Kalao alias Mjomba v Republic (Criminal Appeal E011 of 2025)
[2026] KEHC 2487 (KLR) (25 February 2026) (Judgment)

Neutral citation: [2026] KEHC 2487 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAPENGURIA

CRIMINAL APPEAL E011 OF 2025

RPV WENDOH, J

FEBRUARY 25, 2026

BETWEEN

PHILIP KALAO ALIAS MJOMBA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. Philip Kalao alias Mjomba was charged with the offence of defilement contrary to section 8(1) (2) of the *Sexual Offences Act*.

2. The particulars of the charge are that Noel Pkerker alias Abraham, on 22/2/2025, Murkwijit Location in West Pokot, intentionally and unlawfully caused his penis to penetrate the vagina of B.C a female juvenile aged ten (10) years.

3. In the alternative Philip Kalao alias Mjomba was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* in that on 22/2/2025 at Murkwijit Location, intentionally and unlawfully touched the vagina and buttocks of B.C, a female juvenile aged ten (10) years.

4. The Appellant denied the offence and the case proceeded to full trial with the prosecution calling a total of four (4) witnesses.

5. The Appellant was called upon to defend himself and he testified on oath and called one other witness in support of his case.

6. The trial court found the appellant guilty on the main charge and convicted him of it. He was sentenced to serve life imprisonment. The appellant is aggrieved by both the conviction and sentence. He preferred this appeal and based it on amended grounds of appeal which are as follows; -

    1. That the charge sheet was defective;

2. That the offence of defilement was not proved;

3. That the appellants rights under Article 49 (f) of *the Constitution* of Kenya were violated;

4. That the Prosecution was riddled with contradictions;

5. That the defence was not considered.

7. The appellant prays that the conviction be quashed, sentence set aside and he be set at liberty or the court to order a retrial.

8. This being a first appeal, it is required of this court to re-examine all the evidence tendered before the trial court afresh, evaluate and analyze it, and arrive at its own conclusions. The court should however, bear in mind that this court neither heard nor saw the witnesses testify. This court is guided by the decision of Okeno V- Republic (1972) EA 32.

The Prosecution Case.

9. PW1, B.C a child aged ten (10) years testified on oath after the court took her through voire dire examination and determined that she was intelligent enough to understand what was going on and directed that she be sworn. PW1 told court that she is ten (10) years old and in grade 4 at [Particulars withheld] school. She recalled that on 23/2/2025, while at home with her two siblings, the appellant called her, took her to his house which was next to theirs. He did to her bad manners by inserting his 'dudu' in her private parts, to which she pointed; that he gave her 20/= and warned her not to tell anybody. She fell sick after three (3) days following which she was taken to Hospital and the doctor checked her private parts and she told her mother what had happened to her.

10. PW2 NC the mother of PW1 recalled the 24/2/2025 about 7.00.p.m., PW1 informed her that she had pain in the stomach, back and head. She took PW1 to hospital next day and the doctor sent them to X-ray and a urinary test; that PW1 told the doctor what Philip did to her and the doctor referred them to the police station. The appellant was arrested, a P3 was filed. PW2 confirmed that PW1 was born on 7/1/2015.

11. PW3 Kennedy Kipchumba, a Clinical Officer, testified that he examined the complainant on 1/3/2025 and found the genitalia i.e. labia minora was reddish and swollen with a whitish discharge mixed with blood; the hymen was freshly torn and the lower part of the anus had a tear. He was of the view that the child was defiled.

12. PW4 PC Chrispinus Ogamba of Kapenguria police station recalled that on 1/3/2025, PW2 accompanied by PW1 reported that PW1 had been defiled by a person known to them. After she was examined by the Clinical Officer and P3 form filled, the appellant was arrested by members of Public and taken to the station.

13. In his sworn defence, the appellant (DW1) stated that he is a motor cycle rider; that he was at home the whole month and came back on 28th, took the motor cycle and was not arrested till 11th. It was alleged he defiled a child; that the complainant's father had used his motor cycle and damaged it. When the appellant demanded that he pays, he warned him that he would revenge. He said the charge was a fabrication to revenge; that the complainant's father asked for Kshs 50,000/= and he then said he would pay the Doctor. He denied reporting about the threats to the police.

14. DW2 Veronica Chepchumba an aunt to the appellant stated that the appellant was in Nairobi and when he returned, he stayed for two (2) days and was arrested.

Appellant's Submissions.

