

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CRIMINAL APPEAL NO. E046 OF 2025

AYUB OSEWE ORIWO alias BABA APPELLANT

- VERSUS -

REPUBLIC RESPONDENT

(Being an appeal from the judgment & conviction of **Hon. J. Kimetto PM** delivered on the 14/11/2024 and sentence passed on the 23/1/2025 in **Maseno SPMC in Criminal Case No. E039 of 2022, R. vs Ayub Osewe Oriwo alias Baba)**)

J U D G M E N T

1. The appellant was charged with the offence of defilement **contrary to Section 8 (1) (4) of the Sexual Offences Act No. 3 of 2006.**
2. The particulars of the charge were that, on diverse dates between February 2022 and the 9/9/2022 in Kamunga village and Rambugu Island in South Central Seme, Seme sub county within Kisumu county, he unlawfully caused his penis to penetrate the vagina of R.A. a child aged 17 years.
3. The appellant also faced an alternative charge of committing an indecent act with a child contrary to ***section 11 (1) of the Sexual Offences Act No. 3 of 2006.***
4. The appellant pleaded not guilty and the matter proceeded to trial. The prosecution called four (4) witnesses while the appellant gave sworn testimony.

5. In its judgment dated **14/11/2024**, the trial court found the appellant guilty of the main charge, convicted and sentenced him to serve 15 years' imprisonment.
6. Dissatisfied by that decision, the appellant filed his petition of appeal dated **16/5/2025** raising seven (7) grounds that can be summarized as follows: -
 - a) **That the trial court erred in law and in fact in convicting him despite the fact that the prosecution failed to prove its case beyond reasonable doubt.**
 - b) **That the trial court erred in law and in fact in not making a finding that his constitutional right to a fair trial were breached.**
 - c) **That the trial court erred in law in denying the appellant his absolute right to a least prescribed sentence pursuant to Article 25 (c), 50 (2) (p) and section 333 (2) of the CPC.**
7. The appellant did not file submissions in support of his appeal but instead opted to rely on his grounds of appeal.
8. On its part, the State submitted that the prosecution had proved its case to the required standard. That the appellant's defence was correctly found to be evasive and a mere denial. That the trial court conducted the trial with fairness as it gave the appellant an opportunity to prepare his defence and that therefore, there was no procedural error vitiating.
9. That the sentence meted out to the appellant was commensurate with the offence. That however, despite the fact that the trial court directed that the time spent in custody be considered in computing the appellant's sentence, the same was not done and ought to be considered by this Court.

10. This being the first appellate Court, its duty is well spelt out, namely, to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach its own independent conclusion and findings but at all times bearing in mind that it did not see the witnesses testify. (See *Okeno v Republic [1972] EA 32.*)
11. Before the trial court, **Pw1 R.A**, the complainant testified that she was born on the **27/3/2005**. That between the months of February and September 2022, the appellant, her step father, wanted her to have a relationship with him but she refused.
12. That the appellant insisted on sleeping with her as she was sleeping in his house. That the appellant lured her to join him at Rambugu Island in the pretext of collecting firewood but while there, the appellant whilst threatening her with a panga and having tied her hands with a tree bark, removed her panty and had sex with her.
13. That the appellant threatened her mother with death if she revealed the incidence. It was her testimony that after they returned home she did not reveal the incident to anyone. That as her mother was away, she waited until April that year when her mother returned and informed her of the incident but she did not believe her.
14. That the appellant continued to defile her whereby he would tie her hands then defile her and afterwards threaten her with death. That on the **9/9/2022**, the appellant lured her to join him in fetching firewood and whilst in the forest, the appellant took a stick and beat her with it and attempted to kill her after which he proceeded to have sex her with her.
15. That on the following day, **10/9/2022**, she could not walk properly as she was in pain and her legs were aching. That she managed to escape to her

uncle's house where she spent the night but the appellant came to look for her there. It was her testimony that the following day she headed to her maternal grandmother's place where she informed her grandmother what had happened.

