

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KIBERA
CRIMINAL APPEAL NO. E120 OF 2025

DAVID AMAI.....
.....APPELLANT

VERSUS

REPUBLIC.....
RESPONDENT

(Being an appeal against the original conviction and sentence delivered on 31st July 2025 by Hon. C. Njagi (PM) at Kibera Chief Magistrate's Court, Sexual Offences Case No. E002 of 2023 Republic vs David Amai)

JUDGEMENT

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 30th December 2023 at Gathondeki area in Dagoretti sub-county, within Nairobi County unlawfully and intentionally caused his penis to penetrate the vagina of S.A.O a child aged 14 years. He was sentenced to serve twenty-five years imprisonment.
2. Being aggrieved, he filed an appeal challenging his conviction and sentence. In his amended petition of appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted. He complained that the evidence of the minor was inadmissible due to failure to conduct voir dire examination. Further, that the sentence imposed was harsh and excessive. He urged the court to quash his conviction and set aside the sentence imposed.

3. The first issue complained of was that the trial court failed to conduct a voir dire examination. A voir dire examination is conducted on witnesses who are children of tender years. Section 125 (1) of the Evidence Act, which states:
4. All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause.
5. Section 19(1) of the Oaths and Statutory Declarations Act provides guidance on obtaining evidence from a child of tender years as follows:

Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.

6. I am aware of decisions which held that a child of tender years is a child under the age of ten years, which resonates with the

definition in the Children Act. In this case, it was not necessary to conduct a voir dire for the complainant who was 14 years old.

7. Although the appellant contended that the charge was defective, he did not demonstrate any defect, nor did I observe any defect.
8. 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.
9. PW3, the complainant SAO (the minor), testified that she lived with PW1 (her aunt). She stated that on the fateful night she was outside fetching water when David the appellant who lived in door 5 and whom she knew as a neighbour, pulled her into his house. He took her to a seat, removed her skirt, panty and biker, and inserted his penis into her vagina. He remained inside her until he heard the aunt calling for her. The appellant then told her not to leave until her aunt had gone, locked her in the house, and only allowed her to leave after the aunt had departed. When she returned home, her aunt found her and asked where she had been. PW3 disclosed that she had been with David and explained what he had done to her.
10. PW3 further stated that she was subsequently taken for medical examination and the matter was reported to the police. She consistently identified the appellant as David, the neighbour who defiled her, and maintained that he was the one who committed the act.

11. PW1, Asenath Aoko, the aunt of the complainant SAO, testified that on 30th December 2023 she sent her niece outside to pour dirty water. The minor took unusually long to return. When PW1 went to search for her, she later found her back in the house. Upon inquiry, SAO disclosed that she had been at David's house. PW1 then went to the appellant's house, questioned why he had been with the minor with the lights off, and subsequently reported the matter to the police. The minor was taken to hospital for examination, where it was confirmed that David had defiled her. SAO stated that the appellant had slept with her on a chair.
12. PW2, Selina Nyambu from MSF, provided the medical evidence. She examined the complainant on 31st December 2023 and found cuts on the private parts measuring 2 centimetres, multiple abrasions on the genital areas, and slight bloody discharge. The hymen was crescent-shaped. The minor was referred for further tests and given medication. PW2 stated that the physical injuries observed were compatible with the alleged assault. She produced the P3 form, the PRC form, and another P3 form.
13. PW4, PC (W) Nancy Gathoni, the investigating officer, testified that the incident was reported and assigned to her. She recorded statements from the complainant and PW1, issued a P3 form (later filled), and produced an age assessment report, indicating the minor was between 16 and 17 years at assessment but approximately 14 years old at the time of the incident in 2023. The appellant was arrested and charged following confirmation of penile vaginal penetration of the minor. The complainant identified him as the person who took her into his house and defiled her.

14. In his defence, the appellant confirmed that he resided in door 5 of the same premises, while the complainant and her aunt lived in door 3. He denied defiling the minor, stating that he was arrested on the allegation but never committed the offence.
15. He claimed that at the police station, officers demanded Kshs. 500,000 to have the case dropped. He acknowledged that the minor alleged he had defiled her and locked her inside his house, but he disputed this, asserting that his house had no external locks capable of confining anyone. He further stated that he and the aunt had a prior grudge, which he suggested motivated the complaint.
16. The appellant said he had only seen the complainant for about two weeks before the incident and was unaware that she was a schoolgirl. Regarding his whereabouts on the material night, he stated he was at work in Ngong, though he admitted no one could verify or corroborate his alibi. He later clarified that there was no ongoing grudge with the aunt and that he was with his wife at the relevant time.
17. The appeal was canvassed by way of written submissions which have been duly considered and there is no need to rehash them.
18. 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."**
19. 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 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.

