



**Imbotsi v Republic (Criminal Appeal E128 of 2024)  
[2025] KEHC 15220 (KLR) (7 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15220 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL E128 OF 2024  
S MBUNGI, J  
OCTOBER 7, 2025**

**BETWEEN**

**MORGAN OTUDO IMBOTSI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence by Honorable G.P.  
Omondi in criminal case number MCSO E18 of 2023 at the Senior  
Principal Magistrate's Court in Mumias, delivered on 19th December 2024)*

**JUDGMENT**

**Introduction**

1. The appellant was charged and found guilty of defilement under section 8(1) read with section 8(3) of the *Sexual Offences Act*.
2. The charge stated that between January 2023 and 6th May 2023, at Matungu sub-county within Kakamega County, the accused intentionally and unlawfully penetrated the vagina of V.A., a 14-year-old child.
3. As an alternative to Count I, the accused faced charges of committing an indecent act on a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006.
4. The particulars were that on various dates between January 2023 and 6th May 2023 in Matungu Sub-County, Kakamega County, the accused intentionally and unlawfully touched the vagina of V.A. with his penis.
5. In the second count, the accused was charged with defilement under section 8(1) read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006.



6. This charge alleged that between May 2022 and 7th May 2023, also in Matungu Sub-County, the accused intentionally and unlawfully penetrated the vagina of P.S., an 11-year-old child.
7. The prosecution called 6 witnesses to support its case; the accused gave his testimony.
8. After hearing all evidence and mitigation, the trial court found that the prosecution had proven the case beyond a reasonable doubt, convicted the appellant, and sentenced him to 15 years' imprisonment.
9. Dissatisfied with the judgment dated 19th December 2024, the appellant appealed on these grounds:
  - a) The trial magistrate erred in law and fact by finding the prosecution's evidence met the required high standard beyond reasonable doubt.
  - b) The magistrate incorrectly rejected the appellant's entire defense and convicted him based on suspicion.
  - c) The magistrate failed to consider contradictions in the prosecution's testimonies and documents before finding a prima facie case.
  - d) The magistrate erred by not recognizing that the prosecution's investigations were inadequate, thereby invalidating its case.
  - e) Due to a lack of direct evidence tying the appellant to the crimes, the benefit of the doubt should have been given to him.
  - f) The judgment merely repeated the prosecution witnesses' accounts without properly analyzing the evidence, showing bias toward the prosecution.
  - g) The appellant's right to a fair hearing was violated.
10. The appellant requested that the conviction and sentence be overturned and that he be released.
11. The parties were to file written submissions; however, at the time of writing the appeal, there were no submissions on the court file or in the CTS.

### **Summary of Evidence:**

12. PW1, V.A., produced her birth certificate (exhibit PMF1-1) showing she was born on 27 January 2009. She stated that in January 2023, she and her mother lived in St. Paul before moving to stay with M at Koyonzo.
13. She testified that the accused had other children and promised to enroll her in school at Ekulumoyo. However, some boys at the school harassed her. When she informed M, he complained to the school, but she was rejected. M then sought another school.
14. She claimed that the accused promised to take her to grade 5 but never did. One day, he told her to go with him to a farm where there was an incomplete house. The next day, he took her there again alone.
15. PW 2 was P.S., aged 11 years old. She identified the accused as M and stated that they lived with him. She testified that the accused used to take her to dig the garden, and later he would take her to a building and ask her to remove her clothes, and he would lie her down and rape her. She claimed that he showed her bad manners, such as putting his "thing" penis inside her private parts.
16. PW3 was AO, the wife of the accused, who began to testify but was stood down by the prosecution, given her relationship with the accused. Her records were expunged from the court's record.



17. W4 produced the birth certificate for VA-Pexh1. She confirmed that she had visited the orphanage near the mosque in
18. She produced the treatment notes-Pexh2, PRC-Pexh3, P3 form-Pexl4, and confirmed she had examined PW2 (P.S), who was 10 years old on 9/5/2023, who was taken to an incomplete house by the accused, who defiled her and threatened her not to make any noise or tell anybody. She examined her and found bilateral bruises around her vaginal opening, and her hymen was broken. They further took samples of her urine, blood, and high vaginal swab, and the PRC and p3 form filed.
19. During cross-examination, she confirmed not knowing his innocence since her experience was in the medical field, not psychological, and from the report, the children had been defiled.
20. PW5 was Dorah Aunga, a Clinical Officer stationed at Matungu Hospital with 15 years of experience, who examined PW1 and PW2. It was PW1 who disclosed that they lived with the accused and that they had sexual intercourse with him on approximately five occasions, with the most recent being 6th May 2023.
21. She testified that the Physical examination revealed injury, and samples were taken for forensic analysis. Psychological trauma counseling was recommended, and official medical forms, including treatment notes and P3 forms, were completed.
22. From the assessment of pw2, there were signs consistent with sexual assault, including bruising and hymenal rupture.
23. PW6: PC Isaac Odoyo was the Investigating Officer attached to the Directorate of Criminal Investigations, who investigated a report by the Children Officer.
24. During the inquiry, ten children aged between 2 and 14 were found at the accused's residence and taken into protective custody. Two children, PW1 (14 years) and PW2 (11 years), were confirmed through medical examination as victims of sexual abuse. The accused was charged following the investigations, which included the production of age assessment reports and P3 medical forms.
25. Cross-examination addressed procedural matters and the nature of the charges against the accused.
26. DW1, the accused, gave sworn evidence while he professed his innocence, claiming that he specifically lived alongside his family in Koyonzo and practices both preaching and business as an occupation
27. He went into the circumstances surrounding how he set up the orphanage. He denied the charges, saying that the accusations were concocted by local authorities who wished to take his property.
28. The accused highlighted inconsistencies and gaps in the prosecution's case, questioned whether investigations were sufficiently thorough, and asserted that some key witnesses had not been called to testify. He maintained that the accusations were a coordinated attempt to tarnish his image.

