



**Were v Republic (Criminal Appeal E090 of 2024)  
[2025] KEHC 18912 (KLR) (18 December 2025) (Judgment)**

Neutral citation: [2025] KEHC 18912 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL APPEAL E090 OF 2024  
WM KAGENDO., J  
DECEMBER 18, 2025**

**BETWEEN**

**NELVINE ANYOLO WERE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment that was delivered by Honourable L.N Juma  
(PM) on 28th June 2024 in Shanzu Cms'court in S.O number E014 of 2023)*

**JUDGMENT**

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](#). That on diverse dates between November 2022 and 2nd January 2023 at (particulars withheld) area, in (particulars withheld) sub- county, within Mombasa County intentionally and unlawfully caused the penis of E.M.N a boy child aged 7 years to penetrate your vagina.
2. As an alternative charge, the appellant was equally charged with the offence of committing an indecent act with a child contrary to section 11 (1) of [Sexual Offences Act](#). That on diverse dates between November 2022 and January 2023 at (particulars withheld) area, in (particulars withheld) sub-county within Mombasa County unlawfully and intentionally caused E.M.N a boy child aged 7 years to suck and kiss your vagina.
3. The matter proceeded for hearing, the prosecution called 4 witnesses in support of their case while the defence called the accused person only. On 28th June 2024 the trial court found the accused guilty of the offence of committing an indecent act with a child contrary to section 11 (1) of the [Sexual Offences Act](#) and discharged her on the main count. On 31st July 2024 the accused was sentenced to ten years' imprisonment on the alternative charge.



4. Aggrieved with the said judgement, the appellant filed the instant appeal based on the following grounds: -
- a. That he was arrested charged at Shanzu law Court for the offence of committing an indecent act with a child c/sec 11 (1) of the sexual offences act no. 3 of 2006 and sentenced to 10 years' imprisonment.
  - b. That he pleaded not guilty to the offence and his case went to full trial and sentenced to serve 10 years' imprisonment.
  - c. That the sentence of 10 years was harsh and excessive in the circumstances of his case.
  - d. That the learned trial magistrate did not put into consideration his defense.
  - e. That he humbly begs the honourable court that may the sentence meted on him be set aside and conviction quashed.
5. The duty of this court as a first appellate court is well settled in the case of *Okeno v Republic* [1972] EA 32 at 36 where the court held that: -

“....an appellant on a first appeal is entitled to expect the Evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v Rep* [1957] EA 336 and to the appellate court's own decision on the Evidence. The first appellate must itself weigh conflicting evidence and draw its own conclusions. (*Shentilal M. Ruwala v R* [1957] E.A 570. It is not the function of the first appellate court to merely scrutinize the Evidence to see if there was Some evidence to support lower court's findings and conclusions, it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing witnesses, See *Peters v Sunday* [1958] E.A 424.”

#### **Prosecution's case**

6. PW1 MWM the complainant's mother testified that on 22/1/2023 she was looking for a new house help because the NA who was her new house had run away on 2/1/2023 she was at work. She stated that her son, born on 27/4/2015 (birth certificate MF-1) told her while shaking , on 22/1/202 , that NA , the accused had called him to her bathroom and told him he was dirty and she wanted to wash him. She washed him and asked him to lick her private parts and she also sucked his penis. She also told him to insert his penis in her private parts.
7. PW1 stated that the minor told her that the accused removed her skirt and asked the minor to put his penis in her vagina. This was done at the bed from the bathroom. The minor said he was in pain. She did this two times. She reported the matter to Bamburi Police Station and took the minor to Makadara hospital. The accused was arrested and brought to court. She identified the accused in the dock.
8. In cross examination she stated that the minor informed her that he was defiled twice before and after Christmas. She does not have a camera in the house help's room. That the minor is the one who told her the whole story and she was not present when the incident occurred.



9. PW2 EMN minor testified that he is in Grade 4 at N. Primary School. His birthday is on 27/4/2024. He knows the accused. She was their house help. That on the material day he was watching television with his siblings the accused called her in her room and she sexually assaulted him.
10. The minor testified that the accused removed her skirt and she put her private parts in his mouth. She was standing and he was kneeling on the floor. That she opened his mouth after that and told him to do another one. She removed his short and asked him to put their private parts together. He removed his short and did as she said while they were both standing. The accused told him if he told anyone about the incident she would do something bad to him that's why he told his mom after NA ran away from their home.
11. On cross examination the minor stated that NA used to take him to the bathroom to wash him. She had washed him twice. She asked him to lick her vagina and she sucked his penis. He is certain about what he is saying. That he was scared to tell his parents and only told them after she left.
12. PW3 PC woman Getrude Kwamboka attached at Bamburi police station. She testified that she took over the file from PC Irene Karuvya. That from the record the mother of the minor reported that the suspect who was their house help ran away after the minor disclosed to his mother that the house help forced him to suck her vagina in the bedroom. Incident took place in two different occasions while the accused bathed him.
13. PW3 stated that the accused instructed the minor to suck the vagina while standing. The accused instructed him to put his penis in her vagina. The accused warned the minor that she will do something bad to him if she reported to anyone.  
  