20. The age of the complainant was proved by the production of an age assessment report admitted in evidence. The report, dated 2025, assessed the minor's age as falling between 16 and 17 years at the time of examination. Calculating back from the date of the alleged offence on 30 December 2023, the complainant was therefore between 14 and 15 years old when the incident occurred. The age ingredient of the offence under section 8(1) of the Sexual Offences Act has been unequivocally established beyond reasonable doubt.

21. The second essential element is penetration, defined in section 2 of the Sexual Offences Act to mean any partial or complete insertion of the genital organs of one person into the genital organs of another. PW3, the complainant SAO, gave a clear, coherent and consistent account. She testified that on the night in question she was outside fetching water when the appellant, David, her neighbour residing in door 5, pulled her into his house, closed the door, took her to a seat, removed her skirt, panty and biker, and inserted his penis into her vagina. He detained her inside until he heard her aunt calling, then instructed her to remain until the aunt had left before releasing her.

22. This direct evidence of penetration is strongly corroborated by the medical testimony of PW2, Selina Nyambu from MSF, who examined the complainant on 31st December 2023. She found a recent tear of the hymen at the 6 o'clock position, multiple abrasions in the genital areas, a reddened vagina, and bloody discharge. She concluded that the injuries were compatible with penile penetration and consistent with the assault described. The medical findings, documented in the produced P3 and PRC forms, provide objective confirmation of recent traumatic penetration. The element of penetration was proved beyond reasonable doubt.
23. On identification, the complainant was resolute and unshaken. She positively identified the appellant as the perpetrator, emphasising that he was her neighbour in the same premises whom she knew well. Her account remained consistent in examination-in-chief and under cross-examination. PW1, the aunt, corroborated that the appellant was a neighbour and confirmed the identification made by the minor immediately upon her return home.
24. In defence, the appellant admitted residing in door 5 but denied the allegations. He alleged a prior grudge with PW1 over water issues in the plot and claimed he was at work on the material night, though he adduced no corroborative evidence, no witness, no record or documentation to support his alibi. The trial court correctly regarded the defence as unsubstantiated and an afterthought.
25. Upon re-evaluation of the evidence, this court finds the appellant's defence inconsistent and wholly implausible when weighed against the complainant's detailed, credible and unshaken

testimony, the prompt disclosure to PW1, the consistent identification across witnesses, and the compelling medical evidence of recent penile penetration. No material contradictions, improbabilities or motive to fabricate undermine the prosecution case. The defence raises no reasonable doubt.

26. The prosecution proved all the essential ingredients of defilement. The conviction under section 8(1) as read with section 8(3) of the Sexual Offences Act is affirmed.
27. The appellant was sentenced to twenty five years' imprisonment. In imposing sentence, the trial court stated that it had considered the appellant's mitigation, and the fact that he was a first offender. The applicable provision of the Sexual Offences Act prescribes a minimum sentence of twenty years' imprisonment for defilement involving a child within the relevant age bracket. The law does not impose a mandatory maximum sentence. The sentencing court therefore retains discretion to impose a sentence above the minimum, but that discretion must be exercised judiciously, proportionately, and upon clear reasons supported by the record.
28. The Criminal Procedure Code empowers a court, before passing sentence, to receive and consider all relevant material necessary to arrive at an appropriate and individualized sentence. This includes the offender's personal circumstances and whether there are aggravating or mitigating factors.
29. In the present case, the appellant was a first offender. The record does not disclose any aggravating factors that would justify a sentence exceeding the statutory minimum. Although the trial court indicated that it had considered mitigation, no reasons were

given for enhancing the sentence beyond the minimum prescribed by law.

30. In the absence of identifiable aggravating circumstances, a sentence of twenty-five years' imprisonment was excessive. The objectives of punishment would have been adequately met by the minimum sentence provided under the statute.

31. Accordingly, the sentence of twenty-five years' imprisonment is hereby set aside and is substituted with a sentence of twenty (20) years' imprisonment, to run from the date of his conviction by the trial court.

Orders accordingly.

Judgement dated and delivered virtually this 12th day of February 2026

D. KAVEDZA
JUDGE

In the presence of:

Appellant Present

Mr. Mutuma for the Respondent

Karimi Court Assistant.