



REPUBLIC OF KENYA



**Ombima v Republic (Criminal Appeal E016 of 2024)  
[2025] KEHC 7105 (KLR) (27 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7105 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CRIMINAL APPEAL E016 OF 2024**

**JN KAMAU, J**

**MAY 27, 2025**

**BETWEEN**

**JACKSON NDANYI OMBIMA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon S.O Ongeru (SPM) delivered at Vihiga in the Senior Principal Magistrate's Court in Criminal Case No 3 of 2020 on 16th November 2022)*

**JUDGMENT**

**Introduction**

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the [Sexual Offences Act](#) No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#).
2. The Learned Trial Magistrate, Hon S. O. Ongeru (SPM) convicted him on the main charge of defilement and sentenced him to fifteen (15) years imprisonment.
3. Being dissatisfied with the said Judgment, he lodged an appeal herein. His Petition of Appeal was dated 26<sup>th</sup> September 2023 and filed on 13<sup>th</sup> March 2024. He set out two (2) grounds of appeal. In his Written Submissions dated 22<sup>nd</sup> August 2024 and filed on 28<sup>th</sup> August 2024, he incorporated three (3) other Grounds of Appeal.
4. The Respondent's Written Submissions were dated 16<sup>th</sup> December 2024 and filed on 17<sup>th</sup> December 2024. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.



## **Legal Analysis**

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify.
6. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify, and thus make due allowance in that respect.
7. Having looked at the Appellant's Grounds of Appeal, his Written Submissions and those of the Respondent, it appeared to this court that the issues that had been placed before it for determination were as follows:-
  - a. Whether or not the Prosecution proved its case beyond reasonable doubt; and
  - b. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.
8. The court therefore dealt with the said issues under the following distinct and separate heads.

### **I. Proof of Prosecution's Case**

9. Ground of Appeal No (1) of the Grounds of Appeal dated 22<sup>nd</sup> August 2024 and filed on 28<sup>th</sup> August 2024 was dealt with under this head.
10. In determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases was proof beyond reasonable doubt, this court considered the ingredients of the offence of defilement.
11. It is now settled that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and identification of the perpetrator as was held in the case of *George Opondo Olunga vs Republic* [2016] eKLR. This court dealt with the same under the following distinct and separate heads.

#### **A. Age**

12. The Appellant did not submit on this issue. On its part, the Respondent placed reliance on the case of *Musyoki Mwakavi vs Republic* [2014] eKLR where it was held that in a charge of defilement, age of a minor could be proved by medical evidence, baptism card, school leaving certificate, by the victim's parents and/or guardians, observation and common sense.
13. It pointed out that No 248292 PC Woman Rebeca Cheruto (hereinafter referred to as "PW 3") testified that the Complainant, JA (hereinafter referred to as "PW 1") was born on 22<sup>nd</sup> June 2002, was aged seventeen (17) years and produced her Birth Certificate as exhibit in this case.
14. Notably, PW 1's Birth Certificate showed that PW 1 was born on 22<sup>nd</sup> June 2002. The incident occurred on 12<sup>th</sup> January 2020. She was therefore seventeen (17) years and seven (7) months at the material time.



15. As the Appellant did not challenge the production of the aforesaid Birth Certificate and/or rebut this evidence by adducing evidence to the contrary, this court was satisfied that PW 1's age was proven beyond reasonable doubt and that she was a child at all material times.

