



REPUBLIC OF KENYA



**Eshiwani v Republic (Criminal Appeal E055 of 2024)
[2025] KEHC 1742 (KLR) (25 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1742 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E055 OF 2024
DR KAVEDZA, J
FEBRUARY 25, 2025**

BETWEEN

CHARLES OKENO ESHIWANI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered
on 19th Jan 2023 by Hon. Boke (S.P.M) at Kibera Chief Magistrate's
Court Criminal Case no. 60 of 2020 Republic v Charles Okeno Eshiwani)*

JUDGMENT

1. The appellant Charles Okeno Eshiwani was charged and after a full trial convicted for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*, No. 3 of 2006. He was sentenced to serve twenty (20) years imprisonment. Being aggrieved, he filed an appeal challenging his conviction and sentence.
2. In his petition and amended grounds of appeal, the appellant raised several key issues. He challenged the sufficiency of the prosecution's evidence upon which his conviction was based. He also argued that the trial court failed to conduct a proper voir dire examination of the victim. Additionally, he contended that inconsistencies and contradictions in the prosecution's evidence prejudiced his right to a fair trial. Lastly, he complained that the trial court failed to consider his mitigation, leading to the imposition of an excessively harsh 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 analyze and re-evaluate the evidence that was before the trial court, and itself 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. To succeed in a prosecution for defilement, it must be proven that the accused committed an act that caused penetration with a child.
5. "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."
6. 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 offense 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.
7. Bearing in mind the above provisions, I will now analyse the evidence on record to ascertain whether the essential ingredients of the offence preferred against the appellant were established to the required standard of proof.
8. Regarding the ingredients, I wish to state at the outset that the importance of proving the age of a victim, proof of penetration, and positive identification of the assailant in sexual offences is paramount.
9. PW1, JM, the complainant, testified that she was born on 1st January 2011 and was a Standard Four pupil at [Particulars Withheld]. She identified the appellant, known as Baba [Particulars Withheld], as a tenant in her aunt's plots, living approximately eight to nine meters from her home.
10. She recounted that on 26th June 2020, while at home with her sister, EW, she was sent to pour water outside. On her way back, she encountered the appellant, who obstructed her path, covered her mouth, and led her to the toilet. She specifically recalled him holding her hand and preventing her from calling for help. He then inserted his private parts into her private part while standing after unzipping his trousers without removing them. She said that it only took a few minutes and he then told her not to tell anyone.
11. PW1 testified that after leaving the toilet, she met her sister but did not disclose the incident. The following day, while playing outside, the appellant gave her Kshs. 10 before entering his house. She later confided in the appellant's daughter, who informed her mother, and eventually, the property owner learned of the incident. PW1 also told her aunt, and her mother later took her to Nairobi Women's Hospital.
12. During cross-examination, she stated it was a weekend as she had not gone to school. She was wearing trousers without a panty. She recalled that the appellant wore a black trouser and brown clothes with a jacket. She did not see blood or feel pain initially but experienced pain after treatment. She left the appellant in the toilet after the incident, which occurred at night, though she could not recall the exact time.
13. Upon re-examination, she confirmed that a nearby shop cast light into the plot, allowing her to clearly see the appellant. Given that PW1 knew the appellant as a neighbor and a tenant in her aunt's house, identification was by recognition.



