



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Ubaka v Republic (Criminal Appeal E030 of 2023)
[2025] KEHC 9114 (KLR) (25 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9114 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL APPEAL E030 OF 2023**

JN KAMAU, J

JUNE 25, 2025

BETWEEN

ALEX ANDIKA UBAKA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgment of Hon R. Ndombi (PM) delivered at Vihiga in the Principal Magistrate's Court in Sexual Offence Case No E004 of 2022 on 7th August 2023)

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 R. Ndombi (PM) convicted him of the offence of attempted defilement contrary to Section 9(1) as read with Section 9(2) of the [Sexual Offences Act](#) No 3 of 2006 and sentenced him to ten (10) years imprisonment.
3. Being dissatisfied with the said Judgement, on 6th September 2023, he lodged an appeal herein. His Petition of Appeal was dated 5th September 2023. He set out four (4) grounds of appeal.
4. His Written Submissions dated and filed on 28th January 2025 while those of the Respondent were dated 4th January 2025 and filed on 4th February 2025. 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.

II. Proof Of Prosecution's Case

9. Ground of Appeal No (1) and (2) of the Petition of Appeal were 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. Both parties did not submit on this issue. Notably, the Complainant, SM (hereinafter referred to as "PW 1") testified that she was thirteen (13) years old. No 23xxxx PC George Kemboi (hereinafter referred to as "PW 6") produced an Age Assessment Report dated 24th February 2022 which indicated that PW 1 was approximately thirteen (13) years of age.
13. This court had due regard to 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.
14. Notably, as the Appellant did not challenge the production of the aforesaid Age Assessment Report and/or rebut this evidence by adducing evidence to the contrary, this court was satisfied that PW 1's age was proven by medical evidence beyond reasonable doubt and that she was a child at all material times.

B. Identification

15. None of the parties submitted on this issue. A perusal of the proceedings showed that on the material day of 26th January 2022, PW 1 was going to buy mandazi and when she got to where there were trees,



- she saw the Appellant who held her hand and covered her mouth. She said that he had a knife in his pocket which he told her he would stab her with.
16. She further stated that the Appellant laid her on some bush, lifted her dress removed her pant and threw it away. She informed the court that he then removed his shirt, trouser and boxer and remained with his vest. He then lay on top of her and inserted his private parts into her vagina.
 17. It was her further evidence that she started screaming and some women came to her rescue while the Appellant ran away. She said that the women called the Chief and she told them that she knew the Appellant's home. When they went to his home, they did not find him and were told that he went to work. She informed the court that while walking on the road, they met the Appellant and some men tied up his hands, called police and he was arrested.
 18. ZZ (hereinafter referred to as "PW 3") was PW 1's grandmother. She testified that PW 1 informed her that she was defiled by the Appellant whom she knew as a neighbour and a clan member.
 19. Judith Loyila (hereinafter referred to as "PW 4") was the Assistant Chief Emanda Sub-location who assisted the arrest of the Appellant. She testified that after she was informed of the incident on the material date, she proceeded to the scene where she found PW 1 who identified the Appellant and she called the police to arrest him.
 20. Her evidence was corroborated by that of Newton Ombego (hereinafter referred to as "PW 5") who stated that when he heard screams of a child at the river, he went accompanied by his brother and they found PW 1 in school uniform. He said that she informed them that she had been defiled by one Alex Ubaka. They called PW 4 who interrogated her and she repeated the name of her perpetrator as Alex Ubaka.
 21. Notably, the incident happened during daytime. PW 1 stated that she knew the Appellant by name and where he stayed at Gisambai. She was able to trace his home leading to his arrest. Her grandmother also pointed out that she knew the Appellant as a neighbour and a clan member. In his defense, the Appellant admitted knowing PW 1 as coming from his clan.
 22. It was evident that PW 1 positively identified the Appellant. They were neighbours and clan members. The incident occurred during the day when the lighting conditions were favourable for his positive identification by PW 1. She could not, therefore, have been mistaken by his identity.
 23. 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