## **B. Identification**

16. The Appellant did not submit on this issue. On its part, the Respondent submitted that PW 1 testified that she was defiled by the Appellant and that her mother, Sarah Aseka (hereinafter referred to as "PW 2") testified that when they rescued her, the Appellant ran away but was arrested four (4) days later whereby she identified him at the Police Station.
17. It argued that the Appellant was therefore well known to PW 1 and could not have been mistaken as to his identity. It pointed out that that was evidence of recognition which was held by courts to have been more reliable and weightier than the identification of a stranger as was held in the case of *Anjononi & Others vs Republic (1976-80) 1 KLR 1566, 1568*. It was emphatic that there was proper identification as there was prior knowledge of the Appellant.
18. A perusal of the proceedings showed that PW 1 testified that on the material day of 12<sup>th</sup> January 2020, which was a Sunday, a woman asked her to go and assist her with chores at her home. On her way to the said woman's home, at the junction, she was waylaid by the Appellant and one other person. The Appellant threatened to kill her if she screamed and his co-perpetrator hit her.
19. She stated that they took her to the Appellant's house at Esiamarah where she stayed until Monday. She said that he defiled and beat her up. Her further testimony was that when his parents came to her rescue, he quarreled and threatened to assault them with a panga. His father then reported the matter to the local administration and she was rescued.
20. PW 2 confirmed that they rescued PW 1 from the Appellant's house and he ran away. She met the Assistant Chief the day after PW 1 went missing and a man who was with the Assistant Chief informed her that her daughter was with his son. She was assisted by the said Assistant Chief and some youth to rescue PW 1 from the Appellant's house.
21. Notably, PW 1 stayed with the Appellant in his house the whole night of the material day until when she was rescued on the evening of the next day. That was enough time to recognise the Appellant. She could not therefore have been mistaken by his identity.
22. Without belabouring the point, this court came to the firm conclusion that the ingredient of identification was proven through recognition and the Appellant was positively identified by PW 1.

## **C. Penetration**

23. The Appellant submitted that PW 1's testimony on penetration was flawed. He questioned why no spermatozoa was collected yet she had claimed that she stayed with him for two (2) days. He argued that the Clinical Officer, Michael Ochieng (hereinafter referred to as "PW 4") did not state whether the broken hymen was fresh or long-standing. He added that according to Section C No 2(a) of the P3 Form, the physical state of labia majora, labia minor, vagina and cervix were normal.
24. He argued that PW 1 did not state whether or not she had never had penetration sex before thus throwing the court into a limbo as to when and what led her to her missing hymen with all other factors remaining normal. He was emphatic that a missing hymen was not a conclusive proof of penetration.



25. In this regard, he relied on the case of *Munyoki vs Republic and Arthur Mshila Manga (sic)* (eKLR citation not given) where it was held that the trial court introduced doubt when it said there was no discharge from the victim's private part.
26. On its part, the Respondent cited Section 2 of the *Sexual Offences Act* and placed reliance on the case of *Mohammed Omar Mohammed vs Republic*[2020]eKLR where it was held that the key evidence relied upon by the courts in rape and defilement cases in order to prove penetration was the complainant's own testimony which was usually corroborated by the medical report presented by the medical officer.
27. It contended that the PW 1's evidence on penetration was corroborated by that of PW 4 thus the ingredient of penetration was proved. It added that in sexual offences the victim was normally the only witness as the offence was committed in secrecy and that the Trial Court warned itself of such evidence as per Section 124 of the *Evidence Act*.
28. It placed reliance on the case of *Charles Wamukoya Karani vs Republic Criminal Appeal No 72 of 2013*(eKLR citation not given) where it was held that the critical ingredients forming the offence of defilement were age of the complainant, proof of penetration and positive identification of the assailant. It was emphatic that all the ingredients of defilement were proved beyond reasonable doubt.
29. PW 4, confirmed that on examining PW 1, she had normal outer genital with no visible injuries and presence of discharge which was whitish in colour and had a foul smell. He opined that penetration had taken place and classified the injury as harm. PW 1's evidence was therefore corroborated by the medical evidence of PW 4.
30. In his defence, the Appellant stated that he was a hawker and on the material day of 12<sup>th</sup> January 2020, he was at work until 7.00p.m when he went back home and slept. He denied having defiled PW 1. He did not call any witness to corroborate his alibi evidence. Be that as it may, his defence did not outweigh the inference of guilt on his part as laid out by the Prosecution witnesses.
31. In the premises foregoing, this court found and held that the Prosecution had proven its case to the required standard, which in criminal cases, was proof beyond reasonable doubt that the Appellant defiled PW 1 on the material date.
32. Ground of Appeal No (1) of the Grounds of Appeal dated 22<sup>nd</sup> August 2024 and filed on 28<sup>th</sup> August 2024 was therefore not merited and the same be and is hereby dismissed.