16. That as the appellant had reported her missing, a village elder from her village inquired from her the reason why she was at her grandmother's place and she revealed what the appellant had been doing to her but the village elder did not take any action as the appellant was his friend.
17. That the following day, a health worker, Madam Linet, came to her grandmother's house and she revealed to her what the appellant had been doing to her. The said Linet took her to hospital and subsequently to the police station.
18. **Pw2 Linet Amolo Odede** a community health worker testified that on the **15/9/2022**, she received information that there was a girl whose rights had been infringed. The following day, **16/9/2022** she proceeded to the appellant's homestead where she found the complainant. That on interrogating her, she established that she had been molested by her father, the appellant. That she later accompanied the complainant to Kombewa Hospital.
19. **Pw3 Crans Odhiambo Okumu**, a clinical officer at Kombewa County Hospital produced the PRC form, Outpatient report and P3 form filled after the complainant's examination. That on examination, it was found that there was no vaginal discharge, laceration or bruises in her vagina and that though her hymen was not there, it was not freshly torn. That the complainant had a healing wound around her lumbar region at her back.

20. **Pw4 No. 232506 PC Rukia Ismae,l** the investigations officer, testified that a defilement report was made on the **17/9/2022** regarding the complainant. On investigations, she established that the appellant had started seducing the complainant who was 17 years old in **February 2022**.
21. That the complainant's mother was usually not around and it is during this time that the appellant defiled the complainant. That the appellant continued defiling the complainant leading up to his arrest.
22. When placed on his defence, the appellant denied committing the offence. It was his testimony that on the **26/9/2022**, his wife informed him that he had guests who informed him that they wanted to take him to their boss who wanted fish. That he was taken to Kombewa Police Station where he was placed in the cells without being told what mistake he had done. The appellant placed the blame on the charges brought against him on the complainant's grandmother whom he alleged wanted his land.
23. It is on the foregoing evidence that the trial court found the appellant guilty, convicted and sentenced him.
24. **Section 8 (1)** as read with **section 8 (4) of the Sexual Offences Act** establishes the offence of defilement as follows:

“8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

8(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.”
25. The specific elements of the offence of defilement arising **from section 8(1) of the Sexual Offences Act** which the prosecution must prove beyond reasonable doubt are: -

a) Age of the complainant;

b) Proof of penetration in accordance with Section 2(1) of the Sexual Offences Act;

c) Positive identification of the perpetrator.

26. The age of the victim of defilement is an essential element because defilement is a sexual offence committed against a child who under the Children's Act is a person below the age of 18 years. In addition, the age of the child is an aggravating factor for purposes of determining the sentence to be imposed as per the penalty clauses in the **Sexual Offences Act**. The younger the child, the more severe the sentence.
27. In this case, there was no dispute over the complainant's age. The complainant testified that she was born on the **27/3/2005** a fact which was corroborated by **Pw4** who produced the complainant's birth certificate as **PExh1**. The Complainant was thus 17 years old at the time the offence being committed.
28. On penetration, **section 2 of the Act** defines penetration as follows: -
- “the partial or complete insertion of the genital organs of a person into the genital organ of another person.”***
29. The complainant testified how the appellant had defiled her on several occasions between **February and September 2022** most of the times under threat of death. This was because she was not his biological child but lived under his roof.
30. On this issue, it has been held in several occasions that a fact of rape or defilement can be proved by oral evidence and circumstantial evidence without necessary calling for medical evidence. This is in line with **section**

124 of the Evidence Act which states that corroboration is not necessary in sexual offences.