### **Analysis and Determination**

29. The role of this court as the first appellate court is well settled. It was held in the case of Okeno vs. Republic (1972) EA 32 and in Mark Oiruri Mose vs. R (2013) eKLR that a first appellate court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate, analyze it and come to its independent conclusion but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.
30. The ingredients of defilement, as stated in George Opondo Olunga v Republic, are:
  - a. Proof of the complainant's age as a child;



- b. Proof of sexual penetration;
  - c. Proof that the accused was the perpetrator.
31. The offence of defilement under Kenyan law, especially as outlined in the *Sexual Offences Act* No. 3 of 2006, has three principal elements that must be established for conviction:
- a. Age of the Complainant (Victim)
32. The complainant/s must be a child under the age of 18 years at the time of the offence.
33. Proof of the child's age is essential and must be established beyond a reasonable doubt. This can be through credible evidence such as a birth certificate, medical age assessments, or trustworthy testimony.
34. The courts emphasize that age is a key ingredient. For example, in *Kaingu Elias Kasomo v Republic* [2018] eKLR, the Court held that birth certificates or medical reports confirming the victim's age must be produced to satisfy this element.
35. The birth certificates of PW1 (V.A.) and PW2 (P.S.) were admitted in evidence (PMF1-1 and PExh 1, respectively), establishing their ages as 14 and 11 years at the relevant times.
36. The second element to be established was the element of penetration,
37. The complainant's testimonies were clear, consistent, and detailed, describing repeated unlawful sexual penetration and indecent acts by the appellant. How the appellant lured them into the unfinished building on several occasions and took off their clothes, and defiled them both on separate occasions. Their accounts were supported by medical evidence of the clinical Officers, and the investigating officer, PW4 and PW5, both testified to physical examination findings confirming genital injuries, including bruising and hymenal rupture, consistent with recent sexual assault, and completed the requisite medical documentation (P3 and PRC forms).
38. The Investigating Officer's testimony explained the procedures of securing the victims, forensic collection, and compliance with legal processes, reinforcing the chain of evidence.
39. It's my finding that the prosecution proved the element of penetration beyond a reasonable doubt.
40. The third element is the identification of the appellant. It was the evidence of PW4, the mother to PW1, that she took her children to the orphanage in January 2023 and that she was later informed that the accused had defiled the minors. The appellant was not a stranger to the complainants since they stayed with him at the institution they knew him very well so the element of identification was established
41. The appellant's defense alleging a conspiracy was not supported by credible evidence and was reasonably rejected by the trial court. The inconsistencies he sought to highlight were neither material nor sufficiently significant to cast reasonable doubt on the prosecution's case.
42. The trial magistrate undertook a thorough analysis, mindful of the high standard of proof, and was justified in finding the prosecution had discharged the burden beyond a reasonable doubt.
43. The penalty of 15 years imposed aligns with the mandatory minimum sentences under Section 8(3) of the *Sexual Offences Act* and is appropriate given the seriousness of the offences.



## **Conclusion and Orders**

44. This Court finds no merit in the appellant's grounds of appeal. The evidence led at trial was cogent, credible, and sufficiently corroborated.

The prosecution proved all the essential elements of defilement and indecent acts beyond a reasonable doubt.

- a. The conviction and sentence passed by the trial court are upheld.
- b. The appellant's appeal is dismissed in its entirety.
- c. The sentence of 15 years' imprisonment is upheld.
- d. The sentence of fifteen years' imprisonment shall be served as ordered, unless otherwise lawfully altered.
- e. Right of Appeal 14 days.

**DATED SIGNED, and DELIVERED in open court at KAKAMEGA THIS 7<sup>th</sup> OF OCTOBER, 2025.**

**S.N. MBUNGI**

**JUDGE**

In The Presence of;

Appellant present online.

Ms Osoro for the Dpp , present.

