



REPUBLIC OF KENYA



**Chebuche v Republic (Criminal Appeal E132 of 2025)
[2026] KEHC 1760 (KLR) (18 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 1760 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E132 OF 2025
DR KAVEDZA, J
FEBRUARY 18, 2026**

BETWEEN

PHILIP OCHIENG CHEBUCHE APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant was charged and, after full trial, convicted by the Subordinate Court of the offense 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 11th November 2024 at Silanga aread in Kibra Sub County within Nairobi County, you intentionally and unlawfully caused his penis to penetrate the vagina of J.W.M a child aged 16 years. He was sentenced to serve fifteen (15) years imprisonment.
2. Aggrieved, he filed an appeal challenging his conviction and sentence. In his petition of appeal, he challenged the totality of the prosecution's evidence against which he was convicted. He urged the court to quash his conviction and sentence.
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 conclusion on that the evidence without overlooking the conclusions of the trial court, but bearing in mind that it never saw the witnesses testify.
4. The Complainant (PW1) testified that police officers arrived at her home accompanied by her mother. She stated that her mother instructed her to record a statement alleging sexual intercourse with the appellant, an allegation she then denied. She was subsequently taken to Coptic Hospital for medical examination. Following this testimony, the prosecution requested she be stood down for further interrogation by their office.



5. Upon being recalled, the complainant stated that the appellant was her boyfriend. She testified that on the day in question, she was at the appellant's house when police officers and her mother arrived. She stated that she and the appellant had engaged in sexual intercourse using a condom prior to the arrest. She was taken to the police station to record a statement. Under cross-examination, she maintained that her previous denials in court were lies prompted by tension, asserting that she had not been coerced into changing her testimony.
6. AM (PW2), the complainant's mother, testified that the complainant was 16 years of age. Upon learning from her other daughter that the complainant was at the appellant's house, PW2 instructed that the door be locked from the outside while she sought police assistance. She returned at approximately 07:30 with two officers, including Sergeant Langat (PW5). After unlocking the door, the party entered and found the complainant seated on the appellant's bed. PW2 noted that the complainant was dressed but her undergarments were on the floor. Both parties were then taken to Kibra Police Station and Coptic Hospital.
7. Edith Kerubo (PW3), a registered nurse, testified to examining the complainant. She noted a history of alleged defilement by a neighbour and was informed by PW2 that the complainant frequently visited the appellant's house against her mother's wishes. Clinical examination revealed irregular hymenal margins described as 'old tags', with no fresh scars or bruising. Laboratory tests revealed the presence of spermatozoa in her cervix.
8. PC (W) Kagera (PW4), the investigating officer, testified that the complainant admitted during interrogation to having been in a sexual relationship with the appellant for one week. The spermatozoa sample extracted from the complainant was submitted to the Government Chemist for analysis. PW4 concluded that the offence of defilement had occurred based on the complainant's admission, the medical findings of PW3, and the circumstances of the arrest.
9. Sergeant Langat (PW5) testified that he arrested the appellant between 07:30 and 08:00 on the material day. He noted he had no knowledge of any subsequent claims by the complainant regarding the timing of the sexual act.
10. In his defence, the appellant denied the charges in their entirety. He testified that he was arrested without cause upon returning home from work. He maintained that he first encountered the complainant at the police station and alleged that the charges were fabricated following his refusal to pay a bribe to PW4. He cited the complainant's initial testimony on 3rd December 2024 as evidence in his favour.
11. After a full trial, he was convicted and sentenced accordingly.
12. Further, section 8(1) and (4) of the [Sexual Offences Act](#), No. 3 of 2006 provides thus: -
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.
13. The elements of the offence of Defilement contrary to Section 8(1) of the [Sexual Offences Act](#), No. 3 of 2006, are the age of the complainant, the occurrence of penetration of the complainant's body by the perpetrator's genital organ, and the positive identification of the perpetrator. It is a matter of law



that any person who commits an act of penetration with a child is guilty of the offence of defilement regardless of the nature of the orifice penetrated.

