



REPUBLIC OF KENYA



**KENYA LAW**  
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**Madaraka v Republic (Criminal Appeal E123 of 2023)  
[2025] KEHC 1776 (KLR) (Crim) (18 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1776 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL**

**CRIMINAL APPEAL E123 OF 2023**

**CJ KENDAGOR, J**

**FEBRUARY 18, 2025**

**BETWEEN**

**CLINTON MADARAKA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal against conviction and sentence in Makadara Magistrates  
Courts S.O No. 138 of 2021 delivered on 17/8/2021 by Hon. E. KANYIRI (PM.)*

**JUDGMENT**

1. Clinton Madaraka, the Appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on the 20<sup>th</sup> day of September, 2016 at around 3.00 p.m. in Tassia area of Embakasi Sub county within Nairobi County, intentionally caused his penis to penetrate the vagina of M.S, a child aged 17 years.
2. He faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No. 6 of 2006, which particulars of the offence are that on the 20<sup>th</sup> day of September, 2016, around 3.00 p.m. in Tassia area of Embakasi Subcounty within Nairobi County, intentionally touched the vagina of M.S a child aged 17 years.
3. The Appellant was found guilty of the main charge after a full trial, and no determination was made regarding the alternative charge, resulting in a sentence of fifteen (15) years' imprisonment.
4. The Appellant was aggrieved by the conviction and sentence, and he preferred the present appeal. He argued that the learned trial magistrate erred in both law and fact by failing to determine that the critical elements of the offence were not established against him. That there was no corroborative evidence to



support the prosecution's claims. Furthermore, that his entire defence was not properly considered, which could have exonerated him.

5. The appeal was canvassed by way of written submissions. The Appellant contends that the evidence was not sufficient to convict him. He submitted that the evidence was highly contradictory and relied on the authorities in *Woolington vs DPP* (1935) AC 462, *O K K vs Republic* (2021)eklr, *Miller vs Ministry of Pensions* (1947) 2A IIR 372, *Okeno vs Republic* (1972).
6. The Respondent, at the time of making this determination, had not yet filed its submissions.

### **Determination**

7. It is the duty of the first Appellate Court to carefully examine and analyze afresh the evidence presented from the trial Court and draw its own conclusion. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination. (See *Pandya vs. Republic* (1957) EA 336).

### **Whether the prosecution established its case against the appellant beyond reasonable doubt?**

8. The offence of defilement is rooted on three main ingredients being the age of the victim (must be a minor), penetration and the proper identification of the perpetrator. These ingredients are provided for under Section 8 (1) of the *Sexual Offences Act* No. 3 of 2006 and must each be proven for a conviction to issue. (See *George Opondo Olunga vs. Republic* [2016] eKLR.)
9. Section 8 (1) of the *Sexual Offences Act* provides as follows:
  - a. 8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
  - b. ...
  - c. (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.
  - d. (5) It is a defence to a charge under this section if –
    - a. it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
    - b. the accused reasonably believed that the child was over the age of eighteen years.
10. The first element is age. The Court of Appeal in *Edwin Nyambogo Onsongo vs. Republic* (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:
  - a. ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.” (emphasis added).