15. On ground 1, the appellant submitted that the charge was defective because though the appellant's name appears in the statement of the charge, the particulars of the charge refer to somebody else i.e. Noel Pkerker alias Abraham as relates to the particulars of the charge. On the other hand, the alternative charge wholly refers to the appellant as the perpetrator. He contended that both the prosecutor and the court did not notice the anomaly in the charge to rectify it and it was prejudicial to the appellant.

16. In ground No.2, the appellant alleged that his fundamental rights under Article 49(f) of *the Constitution* were violated because he was held in police custody for more than twenty-four (24) hours before he was arraigned in court for plea; that he was arrested on 1/3/2025 and presented in court for plea on 6/3/2025.

17. On proof of defilement, the appellant submitted that PW3 did not prove that he was a Clinical Officer by not indicating his Reference number and station; that the Clinical Officer did not find any injuries to the labia minora but instead found them healed, hence no proof of penetration; that there was no proof of presence of Spermatozoa or that it is the appellant who committed the offence.

18. In regard to ground 4 on inconsistencies the appellant first pointed out the different names in the charge sheet and that it was not clear who was charged with the said offence. The appellant also raised issue with whether the offence had been committed two weeks earlier or on the date mentioned by the complainant on 23/2/2025.

19. The fifth ground is that the defence was not considered by the trial court and the appellant should therefore be acquitted.

20. The Respondent did not file submissions despite having been given time to do so.

Determination

21. I have now considered the evidence on record, the grounds of appeal and appellant's submissions.

22. The first issue I wish to tackle is whether the charge was defective and if so, whether or not the said defect was curable or not. Section 134 of the CPC provides for the contents of a charge sheet. It states as follows;- "Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

23. In Isaac Omambia v Republic (1995) eKLR, the court said this "In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence." See Peter Ngure Mangi v Republic (2014) KECA.

24. A charge can also be defective if it is at variance with the evidence.

25. In Peter Sabem Leitu -V- Republic CRA.482/2007, the court considered whether the defect if any, caused prejudice to the accused or occasioned a miscarriage of justice. The court said "The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well

as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant"

26. As to whether a defect is curable, Section 382 of the Criminal Procedure Code provides as follows:- "Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

> " Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."
>
> The Court of Appeal in Njuguna v Republic (2002) ILR 37 35, considered whether a defect in a charge sheet is fatal or not stated "We think, like the Learned Judges of the High Court did, that stating in a Charge Sheet a lesser amount than the amount which was actually stolen was no more than an irregularity in the Charge Sheet and it did not render the Charge Defective. It was an irregularity curable under the above quoted section of the Criminal Procedure Code and the Appellant did not point out to us any sort of prejudice which the irregularity could or did occasion to him."

27. In this case the charge was framed thus; -

> " Philip Kalao alias Mjomba
>
> Defilement contrary to section 7(1) (2) of the *Sexual Offences Act*.
>
> Noel Pkerker alias Abraham on the 22nd day of February 2025 at Bondeni area in Murkwijit location in West Pokot, Sub-County, within West Pokot County, intentionally and unlawfully caused his penis penetrate the vagina of B.C a female juvenile child aged ten (10) years"

28. In this case, PWI identified the appellant as a neighbour and in court, pointed him out as the perpetrator. PW2 identified him as Philip. At the trial only one accused person was before the court, the appellant, and in the court's judgment, the person identified as the accused was Philip Kalao. At no time did the name of Noel Pkerker alias Abraham arise. It appears that the court never noticed the anormally in the names and never referred to the appellant Noel Pkerker by the name in the particulars of the main charge. Otherwise, there was nothing stopping the appellant from bringing it to the attention of the court that he was not 'Noel Pkerker" I believe the appellant only noticed the 'defect' in the names after the conclusion of the case and when a copy of the proceedings were given to him. In that regard, this court finds that the inclusion of the name Noel Pkerker alias Abraham in the parties of the charge was a mere error and the appellant did not suffer any prejudice because the person who faced trial in the trial court is Philip Kalao alias Mjomba. Of course, the court must point out to the trial court and the prosecution Counsel that they must be alert and keen on what the contents of the charge sheet are so as to avoid such silly mistakes. In Peter Ngure Mwangi v Republic (2014) KECR (KLR) the Court of Appeal upheld the finding that the reference of the appellant as 'Mongare' instead of 'Mungai' did not prejudice the appellant.

29. The next issue is whether the appellant's fundamental rights under Article 49(f) were violated. The alleged violation was not committed before the court. The allegation of failure to produce the appellant

before the court for plea was allegedly committed by the police who held the appellant in custody for over twenty-four (24) hours. The complaint should be made against the police in a Constitutional petition where the appellant can seek damages, but not in this criminal case. The alleged violation was not committed before this court and the alleged violation cannot vitiate the proceedings before the trial court.

