



**Mususi v Republic (Criminal Appeal 2 of 2025)
[2025] KEHC 18612 (KLR) (17 December 2025) (Judgment)**

Neutral citation: [2025] KEHC 18612 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 2 OF 2025
DR KAVEDZA, J
DECEMBER 17, 2025**

BETWEEN

DUNCAN MUSUSI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered on 2nd April 2025 by Hon. C. Njagi (PM) at Kibera Chief Magistrate's Court, Sexual Offences Case No. E083 of 2023 Republic vs Duncan Mususi)

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(4) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on the diverse dates between May and 9th July 2023 in Kibra Sub-County within Nairobi County, intentionally caused his penis to penetrate the vagina DA a child aged 16 years
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), DA, testified that the appellant had been her boyfriend since 2023. They met on the road and were neighbours. She visited his house on three occasions, admitting to having sexual intercourse with him on each of her visits, but not on the first. She maintained that the appellant never



- forced or coerced her into any sexual act. During cross-examination, she reaffirmed that the appellant neither forced nor harassed her.
5. PW2, Pameline Wambui, a clinician at Coptic Hospital, produced the medical report in respect of PW1. Upon examination, PW1 was found to have an old torn hymen with no vaginal discharge or injuries. Laboratory tests revealed the presence of bacteria in her urine.
 6. PW4, Regina Awinja, a community health promoter and GBV mentor, testified that on 9th July 2023 she received information from Peter Makau that a girl had been defiled behind Makina Mosque. She proceeded to the appellant's house in an attempt to rescue PW1 but found no one there. As she was leaving, PW1 appeared and accompanied her to the police station, where PW1 reported that she had been defiled and disclosed that she was in a relationship with the appellant.
 7. During cross-examination, PW4 stated that PW1 was known to refuse to go to school, to associate with boys, and that this behaviour was attributable to poor parenting.
 8. PW5, Peter Makau, a village elder from Makina, testified that he received information of the defilement behind Makina Mosque. Upon visiting the scene, he found PW1 but the appellant had fled. When questioned, PW1 admitted to having sexual relations with the appellant.
 9. PW3, MA, a security worker and mother of PW1, testified that she was informed by Regina (the village elder) that her daughter had been arrested. She confirmed PW1's date of birth as 16th October 2006 and identified the appellant as their neighbour.
 10. PW6, Amina Aminata, a village volunteer, testified that she was informed by a neighbour that the appellant was sleeping with schoolgirls. Upon interrogation, PW1 admitted to engaging in sexual activity generally and stated that her mother had instructed her to seek money for food, in consequence of which she would have sexual intercourse with the appellant in exchange for food.
 11. PW7, Esther Kagendo, the investigating officer at Kibra Police Station, summarised the prosecution's evidence.
 12. The appeal was canvassed by way of written submissions, which have been duly considered, and there is no need to rehash them.
 13. 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."
 14. Further, section 8(1) and (4) 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.
 - (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.
 15. The complainant's mother (PW3) adduced evidence that the complainant was born on 20 April 2007 and was accordingly sixteen years of age at the time of the alleged offence. She was therefore a child within the meaning of the law, and the age ingredient of the offence was unequivocally established.



16. The element of penetration is defined under section 2 of the *Sexual Offences Act* as including the partial or complete penetration of the vagina by the genital organs. PW1 gave a detailed account, admitting that she had visited the appellant's house, he being their neighbour, and had engaged in sexual intercourse with him on three occasions. This was corroborated by the evidence of PW2, who produced the medical report showing an old hymenal tear. The element of penetration was accordingly proved beyond reasonable doubt.
17. As regards identification, PW1 was firm and consistent in stating that the appellant, her neighbour and self-described boyfriend, was the person with whom she had sexual intercourse with. She provided a detailed account which remained unshaken on cross-examination. PW3, the complainant's mother, confirmed knowing the appellant as their neighbour and positively identified him. The court is satisfied that identification was not in issue and was properly established.
18. In his defence, the appellant admitted being a neighbour but denied the allegations of defilement. He described PW1 as a friend rather than a girlfriend, maintained that he had never had sexual intercourse with her, and stated that their only interactions occurred when fetching water. During cross-examination, he reiterated his denial and claimed to have been at work on the material day. His alibi defence was however uncorroborated. The trial court considered the defence and rightly found it to amount to a mere denial and an afterthought.
19. Notwithstanding the complainant's assertion of a consensual relationship, she was a child incapable in law of giving consent, whereas the appellant was an adult. Consent was therefore irrelevant and unavailable as a defence.
20. The prosecution proved each ingredient of the offence of defilement beyond reasonable doubt. The appellant's defence raised no reasonable doubt in the prosecution case. The conviction under section 8(4) of the *Sexual Offences Act* is safe and is hereby affirmed.
21. On sentence, the appellant was sentenced to 15 years' imprisonment. During sentencing, the court considered the appellant's mitigation, and his status as a first offender and sentenced the appellant accordingly. In the premises, I see no reason to interfere.
22. In the end, the appeal is found to be lacking in merit and is dismissed in its entirety.
Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 17TH DAY OF DECEMBER 2025

D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Mr. Mutuma for the Respondent.

Karimi Court Assistant.