14. As discussed in the [Kenya Judiciary Criminal Procedure Bench Book](#) 2018 paragraphs 94-96 no corroboration is necessary for the evidence of a child taken on oath although cross-examination is available for sworn or unsworn evidence of a child in the usual way:
- “94. No corroboration is required if the evidence of the child is sworn (*Kibangeny arap Kolil v R* 1959 EA 92). Unsworn evidence of a victim who is a child of tender years must be corroborated by other material evidence implicating the accused person for a conviction to be secured (*Oloo v R* (2009) KLR).
95. However, in cases involving sexual offences, if the victim's evidence is the only evidence available, the court can convict on the basis of that evidence provided that the court is satisfied that the victim is truthful (s. 124, [Evidence Act](#)). The reasons for the court's satisfaction must be recorded in the proceedings (*Isaac Nyoro Kimita v R* Court of Appeal at Nairobi Criminal Appeal No. 187 of 2009; *Julius Kiunga M'biritbia v R* High Court at Meru Criminal Appeal No. 111 of 2011).
96. The evidence of a child, sworn or unsworn, received under section 19 of the [Oaths and Statutory Declarations Act](#) is subject to cross-examination pursuant to the right to fair trial, which encompasses the right to adduce and challenge the evidence produced against the accused (art. 50(2)(k), [CoK](#)”
15. PW1's testimony did not require corroboration in accordance with the proviso to section 124 of the [Evidence Act](#) (Chapter 80 of the Laws of Kenya) if there are reasons to believe that the minor was telling the truth.
16. In this regard, I note that PW1 was consistent and steadfast in her testimony. In addition, her evidence which was subjected to cross-examination remained consistent throughout.
17. PW2, the complainant's elder sister, corroborated PW1's evidence, confirming she sent her to pour water around 7:00–7:30 PM. PW1 took approximately 20 minutes, and when PW2 went to check, she found her at the inner gate returning. She also saw the appellant leaving through the main gate carrying a toilet jerrican. The following day, after hearing rumors from children in the plot, she asked PW1 what had happened. PW2 further confirmed PW1's account regarding the appellant's arrest and their hospital visit.
18. During cross-examination, PW2 stated she did not hear any screams from her sister or notice anything unusual until they went to the hospital. However, upon re-examination, she confirmed that PW1 was crying when she met her.
19. PW3, Mary Muturi, the property owner, testified that on 23/6/2020, PW1 informed her of the incident when she returned home at 9 PM. Later, the appellant approached her, suggesting they settle the matter privately. Her husband proposed taking PW1 to the hospital, where they were advised to report the matter to the police. PW3 confirmed there was some light outside. When cross-examined, she stated that PW1 reported the incident to her, and on re-examination, she noted that if the appellant were innocent, he would not have sought a private settlement.
20. PW4, John Njuguna from Nairobi Women's Hospital, testified that PW1, born on 1/1/2011, was treated on 24/8/2020 at 10:50 am following allegations of defilement by a neighbor on 22/6/2020 at 7:00 pm.



21. On examination, PW1 had no physical injuries on her body, but her hymen had fresh tears at the 6 o'clock position, and she was soiled with feces. Her outer genitalia appeared normal. Lab tests, including HIV and syphilis, were negative. He produced the PRC Form, the GVRC Form, and the P3 Form.
22. During cross-examination, he confirmed the hymen had fresh tears and explained that a blunt object had forcefully penetrated her vagina. He could not confirm if there was blood since the minor had changed clothes.
23. Based on the medical evidence and history provided, penetration was sufficiently proved.
24. PW5 CPL Pauline Wangoi who was the Investigating officer produced the PW1 birth certificate, which indicated that the minor was born on 1st January 2011 She highlighted how she took the witness evidence and conducted her investigation.
25. On the age of the complainant, her birth certificate indicated that she was born on 1/1/2011. She was therefore 9 years old and a child within the meaning of the law.
26. In his defence, the appellant narrated how he came to Nairobi and settled at PW3's plots. He alleged that PW3 wanted a romantic relationship with him, but he refused, as he had a wife and children. On 19/6/2020, PW3 allegedly seduced him again while he was buying breakfast. Later, PW3 reportedly stormed into his bedroom without saying a word and threatened him. He also claimed that one Baba [Particulars Withheld] was pursuing his wife. When he confronted him, Baba [Particulars Withheld] allegedly threatened him as well. Due to the growing hostility, his wife suggested they move out.
27. On 21/6/2020, he attended church with PM, N, and B. He saw Baba [Particulars Withheld] again but avoided him. On 22/6/2020, he went to [Particulars Withheld] Road for a work-related matter. He stated that PW1 only identified a voice and clothing, which matched those of Baba [Particulars Withheld]. He alleged that people were bribed to testify falsely against him and insisted he was accused due to rejecting advances and exposing infidelity.
28. The trial court considered this defence and found it to be baseless. I have already found above that PW1's testimony was truthful and consistent all through. When weighed against the prosecution case, the appellant's defence did not raise any doubts thereof and it was rightly dismissed by the trial court. I therefore find that defilement was proved to the required legal standard.
29. Having analysed the totality of the prosecution's case, I find that the prosecution proved their case beyond reasonable doubt. The conviction on the charge of defilement is thus affirmed.
30. On the sentence, section 8(2) provides that 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.
31. The trial court exercised its discretion in sentencing and imposed the sentence of 20 years imprisonment. I therefore find no reason to interfere.
32. The upshot of the above analysis is that the appellant's appeal is dismissed in its entirety for lack of merit.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 25TH DAY OF FEBRUARY 2025

D. KAVEDZA

JUDGE



In the presence of:-

Mr. Mutuma for the respondent

Appellant – present

Achode – court Assistant

