

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KIBERA
CRIMINAL APPEAL NO. E129 OF 2025

THOMAS MACHARIA alias MASHA.....
.....APPELLANT

VERSUS

REPUBLIC.....
RESPONDENT

(Being an appeal against the original conviction and sentence delivered on 19th August 2025 by Hon. A. N. Ogonda (PM) at Kibera Chief Magistrate's Court, Sexual Offences Case No. E091 of 2024 Republic vs Thomas Macharia)

JUDGEMENT

1. The appellant was charged and, after a full trial convicted by the Subordinate Court of the offence of defilement contrary to section 8(1) as read with 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the 20th November 2022 at 1100hours at Raila Estate, Langata sub-county within Nairobi County, intentionally caused his penis to penetrate the vagina of S.H. a child aged 8 years old. After a full trial, the appellant was sentenced to serve life imprisonment.
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. PW1, the complainant (a minor), testified after a voir dire examination. She stated that she was playing outside when the appellant approached her, called her over, and took her into his house. He promised her a pen and money, then instructed her to close her eyes and touch his “thing.” The appellant then put his “thing” into her “thing” (indicating her private parts). He warned her not to tell anyone. She returned home without informing her grandmother. Later, her aunt noticed blood on her panty when she changed clothes, and she was taken to hospital.
5. PW2, Sumaiya Khaikhai (PW1’s aunt), gave sworn testimony that on the material day she checked PW1’s clothes and found the first panty filled with faeces and blood, which she discarded. The second panty also had faeces and blood. When questioned, PW1 initially remained silent. After involving her husband, PW1 disclosed that “Masha” (the appellant, their neighbour) had defiled her. PW1 was then taken to hospital. In cross-examination, PW2 confirmed she discarded the first soiled panty and retained the second.
6. PW3, Abdiah Ali, a social worker from Kawangware, testified that she received a telephone call from one Adam reporting that a child had been defiled. PW1 was brought to her and narrated the incident, identifying the perpetrator as “Masha.” PW3 took PW1 to Riruta Health Centre for treatment and reported the matter to the police. In cross-examination, she confirmed that PW1 identified the appellant as the person who defiled her.

7. PW4, Esther Chemutai Cheboss, a clinical officer specialising in gender-based violence cases, produced the medical records of PW1. Upon examination, the female external genitalia appeared swollen, with a laceration on the hymen at the 3 o'clock position, signs of inflammation, but no active bleeding or anal sphincter injury. Tests conducted were all negative. PW4 concluded there were signs of penetration. In cross-examination, she confirmed that PW1 identified the appellant as the perpetrator.
8. PW5, PC Wambui Muli, corroborated the testimonies of PW1, PW2 and PW3. She visited the scene of crime and confirmed that the appellant resided in the same plot as the complainant. In cross-examination, she stated that PW1 knew the appellant before the incident, identified him as the perpetrator, and explained that she did not scream or report immediately because the appellant had threatened to beat her and she was afraid.
9. The appeal was canvassed by way of written submissions which have been duly considered and there is no need to rehash them.
10. 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."**
11. Further, section 8(1) and (2) 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.

(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.

12. The complainant's aunt, PW2, evidence that she was born on 30th December 2016. The alleged incident took place on 26th July 2024. She was therefore sixteen (8) years old at the time the alleged offence was committed. The age ingredient was therefore unequivocally established.
13. The second element is penetration, defined under section 2 of the Sexual Offences Act to include partial or complete insertion of the genital organs into the vagina. PW1, the victim, gave a detailed and consistent account. She stated that the appellant, their neighbour, lured her into his house, instructed her to close her eyes, and then inserted his penis into her vagina. PW4, the clinical officer who produced the medical report, confirmed findings consistent with penetration: a laceration on the hymen at the 3 o'clock position and swollen labia. There was no obvious discharge and no injuries to the anal sphincter. The element of penetration was proved beyond reasonable doubt.
14. On identification, PW1 was firm and unshaken. She positively identified the appellant as the perpetrator, emphasising that he was their neighbour whom she knew well. Her account remained consistent in examination-in-chief and cross-examination. PW2, the aunt, corroborated that the appellant was a neighbour and confirmed the identification. PW1's evidence was direct, coherent, and supported by the prompt medical examination.
15. In his defence, the appellant admitted being a neighbour but denied committing the offence. He claimed he had travelled upcountry to attend to his sick daughter, leaving his wife behind,

and was not present on the material dates. He alleged that on 17th February 2023 a police officer from Southern Bypass Police Post instructed him to report to Langata Police Station. He further suggested that PW5 fabricated the complaint due to a strained relationship over a leadership position.

16. However, the appellant adduced no corroborative evidence, no alibi witnesses, and no documentation to support his travel or absence. The trial court rightly regarded the defence as unsubstantiated and an afterthought.
17. Upon review, this court finds the appellant's defence inconsistent and implausible when weighed against the complainant's clear, detailed, and unshaken testimony, corroborated by PW2's initial report, PW4's medical findings confirming recent penetration, and the consistent identification by PW1. The prosecution evidence is cogent, credible, and mutually reinforcing. No material contradictions or improbabilities undermine it.
18. Accordingly, the prosecution proved all the essential elements of defilement being the age of the victim, penetration, and positive identification of the appellant, beyond reasonable doubt. The defence failed to create any reasonable doubt. The conviction under section 8(2) of the Sexual Offences Act is affirmed.
19. On sentence, the appellant was sentenced to life imprisonment. During sentencing, the court considered the pre-sentence report, the appellant's mitigation, and that he was a first offender and sentenced the appellant accordingly. In the premises, I see no reason to interfere.
20. 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 12th day of
February 2026**

**D. KAVEDZA
JUDGE**

In the presence of:

Appellant Present

Mr. Mutuma for the Respondent

Karimi Court Assistant.

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