



REPUBLIC OF KENYA



KENYA LAW
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**Makhukhu v Republic (Criminal Appeal E096 of 2024)
[2025] KEHC 15402 (KLR) (8 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15402 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E096 OF 2024
S MBUNGI, J
OCTOBER 8, 2025**

BETWEEN

PAUL OMUNGA'LA MAKHUKHU APPELLANT

AND

THE REPUBLIC RESPONDENT

(Being an appeal from the Judgement, conviction and sentence of Hon. G. Ollimo. Resident Magistrate delivered on 21st, June, 2023 at Butere in Senior Principal Magistrate Criminal Case –Sexual offence No. E017. of 2022.)

JUDGMENT

Introduction

1. Appellant was charged with the offense of Defilement contrary to section 8(1) as read with section 8(2) of the sexual Offences Act No.3 of 2006. The particulars are that on the 30th day of April 2022, In Khwisero sub-county, within Kakamega County. Intentionally and unlawfully caused his penis to penetrate the vagina of ROA a child aged 5 years.
2. The appellant was also charged with an alternative charge of committing an indecent act with a child contrary to Section 11(I) of the same act
3. The trial court heard testimonies from seven prosecution witnesses including the complainant's mother, neighbors, cousin, the village elder, the arresting officer, and a clinical officer. The Appellant gave an unsworn defence denying the charges and alleging malice from the village elder.
4. On 21st. June .2023 the trial court found the appellant guilty of the principal charge of defilement and sentenced him to life imprisonment contrary to section 8(1) pursuant to 8 (2) of the sexual offences Act No. 3 of 2006.



5. The appellant being aggrieved and dissatisfied by the conviction and sentence filed this petition of appeal dated 18th Dec. 2024 seeking setting aside of the judgement and quashing of the sentence of Life Imprisonment.
6. The appellant challenged the decision of the trial court on several grounds. It was contended, first, that the trial court erred in law by failing to establish the essential ingredients of the alleged offence not proved beyond reasonable doubt, as required by the standard of proof in criminal proceedings. Secondly, the appellant submits that the trial court misdirected itself in law and fact by relying on fanciful and speculative possibilities, rather than credible evidence, in arriving at a conviction.
7. Further, the appellant averred that the trial court failed to properly evaluate and weigh the conflicting evidence presented by the prosecution, which in itself was inconsequential and insufficient to sustain a conviction. Finally, he stated that the trial court erred both in law and fact by disregarding the appellant's cogent and well-founded defence, which substantially undermined and outweighed the prosecution's case.
8. The appellant prays that the lower courts judgement and conviction be quashed and the sentence of life imprisonment be set aside and the appellant to be set free.

Prosecution Case

9. The prosecution called 7 witnesses to prove its case.
10. PW1, Lydia Andati stated that she was a resident of [Particulars Withheld] Village. R the minor was her in-law – R's mother was her mother in-law. R was almost 5 years old and she was in PP1. She was a student at XX. She knew the accused for he hails from the same village as herself. On 30.4.22 at around 11.00 pm it was raining. She heard screams and she recognized it was R's mom screaming. She got scared to leave the house, being alone. After the rain subsided, her neighbor Eric emerged, he told her he had also heard screams. They proceeded to R's mother's house. She asked her what the problem was she recounted to her that someone accessed the house and raped R. She said she knows some sign language so she was able to communicate with her. She examined the minor, she noted she was bleeding from her genitals. The complainant's mom told her that she was awakened by the commotion between the perpetrator and the .She further recounted that when perpetrator saw her he left. She said he accessed the house through the upper opening of the door (the upper opening above the door). The accused had attempted to rape the complainant's mother therebefore, he was positively identified that time, but the matter was not escalated to the police because Lucy (complainant's mother) did not open up. She advised her mother not to wipe or bathe her in the morning. She escorted the child to the hospital alongside her mother, on the night of the incident the was unconscious and she was not even able to respond when she was asked her name. She had scratch marks on her neck, she regained consciousness the next morning. Her mother is deaf and dumb, the complainant kept pointing at her genitalia.
11. PW2, a female minor confirmed her name as R but did not know her second name. She said she was in PP1. Minor was asked whether she recognized she just smiled. Minor was not able to respond to basic questions. Given her tender age, she could not comprehend the nature of change and why she was before court that time
12. PW3, Kennedy Omung'ala a resident of [Particulars Withheld] village. He is a security officer at Muhila Girls. R (P W 2) was her cousin. He recognized the accused. He was Paul Mongala. He hailed from his village. He was at work (night duty). He got a call from his brother Hezon Ochieng informing him (PW 2) had been raped. He called the village elder and notified him. Then called the area Chief who advised them not to bath the child. In the morning he proceeded to R's home, he examined her