11. The age of the Complainant was established by producing a copy of her birth certificate which confirmed that the complainant was born on 6<sup>th</sup> April, 1999; therefore, at the time of the incident, she was 17 years old. This was corroborated by the Complainant’s guardian, her aunt, PW2, CA.
12. The second issue is whether the prosecution established proof of penetration of the complainant beyond reasonable doubt. Penetration is proved through the evidence of the victim and may be corroborated by medical evidence. The provisions of Section 124 of the *Evidence Act*, informative to the end that a conviction can rest squarely on the sole testimony of the victim. See *Daniel Maina Wambugu v Republic* [2018] KEHC 5656 (KLR).
13. Section 124 of the *Evidence Act*, Cap 80 provides as follows:
  - a. 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 offense, 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.”
14. According to the Appellant, the prosecution failed in its obligation to prove its case beyond reasonable doubt. He contended that the corroborative evidence was not sufficiently convincing to establish a conviction. Primarily, he asserted that the PRC form and the medical summary sheets were completed and filed on 20<sup>th</sup> September, 2016 yet the P3 presented in Court by PW3, Dr. Joseph Maundu, was filed and signed on 10<sup>th</sup> April, 2017, yet still reflected the same facts as the earlier documents, despite a gap of seven months.
15. With regards to discrepancies and contradictions, I cede guidance to *John Mutua Munyoki v Republic* [2017] KECA 376 (KLR) where the Court of Appeal noted as follows;
  - a. How about inconsistencies and contradictions? There were quite a number though the respondent dismissed them as inconsequential. In cases where the court has to prefer the evidence of one person against the other, for instance between the accused and the complainant and that is the only evidence, the court must approach such evidence with a degree of circumspection, particularly in sexual offences that are normally committed in secrecy with hardly any eye witness. Contradictions and inconsistencies therefore matter in deciding who to believe. The contradictions have to be considered and weighed carefully.”
16. I have reviewed the mentioned P3 form dated 10<sup>th</sup> April, 2017, which indicates under paragraph 5 that the findings were ‘as per the PRC form’. This means that the findings were derived solely from the reports on the PRC form. Consequently, the allegations of significant contradictions in evidence are dismissed.
17. PW1 provided a cogent account of how the appellant seized her from behind and dragged her to a second-floor flat in their residential building. The flat consisted of a single room containing a bed and a table, upon which rested a glass of water. The Appellant insisted that she drink the entire glass of water.



After drinking the water, she became dizzy and later awoke to find herself naked on the bed in the same room. She noticed two individuals present: the Appellant and PW5, C.W, a chemist. Subsequently, she lost consciousness and later regained it in her aunt's house, at which point she was taken to hospital by ambulance.

18. The Appellant, in his defence testimony, acknowledged that he invited PW1 to his house. He stated that he touched her breasts and vagina with his fingers, at which point she passed out, but he did not attempt anything else. Later, when she woke up, he gave her Diclofenac. (A pain-killer as attested by PW5.)
19. PW1's ordeal was corroborated by the PRC report (P-exh2) and the Medical Summary sheet (P-exh), produced in court by PW6. On genital examination, it was evidenced that PW1, her vagina had foul-smelling vaginal discharge, and the hymen had fresh tears at 3.00 o'clock and 9.00 o'clock, which were bleeding to the touch. The determination was that the injuries were synonymous with sexual assault.
20. From the foregoing, there leaves no room for doubt that the indeed penetration sufficed. I conclude, therefore, that the second ingredient, namely penetration, was sufficiently proven based on the victim's evidence and the medical evidence.
21. In relation to the identification of the perpetrator, the testimony provided by PW1 indicates that she was very familiar with the Appellant, as he resided in the same building as her neighbour for several years. This was further substantiated by the additional prosecution witnesses.
22. I have no reason to deviate from the findings of the trial magistrate, who had the opportunity to observe the Complainant as she testified and weigh her testimony against the Appellant's defence, testing both their demeanours. The trial Court correctly addressed the issue of the standard and burden of proof in this case and the Appellant was afforded a fair trial.
23. The ingredients of the offence of defilement contrary to Section 8 (1), as read with Section 8 (3) of the *Sexual Offences Act*, were proved to the required standards beyond a reasonable doubt, and the conviction was safe. Much like the trial Court, I make no determination regarding the alternative charge.
24. As to the 15-year custodial sentence imposed on the Appellant, it is noteworthy that he neither questioned its legality or lack thereof nor submitted on the same. In my view the trial court duly exercised its discretion and proceeded to sentence the Appellant for a term of fifteen (15) years imprisonment. Section 8 (1) (4) of the Sexual Offence Act, stipulates that 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. I find the sentence in itself is inherently sound and guided by statute.
25. I uphold the conviction and sentence of the trial Court. Consequently, the appeal is hereby dismissed in its entirety.

**DATED, DELIVERED and SIGNED at NAIROBI through the Microsoft Teams Online Platform on this 18<sup>TH</sup> day of FEBRUARY, 2025.**

.....

**C. KENDAGOR**

**JUDGE**

In the presence of:

Court assistant: Beryl



Mr. Omondi, ODPP

