



REPUBLIC OF KENYA



**KENYA LAW**  
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**Lunyama v Republic (Criminal Appeal E038 of 2025)  
[2025] KEHC 11492 (KLR) (31 July 2025) (Abridged Judgment)**

Neutral citation: [2025] KEHC 11492 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL E038 OF 2025**

**DR KAVEDZA, J**

**JULY 31, 2025**

**BETWEEN**

**BRIAN LUNYAMA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered on 5th March 2025 by Hon. D. Mutai (PM) at Kibera Chief Magistrate's Court Sexual Offences Case No. E125 of 2023 Republic vs Brian Lunyama)*

**ABRIDGED JUDGMENT**

1. The appellant was charged and, after a full trial, convicted by the Subordinate Court of the offence of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 28<sup>th</sup> November 2023 at [Particulars Withheld] Area in Dagoretti Sub-County within Nairobi County, the appellant intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of TN, a child aged 5 years. He was sentenced to serve life imprisonment.
2. Being aggrieved, he filed an appeal challenging his conviction and sentence. In his petition of appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted. He urged the court to quash his conviction and set aside the sentence imposed upon him.
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. PW4, the complainant minor TN, aged four, gave unsworn evidence after a voir dire examination. She identified the appellant as Brian, stating he removed her clothes and inserted his "dudu" into her,



- causing pain, including during urination. Using a doll, she pointed to her vagina as the area of pain and indicated the “*dudu*” was Brian’s penis by pointing to the corresponding area on the doll.
5. PW1, HN, TN’s aunt, testified that on 28th November 2024, she searched for TN after learning she was at Brian’s house. She met TN coming from that direction with wet trousers and struggling to walk. TN said she had been mopping Brian’s house and was in pain. PW1 and TN’s mother examined her, finding bleeding from her private parts. At the hospital, they observed blood and semen. TN consistently named Brian as the perpetrator, though she also mentioned a bicycle injury. A confrontation with the appellant’s family led to a scuffle.
  6. PW2, TN’s mother, confirmed TN’s birthdate as 14th December 2018, making her four years old at the time of the incident. She corroborated PW1’s account, noting blood gushing from TN’s vagina during the hospital examination. When relaxed, TN said Brian inserted his “*dudu*” into her vagina, though she also referenced a bicycle injury.
  7. PW3, a friend of PW2, observed T.N.’s difficulty walking and wet clothes. He advised them to report the incident and take the complainant to the hospital.
  8. PW5, John Njuguna, a clinician at Nairobi Women’s Hospital, examined TN on 28th November 2023. Despite an initial report of a bicycle injury, he found a freshly broken hymen, multiple vaginal wall tears, and peri-anal injuries, inconsistent with typical bicycle trauma. No vaginal swab was conducted due to excessive bleeding. The extent of the genital injuries cast doubt on the bicycle explanation, and TN appeared scared.
  9. PW6, Investigating Officer Benson Njeri from Kineme Police Station, recorded a defilement report from Emily Lavender, PW3, alleging the appellant, a neighbour, was responsible. He produced the complainant’s birth notification, confirming her birthdate as 11th December 2018. The complainant told him Brian inserted his “*dudu*” into her private parts, demonstrating with gestures. No bicycle was found at the appellant’s premises. The appellant was arrested, and a prima facie case was established, placing him on his defence.
  10. In his defence, the appellant claimed that on the material date, five children, including the complainant, were at his house. He overheard them discussing a bicycle and found the complainant sitting on a bicycle frame, which was too large for her. He alleged that she refused to dismount and later spilled water on herself while attempting to mop. He denied the defilement allegations, stating that her mother, PW3, later informed him of her bleeding, which he attributed to a bicycle injury.
  11. DW2, a female minor of PP2, gave unsworn evidence. She testified that she was present at the house at the material time. She told the court that the complainant was briefly left alone in the house while Brian was outside. She saw the complainant exit wet and eating, noting a large bicycle in the house. The complainant insisted on mopping before leaving.
  12. DW3, JM, a male minor aged 15 years, gave sworn evidence. He reported hearing the complainant complain of being scratched by a bicycle at Brian’s house. He saw her climbing a fence later and noted scratches on her thigh. He left her playing with water and a duster. On cross-examination, he told the court that he left the complainant alone with the appellant in the house.
  13. DW4, BK, a male minor aged 16 years, corroborated that TN claimed a bicycle caused her injuries, including to her private parts, and observed thigh scratches when her mother undressed her to reveal the injuries.
  14. DW5, the appellant’s mother, saw PW3 beating the complainant as she described a bicycle injury. Upon inspection, she noted a scar near the complainant’s vagina and confirmed two bicycles were in the room.



