



REPUBLIC OF KENYA



KENYA LAW
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**Kahiu v Republic (Criminal Appeal E022 of 2024)
[2025] KEHC 5681 (KLR) (Crim) (7 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5681 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
CRIMINAL
CRIMINAL APPEAL E022 OF 2024**

KW KIARIE, J

MAY 7, 2025

BETWEEN

PETER KAMAU KAHIU APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in the S.O.A. case NO. E010 of 2023 of the Senior Principal Magistrate's Court at Ol Kalou by Hon. J. Nthuku-Principal Magistrate)

JUDGMENT

1. Peter Kamau Kahiu, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of the offence are that on diverse dates between July 2021 and the 8th day of February 2023 at [particulars withheld], in [particulars withheld] sub county, within Nakuru County, he intentionally and unlawfully caused his penis to penetrate the vagina of R.W.W, a child aged thirteen years.
3. The appellant was sentenced to serve thirty years' imprisonment. He was aggrieved and filed this appeal against the conviction and the sentence through Martin Gathumbi & Company advocates. He raised the following grounds of appeal:
 - a. The learned magistrate erred in law and fact in convicting the appellant to a severe sentence, yet there was no evidence of penetration or partial penetration.
 - b. The learned erred in law and fact to convict the appellant on a sentence that was not proved beyond a reasonable doubt, as required by law.



- c. The learned magistrate erred in fact and law in sentencing the appellant and meting out an excessive sentence.
 - d. The learned trial magistrate erred in law and fact by failing to consider that the prosecution's witness evidence here was contradictory, doubtful, and untrustworthy to warrant conviction.
4. The state did not file grounds of opposition or submissions.
 5. This is the first appellate court. As expected, I have analyzed and evaluated all the evidence adduced before the lower court afresh. I have drawn my conclusions, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of *Okeno v Republic* [1972] EA 32.
 6. An offence of defilement is established against an accused person when the prosecution has proved the following ingredients:
 - a. That there was penetration of the complainant's genitalia;
 - b. That the accused was the perpetrator and
 - c. The victim must be below eighteen years old.

This position was echoed in the case of *Fappyton Mutuku Ngui v Republic* [2012] eKLR. Ngugi J. (as he was then) said:

Going by this definition of defilement... the issues which the court needs to determine...first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child, and finally, whether the penetration was by the Appellant.

7. I will determine if the prosecution proved these ingredients to the required standards.
8. R.W.M. (PW1), the complainant, said she was 15 years old when she testified on 28 March 2023. A Certificate of Dedication issued to her on the 11th day of December 2007 indicates that she was born on the 24th day of July 2007. Dr. Joseph Mburu (PW3), who examined her, estimated her age on the 18th day of November 2021 to be 13 years old. As of July 2021, she was 14 years old.
9. Though no copy of the Certificate of Birth was produced, I am satisfied that her age was proven.
10. The complainant testified that whenever schools were closed, the appellant would take her to his home to care for his children, as he had separated from his wife. This arrangement was made with the approval of her parents. It was during her time in his home that he defiled her once, and she became pregnant. She delivered a baby on the 3rd day of March 2022.
11. GWM (PW2) said that when she found the complainant expectant, she only informed her that she was raped but did not tell her by whom. After she had delivered, her mother informed her that the appellant was the one who had impregnated the complainant. Her mother was not called as a witness. This information is therefore hearsay.
12. PC CN (PW4) testified that the appellant was found cohabiting with the complainant by the arresting police officer, who did not testify. His evidence, like that of PW2, is hearsay.



13. The prosecution did not explain the failure to call the complainant's mother and the arresting police officer. The Court of Appeal in the case of *Bukenya v Uganda* [1972] EA 549 (Lutta Ag. Vice President) held:

The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

Failure to call these two material witnesses was fatal to the prosecution's case.

14. The appellant contended that he was arrested on the instigation of PW2, a friend of his former wife. He denied the offence.
15. Although DNA is not always required to prove defilement, in the instant case, where the evidence against the appellant was very scanty, this would have either implicated or exonerated him. There was insufficient evidence to convict him. The conviction is quashed and the sentence set aside. The appellant is set free unless otherwise lawfully held.

DELIVERED AND SIGNED AT NYANDARUA ON THIS 7TH DAY OF MAY 2025

KIARIE WAWERU KIARIE

JUDGE

