



**Bocha v Republic (Criminal Appeal E039 of 2024)  
[2025] KEHC 9673 (KLR) (27 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9673 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL APPEAL E039 OF 2024**

**MS SHARIFF, J**

**JUNE 27, 2025**

**BETWEEN**

**RAPHAEL SIMIYU BOCHA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

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. The particulars being that on diverse dates between 27<sup>th</sup> November 2022 and 5<sup>th</sup> January 2023, at Kimilili Sub-County within Bungoma County, he intentionally caused his penis to penetrate the vagina of P.N.M a child of 16 years.
2. Under Count II, he was charged with being in possession of narcotic drugs contrary to Section 3(1) as read with Section 3(2) of the Narcotic Drugs and Psychotropic Substances Control *Act No. 4 of 1994*.
3. The Respondent called six (6) witnesses in support of its case and in his defense, the Appellant gave a sworn testimony, but did not call any witness.
4. The trial Court after considering the evidence adduced by both parties found that the Respondent had proved it's case against the Appellant beyond reasonable doubt on both Counts. Under Count 11, the Appellant was convicted and sentenced to pay Kshs. 50,000/= in default be imprisoned to serve six (6) months. Under Count I he was sentenced to serve ten (10) years imprisonment.
5. Aggrieved by the sentence, the Appellant filed his Petition of Appeal in Court on 4<sup>th</sup> March 2024, in which he raised the following grounds of appeal:
  - a. That he is lodging his appeal out of time due to ill-health and sickness.
  - b. That he is a first offender.



- c. That the sentence imposed against him was rather too harsh and excessive and this Court be pleased to reduce the same
  - d. That this Court be pleased to consider reducing the sentence imposed on humanitarian ground.
  - e. That the sentence imposed be reduced and fall under probative terms.
  - f. That he wishes to adduce more grounds at the hearing of his appeal.
6. He prayed that this Court allows his appeal in its entirety.
  7. The appeal was canvassed by way of written submissions. The record only bears the Appellant's written submissions filed on 12<sup>th</sup> June 2024.
  8. On my perusal of the Appellant's written submissions, it is clear that the appellant is appealing his conviction on the main charge of defilement. This Court shall therefore determine whether the Respondent proved its case against the Appellant under Count I beyond reasonable doubt.
  9. As a first appellate Court I shall re-evaluate and re-assess the evidence afresh and arrive at my own independent conclusions. I am however reminded that unlike the trial Court, I neither saw nor heard the witnesses and I give due regard for that. See *Okeno v R.* [1972] E.A. 32.
  10. After a brief voir dire examination, the Complainant testified as PW1. She told the Court that she was 16 years old and student, and that her parents are deceased so she is residing with her grandmother. She recalled between January 2022 and 5<sup>th</sup> January 2023, she was arrested together with her boyfriend, the Appellant herein, in his house. She told the Court that she resided with the Appellant for three days and that they were also in the company of another not before this Court. She told the Court that she had sexual intercourse with the Appellant herein and had known him from the year 2020.
  11. PW2, SWO, testified that the complainant herein is her granddaughter and that she left home after Christmas celebrations on 25<sup>th</sup> December 2022 saying that she was going to visit a friend and only rung her phone after a week notifying her that she had been arrested and that she had been found living with the Appellant herein. She told the Court that PW1 told her that she was married to the Appellant herein and that they had sexual intercourse. She confirmed to the Court that she knew the Appellant prior to the incident as she had previously gone to Kimilili to the Appellant in search of PW1 and found them together, and that was in the year 2022 prior to Christmas. On cross-examination, she told the Court that she found PW1 residing with the Appellant and they lived together for 2 months and the Appellant did not harm her.
  12. PW4, Dr. Erick Chemwor, testified that he conducted the examination of PW1 herein on 11<sup>th</sup> January 2023, and he established that on external examination that PW1 was of good general condition. On laboratory examination, he established that the urinalysis tests and high vaginal swab showed presence of puss cells with evidence of a urinary track infection. The P3 form was filled on 11<sup>th</sup> January 2023 and produced in Court as PEXH. 2. PW1 treatment notes dated 11<sup>th</sup> January 2023, were produced in Court as PEXH 2. This witness told the Court that an age assessment was also conducted on PW1 and the same concluded that she was 16 years old. The age assessment report dated 11<sup>th</sup> January 2023, was produced in Court as PEXH. 3
  13. PW5, No. 79219 PC Sammy Maina Mureithi, testified that he is currently attached at DCI Kimilili and that on 6<sup>th</sup> January 2023, while acting on a tip of suspected house breaking and burglary, at around 2130 hours with his colleagues they managed to get the alleged suspects, PW1, Appellant and another not before this Court at their rental house within Kamusinga area. They noted that the girl was a minor



and they found the suspects, the Appellant and another not before the Court smoking bhang. They searched the house and got 49 rolls of bhang. They recovered the items and prepared an inventory. On cross-examination, he told the Court that it was not mandatory to take a photo of the items they recovered and that the Appellant saw and signed the inventory.