She produced the birth certificate as PEXH-1. On cross examination she stated that she was not present when the accused was arrested. That the complainant's mother identified her positively.
14. PW4 Dr Gabriel Muyola testified that he had a P3 form filed by Dr Zainab, whom he knows well as they work together. He knows his handwriting and signature. The PRC was filed with Saida and Ali. He knows her handwriting and Ali was his assistant. He produced the P3 as PEXH-2 and PRC form as PEXH-3.
15. He testified that the clothes were not brought, victim was in fair general condition. The time had lapsed since examination was done was weeks later. That a Blunt object injury - was vagina used in the offence. Degree of injury was harm. P3 shows defilement. Victim was aged 7 years. The victim was a male child. No injuries noted on the private parts of the victim or anus. No discharge noted on the penis or anus of the victim.
16. On re-exam he testified that the victim showed he has no injuries on the victim. The victim was given PEP to prevent STI's.

### **Defence case**

17. In her defense she gave sworn testimony and stated that she came to Mombasa to look for job. She got a job as a house help. She worked for 2 months and left. She was only paid half of the amount they had agreed. She left work and went to Kakamega on 22/1/2023. That she is the one who takes care of her family. She stated that when she came back she was arrested with the mother to the complainant and was taken to the police station.
18. On cross examination she stated that Margaret Wanjiru is the person who had employed her. EM is the complainant. She doesn't know why she was charged with the offence. She had no dispute with the complainant or his mother.



## Analysis and Determination

19. Section 8 of the [Sexual Offences Act](#), 2006 is captured in the following terms in creating the offence and punishment for defilement;

“ 8. Defilement

1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
2. A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
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.”

20. Section 11 (1) of the [Sexual Offences Act](#) provides for the offence of an indecent act with a child in the following terms;

“ 11. Indecent act with child or adult

- (1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.”

21. The crucial elements that need to be proved for a crime of defilement to be inferred can be drawn from the wording of Section 8 of the [Sexual Offences Act](#). The prosecution needs to prove beyond reasonable doubt that; -

- i. There was an act which causes penetration (of the victim’s genital organs by the accused’s genital organs)
- ii. The age of the victim (must be a child)
- iii. Positive identification of the accused as the person who committed the act.

## Penetration

22. Section 2 (1) of the [Sexual Offences Act](#) defines penetration as follows: “penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

23. Dr Gabriel Muyola produced the p3 form and PRC form filled on behalf of the minor. No notable injuries were reported on his genitalia. The said forms do not show any aspect of penetration as the complainant was a boy child. The prosecution therefore failed to prove penetration beyond reasonable doubt in this case.



### **Age of the victim**

24. Proof of age is important in a sexual offense. In *Kaingu Kasomo vs. Republic*, Criminal Appeal No. 504 of 2010 (UR), the Court of Appeal stated that:-

“Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.”

25. The birth certificate produced indicate that the minor was born on 27/4/2015. The PRC form also indicate that the complainant was born on 27/4/2015. This is in line with the testimony of the complainant who testified before the trial court on 7/3/2024 that his birthday will be on 27/4/2024.

26. His evidence was also corroborated by his mother’s testimony that the minor was born on 27/4/2015 hence I find that the prosecution proved beyond reasonable doubt that the victim was born a minor aged 7 when the incident occurred.

### **Positive identification of the accused**

27. From the testimony of both the complainant, his mother and the accused, it has not been disputed that they knew each other well as the accused used to work as at the complainant’s home as a house help. The complainant therefore positively identified the accused person. I am persuaded that the accused person was positively identified as having committed the offence as she was well known to the complainant at the time of the incident.

28. In light of the above I agree with the trial court that the prosecution has proved only two ingredients of defilement in this case. The key ingredient of penetration has not been proved beyond reasonable doubt hence the offence of defilement fails.

29. On the alternative charge of committing an indecent act with a child, Section 2 (1) of the *sexual offences act* defines an indecent act as:

“Unlawful intentional act which causes any contact between any part of the body of a person with the genital organs, breasts or buttocks of another but does not include an act that causes penetration.”

30. Therefore, the main ingredients of the offence of committing an indecent act with a child are: -

- a. Proof that the victim is a child in law;
- b. Proof that there was contact between any body part of the accused person with the genital organ, breast or buttocks of the child victim (but that act must not be an act that caused penetration) or proof of exposure or display of any pornographic material to a child;
- c. Proof that the act(s) in (b) was/were intentional;
- d. There should be no legal justification in the act(s) complained of.

31. The complainant narrated how the accused person called him in her room and sexually assaulted him. In his testimony he stated that the accused removed her skirt and put her private parts in his mouth. That the accused person told him to remove his short and then she told him to put their private parts together. He stated that the accused person put his penis in her private part.



32. This testimony was not shaken as the same was, what he narrated to his mother, to the doctor during examination, to the police and also to the trial court. During cross examination the minor was not shaken as he repeated the same narration on how the incident occurred.
33. Proviso to Section 124 of the Evidence Act states: -
- “Provided where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim was talking the truth.”
34. From the trail of evidence, the complainant’s evidence was concrete and I am satisfied that the complainant was telling the truth. He was a child of tender ages and he vividly gave a proper account of all the acts that the appellant made him perform. His evidence was firm and consistent . he gave the same narration to his mother, the investigator, the medical officer and in court during both the examination in chief and during cross examination. I therefore find that the prosecution proved the ingredients of an indecent act with a child beyond reasonable doubt.
35. As to the sentence I note thea the same could have been enhanced but due notice was not served to the Appellant. LET her count herself lucky and take time to reflect on her actions .The sentence to serve as an example to others.
35. Consequently ,the appeal is not merited. The same is dismissed on all grounds.
36. It is so ordered.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF DECEMBER 2025.**

**WENDY KAGENDO JUDGE**

In the presence

The Appellant In Person Mr Ngiri For The State Bebora Court Assistant

SIGNED BY/FOR:

**HON. LADY JUSTICE WENDY MICHENI**