- alongside Lydia (PW 10) she was bleeding. He advised Pw1 to escort PW2 and her mother to hospital. He testified R's mother (Lucy using sign language described the perpetrator). She was able to identify perpetrator because the perpetrator attempted to rape her therebefore. He further testified he went alongside the village elder to the accused's home and arrested him at 6.00 am.
13. PW4, Mary Stella Musa a resident of XX village. She was the village elder. She knew R and her mother. They stay in same village. Accused is her relative. They have an ancestral relationship. At around mid-night she received a call from Joel (Pw3) who informed her that someone had attacked (the deaf and dumb lady. She went to her home. She found Joel (PW3) and his mother and enquired from them what transpired , she said he knew the suspect. He led her to Paul Mungala's (Accused's) home. They found the accused in his house. He stepped outside she told him to follow her to the Police station. He obliged they then escorted him to the station at Khwisero she was in the company of her 3 (Three) youths who usually assist her. She handed him over to the police. The police told her that complainant had already been escorted to hospital. She proceeded to Hospital/Dispensary and met complainant. She was wrapped in a lessa and she was bleeding. That was all. She further wished to clarify that the complainant's mother who is deaf and dumb used sign language to communicate and gave a description of who the perpetrator was she stated using sign language that the individual who attempted to defile her previously was the very person who defiled her daughter R (PW2)
 14. PW5, Female Adult and a Deaf Person with the help of a certified sign language interpreter. She stated that it was at night; she had put off her tin lamp. The door was shut. She was sleeping on the floor. She had spread her beddings on the floor. Her daughter was also sleeping besides her on a separate bedding. The intruder struggled the little girl and also covered her mouth with his hands. She felt the small girl throwing kicks as she was struggling to free herself. She woke up, the intruder escaped through the roof opening. She was able to identify the perpetrator because she first lit the tin lamb and then saw him. The intruder was her neighbor. He is before court (identified/pointed at accused persons) After the intruder fled, she raised an alarm while in the house. She raised an alarm because it was at night and it was dark outside, she just screamed from the house. She was too scared to step out of the house. There was heavy down-pour on material night PW1 emerged. They escorted the complainant to hospital the following morning. Accused's home was in close proximity to their home. She further wished to state that prior to that incident, the same accused had invaded them at night and attempted to rape her.
 15. PW6, Belinda Mlanya a Clinical officer attached at Khwisero Sub-county hospital. On 1st May, 2022, stated that they received one RO (5 years). Outpatient No. 64xxx she was bleeding from her vaginal area. She was in a lot of pain. She was accompanied by her mom. She stated that she was defiled inside their house as they were asleep. The incident happened on 30.4.2022 at about 11.00 p.m. On examination she was cladded in a purple dress with blood stains. She walked with difficulties. She had bruised marks on the left side of her neck. There was blood on her vaginal opening, swelling around the vagina and tears around her vagina. The vagina was torn and the hymen was lying loose and freshly torn. Lab investigations showed there was blood in her urine. Other tests like syphilis and HIV negative. She was given medication, namely PEP, Tetanus injection, antibiotics and painkillers. They also filled Post Rape Care Form. It contained the same information she also filled P3 Form. It contained similar information captured in the Treatment Notes. On the same date, they also received Paul Mangala (Accused) in their facility. He was examined and no injuries were noted, Lab investigations revealed pus cells in his urine, Sign of bacterial infection. I filled his P3 form. She produced the documents as exhibits.
 16. PW7, Evans Otieno of No. 11xxx PC attached at Khwisero Police Station. Said he is not the I.O. He took over the investigations from PC Pendo who was transferred. Investigations established that the Accused defiled a minor he sneaked into the Complainant's house where she lived with her deaf mother. The



minor was received by a neighbor. The neighbors arrested the Accused. The victim was escorted to hospital and Accused was subsequently charged upon confirmation by doctors that minor was defiled.