Whether the offence of defilement was proved.

29. In the case of Dominic Kibet Mwareng v Republic (2013) eKLR the court held that the three elements that form the offence of defilement are;

    1. Age of the Complainant;
    2. Proof of penetration;
    3. Proof of identity of the perpetrator.

Age; –

30. In the case of Joseph Kiet Seet v Republic (2014) eKLR, the court held "It is trite law that age of a victim can be determined by medical evidence and other cogent evidence."

    In Francis Omuroni v Uganda CRA. 2/2000, the Court of Appeal of Uganda held thus:- "In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense."

31. The court was of the same view in Mwalongo Chichoro Mwajembe v Republic CRA 24/2018

32. Both the complainant (PW1) and her mother (PW2), told the court that she was ten (10) years old. PW2 in support thereof produced a birth certificate which indicates that she was born on 7/1/2015.

33. As of 22/2/2025 when the offence was allegedly committed, PW1was exactly ten (10) years old.

Penetration:

34. Penetration is defined in section 2 of the *Sexual Offences Act* to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person".

    In the case of Mark Oiruri Mose-V- Republic (2013) eKLR the Court of Appeal explained what amounts to penetration as follows "..... So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and penetration need not be deep inside the girl's organ".

35. In Bassita v Uganda SC ..... Appeal No. 35 of 1995, the court said as follows,

    > " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, sexual intercourse is proved by medical evidences or other evidence. Though desirable, it is not a hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove it's case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt." (see Gacheru v Republic (CRA 48/2020) 2023 KECA .3005."

36. The victim (PW1), testified that once she was in the appellant's house, he inserted his 'dudu' in her private parts. She told the court this as she pointed to her private parts. Her testimony was corroborated by the testimony of Clinical Officer, PW3 who examined PW1 on 1/3/2025 about nine (9) days after the act. PW2 did not know of the incident till PW1 told her that she was feeling unwell, On 24/2/2025. After the doctor examined PW1 is when the incident came to the fore. PW3 found that PW1's labia minora and majora were reddened and swollen with a whitish discharge mixed with blood, the hymen was freshly torn and lower part of the anus had a cut. There was overwhelming evidence of penetration.

Identity of the perpetrator.

37. It is the complainant who named the appellant as the perpetrator when it was found out that PW1 had been defiled. The incident took place in the appellant's house as per PW1's testimony. PW1 and the appellant are not strangers to each other but are neighbours. They knew each other before.

38. The appellant raised an alibi defence, that he was away in Nairobi when the incident allegedly happened. In the case of Victor Mwendwa Mulinge v Republic (2014) eKLR the Court of Appeal rendered itself thus on alibi defence: "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; see KARANJA V R, [1983] KLR 501 ... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought." See Stephen Nguli Mulili v Republic

39. The trial court tended to shift the burden of proof to the appellant to prove that he was actually away from home. However, as held in the above case, the burden to prove the truth or otherwise of an alibi always rests on the Prosecution.

40. The appellant generally told court that he was away till 28th but he did not tell court which month or when he left the area. Similarly, his witness DW2 did not add any value to his defence. She did not live with the appellant and had no idea when he left for Nairobi or the date he came back. From the defence; the alibi did not raise any reasonable doubt in the prosecution case. The prosecution made a strong and watertight case against the appellant.

41. Belatedly, the appellant also alleged that the complainant's father had spoilt his motor cycle and when he demanded payment, the father threatened him with dire consequences. That allegation was raised for the first time in the defence. He did not raise it during the prosecution case by cross examining the witnesses on it. So that the prosecution would have been accorded an opportunity to respond. In any case, the said father of PW1 was not even a witness in the case, nor was he said to have played any role. The defence was an afterthought and not believable. It was properly rejected.

42. Taking all the evidence in its totality, the alibi defence did not shake or dislodge the prosecution case and was properly dismissed.

43. I find that the conviction of the appellant was properly founded and I affirm it.

44. The complainant was aged ten (10) years. Under Section 8(2) of the *Sexual Offences Act*, upon conviction, one is liable to a mandatory sentence of life imprisonment. The court has no discretion to interfere. In the end, I find that the appeal lacks merit and it is hereby dismissed in its entirety.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAPENGURIA THIS 25TH DAY OF FEBRUARY, 2026.

R. WENDOH

JUDGE

In the Presence of:-

Appellant – in person

Ms. Koech for Respondent - Prosecution Counsel

Juma/ Hellen Court Assistants