



**Juma v Republic (Criminal Appeal E032 of 2024)
[2025] KEHC 8934 (KLR) (28 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 8934 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E032 OF 2024
AN ONGERI, J
FEBRUARY 28, 2025**

BETWEEN

ABUBAKAR KICHUCHA JUMA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Judgment and sentence of Hon. D. Wangeci (SPM) in Wundanyi SPMC Sexual Offence Case No. E019 of 2022 delivered on 5th June 2024)

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences (SOA) Act No. 3 of 2006. He convicted and sentenced to twenty five (25) years imprisonment.
2. The particulars of the offence are that on 30th September 2022 at 2200hours at [Particulars Withheld], Wundanyi Location within Taita Taveta County, the Appellant intentionally caused his penis to penetrate the vagina of M.T.A, a child aged 16 years.
3. The prosecution evidence in summary was that on the material day, the complainant was sent home from school on disciplinary issues.
4. The following day on 30th September 2022 her mother spotted her with some young men and when the complainant would not explain herself, her mother beat her up.
5. The complainant left home and she started walking aimlessly and went to the river.
6. The Appellant met her and asked her why she was there at that hour. She said she was hungry. The Appellant offered her food and a place to stay and told her to wait for him at that spot.



7. They Appellant returned after 45 minutes and asked the complainant to accompany him to his house at [Particulars Withheld].
8. At his house, the Appellant offered her a place to sleep and he slept on the coach.
9. Later that night the Appellant joined the complainant in bed and proceeded to have sex with her. The following morning after breakfast, the Appellant locked the complainant in his house after they had breakfast.
10. The complainant said the Appellant returned at noon, fixed a meal, cleared up the house and left locking her in the house again.
11. Later that evening the Appellant again had sex with the complainant and they spent Sunday together.
12. The Appellant then took the complainant to his Aunties house to work as a househelp. While at the Appellant's Auntie's house at Kishamba the complainant learnt that she had been reported missing and she decided to go home.
13. The Appellant abandoned the complainant along the road as they approached her house on foot. The complainant met her Uncle and she was taken to Wundanyi Police Station to report and later to Wesu Hospital for examination.
14. The complainant led the police to the Appellant's house where he was arrested.
15. PW6 Dr. Mlamba produced the complainant's treatment notes. He noted that her hymen was missing and there was a foul smelling discharge and pus cells. He also examined the Appellant and noted bleeding on the groin.
16. The Appellant said in his defence that he met the complainant on 2nd October 2022 at 6p.m and she told him she was looking for a job and that she had been chased away by her mother who wanted to kill her.
17. The Appellant said he took the complainant to her Auntie who wanted a house help at Kishamba.
18. They arrived at her Aunt's place at 9p.m and the following day they learnt the complainant was being looked for.
19. The Appellant said he was arrested on 14th October 2022 and subsequently charged with defilement.
20. The trial court found the Appellant guilty as charged and sentenced him to twenty five (25) years imprisonment.
21. The Appellant has appealed to this court on the following grounds:-
 1. That, the learned tri magistrate erred both in law and facts by charging me by Defective charge sheet in drafting and in informal. I was served with the charge sheet but I was not served with the first initial report of the complainant PW I that I may have access on it.
 2. That, the learned trial magistrate erred both in law and facts by failing to evaluate and find that the Court contravened Article 50(1), (2)(g) & (h) and Article 35(1)(a) & (b) of *the constitution* of Kenya.
 3. That the learned trial magistrate erred both in law and facts by failing to evaluate the PRC Form and P3 form and the treatment notes a fresh.



4. That, the learned trial magistrate erred both in law and facts by failing to find that the evidence of Pw I consisted of lies to cover what she did in school and at her home which compelled her to be chased away by her parents and also covering her beatings by her mother.
5. That, the learned trial magistrate erred both in law and facts by failing to find that I was paid good for evil yet just a good Samaritan saving the girl from the cold.
6. That, the learned trial magistrate erred both in law and facts by failing to find that I am just like a stepping stone and a scape goat taken into slaughter house without knowing.
7. That, the learned trial magistrate erred both in law and facts by failing to find that the girl did not spend the night in my house. I took her to my Aunt straight away.
8. That, the learned trial magistrate erred both in law and facts by failing to find that the crucial witnesses were not summoned or availed in court.
9. That, the learned trial magistrate erred both in law and facts by failing to find that the evidence of PW I -7 all their evidences are being contradicted and having discrepancies and inconsistencies and they don't corroborate at all.
10. That, the learned trial magistrates erred both in law and facts by alleging that in paragraph 16 of the judgment that the treatment notes and lab results as per pex 6 and 7 were produced respectively and that breeding as for the accused person was noted on the groin.
11. That, the learned trial magistrate erred both in law and facts by failing to find that hymen can be caused by hard working, bicycle riding horse riding practice and foul smelling can also be caused by failure of taking bath for some days and sweating for the qua girls and women.
12. That, the learned trial magistrate erred in law and facts by failing to find that I was incriminated framed and case fabricated in the alleged defilement which had no eye witnesses' only evidences of hearsay and evidence of being told. No defilement occurred at all.
13. That, the learned trial magistrate erred both in law and facts by convicting me by the offence of defilement yet failed to find that I am a sickly person man who don't erect and be able to penetrate a vagina of any girl or a woman even my wife ran away leaving me for failing to satisfy her need of sex.
14. That, the learned trial magistrate erred both in law and facts by failing to consider my alibi defense of truth which I adduced before court.
15. That, the learned trial magistrate erred both in law and facts by relying on the evidences of lies which does not support the alleged defilement and also, the prosecution failing to prove the case beyond reasonable doubt or to the required standard.
16. That, the honorable court erred in law to evaluate the treatment notes of mine and my medical examination and find that I cannot defile or penetrate the vagina of any girl. Having a very serious sickness in above blunder very big one reddish like a penis, which is very painful and I also have a spinal cord problem and knees and I cannot even erect at all. Document attached in the submission here in court to evaluate and find the same
22. The parties filed written submissions as follows:- the appellant did not file any submissions.
23. The prosecution submitted that PW1 testified that she was in high school and that she was 16 years old. In support her birth certificate was produced that proved the same.



