



REPUBLIC OF KENYA



KENYA LAW
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**Atemba v Republic (Criminal Appeal E135 of 2024)
[2025] KEHC 3597 (KLR) (25 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3597 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E135 OF 2024
DR KAVEDZA, J
MARCH 25, 2025**

BETWEEN

CLITUS WAWIRA ATEMBA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered on
31st October 2024 by Hon. C. Njagi (PM) at Kibera Chief Magistrate's Court
Sexual Offences Case No. E003 of 2022 Republic vs Clitus Wawira Atemba)*

JUDGMENT

1. The appellant was charged and after full trial convicted by the Subordinate Court of the offence of defilement contrary to section 8(1) as read with 8(3) of the *Sexual Offences Act* No. 3 of 2006 (herein the Act). The particulars were that on the 16th of December 2022 at [Particulars Withheld] in Dagoretti Sub-county within Nairobi County the appellant unlawfully and intentionally caused his male genital organ (penis) to penetrate the female genital organ (vagina) of LN a child aged 13 years. He was sentenced to serve forty-five (45) years 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 contended that the learned magistrate erred by disregarding his cogent defense.
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. The prosecution called four (4) witnesses in support of their case. PW1, L.N gave sworn evidence after a voir dire testimony. She testified that on 16th December 2022, as she was playing with two of her friends, the appellant grabbed her from the back, dragged her into his house, and locked the door. He proceeded to undress her, tie her arms and legs to the bed, gagged her mouth, and insert his penis into her vagina. She screamed attracting the attention of the neighbours and caretaker. When the appellant was done, he untied her and instructed her to dress up. He further gave her Kshs. 50 under the guise of payment for her help in washing the dishes. She told the court that she knew the appellant who was their neighbour and identified the appellant in court.
5. PW2, VK narrated that upon her arrival at 8 pm, she was informed of the ordeal by her neighbour. Thereafter, she rushed her daughter to Nairobi Women's Hospital where she was examined, treated, and handed several documents which she took to Muthangari Police Station where she reported the matter. She further averred that the complainant was born on 15th August 2009.
6. PW3, John Njuguna while referring to the complainant's PRC form, P3 form, and GVRC form testified that the appellant was examined at 10 pm. It was observed that she had an injury on her head, as well as her vagina. She had injuries on the hymen at 3, 6, and 9 o'clock. He testified that there was evidence of vaginal penetration.
7. PW4, PC Vela Makungu Ayodi recalled that on the material day, the matter was reported to Muthangari Police Station after which the complainant's statement was recorded. She issued the complainant with a P3 form and further conducted an age assessment on the complainant which revealed that the complainant was between 14-15 years old at the time the incident occurred. She produced the age assessment report in court.
8. In his defence, the appellant maintained that on the material day, he was at home. However, on 25th December, he was arrested and placed in custody at Muthangari Police Station, having refused to give up a sum of Kshs. 100,000 towards the complainant's mother.
9. To succeed in a prosecution for defilement, it must be proven that the accused 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."
10. Further, section 8(1) and (3) of the Act provides thus: -
 8. Defilement
 - (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
11. In this case, the evidence tendered by the prosecution sufficiently established the element of penetration. PW1 testified that the appellant had inserted his penis into her vagina after having forcefully tied her arms and legs to his bed. This was further corroborated by the clinician who maintained that her medical diagnosis indicated the presence of injuries on her vagina which confirmed the occurrence of penile vaginal penetration.
12. On the other hand, the age of the complainant was settled. The complainant's mother testified that her daughter was born on 15th August 2009. Moreover, the investigating officer, having conducted an



age assessment report established that the appellant's age was between 14-15 years. The trial court duly deduced that PW1 was thirteen (13) years old at the time of the offence.

13. The element of identification was rightly resolved since the complainant had known the appellant as her neighbour and further identified the appellant in court. His identification was by recognition.
14. The foregoing analysis rightfully demonstrates that the prosecution aptly discharged their burden of proof beyond reasonable doubt. The evidence proffered before the court suffices in light of the elements of penetration, the complainant's minority, and the appellant's identity. Consequently, the appellant's conviction is affirmed.
15. Regarding the sentence, the appellant was sentenced to serve forty-five (45) years imprisonment. During sentencing, the court considered the pre-sentence report, the aggravating circumstances of the case and exercised discretion. In the premises, I see no reason to interfere with the sentence.
16. 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 25TH DAY OF MARCH 2025

D. KAVEDZA

JUDGE

In the presence of:

Malala for the Appellant

Mutuma for the Respondent

Tonny Court Assistant.

