, having conducted a voir dire examination, found her competent to testify and relied on her direct evidence.
21. In this case, the magistrate expressly found the complainant credible, observing that her demeanor and consistent narration were convincing. The identification of the appellant was therefore positive and reliable.

Procedural and Evidentiary Irregularities

22. The appellant alleged that the P3 and PRC forms were filled by different clinicians, that he was held beyond constitutional timelines, and that the prosecution failed to explain these irregularities.
23. The record indeed shows that the documents were filled by different medical officers. However, it doesn't interfere with the credibility of the documents as illustrated in the case of *Kadima v Omumu (Civil Appeal 50 of 2023) 2024 KLR*, where the court accepted the medical evidence from two different doctors, even though their reports were from two different facilities, because their reports were on the nature of the same injury.
24. On the claim of delay in arraignment, this Court aligns with the stance that where there has been violation of the accused's rights of unlawful detention prior to arraignment under Article 49(1)(f) of [*the constitution*](#), doesn't render the subsequent proceedings a nullity. Such a breach is a constitutional matter to be pursued through a separate petition for redress and doesn't automatically invalidate an otherwise proper conviction. I therefore find that while minor procedural imperfections existed, they do not go to the root of the conviction, nor do they occasion a miscarriage of justice.

3. The Defense of Alibi

25. The appellant raised an alibi late in the proceedings. The trial court found that it was introduced when the prosecution had little to no opportunity for rebuttal. The trial court properly analyzed the alibi and found it unsubstantiated. I find no reason to depart from that finding.

4. Consistency of the Child's Testimony

26. The complainant's evidence was challenged for minor inconsistencies during cross-examination. However, courts have consistently held that minor contradictions in the testimony of a child of tender years do not necessarily destroy credibility. on *BKW v Republic (2020) eKLR*, where the court observed that "a child's variation in testimony due to trauma does not necessarily discredit the truthfulness of their account." This Court, upon re-evaluating the evidence, finds the complainant's testimony credible and corroborated by the medical evidence.



5. Sentence

27. The appellant was sentenced to life imprisonment, as prescribed by section 8(2) of the [Sexual Offences Act](#), for defilement of a child aged 8 years. Life imprisonment is the only lawful sentence under section 8(2), and courts cannot vary it except where the law provides otherwise.
28. Although the appellant contends that the sentence is harsh, the court cannot impose a lesser punishment where the statute is explicit.

Conclusion

29. Upon re-evaluation of the evidence and the entire record, this Court finds that the prosecution proved the offence of defilement beyond reasonable doubt. The minor procedural lapse regarding documentation and custody time did not occasion any miscarriage of justice.
30. The trial court conducted itself properly, conducted a voir dire, warned itself of the dangers of child testimony, and reached a lawful conclusion supported by the evidence.
31. Consequently, the appeal lacks merit.

Final Orders

32. The appeal is hereby dismissed in its entirety.
33. The conviction for defilement contrary to section 8(1) as read with section 8(2) of the [Sexual Offences Act](#) is upheld.
34. The sentence of life imprisonment imposed by the trial court is affirmed.
35. Right of appeal within 14 days explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 27TH DAY OF OCTOBER, 2025.

S.MBUNGI

JUDGE

In the presence of:-

Ms. Loise for ODPP present online.

Appellant, present online.