14. PW6, No. 119093 PC Geoffrey Onyancha, testified that he was the investigating officer in the matter and that he is attached to DCI Kimilili Police Station. He recalled on 6<sup>th</sup> January 2023, at around 5 p.m., while in company of his colleagues, they received information and calls for reinforcement; that there were suspects who had been spotted within the area and that was in regard to activities of burglaries and breaking in which had been rampantly occurring. They immediately proceeded to the area and were directed to one rental house within Kamusinga area where they found 2 suspects who had been mentioned, the Appellant and another not before the Court. On entering the house, they found them smoking bhang and established that there was minor in the said house who was introduced as P.N.M, PW1 herein. They conducted a further search and recovered 49 cigars of bhang hidden in the Appellant's shoes. On 10<sup>th</sup> January 2023, the 49 sticks of bhang were submitted to the Government Chemist for analysis and it was established that they were cannabis sativa. He produced in Court the 49 cigars/sticks of bhang in Court as PEXH. 5 and the Government analyst report as PEXH. 12. He told the Court that after apprehending the Appellant and PW1 they proceeded to the station wherein they interrogated PW1 and they established the name of her grandmother, PW2, and they reached out to her and PW2 was able to confirm that PW1 was indeed a minor and had been missing for some time. PW2 gave them a birth notification bearing serial No. 0423662 indicating date of birth of PW1 as 5<sup>th</sup> November 2007. PW1 told them that she had been staying with the Appellant as husband and wife and they had been engaging in sexual intercourse. He produced in Court the birth notification of PW1 as PEXH. 4. On cross-examination, he told the Court that by the time they arrived at the scene it was at night wherefore they could not take photographs. Further that if the Appellant had disputed the recovered items he was at liberty not to sign the inventory, but he had signed the same willingly.
15. In his defense, the Appellant denied committing the offence. He testified that he had been arrested by individuals in civilian clothing, who introduced themselves as police officers and they told him he would be made aware of his crime once he is arraigned before a Court of law. He also alleged that the said police officers solicited for a bribe from him while he was at the police station.

### **Analysis and determination**

16. I have considered the Appellant's grounds of appeal, the evidence adduced before the trial Court as well as the appellant's submissions and the applicable law and the issues that emerge for determination are as follows:
  - i. Whether the Respondent's case against the Appellant was proven beyond reasonable doubt in Count I and
  - ii. Whether the sentence meted out on the Appellant was excessive and harsh.

### **Whether the Prosecution's case against the Appellant was proven beyond reasonable doubt in Count I**

17. The Appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the *Sexual Offences Act*. The section provides that:

“(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.



- (4) 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."

18. To sustain the charge of defilement against the Appellant, the Prosecution needed to prove the following essential ingredients of the offence of defilement:
- a. That the Complainant was, at the material time, a child as defined under section 2 of the Children's Act and of the age between 16 years and 18 years
  - b. That there was penetration of the child's vagina; and;
  - c. That it was the appellant who caused such penetration of the complainant's vagina or genitalia.

### **Age**

19. On the age of the Complainant, the Complainant testified that she was 16 years old. PW6 testified that PW2 gave him a birth notification bearing serial No. 04XXXXX indicating the Complainant's date of birth as 5<sup>th</sup> November 2007 (PEXH 4), thus showing that the Complainant was 16 years at the material time. PW4 testified that an age assessment was also conducted on the Complainant and the same concluded that she was 16 years old. The age assessment report dated 11<sup>th</sup> January 2023, was produced in Court as PEXH. 3.
20. In *Kaingu Kasomo v Republic*, Criminal Appeal No. 504 of 2010, the Court of Appeal stated as follows:

"Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

21. Rule 4 of the Sexual Offences Rules of Court Rules is explicit that:

"When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."

22. Therefore, in this case, in the absence of any other evidence to the contrary, I find that Complainant was aged 16 years when the alleged incident of defilement occurred.