15. The appeal was canvassed by way of written submissions, which have been duly considered, and there is no need to rehash them.
16. 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."
17. Further, section 8(1) and (2) 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.
    - (2) 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.
18. The offence of defilement under Section 8(1) of the Sexual Offences Act requires proof of three elements: the complainant's minority, penetration, and positive identification of the appellant as the perpetrator.
19. The complainant's age was undisputed. PW2, her mother, and PW6, the investigating officer, produced a birth notification confirming the complainant's birthdate as 11th December 2018, establishing her as four years old on 28 November 2023, satisfying Section 8(2) of the Act.
20. On the element of penetration, the complainant alleged that the appellant inserted his "dudu" into her vagina, causing pain. Yet, she initially told PW1, PW2, PW5, and defence witnesses DW2, DW3, DW4, and DW5 that a bicycle caused her injury. This account, given soon after the incident, was consistent across multiple witnesses before her testimony in court, which was made ten (10) months after the incident.
21. Medical evidence from PW5, a clinician, noted a fresh hymenal tear and multiple genital injuries, including vaginal wall and perianal tears. No vaginal swab was conducted to confirm semen or spermatozoa due to excessive bleeding. PW5 conceded during cross-examination that such injuries could result from accidental genital trauma, such as a bicycle fall. The absence of forensic evidence and the clinician's acknowledgment of a plausible non-sexual cause introduce significant doubt. The injuries alone do not conclusively prove penile penetration.
22. Defence witnesses DW2, DW3, DW4, and DW5 corroborated the presence of bicycles at the appellant's house and the complainant's initial claim of a bicycle-related injury. DW1, the appellant, stated that the complainant was on a bicycle frame too large for her and later spilled water while attempting to mop, aligning with her wet clothes observed by PW1 and PW3. PW1 and PW2 also acknowledged her initial bicycle injury claim.
23. As discussed in the Kenya Judiciary Criminal Procedure Bench Book 2018 paragraphs 94-96, no corroboration is necessary for the evidence of a child taken on oath, although cross-examination is available for sworn or unsworn evidence of a child in the usual way:
  - "94. No corroboration is required if the evidence of the child is sworn (*Kibangeny arap Kolil v R* 1959 EA 92). Unsworn evidence of a victim who is a child of tender years must be corroborated by other material evidence implicating the accused person for a conviction to be secured (*Oloo v R* (2009) KLR).



95. However, in cases involving sexual offences, if the victim's evidence is the only evidence available, the court can convict on the basis of that evidence provided that the court is satisfied that the victim is truthful (s. 124, *Evidence Act*). The reasons for the court's satisfaction must be recorded in the proceedings (*Isaac Nyoro Kimita v R* Court of Appeal at Nairobi Criminal Appeal No. 187 of 2009; *Julius Kiunga M'birithia v R* High Court at Meru Criminal Appeal No. 111 of 2011).
96. The evidence of a child, sworn or unsworn, received under section 19 of the *Oaths and Statutory Declarations Act* is subject to cross-examination pursuant to the right to fair trial, which encompasses the right to adduce and challenge the evidence produced against the accused (art. 50(2)(k), CoK”
24. PW4 gave unsworn testimony on account of her tender age. While her evidence bore the innocence typical of a child, it was inconsistent in material respects. Further, due to concerns that her account changed over time, her testimony required corroboration as per the proviso to section 124 of the *Evidence Act* (Cap 80, Laws of Kenya).
25. The minor testified that the appellant, Brian, placed his “*dudu*” in her. This statement must be considered alongside her earlier accounts and her age at the time. The court is obligated to exercise caution when assessing the credibility of very young witnesses, especially where their accounts vary and there is a possibility of suggestibility. It cannot be ruled out that the child's memory may have been influenced or reconstructed over time. The initial statement she gave immediately after the incident differs from the testimony tendered in court, raising further doubt.
26. In addition, the prosecution failed to rebut the possibility of accidental injury. No expert evidence was led to exclude a non-sexual cause. Although PW5 speculated that the injuries were extensive and inconsistent with a bicycle accident, this opinion lacked definitive certainty and did not establish penetration conclusively.
27. In the end, while the complainant was a minor and eventually named the appellant, the prosecution failed to prove penetration beyond reasonable doubt. The medical evidence was inconclusive, her narrative inconsistent, and the possibility of accidental injury remained unrefuted. The prosecution's case did not meet the evidential threshold required for a criminal conviction. Pursuant to Article 50(2) (a) of *the Constitution*, the appellant is presumed innocent and must be acquitted where doubt exists. I find that the prosecution did not prove its case against the appellant beyond reasonable doubt, and the appellant's conviction cannot stand. The appeal therefore succeeds.
28. Consequently, I hereby quash the appellant's conviction for the offence of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act* No. 3 of 2006 and set aside the sentence of life imprisonment. The appellant is set at liberty unless otherwise lawfully held.

It is so ordered.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 31<sup>ST</sup> DAY OF JULY 2025**

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**D. KAVEDZA**

**JUDGE**

In the presence of:



Ms. Mangla for the Appellant

Appellant Present

Ms. Karimi Court Assistant.

