



REPUBLIC OF KENYA



**Maina v Republic (Criminal Appeal E170 of 2023)
[2025] KEHC 1424 (KLR) (17 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1424 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E170 OF 2023
DR KAVEDZA, J
FEBRUARY 17, 2025**

BETWEEN

JOSEPHAT MAINA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered on 25th October 2023 by Hon. E. Riany (S.R.M) at Kibera Chief Magistrate's Court Sexual Offences Case no. E073 of 2023 Republic vs Josephat Maina)

JUDGMENT

1. The appellant Joesphat Maina was charged and after a full trial convicted for 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 sentenced to serve fifteen (15) years imprisonment. Being aggrieved, he filed an appeal challenging his conviction and sentence.
2. In the petition of appeal and amended grounds of appeal, he raised the following main grounds: The appellant challenged the totality of the prosecution's evidence against which he was convicted; he complained that his right to a fair trial was violated; further that the medical evidence relied on was not proper. He urged the court to quash his conviction and set aside the sentence imposed.
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 that was before the trial court, and itself come to its own conclusions on that evidence without overlooking the findings of the trial court but bearing in mind that it never saw the witnesses testify.
4. 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."



5. Further, section 8(1) and (4) 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.

(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.

6. Bearing in mind the above provisions, I will now analyse the evidence on record to ascertain whether the essential ingredients of the offence preferred against the appellant were established to the required standard of proof. Regarding the ingredients, I wish to state at the outset that the importance of proving the age of a victim, proof of penetration, and positive identification of the assailant in sexual offences is paramount.

7. PW1, the complainant, informed the court that she was in Form Three at the time of the incident. She testified that she had met the appellant, her boyfriend, in March of the previous year. She stated that the appellant was a boda-boda operator whom she had encountered at a barbershop in Shofco, where he had asked her to be his girlfriend. They had been in a relationship for approximately one year. PW1 recalled visiting the appellant's house in Corner Club on March 2023 at around 7:30 pm. She had left her sister's child, informing them that she was going shopping. She had visited his residence on three prior occasions and described his accommodation as a single room partitioned by a curtain. PW1 further testified that the appellant had wronged her by maintaining relationships with multiple girlfriends.

8. The appellant apologised to PW1, and they remained together until between 10:00 pm and 11:00 pm when he escorted her back home. Upon being confronted by her brother, J, PW1 falsely claimed that she had been with friends. J verified that she was lying by contacting the parents of the alleged friends. Subsequently, J took PW1 to Coptic, where she underwent testing and examination. PW1 reiterated that she had been in a relationship with the appellant for one year.

9. The complainant testified that she understood the meaning of sex and stated she had engaged in sexual intercourse with the appellant. She explained that he would remove her clothes and penetrate her vagina with his penis. This occurred three times over a year, and they did not use protection.

10. During cross-examination, PW1 identified the appellant as Josephat Maina, alias Uji Moto. She admitted to visiting his home after leaving school on Saturdays. At their final meeting, he apologised for cheating. She recalled he wore combat trousers, a yellow cap, and a jacket. PW1 stated she lied to her brother to protect the appellant, knowing her brother would harm him if he found out. She confirmed her school friends knew the appellant as her boyfriend and that she led the police to his residence. Upon re-examination, she reiterated they had sex three times.

11. PW1 maintained she had known the appellant for over a year as her boyfriend and identified him through recognition, as he was well-known to her.

12. PW1's testimony did not require corroboration under the proviso to Section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya), provided there were reasons to believe the child was telling the truth. In this case, the trial magistrate noted that PW1 was consistent and steadfast in her testimony. Furthermore, her evidence, which was subjected to cross-examination, remained consistent throughout.



13. The appellant was well-known to PW1, who recognized him and had a relationship with him. This was not their first meeting. Therefore, I find that the appellant was properly identified.
14. PW2, JE, the complainant's brother, testified that on 26/3/2023, he left PW1 at home. Upon returning, he found her missing. By 10 pm, she was still absent. After searching unsuccessfully, she returned past midnight alone. When questioned, she remained silent. He took her to Shofco and was referred to Coptic Hospital. PW1 had initially claimed to be with her friend S, but S confirmed they had parted ways at 4 pm.
15. Upon calling their mother, PW2 learned PW1 had STIs, as indicated in the PRC form. They reported the matter, and a P3 form was issued. PW2 stated that PW1 led them to the appellant's house, where he was arrested. During cross-examination, he admitted PW1 sometimes returned home at 10 pm, despite her school releasing students at 7:30 pm.
16. PW3, Loran Mwendu, a clinical officer at Coptic Hospital, produced the PRC form dated 22/5/2023 for the victim, born on 14/7/2005. Physical examination revealed no significant findings except fresh pubic hair, pimples on the labia majora, and white vaginal discharge. The hymen was broken prior to the incident, indicating possible penetration. The P3 corroborated these findings.
17. During cross-examination, PW3 confirmed the hymen was old and not freshly broken. No tests were conducted on the appellant.
18. Based on the evidence, I find that penetration was sufficiently proved.
19. PW4, PC Esther Kagwa, the Investigating Officer, testified that she received the victim and her brother on 12/6/2023 at around 15:30 hours. The brother reported a case of defilement involving his sister. PW4 took the victim aside, and her statement corroborated the allegations. The Investigating Officer produced the victim's Birth Certificate, confirming her date of birth as 14/7/2005, making her 17 years and 11 months old at the time. The appellant was arrested after being identified and located by the victim.
20. The complainant's birth certificate confirmed her date of birth as 14/7/2005, making her 17 years old at the time of the incident. She was therefore a child under the law.
21. In his defence, the appellant stated he was 23 years old, working as a mechanic and boda-boda rider. He testified that on 15/5/2023, he left work at Wilson, met a friend, David, and went home to sleep. At midnight, police arrested him, initially alleging he was preventing a student from attending school. He later learned of the defilement charges in court. He admitted knowing the minor but claimed she was a friend of his girlfriend, Brenda, and denied any relationship with her.
22. The appellant asserted that the minor had asked his girlfriend for his address and was taken there by her. He alleged the minor wanted a relationship with him, and when he rejected her, she fabricated the story. He denied ever being treated for an STI.
23. During cross-examination, the appellant reiterated that the minor was his girlfriend's friend and claimed she sent friends to express her feelings for him. He admitted slapping her and telling her to stop disturbing him. He also denied operating a barbershop.
24. The trial court dismissed the appellant's defence as baseless. I concur, having found the complainant's testimony truthful and consistent. The defence failed to raise reasonable doubt against the prosecution's case. Defilement was proven to the required legal standard. After analysing the evidence, I find the charge of defilement was proved beyond reasonable doubt. The conviction is affirmed.



25. On sentence, the appellant was sentenced to serve fifteen (15) years imprisonment. During sentencing, the court considered the pre-sentence report, the appellant's mitigation, and that he was the first offender. The court sentenced the appellant to the minimum sentence provided under the law.
26. As such, I find that the sentence was proper in light of the supreme court decision in Petition E018 of 2023 *Republic v Joshua Gichuki Mwangi*. In the end, the appeal is found to be lacking in merit and is dismissed in its entirety.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 17TH DAY OF FEBRUARY 2025

D. KAVEDZA

JUDGE

In the presence of:

Mutuma for the respondent

Appellant – present

Achode – court assistant

