



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwembi v Republic (Criminal Appeal E111 of 2024)  
[2025] KEHC 4951 (KLR) (28 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4951 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL E111 OF 2024  
DR KAVEDZA, J  
APRIL 28, 2025**

**BETWEEN**

**BOAZ OBINO MWEMBI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered on  
14th May 2024 by Hon. M.W Murage (PM) at Kibera Chief Magistrate's  
Court Sexual Offences Case No. E081 of 2020 Republic vs Boaz Obino Mwembi)*

**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. The particulars are that on 26<sup>th</sup> August 2020 at [particulars withheld] in Embakasi Sub-county within Nairobi County, the appellant intentionally and unlawfully caused his penis to penetrate the anus of DNK a child aged 12 years. He was sentenced to serve twenty-five (25) years imprisonment.
2. Aggrieved, he filed an appeal challenging his conviction and sentence. In his petition of appeal, he challenged the totality of the prosecution's evidence against which he was convicted. He contended that his sentence ought to be reduced to the minimum statutory sentence to avoid discrimination. 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. The prosecution availed six (6) witnesses in support of their case. The complainant, DNK (PW1), a minor born on 28th April 2008, provided sworn testimony after voir dire examination. He stated the



appellant ordered him to carry luggage. Upon refusal, the appellant strangled him, lured him into his home, continued the assault, removed his clothing, and sexually assaulted him by penile penetration. DNK's screams drew two women to the gate, but they did not speak to him as he left.

5. At home, DNK confided in his brother. His mother, MMK (PW2), overheard, inquired, and learned of the assault. She observed bruising and soiling on DNK's anus, took him to hospital, and reported the incident to Tassia Police Station, producing his birth certificate. David Kamau Wanjiru (PW3), DNK's father, identified the appellant in court, corroborating PW2's testimony.
6. PC Joseph Kayara (PW4) and PC Edward Githinji (PW5) arrested the appellant that night and identified him in court. Pamela Okelo (PW6), a government chemist, analysed a rectal swab from DNK, confirming the DNA matched the appellant's.
7. In his defence, the appellant maintained that on the material day, he was with his friend and was not at the scene as alleged. He maintained his innocence.
8. 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."
9. Further, section 8(1) and (3) 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.
    - (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.
10. In this case, the prosecution's evidence robustly established the element of penetration. The complainant provided a clear and vivid account, testifying that the appellant inserted his penis into his buttocks. This was substantiated by the testimony of his mother (PW2), who observed an abnormal widening of the complainant's anal area and further corroborated by PW6, a forensic expert, who confirmed that DNA from semen obtained via an anal swab from the complainant matched a sample from the appellant, unequivocally linking him to the offence.
11. The complainant's age was conclusively settled through his own testimony, supported by his birth certificate, tendered in court by his mother, verifying his birth date as 28th April 2008. At the time of the incident, he was 12 years old, thus a child under the law.
12. Identification posed no issue, as the complainant, his mother, and his father all identified the appellant in court, being familiar with him as their neighbour.
13. The trial court considered the appellant's alibi defence, in which he claimed to be elsewhere during the incident. However, this was found baseless, lacking credible evidence or corroboration, and was wholly inconsistent with the prosecution's compelling evidence.
14. Given the overwhelming evidence and the dismissal of the appellant's unsubstantiated defence, the conviction is upheld.
15. The appellants were sentenced to twenty-five (25) years imprisonment. During sentencing, the court considered the pre-sentence report, and the aggravating circumstances surrounding this case and exercised discretion. Based on this premise, 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 28<sup>TH</sup> DAY OF APRIL 2025**

.....

**D. KAVEDZA**

**JUDGE**

In the presence of:

Appellant Present

Mr. Chebii for the Respondent

Tonny Court Assistant

