



REPUBLIC OF KENYA



KENYA LAW
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**Omuse v Republic (Criminal Appeal E085 of 2024)
[2025] KEHC 7371 (KLR) (27 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7371 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E085 OF 2024
DR KAVEDZA, J
MAY 27, 2025**

BETWEEN

TOM OMUSE APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered on
31st August 2023 by Hon. E. Riany (SRM) at Kibera Chief Magistrate's
Court Sexual Offences Case No.75 of 2023 Republic vs Tom Omuse)*

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 the 15th day of June 2016 at [Particulars Withheld], Dagoretti Sub-county within Nairobi County the appellant intentionally and unlawfully caused his penis to penetrate the vagina of DM a child aged 12 years. He was sentenced to serve twenty (20) years imprisonment.
2. Being aggrieved, he filed an appeal challenging the totality of the prosecution's evidence against which he was convicted. He contended that the trial magistrate disregarded his 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 witnesses. PW2, DM, the complainant, aged 12 (born 13/3/2011), testified after voir dire. She stated the appellant, a neighbour, dragged her into his house, forcibly removed her clothes, and penetrated her vagina with his penis, ignoring her pleas of pain and



- menstruation. He abandoned her at Kamukunji at night. A lady assisted her to Kamukunji Police Station, and she later reported the matter at Kayole Police Station.
5. PW1, NN, the complainant's mother, learned from a neighbour that DM entered the appellant's house and went missing while she was away. PW1 located DM at Kayole Police Station and took her to Dalas Hospital. DM's birth certificate, confirming her birth date as 13/3/2011, was produced.
 6. PW3, Daisy Kerubo, a clinical officer, presented DM's PRC Form. Examination five days post-incident revealed a white, thick, curd-like genital discharge, indicating a urinary tract infection, consistent with sexual assault.
 7. PW4, Hellen Muruka, received PW1's missing child report and later confirmed DM was found at Kayole Police Station. Upon interrogation, DM consistently stated the appellant forcibly had sex with her while PW1 was away. DM positively identified the appellant.
 8. In his defence, the appellant denied knowing the complainant or committing the offence
 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 [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.
 11. PW2, the complainant, testified that the appellant forcibly inserted his penis into her vagina. Her account was consistent and unwavering throughout. This was corroborated by PW3, a clinical officer, whose medical report confirmed the complainant contracted a urinary tract infection, a likely consequence of the sexual assault, further substantiating the element of penetration. The prosecution's evidence conclusively established penetration.
 12. The complainant's age was undisputed. PW2 testified she was born on 13/3/2011, corroborated by PW1, her mother, and PW4, the investigating officer. Her birth certificate, produced as evidence, confirmed she was 12 years old at the time of the incident. Under Kenyan law, she is a child, incapable of consenting to sexual activity.
 13. The appellant's identity was firmly established. PW2, familiar with the appellant as a neighbour in the same apartment block, positively identified him. PW1, her mother, also confirmed his identity, as did PW4, who identified him in court. The complainant's consistent recognition of the appellant as the perpetrator leaves no doubt as to his identity.
 14. The prosecution proved all elements of defilement namely: penetration, the complainant's minor status, and the appellant's identity beyond reasonable doubt. The appellant's defence was unconvincing against the cogent, corroborated evidence. The trial court's findings were sound and supported by the record. Accordingly, the appellant's conviction was proper and is upheld.
 15. The appellant was sentenced to serve twenty-five (25) years imprisonment. During sentencing, the court considered the appellant's mitigation, 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 27TH DAY OF MAY 2025

D. KAVEDZA

JUDGE

In the presence of:

Appellant present

Mutuma for the Respondent

Tonny Court Assistant.