14. As to age, the complainant (PW1) was established to be a child under the age of eighteen years. This was corroborated by the testimony of PW4 who produced her birth certificate confirming that she was born on 10th November 2008. The alleged incident took place on 11th November 2024. There is, therefore, no doubt that the complainant was a child at the time of the offence, satisfying the first limb of the charge.
15. The central issue for determination is whether the prosecution proved beyond reasonable doubt that the appellant defiled the complainant (PW1). The complainant initially gave evidence denying any sexual contact, asserting she was coerced by her mother (PW2) to frame the appellant. However, upon being recalled by the prosecution, she retracted this, alleging a romantic relationship and a single act of intercourse using a condom prior to their arrest at the appellant's house.
16. The complainant was medically examined by PW3, a registered nurse at Coptic Hospital. The clinical findings revealed irregular hymenal margins described as "old tags," with no fresh scars, bruises, or signs of recent trauma. Crucially, while PW5 (the arresting officer) testified that he recovered a used condom from the scene, this vital physical exhibit was never produced in evidence. Furthermore, despite the retrieval of spermatozoa from the complainant's cervix and the taking of the appellant's blood for analysis, no DNA results were ever presented to the court.
17. As a first appellate court, I am obligated to re-evaluate the entire evidence and draw my own conclusions, while bearing in mind that I did not see or hear the witnesses testify.
18. Upon re-evaluation, material inconsistencies and procedural anomalies emerge. The prosecution further failed to lay any factual or legal basis for recalling the complainant after she had given sworn evidence exculpating the appellant. The record does not disclose any application by the prosecution explaining whether the recall was necessitated by mistake, inadvertence, coercion, intimidation or any other lawful reason recognised in criminal procedure. In the absence of such explanation, the recall was irregular.
19. More troubling is that upon recall, the complainant diametrically changed her testimony and directly implicated the appellant. That shift was neither interrogated nor tested by the trial court. The prosecution did not lead evidence to demonstrate that the earlier testimony was false or that the later version was free from external influence. This omission was material, as it went to the root of credibility and fairness of the trial.
20. A witness who gives two irreconcilable versions of events cannot be relied upon without clear justification for the inconsistency. Where such inconsistency arises in the evidence of the complainant in a sexual offence, the court is required to exercise heightened caution. The failure by the prosecution to address whether the complainant had been coerced, coached or induced before changing her testimony fatally weakened the prosecution case.
21. The forensic timeline and handling of exhibits are equally troubling. PW4 and PW5 relied heavily on the "recovery" of a condom and medical samples to conclude an offence had occurred. However, the prosecution failed to move the court to summon the Government Chemist to explain why DNA results, which could have conclusively linked or excluded the appellant, were never made available. The appellant consistently maintained that the case was a fabrication, a claim bolstered by the prosecution's failure to produce the very physical evidence they alleged to have seized at the scene.
22. While Section 36 of the [Sexual Offences Act](#) does not render DNA mandatory in every instance, the specific circumstances of this case made it necessary. Given the lack of fresh physical trauma in



- the medical report and the complainant's conflicting accounts, DNA testing was the only objective method to resolve the veracity of the claim. The unexplained failure to produce the condom or the DNA results left a critical evidentiary gap, which must be resolved in favour of the appellant.
23. The High Court has recognised that DNA evidence may be indispensable where certainty is required. In *Republic v Timothy Mwenda Gichuru & 2 others* [2017] eKLR, the court stated:
- “In this age of technology, DNA has become an investigative tool which will determine with almost certainty that a person committed or did not commit an offence.”
24. Similarly, in *Stephano Ngigi Maigwa v Republic* [2022] eKLR, the court held that where the link between the accused and the offence is not clearly established, failure to conduct DNA testing may be fatal to the prosecution case. The mere fact that PW1 and the appellant were found in the same room, as testified by PW2 and PW5, explains the circumstances of the arrest, but it does not, in the absence of the recovered condom or DNA, corroborate the act of defilement.
25. The medical findings further complicated the prosecution case. The presence of "old tags" without fresh injury suggests prior sexual activity unrelated to the events of the material day. Without the DNA nexus, there is a real possibility that the "old" findings related to another person, especially given the complainant's initial adamant denial of any contact with the appellant.
26. The law is settled that not every inconsistency is fatal. However, where contradictions go to material facts and the core of the prosecution case, they cannot be ignored. In *Richard Munene vs Republic* [2018] eKLR, the Court of Appeal held:
- “Contradictions, discrepancies, and inconsistencies in evidence of a witness go to discredit that witness as being unreliable... they must be resolved in favor of the accused.”
27. The test as to whether the contradictions are minor or substantial was laid out in *Sigei v Republic* [2023] KECA 154 (KLR), requiring that for contradictions to be fatal, they must concern "substantial matters" and the "real substance of the case."
28. In this matter, the contradictions were not minor or peripheral. They went to the core of the prosecution case and involved a complete reversal of the complainant's testimony, coupled with a failure to produce critical physical exhibits allegedly recovered by the police. Such inconsistencies raise serious doubt as to the reliability and truthfulness of the evidence tendered.
29. When these contradictions are considered alongside the unexplained absence of DNA evidence, the missing exhibits, and the inconsistent medical findings, it is clear that the prosecution failed to discharge its burden of proof beyond reasonable doubt. The evidentiary gaps were fundamental and incapable of being cured by inference or conjecture.
30. Upon re-evaluation of the entire record, I find that the trial court erred in placing reliance on the recalled witness testimony without interrogating the basis of the drastic change in her account of events. In the absence of the alleged condom or DNA results, the doubts arising from the prosecution case remained unresolved and ought, as a matter of law, to have been resolved in favour of the appellant.
31. The cumulative effect of these deficiencies demonstrates that the trial was marred by material irregularity, rendering the conviction unsafe. A reasonable doubt exists as to whether the appellant committed the offence charged.



32. Accordingly, the conviction of the trial court cannot stand. The appeal is allowed, the conviction is quashed, and the sentence is set aside. The appellant is acquitted. The appellant is set at liberty unless otherwise lawfully held.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 18TH DAY OF FEBRUARY 2026

D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Mr. Mutuma for the Respondent

Karimi Court Assistant.

