



**Werimo v Republic (Criminal Appeal E051 of 2025)  
[2025] KEHC 17363 (KLR) (25 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 17363 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL E051 OF 2025  
DR KAVEDZA, J  
NOVEMBER 25, 2025**

**BETWEEN**

**OSCAR MAKONJIO WERIMO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered on 10th April 2025 by Hon. M.Murage (PM) at Kibera Chief Magistrate's Court, Sexual Offences Case No. 12 of 2019 Republic vs Oscar Makonjio Werimo)*

**JUDGMENT**

1. The appellant was charged and after full trial, convicted by the Subordinate Court of the offence of defilement contrary to section 8(1) as read with 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on the diverse dates between 1<sup>st</sup> October and 31<sup>st</sup> December 2018 at [particulars withheld] area in Dagoretti subcounty area within Nairobi County, intentionally and unlawfully caused his penis to penetrate the vagina of B.M.M a girl aged (15) years old with mental disability.
2. Being aggrieved, he filed an appeal challenging his conviction and sentence. In his petition of appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted. He urged the court to quash his conviction and set aside the sentence imposed.
3. This is the first appellate court and in *Okeno v. R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence which was before the trial court and come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.
4. The complainant (PW1) gave her testimony after a voir dire examination. She told the court that on the material day, the appellant who was their neighbour stated that the appellant held her, pinned her to the toilet, and defiled her. He then gave her Kshs 10 to buy mangoes. She gave it to other children



- and didn't tell anyone what had transpired. She further told the court that she got a child as a result of the defilement. PW1's grandmother reported the incident to the police station. She identifies the appellant in court as Baba Fenny.
5. During cross-examination, the complainant that the incident occurred during the daytime and the children witnessed it, but none reported it.
  6. PW2, Beatrice Nasare, PW1's grandmother, noticed that PW1 was not having her period and took her to the hospital to test for pregnancy, and indeed she was pregnant. She testified that the complainant told her that it was Baba Fenny who defiled her. She identified Baba Fenny as their neighbour.
  7. PW3, John Njuguna, a clinician from Nairobi Women's Hospital, testified that the complainant (PW1) was pregnant after a laboratory test was conducted. Further, she had mental and physical disability. He noted the abdomen was distended with a palpable wall.
  8. PW4, Margaret Wahu Maina, a government chemist, produced the paternity results of the complainant (PW1), the appellant, and the child. From the DNA profile, she drew conclusions that the appellant is excluded as the biological father of the complainant's child.
  9. PW5, Sergeant Pamela Karimi at Muthangari Police Station. She states she noticed the girl was mentally disabled and her speech was not fluent. She also produced the DNA report excluding the appellant from being the father of PW1's child. During cross-examination, she told the court that the appellant was tested twice for DNA and both reports excluded him as the father of the child.
  10. The appeal was canvassed by way of written submissions which have been duly considered and there is no need to rehash them.
  11. To succeed in a prosecution for defilement, it must be proven that the appellant committed an act that caused penetration with a child. "Penetration" under Section 2 of the Act means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person."
  12. Further, section 8(1) and (3) of the [Sexual Offences Act](#), No. 3 of 2006 provides thus:
    8. Defilement
      - (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
      - (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
  13. The Investigating officer, PW5, gave evidence that she was born on 2<sup>nd</sup> January 2005. She was therefore fifteen (15) years old at the time the alleged offence was committed. The complainant was therefore a child within the meaning of the law.
  14. The second element of penetration is defined under section 2 of the [Sexual Offences Act](#), to include, partial or complete insertion of genital organs. In this case, PW1, the victim, testified that she was pinned to the wall and defiled. The perpetrator gave her Kshs 10 to buy mangoes. During cross-examination, she stated that some children witnessed the incident, but none reported it. Further, she became pregnant as a result of the ordeal. The element of penetration was proved beyond reasonable doubt.
  15. As to whether the appellant was the person who committed the offence against the complainant, the prosecution relied principally on the complainant's testimony, which identified the appellant as the



sole perpetrator. A voir dire was conducted prior to her swearing in. The record establishes that the complainant, then a minor, suffered from significant mental and physical disabilities, attended a special school, and was described by PW2 (her grandmother) as not of sound mind. Although no formal medical report was tendered, this Court is satisfied that the complainant was a child with special needs and intellectual impairment.

16. Under section 124 of the *Sexual Offences Act*, where a court admits the unsworn evidence of a child of tender years or a person of unsound mind, it must record its reasons for believing such evidence to be reliable. The trial court complied with this requirement and found the complainant's evidence credible, noting that despite her condition whom she described as an "imbecile", she consistently named the appellant as the person who defiled her and implicated no one else.
17. Notwithstanding the foregoing, scientific evidence was decisive. Two independent DNA analyses of the child born to the complainant conclusively excluded the appellant as the biological father. Given the complainant's sworn assertion that the appellant was the only person who had ever defiled her, the inescapable conclusion is that her evidence on the critical issue of exclusive perpetration was untruthful.
18. Even accepting the possibility that the court believed her evidence to be true, the negative DNA results created an obvious evidential conflict that demanded further investigations. The investigating officer ought to have reasonably pursued enquiries to identify the actual person responsible for the pregnancy. No such investigation was undertaken. This failure left a material gap in the prosecution case.
19. Where the sole witness is shown to have given false evidence on a critical fact, and no independent evidence exists, the remaining testimony cannot safely support a conviction beyond reasonable doubt. In the circumstances, a reasonable doubt exists as to whether the appellant was the person who committed the offence charged.
20. Accordingly, the conviction of the trial court cannot stand. The appeal is allowed, the conviction is quashed, and the sentence is set aside. The appellant is acquitted. The appellant is set at liberty unless otherwise lawfully held.

Orders accordingly.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 25<sup>TH</sup> DAY OF NOVEMBER 2025**

.....

**D. KAVEDZA**

**JUDGE**

In the presence of:

Appellant Present

Mutuma for the Respondent

Karimi Court Assistant

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