



**Abdalla v Republic (Criminal Appeal E054 of 2024)
[2025] KEHC 17701 (KLR) (27 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 17701 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E054 OF 2024
WM KAGENDO., J
NOVEMBER 27, 2025**

BETWEEN

KHAMISI ABDALLA APPELLANT

AND

THE REPUBLIC RESPONDENT

*(Being an appeal from the Judgment delivered by Hon. R.O. Mbogo (SRM) on
10th July 2023 in Shanzu Chief Magistrate's Court, S.O. Case No. 39 of 2019)*

JUDGMENT

Background

1. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars alleged that on 9th March 2019 at Bamburi area in Kisauni Sub- County within Mombasa County, he intentionally and unlawfully caused his penis to penetrate the anus of K.K. (name withheld), a boy aged 12 years.
2. As an alternative, he was charged with committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* for allegedly touching the complainant's anus with his penis on the same date and place.
3. The prosecution called four witnesses; the defence called the accused person only. On 10th July 2023 the trial court found the accused guilty of defilement contrary to section 8(1) as read with section 8(2) and discharged him on the alternative charge. On 28th July 2023 the accused was sentenced to 20 years' imprisonment.
4. Aggrieved, the appellant appealed on grounds that:
 - a. the prosecution evidence was contradictory and inconsistent;



- b. the trial magistrate failed to exercise discretion;
 - c. the magistrate failed to consider mitigation under sections 216 & 329 CPC; and
 - d. the court failed to consider time spent in custody under section 333(2) CPC.
5. The duty of this Court as first appellate court is settled in *Okeno v Republic* [1972] EA 32 — to re-examine the evidence afresh and draw its own conclusions, allowing for the trial court's advantage of seeing and hearing witnesses. Prosecution's case (evidence as given) PW1 - Susan Nyaswa (mother of the complainant).
 6. PW1 testified that her son was 12 years old when the incident occurred. She marked his birth/clinic card MFI-1. She stated that on 9th March 2019 her son left home while she was asleep and did not return that day. The following morning she visited her sister to confirm if he had slept there. While talking, the complainant showed up wearing an oversized shirt and holding Ksh. 50 and sugar.
 7. He said he had been beaten by some boys and rescued by someone. PW1 said the victim removed his shirt and she saw burns on his body. He told her that after playing he fell asleep at a stall and a watchman alleged he had stolen potatoes. The watchman put a panga on gas and burned him while he was being held by the boys. The watchman stayed with him the whole night and they started beating him. The complainant told PW1 that the watchman had asked him to suck his penis and that the watchman also inserted his penis into the complainant's anus. The boys allegedly inserted sticks into his anus. The watchman was arrested and taken to court.
 8. On cross-examination PW1 stated that K.K. (name withheld) was born on 16th May 2003. She works at Utange Primary School next to Joho Girls Secondary School and the complainant attends the same school. The accused is a guard at Joho Girls Secondary School. The incident occurred at Joho Girls Secondary School. PW2 — Dr. Fatuma Ahmed (medical officer, Coast General Hospital)
 9. PW2 tendered a P3 form for K.K. filled by her colleague Dr. Aisha on 4th April 2019. Findings included: no blood stains noted, multiple bruises on both arms due to assault and defilement by a known person; age of injury three weeks. She produced the P3 as Exhibit 3.
 10. She produced a PRC form for K.K. indicating the perpetrator was known. The victim stated that the accused forcefully penetrated his anus and three schoolmates put their fingers in his anus. There were scratch marks on the neck and arms, a superficial burn on the arm, whip marks from beating, and healing lacerations on the arms. The victim was given PEP and antibiotics. The PRC was produced as PEX 2.
 11. PW2 also produced treatment notes dated 10th March 2019 from Coast General Hospital as PEX 4.
 12. On cross-examination PW2 stated she did not prepare the P3, did not personally see the patient. The laceration recorded was at the anal organ. The age of the injury was assessed at three weeks. The victim was given PEP for sexually transmitted infections four days after the incident. PW3 — The complainant (victim).
 13. PW3 testified he was 16 years old and in Standard 8 at Utange Primary School, residing at Majaoni with his mother Susan Wafula. On 9th March 2019 around 6pm he was at school watching football. He had left home earlier and feared returning. His friends Maxwell and Gicheru left him at the kiosk. The school watchman fed him and asked him to bathe, gave him a lesa, and asked him to sleep while chewing muguka with a friend. 14. The victim said he was slapped by the watchman for refusing to go to the toilet and screamed. Two people came and the watchman told them the minor had planned to