24. On penetration the prosecution submitted that PW1, the complainant, testified that on 29th September, 2022 she was sent home from school because of a disciplinary issue. On 30th September, 2022 her mother left home for the market. She later saw her talking to a boy. She asked her who he was but she did not tell her. Her mother then disciplined her. She took off from home and went and sat near a river bank. The appellant herein approached her and took her to his home. He gave her a bed to sleep while he stayed awake chewing miraa. In the middle of the night, he woke her up and forcefully had sex with her. The following day he also had sexual intercourse with her after which he would lock her in the house when he went out. The appellant thereafter took the complainant to her aunt in order to secure her a job as a house help. The appellant's aunt came to find out that there was a missing child report concerning the complainant and thus did not take her in. The appellant took the complainant to a road near her home and left her there. While going home the complainant met her father and uncle who took her to Wundanyi police station and later to Wesu hospital.
25. PW 6, Dr. Timothy Mlamba, from Wesu hospital testified that the complainant was examined at the facility. Upon examination it was noted that her hymen was missing, no injuries on the external genitalia HIV and pregnancy tests were negative. He produced the treatment notes, post rape care form, lab results and P3 as exhibits 2, 3, 4 and 5 respectively. The second ingredient was proved.
26. On identification the prosecution submitted that the complainant positively identified the appellant. The complainant indicated that the appellant on 30/9/2022 took her to his house and had sex with her. The following day in the morning he cooked for breakfast and also lunch. He also had sexual intercourse with her in the course of the day. There was no impediment on identification. The third ingredient was also proved.
27. The prosecution argued that the case against the appellant was proved
28. This being a first appeal, the duty of the first appellate court is as follows:- The Court of Appeal in *Okeno vs Republic* [1972] EA 32 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 vs Republic* (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M Ruwala v R* (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings 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 the witnesses, see *Peters vs Sunday Post* [1958] EA 424.”
29. The issues for determination in this appeal are as follows:-
- i. Whether the prosecution proved the guilt of the Appellant to the required standard.
 - ii. Whether the appeal sought be allowed.
30. On the issue as to whether the prosecution proved the guilt of the Appellant to the required standard, the elements the prosecution should prove for the offence of defilement are as follows:-
- i. Age of the complainant,
 - ii. Proof of penetration



- iii. Positive identification of the assailant.
31. The prosecution proved penetration through medical evidence. Section 2 of the *Sexual Offences Act* defines “penetration” to mean the partial or complete insertion of the genital organs of a person into the genital organs of another person.
32. In the case of *Alex Chemwotei Sakong v Republic* [2018] eKLR the court went to a great extent in expressing what penetration entails in a sexual offence as follows;
- “Penetration is defined under section 2 of the *Sexual Offences Act* to mean the partial or complete insertion of the genital organ of a person into the genital organs of another person. This position was explained by the court of appeal (Onyango Otieno, Azangalala & Kantai JJ A) in the case of *Mark Oiruri vs. Republic Criminal Appeal 295 of 2012* [2013] eKLR in which they opined thus:
- “...and the effect that the medical examination was carried out on her on 16th November, 2008 five days after the event, and that during that time she must have taken a bath and no spermatozoa could be found. In any event the offence is against penetration of a minor and penetration does not necessarily end in the release of sperms into the victim. Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. 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...”
33. The Appellant was properly identified by the complainant. He did not deny that he went with the complainant to his Aunt’s place at Kishamba.
34. The age of the complainant was proved with production of her birth certificate which showed she was 16 years old at the material time of the alleged offence having been born on 18th February 2006.
35. I find that the conviction herein is secure and the sentence lawful.
36. I dismiss the appeal and uphold both the conviction and sentence.

DATED, SIGNED AND DELIVERED THIS 28TH DAY OF FEBRUARY 2025 IN OPEN COURT AT VOI.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Maina