## II. Sentencing

33. Grounds of Appeal No (1) and (2) of the Grounds of Appeal dated 26<sup>th</sup> September 2023 and filed on 13<sup>th</sup> March 2024 and Grounds of Appeal No (2) and (3) of the Grounds of Appeal dated 22<sup>nd</sup> August 2024 and filed on 28<sup>th</sup> August 2024 were dealt with under this head.
34. The Appellant invoked Section 26(2) of the *Penal Code* and Article 50(2)(p) of *the Constitution* of Kenya, 2010 and urged this court to reduce his sentence.
35. He faulted the Trial Court for not directing that his sentence run from the day of his arrest. In that regard, he placed reliance on the case of *88 Prisoners vs DPP, AG and the Prison Homemade Petition*, where it was held that sentence should be deemed to start when liberty was lost. He pointed out that he was arrested on 17<sup>th</sup> January 2020 and was sentenced on 7<sup>th</sup> December 2022. He urged the court to consider the period of two (2) years and eleven (11) months he had spent in custody during trial.
36. On its part, the Respondent invoked Section 8(1) as read with 8(4) of the *Sexual Offences Act* and Section 329 of the *Criminal Procedure Code* and argued that the Trial Court took into account the



evidence, the nature of the offence, relevant factors and the legal principles before arriving at the appropriate sentence hence the sentence meted upon the Appellant was lawful and befitting of the offence committed.

37. It was not opposed to the Appellant's prayer pursuant to Section 333(2) of the *Criminal Procedure Code*. In that regard, it relied on the case of Ahamad Abolfathi Mohammed & Another vs Republic [2018] eKLR where it was held that courts must take into account the time spent in custody while sentencing offenders.

38. The Appellant herein was convicted under Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* Cap 63 (A). Section 8(4) of the *Sexual Offences Act* provides that:-

“A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”

39. The Trial Court sentenced the Appellant to fifteen (15) years imprisonment. This court could not therefore fault it in that regard as the sentence was lawful.

1. In its decision of 12<sup>th</sup> July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case of Joshua Gichuki Mwangi vs Republic [2022] eKLR which had reiterated the reasoning in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR where it had been held that Section 8 of the *Sexual Offences Act* had to be interpreted so as not to take away the discretion of the court in sentencing offences and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence. It stated that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence.

2. As this court was bound by the decisions of courts superior to it, its hands were tied regarding exercising its discretion to reduce the Appellant's sentence. It had no option but to leave the said sentence that was meted against the Appellant herein undisturbed.

3. Going further, this court was mandated to consider the period the Appellant spent in remand while his trial was ongoing as provided in Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya). The said Section 333(2) of the *Criminal Procedure Code* stipulates that:

“Subject to the provisions of section 38 of the *Penal Code* (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody (emphasis court)”.

43. This duty is also contained in the Judiciary Sentencing Policy Guidelines where it is provided that: -

“The proviso to section 333 (2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court



must take into account the period in which the offender was held in custody during the trial.”

44. The duty to take into account the period an accused person had remained in custody before sentencing pursuant to Section 333(2) of the *Criminal Procedure Code* was restated by the Court of Appeal in the case of *Ahamad Abolfathi Mohammed & Another vs Republic*(Supra).
45. The Charge Sheet herein showed that the Appellant herein was arrested on 17<sup>th</sup> January 2020. Although he was granted bond, he did not seem to have posted the same. He was sentenced on 7<sup>th</sup> December 2022.
46. A reading of the Trial Court’s Sentence showed that it did not take into account the time that he spent in remand during trial. This court was therefore persuaded that this was a suitable case for it to exercise its discretion and grant the orders sought.

### **Disposition**

47. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Grounds of Appeal dated 26<sup>th</sup> September 2023 and filed on 13<sup>th</sup> March 2024 and Grounds of Appeal dated 22<sup>nd</sup> August 2024 and filed on 28<sup>th</sup> August 2024 were not merited save for the Grounds of Appeal on Section 333(2) of the *Criminal Procedure Code*. The conviction and the sentence be and are hereby upheld as they were both safe.
48. For the avoidance of doubt, the period between 17<sup>th</sup> January 2020 and 6<sup>th</sup> December 2022 be and is hereby taken into account while computing his sentence in line with Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).
49. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 27<sup>TH</sup> DAY OF MAY 2025**

**J. KAMAU**

**JUDGE**