- steal potatoes and could not leave without his permission. They asked the watchman to take the minor to the area chief and left.
14. The watchman took the minor to the chief but found only the chief's wife. The watchman returned the minor to the school hall. Three boys then arrived, one known as Chopper. They told the watchman that the victim was the son of a school worker.
 15. The boys came with tree branches and assaulted the minor; one removed his shorts and biker leaving him in a vest. One of them put his penis on the victim's anus; another inserted a stick into the victim's anus. The watchman was absent then; he returned later and two boys left. With the help of one boy, the watchman forced the victim to bend over, removed his trousers, and inserted his penis into the victim's anus.
 16. The watchman asked the minor to lick his penis, threatened him with a panga, and forced him to suck. In the morning the watchman took the minor to his home, gave him his oversized shirt and Ksh. 50, and asked him not to tell anyone. The minor took his mother to the watchman's home and the police arrested the watchman.
 17. On cross-examination the complainant stated he did not know the watchman prior to that day and his mother also did not know him. The watchman tried to call his mother but could not reach her. The boy who inserted a stick was not in court. The watchman returned to the hall and forced him to bend over. The watchman's penis was hard when he told him to suck it. The next morning the watchman told him to go home.
 18. On re-examination the complainant reiterated he did not know the watchman before that day. Two of the three boys who beat him remained with the watchman. He can recognize the boy who held him while another inserted his penis in the victim's anus — that boy was the watchman. It was painful and lasted for a long time. The incident happened on Saturday and he went home on Monday morning. PW4 — PC Irene Karugu (Bamburi Police Station, investigating officer)
 19. PW4 testified that on 10/3/2019 the accused was brought to the station by members of the public alleging he had defiled the complainant, aged (reported) 14 years. The complainant informed the IO that the watchman caught him, accused him of stealing potatoes, took him back to school, sodomized him, and forced him to suck his penis. The accused had brought two boys who inserted sticks into his anus.
 20. On cross-examination the IO stated the accused was arrested on 10/3/2019 and refused to be taken to hospital for tests. The incident happened on 9/3/2019. She was unable to arrest the other boys. The complainant identified the accused as the person who sodomized him. --- Defence case (as given)
 21. The accused testified that he knew the complainant only by sight. While on patrol he found the boy in the potato store, took him to the village elder who was absent, then brought the boy to his workplace and allowed him to leave.
 22. The next day a mob knocked his door; when he opened he found the boy with his mother and the mob began beating him, accusing him of sodomizing the boy. He was taken to Bamburi Police Station, his statement recorded, and later taken to court.
 23. The accused stated he was never taken for tests and contended the boy would not be walking if he had been sodomized. He suggested the mother was a neighbour working at the secondary school while he worked at the primary school and framed the incident as workplace jealousy.
 24. On cross-examination the accused admitted that he was the person who had apprehended the boy.



25. The appeal was argued by written submissions which the Court has considered. Law and Elements
26. Section 8 of the *Sexual Offences Act* defines defilement and prescribes penalties. Subsections relevantly provide mandatory minimum sentences depending on the victim's age:

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.
4. A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”
27. Section 11(1) sets out the offence of an **indecent act with a child** carrying a minimum sentence of ten years.
28. The prosecution must prove beyond reasonable doubt: (i) penetration; (ii) the age of the victim (that he was a child); and (iii) positive identification of the accused as the perpetrator. Evaluation Penetration
29. The complainant testified in detail as to penetration. Medical records (P3 and PRC) note anal laceration and injuries consistent with sexual assault. The complainant's narrative and the medical documentation satisfy the Court that penetration was proved beyond reasonable doubt. Age of the victim.
30. Age is a critical element. The clinic card (produced) shows the complainant's date of birth as 16th May 2003. The offence occurred on 9th March 2019. Although the complainant testified as to his age at different times, the clinic card is direct documentary evidence.
31. The record contains the complainant's testimony on 28th September 2021 that he was 16 years old. The prosecution alleged he was 12 at the time of the offence. Having perused the clinic card reflecting 16th May 2003, the Court finds the victim was a minor within the relevant statutory band. (The trial record contains divergent age statements; the clinic card is the primary documentary evidence relied upon.)

Identification

32. The complainant positively identified the accused as the person who sodomized him. That identification is corroborated by the medical evidence and the mother's observations. The accused admitted to having apprehended the boy the previous day, and therefore was present and known to the complainant on the material night. The Court is persuaded that identity was satisfactorily established beyond reasonable doubt.

Findings and Orders

33. Upon independent evaluation of the evidence, this Court sets aside the conviction under section 8(1) as read with section 8(2) and substitutes it with a conviction under Section 8(1) as read with section 8(4) of the *Sexual Offences Act*. The appellant is discharged on the alternative count. The appellant is sentenced to 15 years' imprisonment.
34. The Court must consider the period the accused spent in custody pursuant to section 333(2) of the Criminal Procedure Code and the Judiciary Sentencing Policy Guidelines (clauses 7.10–7.11).



35. The record shows the appellant was on bond during trial; his bond was cancelled and he was taken into custody on 10th July 2023 when the trial court delivered judgment. The trial court did not account for section 333(2); accordingly, the appeal succeeds to that extent.
36. The sentence shall therefore run from 10th July 2023, the date of conviction.
37. It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 27TH DAY OF NOVEMBER 2025

HON. LADY JUSTICE WENDY KAGENDO JUDGE

In the presence of:

The Appellant in person Mr. Sirima for the State Bebor - Court Assistant

SIGNED BY/FOR:

HON. LADY JUSTICE WENDY MICHENI

THE JUDICIARY OF KENYA.