24. The Appellant submitted that the Trial Court did not properly evaluate the evidence thus reaching an erroneous decision. He contended that it was trite that the threshold of evidence in criminal proceedings was so high and had to be beyond reasonable doubt so that any cast of doubt negated a conviction.
25. He pointed out that the investigating officer and the prosecution had to be satisfied that investigations were conducted and exhibits were recovered before charging any offender making them enough to prove the charge beyond reasonable doubt.
26. He argued that the medical records did not prove penetration as they indicated that no hymen was broken and that it was not inflamed, there were no bruises and lacerations on the labia minora and majora. He asserted that the testimony of the Clinical Officer, Ibrahim Vonyoli (hereinafter referred to as "PW 2") was contradictory because he concluded that PW 1 had been defiled yet he pointed out



- that the hymen was not inflamed. He added that PW 2 also stated that no spermatozoa were seen but epithelial cells were found leading him to conclude that PW 1 had been sexually assaulted.
27. It was his contention that the presence of epithelial cells was not proof beyond reasonable doubt as that penetration occurred as epithelial cells were cells that covered the inside and outside of the body including the skin, organs, and blood vessels and that a mere occurrence of them did not point towards a confirmation of penetration.
 28. On its part, the Respondent submitted that in a case of attempted defilement the respondent had to prove other ingredients except penetration.
 29. It cited Section 2 of the *Sexual Offences Act* and placed reliance on the case of *Benson Musumbi vs Republic* [2019]eKLR where it was held that the prosecution in an offence of attempted defilement must prove the other ingredients of defilement except penetration and the steps taken by the assailant to execute the defilement which did not succeed.
 30. It pointed out that the Appellant would have executed the defilement only that the women arrived and he fled. It was categorical that it proved the steps that the Appellant in an attempt to execute the defilement but he was not successful and hence his conviction was safe.
 31. PW 4, confirmed that on examining PW 1, he found that she had bruises on her labia, minora and majora and her genitalia was bleeding but that her vagina was not inflamed. High vaginal swab showed that there were no spermatozoa seen but epithelial cells could be seen. He concluded that PW 1 had been defiled. He produced the P3 form, Post Rape Care (PRC) form and treatment notes as exhibits during trial.
 32. In his defence, the Appellant stated that he was a casual labourer and on the material day of 26th January 2022, he went to work at his employer's home when he was arrested for the charges herein. He denied having defiled PW 1.
 33. Be that as it may, his defence did not outweigh the inference of guilt on his part as laid out by the Prosecution witnesses. His assertions that the medical records were full of contradictions were rendered moot.
 34. 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 as there was presence of epithelial cells which was proof of defilement as PW 2 testified. In this regard, the Trial Court therefore erred for having found him guilty of attempted defilement instead of defilement.
 35. In the premises foregoing, Ground of Appeal No (1) and (2) of the Petition of Appeal were therefore not merited and the same be and are hereby dismissed.

II. Sentencing

36. Grounds of Appeal No (1) and (2) of the Petition of Appeal were dealt with under this head.
37. The Appellant did not submit on the issue of sentencing. On its part, the Respondent invoked Section 9(2) of the *Sexual Offences Act* and pointed out that the Appellant's sentence was lawful and safe.
38. As this court had found that the Trial Court erred in convicting the Appellant under Section 9(2) of the *Sexual Offences Act*, the Appellant ought to have been convicted and sentenced under Section 8(3) of the *Sexual Offences Act* Cap 63 A (Laws of Kenya).



39. The said Section 8(3) of the *Sexual Offences Act* provides that:-

“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.”

1. As the Appellant was not warned of the possibility of an enhancement of the sentence and the Respondent did not file a Notice of Enhancement of Sentence, this court was persuaded to leave the sentence undisturbed.
2. 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)”.

42. 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.”

43. 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 *Abamad Abolfathi Mohammed & Another vs Republic*[2018]eKLR.

44. The Charge Sheet herein showed that the Appellant herein was arrested on 26th January 2022. He was released on bond on 21st February 2022. 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

45. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Petition of Appeal dated 5th September 2023 and filed on 6th September 2023 was not merited and the same be and is hereby dismissed. The conviction and sentence were safe.

46. For the avoidance of doubt, the period between 26th January 2022 and 20th February 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).



47. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 25TH DAY OF JUNE 2025

J. KAMAU

JUDGE