Defence Case

17. The accused Paul Mungala Makuku. A resident of [Particulars Withheld] village Mundobelwa Sub-location. He maintained his Innocence and dismissed the charge as a trumped up charge by the village elder. He said as far he is concerned; he was in prison in the month of April. He said he was imprisoned in the month of April and when he came across their village elder who demanded to know how and when he left prison. He also blamed the grudge between his father a former village elder and the village elder who framed him.

Analysis & Determination

18. This being the first appeal; this court is expected to reevaluate the evidence tendered before the trial court and to come up to its own logical conclusion by taking into account the fact that it did not have the advantage of seeing and hearing the witnesses and their evidence and or see their demeanor.
19. This court is guided by the principles set out by the court of appeal in the case of David Njuguna Wairimu v Republic (2010) eKLR where the court stated as follows:

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

20. Appellant was convicted for the offense of Defilement contrary to section 8(1) as read with section 8(2) of the sexual Offences Act No.3 of 2006. He was sentenced to serve life imprisonment
21. The prosecution is supposed to prove three ingredients
 - i. Proof of the Complainant’s age
 - ii. Proof of penetration.
 - iii. Positive identification of the perpetrator.
22. On age, although no birth certificate was produced, the P3 form (Pexhibit 2) indicated the child was 5 years old. The trial court also observed the child and confirmed her tender age. Courts have held that documentary proof, though desirable, is not the only method of proving age (see Francis Omuroni v Uganda [2002] UGCA). I find that the prosecution sufficiently proved that the victim was a child within section 8(2).
23. On penetration, PW6 (the clinical officer) testified that the child had tears around her vagina, freshly torn hymen, swelling, bruises, and was bleeding. The P3 and treatment notes corroborated this evidence. Penetration, even partial, was proved beyond doubt.
24. On identification, the complainant was too young to give reliable testimony. The key evidence therefore came from PW5, her mother, a person with hearing impairment. She testified through a sign language interpreter that she woke up due to commotion, lit a tin lamp, and recognized the Appellant,



her neighbour, at close range. She had prior knowledge of him, and even recalled a previous attempted sexual assault on her. Her identification was clear, consistent and corroborated by the circumstances.

25. The Defence: The Appellant gave an unsworn statement alleging that the charges were fabricated by the village elder due to family grudges. The trial court considered this defence but correctly found it weak and unsubstantiated. It did not outweigh the cogent prosecution evidence. The trial court was correct in finding that the Appellant was properly and positively identified as the perpetrator by the mother but not framed by the area village elder.
26. Sentence: Section 8(2) of the *Sexual Offences Act* prescribes life imprisonment where the victim is 11 years or below. The complainant herein was 5 years old. The sentence imposed was therefore lawful and mandatory.

Observation Of Language

27. Before I proceed, I wish to issue a caution to all parties and the record of this Court. I have carefully read through the submissions from the lower court, both from the defence and the prosecution, and I have noted with concern that the subject person has been repeatedly referred to as 'deaf and dumb.' This terminology is outdated, derogatory, and legally inappropriate. It diminishes the dignity of the individual and fails to accord her the respect and humanity that the law requires for every person. The correct reference should be 'a person with hearing and speech impairment' or 'a person with a disability,' in line with the *Persons with Disabilities Act*, *the Constitution*, and international human rights standards.

Final Orders

28. The appeal is dismissed.
29. The conviction and sentence of life imprisonment imposed by the trial court are hereby upheld.
30. It is so ordered.
31. Right of Appeal 14 days.
32. File closed.

DATED SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THI 8TH OF OCTOBER, 2025.

S.N. MBUNGI

JUDGE

In presence of;

Court Assistant: Angong'a

Accused : Present

Court prosecutor: Osoro