31. However, in this case, the findings of the clinical officer who testified as **Pw3** was that the complainant had been penetrated. That though the hymen was not there, it had not been freshly broken at the time of the examination thus corroborating the complainant's testimony that she had been defiled over a long duration of time. This is prima facie evidence of penetration hence there can be no doubt that penetration was occasioned on the complainant.
32. The final issue is whether the appellant was positively identified as the perpetrator. The appellant was well known to the complainant being her step-father with whom they lived together. From the foregoing, it is clear that the appellant was not a stranger to the victim having lived with the appellant for a long time.
33. In his defence, the appellant denied the charge. He raised an alibi defence that he was implicated of the charges because the complainant's grandmother wanted his land. He never denied nor challenge the allegations that he went with the complainant to the places the defilement took place.
34. The law is that when an accused puts forward an alibi defence, he does not bear any burden to prove its falsity or truth. The burden always remains with the prosecution. In **Victor Mwendwa Mulinge v Republic (2014) eKLR** the court said: -

“It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution ...”

35. The governing principle on alibi defence is that a failure to disclose an alibi at a sufficiently early opportunity to permit it to be investigated by the police is a factor which may be considered in determining the weight given to it. See **Charles Kasena Chogo v Republic [2019] e KLR.**
36. In the present case, the appellant's alibi never came up at any time during the cross-examination of any of the prosecution witnesses. It seems to be an afterthought and I am in agreement with the trial court that the appellant's defence failed to raise any reasonable doubt regarding the evidence presented by the prosecution. I thus find that the prosecution proved its case beyond reasonable doubt.
37. The appellant complained that his constitutional right to a fair trial were breached. However, the appellant did not state how this breach arose save to state that there were procedural errors which he did not point out.
38. ***Article 50 of the Constitution*** provides for the right to a fair hearing. The aforementioned Article goes on to provide the specific rights that constitute a fair trial. In **Anarita Karimi Njeru (No.1) (1979) 1 KLR 154,** the Court of Appeal held that it is not enough to allege constitutional violation, one must plead the specific violation and proceed to demonstrate the same.
39. In **Aluochier v Senate & 2 others (Petition E014 of 2025) [2025] KESC 59 (KLR) (3 October 2025) (Judgment),** the Supreme Court complimented the Anarita case by stating, *inter-alia*, that a petitioner has the burden of presenting evidence showing on a balance of probabilities that the allegations of constitutional violation are true and factual.
40. Consequently, I find that this limb of the appeal lacks merit.

41. Finally, the appellant contended that he was entitled to the least prescribed sentence pursuant to **Article 25 (c), 50 (2) (p) and section 333 (2) of the CPC.**
42. The relevant penalty clause under which the appellant was sentenced is **Section 8 (4) of the Sexual Offences Act**, which section provides that: -

“8(4) A person who commits an offence of defilement with a child aged sixteen and eighteen years is liable upon conviction be sentenced to imprisonment for term of not less than fifteen years”.
43. The trial court considered the fact that the victim had been under the appellant’s care who instead of protecting her betrayed her. Further that, apart from severally defiling her, he also assaulted her on several occasions.
44. The law is clear on such offences where minors do not have the capacity to consent to any sexual relationships and even marriage. Thus, a deterrent sentence is necessary.
45. The victim was a child. She was 17 years old. The manner the offence was committed was by taking advantage of her. She was living under the appellant’s roof by virtue of her mother being married to and living with the appellant. The child is likely to also suffer post-traumatic effects from agonizing memories of the incidents complained of. The sentence of 15 years is the minimum prescribed by the law. In the circumstances, the 15-year imprisonment sentence is upheld.
46. As regards the computation of the sentence, the appellant urged the court to consider section 333 (2) of the Criminal Procedure Code. **Section 333(2) of the Criminal Procedure Code** provides that: -

“Subject to the provisions of section 38 of the Penal Code (Cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

47. I have considered the entire record. I have also considered the proceedings of the trial Court. The trial court indicated that it had considered the two years which the appellant had been in custody in arriving at the sentence.
48. Notwithstanding the above, there is need to clarify that in computation of the appellant’s 15 years’ sentence, the same will start on the **24/9/2022** when the appellant was arrested. Save for that variation, the appellant’s appeal is without merit and is hereby dismissed.

It is so decreed.

DATED and **DELIVERED** at Kisumu this **19th** day of **December, 2025**.

A. MABEYA, FCI Arb

JUDGE