### **Penetration**

23. On penetration, Section 2(1) of the *Sexual Offences Act* defines penetration as:

"The partial or complete insertion of the genital organs of a person into the genital organ of another person."

24. Section 124 of the *Evidence Act*, Cap 80 provides as follows:

"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be



liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

25. In the instant case, the victim gave sworn testimony that the Appellant was her boyfriend and that she resided with the Appellant for 3 days and they were also in the company of another not before this Court. She told the Court that she had sexual intercourse with the Appellant herein and had known him from the year 2020. PW4 testified that 11th January 2023, he established that on external examination, PW1 was good general condition. On laboratory examination, he established that the urinalysis tests and high vaginal swab showed presence of puss cells with evidence of a urinary track infection. The P3 form was filled on 11<sup>th</sup> January 2023 and produced in Court as PEXH. 2. In the case of *Mark Oiruri Mose v R* [2013] eKLR, the Court of Appeal stated that:

“Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl’s organ.”

26. In this case, it is clear from the evidence adduced before the trial court that the Complainant’s evidence was adequately corroborated by the medical evidence. More so, PW1 testified that the Appellant was her boyfriend and that they had sexual intercourse on diverse dates. Further, the Complainant’s evidence remained unchallenged even under cross-examination.
27. The aforementioned all point to the fact that the Complainant’s testimony was credible and was well corroborated. Accordingly, the evidence undoubtedly proved that indeed the Complainant was penetrated/ defiled.
28. It is instructive to note that in a sexual offence trial, the Court, can, premised on disclosed reasons, convict without corroboration of the evidence of the victim, where the court finds such evidence credible. Section 124 of the [Evidence Act](#) makes this quite clear:

“Notwithstanding the provisions of section 19 of the [Oaths and Statutory Declarations Act](#), where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

### **Identification**

29. As to whether the Appellant was the perpetrator, the Appellant’s testimony was that he knew the Complainant as shewas his girlfriend. PW2 told the Court that she knew the Appellant since 2020 and even at some point when PW1 went missing she found her at his house. It is thus clear that the Complainant knew the Appellant well and recognized him as the perpetrator. In the circumstances,



I find that the Appellant was properly recognized as the perpetrator of the offence. Further, the Complainant's evidence remained unchallenged even under cross-examination.

30. In the end, I find and hold that the Respondent had proved the offence of defilement against the Appellant herein beyond any reasonable doubt and therefore the appeal against conviction fails and is hereby dismissed. The conviction of the appellant for the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* was sound and the same is hereby upheld.

### **Whether the sentence meted out of the Appellant was harsh and excessive**

31. The Appellant has impugned the judgment of the trial Court in imposing a sentence of 10 years' imprisonment under Count I. On my perusal of the lower Court proceedings, on 18<sup>th</sup> September 2023, the trial Court proceeded to sentence the Appellant to TEN (10) years imprisonment. It is thus clear that the Appellant was given a chance to mitigate hence it cannot be said that his right to mitigation was violated.

32. The sentence provided for under Section 8 (4) of the *Sexual Offences Act* is as follows:

“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.”

33. It has been stated time and again that sentencing is at the discretion of the the trial Court, and that an Appellate Court will not necessarily interfere with the sentence meted out, unless it is demonstrated that the trial Court acted on some wrong principles or overlooked some material facts or the sentence was manifestly excessive. The Court of Appeal pronounced itself on the this issue in the case of Bernard Kimani Gacheru v Republic [2002] eKLR; thus :

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with a sentence unless that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless anyone of the matters already stated is shown to exist.”

34. The issue before me is not a novel issue. The Supreme Court in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR) addressing minimum sentences prescribed by section 8 of the *Sexual Offences Act* had this to say:

“66. We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in the Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has



already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed.”

35. I note that the sentence was passed on 18<sup>th</sup> September 2023, and the trial Court in sentencing the Appellant did consider the appellant’s mitigations. The statutory prescribed minimum sentence for the defilement under section 8(4) of the *Sexual Offences Act* is 15 years imprisonment. I do note that the respondent did not issue a notice of enhancement of the sentence wherefore I would not disturb the sentence.

36. In conclusion I do find that this appeal is devoid of any merit. It is thus dismissed.

Orders accordingly.

**DATED AND DELIVERED AT BUNGOMA THIS 27<sup>TH</sup> DAY OF JUNE 2025.**

**M.S.SHARIFF**

**JUDGE.**

In the presence of:

Ms Kibet For State

Appellant Present Virtually

Peter Court Assistant

