



REPUBLIC OF KENYA



**Maina v Republic (Criminal Appeal E046 of 2021)  
[2022] KEHC 17117 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 17117 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CRIMINAL APPEAL E046 OF 2021  
AC MRIMA, J  
OCTOBER 27, 2022**

**BETWEEN**

**GIDEON MAINA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal arising out of conviction and sentence of Hon. V. Karanja,  
(Principal Magistrate) in Kitale Chief Magistrate's Court  
Criminal Case (S.O) No. 234 of 2019 delivered on 25th May, 2021)*

**JUDGMENT**

1. This appeal was, rightly so, conceded to by the respondent on account of irreconcilable contradictions.
2. Having gone through the record, this court, as well, concurs that the appeal must succeed.
3. As the appellant herein, Gideon Maina, was charged with the principal offence of defilement contrary to section 8 (1) as read with section 8 (2) of the [Sexual Offences Act](#), the state was under a duty to *inter alia* prove that it was the appellant who committed the offence.
4. One of the issues raising serious doubt in this case is the evidence of penetration. The victim testified that she was raped, but could not explain what rape was all about. She further stated that after the ordeal she was walked normally and had no pain at all.
5. The victim was examined by a clinical officer at the Kitale County Hospital around 17 days after the alleged sexual ordeal. According to the officer, at the time of the examination, the victim's '...hymen was torn and appeared fresh...'. Is it possible for a torn hymen to appear fresh after such a period of time? Is it possible that the victim may have been defiled on another later date than the date the instant ordeal was allegedly committed which was around 17 days earlier? Indeed, the unanswered questions continue.



6. The evidence on record is weak and can neither support a conviction for the offence of defilement nor the offence of committing an indecent act with a child. At least some other crucial witnesses including MR, the victim's father, among others would have added some weight. Such were not called and no reasons were given for such a lapse.
7. Whereas the prosecutor has discretion on the number of witnesses to call in support of a fact, when crucial witnesses are not called to testify and no explain is given for such, the prosecution case may likely suffer from the inference that had such witnesses been called they would have been averse to the prosecution.
8. Given the state of affairs in this matter, it is highly doubtful if sustaining a further discussion will accord any meaningful value.
9. This court opts to end this discussion at this point and with the following final orders: -
  - a. The appeal on conviction and sentence is successful.
  - b. The conviction on the offence of defilement is hereby quashed and the sentence of 50 years imprisonment is set-aside.
  - c. The appellant herein, Gideon Maina, shall be forthwith released from custody unless otherwise lawfully held.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 27TH DAY OF OCTOBER, 2022.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open Court and in the presence of:**

**Mr. Chebii**, Learned Counsel for the Appellant.

**Miss. Kiptoo**, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

**Kirong/Nawatola** – Court Assistants.

