



REPUBLIC OF KENYA



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

**Ali v Republic (Criminal Appeal E135 of 2022)  
[2025] KEHC 11676 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11676 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL E135 OF 2022  
SM GITHINJI, J  
JULY 31, 2025**

**BETWEEN**

**HASSAN ALI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. Hassan Ali, the Appellant herein, was charged in the main count with an offence of Defilement, contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* no. 3 of 2006.
2. The particulars of this offence are that on the 29<sup>th</sup> day of July, 2020 at Biligo Manyatta in Merti Sub-County within Isiolo County, the Appellant intentionally caused his penis to penetrate the vagina of “R.B.D.” a child aged 6 years.
3. In the alternative, he was charged with the offence of committing an indecent act with a child, Contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006.
4. The particulars hereof being that on the 29<sup>th</sup> day of July, 2020 at Biligo Manyatta in Merti- Sub-County within Isiolo County, the Appellant unlawfully touched the vagina of “R.B.D” a child of 6 years, with his penis.
5. The Prosecution Case is that, in the night of 29<sup>th</sup> July, 2020 at about 1.00a.m. PW-4 in this case was with her two daughters who are PW-1 and PW-2 in this case, and the Appellant herein. PW-2 left Pw-1 to look after the other children as she visited a neighbour. PW-3 entered the house, leaving the Appellant behind. Pw-1 was then lying on the bed. The Appellant got into the house and went upto the bed where she was. He removed her inner wear. He went on top of her, and according to her, touched her between the legs. After he was done, he run away. Pw-2 met him as he was running. She asked him what it was. He lied to her that her son, whom she had left in the house was crying. She suspected the Appellant could have stolen her money. She rushed to the house and checked on her money of which



was intact. She then noted Pw-1 who was lying on bed with her dress pulled upward to the face. The inner wear was down to knees level. She used her phone light to examine her and noted presence of what resembled male semen on her. She then got outside. The appellant asked her what was up. She asked him why he was mannerless. He then requested her for pardon. Pw-2 went and reported it to their mother (Pw-4) PW-4 asked the Appellant what he had done and he sought forgiveness. PW-4 told him off. She had before treated him like her son. He tried to escape. Pw-2 and Pw-4 screamed attracting neighbors to the scene. The said neighbours managed to arrest the Appellant.

6. PW-3 The Village Elder was informed about the incident. He went to the scene and found the Appellant already apprehended. He called police from Biligo Police Station. The police visited the scene and re-arrested the appellant. He was taken to Biligo Police Station and later to Merti Police Station for investigations.
7. On 30<sup>th</sup> July, 2020 the victim (PW-1) was examined at Merti Hospital and her P-3 Form filled. The Clinical Officer who examined her, (PW-5) indicated that she was 6 years old. She had a fresh perforated hymen and the vagina was bruised. Given her age and bruises he could not do HVS test.
8. The Appellant in his defence gave sworn evidence and called no other witness. His defence is that he is from Biligo and is a casual worker. On 30<sup>th</sup> July, 2020 the village elders called him and they arrested him while in company of NPR. He was taken to Merti Police Station. The complainant's mother (PW-4) had a grudge with him as she claimed he had stolen her two sheep and Ksh. 6000/=.
9. The trial court weighed the evidence and found the offence in the main count proved against the Appellant beyond reasonable doubt. He was convicted of it and sentenced to serve 50 years imprisonment.
10. Dissatisfied with the said conviction and sentence he appealed to this court on the grounds that: -
  - a. The age of the complainant was not proved beyond reasonable doubt.
  - b. The sentence of 50 years imprisonment imposed against him, is excessive, arbitrary and inhuman.
  - c. The period spent in custody was not considered in imposing the sentence, which infringes the provision of Section 333(2) of the Criminal Procedure Code.
11. The appeal was canvassed by way of written submissions and both sides filed their respective submissions.
12. The issue for determination is whether the offence against the accused was proved by the prosecution beyond reasonable doubt, and if proved, whether the sentence imposed is excessive.
13. The offence of defilement under section 8 (1) of the Sexual Offences Act No. 3 of 2006, have the following ingredients:-
  - a. Age of the victim.  
The law requires that the victim must be a child of under 18 years.
  - b. Penetration of a genital organ by a genital organ. Under Section 2, it can be partial or complete.
  - c. Positive identification or recognition of the perpetrator.
14. Considering the first one, the complainant herself did not disclose her age in her evidence. PW-2 her sister, and even PW-4 who is her mother did not as well disclose her age. No documents like Birth Certificate, Immunization Card, Baptism Card, School Reports and Age Assessment Report were



availed to show her age. What is in place and was considered by the trial court on the issue, is the voire dire conducted by the court which shows that she was considered as a child of tender years (apparent age) and the P-3 form filled by a Clinical Officer who indicated she was 6 years old.

15. The Clinical Officer did not state the procedure he used to establish the age, and the court can only deduce given the circumstances, that he was guided by apparent age. In the case of Jackton Mwanzia Musembi – Vs – Republic, Criminal Appeal No. 42 of 2016, the court held that, where actual age of a minor is not known, proof of his or her apparent age is sufficient under the *Sexual Offences Act*. It therefore, follows that the age of the victim in this case was well established by the Prosecutions beyond reasonable doubt.
16. On penetration, the victim indicated the Appellant lowered her pants and went on top of her. He touched her between the legs. The evidence of PW-2 shows that her pant had been lowered and the dress pushed upward to the face. There was semen like substance in between her legs. The Clinical Officer’s evidence is to the effect that her hymen was freshly perforated and the vagina was bruised. In my view, the foregoing evidence when weighed together, reveals beyond reasonable doubt, that the victim’s genital organ was penetrated by the appellant’s genital organ. It should be noted here that even the slightest penetration would suffice for the offence.
17. No doubt, the Appellant was well known to the victim, Pw-2 and Pw-4. When he was caught he sought forgiveness from Pw-2 and Pw-4. From the evidence, it appears like he was living with them as PW-4 said she was treating him like her son. He could not have been mistaken for the real culprit. He was well recognized.
18. From the foregoing considerations, the position is one, that the offence in Count 1 was proved by the Prosecution beyond reasonable doubt, and he was rightly convicted of it by the Lower Court.
19. Section 8(2) of the *sexual Offences Act* states: -

“ A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life”
20. In Petition No. E002 of 2024, Republic – Vs – Evans Nyamari Ayako, where the Court of Appeal had downgraded a mandatory life imprisonment to 30 years imprisonment, the Supreme Court reinstated the life term, emphasizing that only parliament defines sentencing and not courts.
21. It therefore, follows that the sentence meted against the Appellant herein is an illegal one, of which must be corrected by this court. In doing so, I set aside the sentence of 50 years imprisonment, and in its place impose one of Life Imprisonment.

**DATED AND DELIVERED AT MERU THIS 31<sup>ST</sup> JULY, 2025.**

**S.M. GITHINJI**

**JUDGE**

Appearances: -

Appellant Present in Meru Prison

Ms. Adhi for State – Present Virtually

