



REPUBLIC OF KENYA



**Maina v Republic (Criminal Appeal E035 of 2024)
[2025] KEHC 6702 (KLR) (20 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6702 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E035 OF 2024**

DR KAVEDZA, J

MAY 20, 2025

BETWEEN

SAMUEL HWAI MAINA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered on 28th May 2024 by Hon. M.W. Murage (SRM) at Kibera Chief Magistrate's Court Sexual Offences Case No.46 of 2016 Republic vs Samuel Hwai Maina)

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(4) of the *Sexual Offences Act* No 3 of 2006. The particulars are that on diverse dates between April 2016 and 15th May 2016 at [Particulars Withheld] within Nairobi County the appellant intentionally and unlawfully caused his penis to penetrate the vagina of TNK a child aged 14 years. He was sentenced to serve twenty-five (25) years' imprisonment.
2. Being aggrieved, he filed an appeal challenging the totality of the prosecution's evidence against which he was convicted, stating that it was marred with inconsistencies.
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 conclusions on that evidence without overlooking the conclusions of the trial court, but bearing in mind that it never saw the witnesses testify.
4. The prosecution called four (4) witnesses in support of their case. PW1, TNK the complainant testified under oath that the appellant often followed her, but one day he lured her into his house, took her clothes off and inserted his penis into her vagina. She failed to raise an alarm since he threatened her, and when he released her, she went to her brother-in-law's house and waited for her sister to arrive.



- When she narrated where she had been, her sister proceeded to take her to the chief's office, after which the appellant was arrested and admitted that he had been with her.
5. PW2, LKN, the complainant's father, accompanied her to Kabete Police Station where they reported the matter, and thereafter to Nairobi Women Hospital where it was confirmed that she was pregnant. Later on, an abortion procedure was performed on her. Both she and her father identified the appellant in court. He produced her birth certificate in court, indicating that she was born on 27th September 2001. When PW1 was recalled to court, she denied having been forced to undergo an abortion procedure to continue with her education. This was corroborated by her father, PW2.
 6. PW3, Doctor Peter Wanyama, adduced PW1's PRC form in court. No injuries were observed, and there was the absence of the hymen. Upon cross-examination, he stated that the pregnancy test was negative since it can only test positive after two weeks.
 7. PW4, PC Ivy Onyango averred that when the incident was reported, she interviewed PW1, who said that she had been cohabiting with the appellant for a year, after which she visited the scene and interviewed the appellant. Additionally, samples of his DNA were collected to verify that the complainant's child was his. She further adduced her birth certificate.
 8. At the close of the prosecution's case, the trial court was satisfied that the prosecution had established a prima facie case, and placed the appellant on his defence. DW1, the appellant, fervently denied knowing the complainant or committing the alleged offence.
 9. 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."
 10. 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.
 11. The element of penetration is sufficiently substantiated. The complainant testified that the appellant inserted his penis into her vagina several times, an act resulting in her getting pregnant. Her testimony remained unshaken during the cross-examination and was corroborated by both PW3, who produced her PRC form, and PW4, the investigating officer.
 12. The age of the complainant is settled. Her testimony, coupled with the birth certificate brought forth by PW2, her father, and PW4, the investigating officer, indicates that she was born on 27th September 2001. She was therefore 14 years old at the time of the ordeal and was therefore a child within the meaning of the law.
 13. The element of identification was adequately demonstrated by the complainant, PW2, and PW4, who positively identified the appellant in court as the complainant's assailant.
 14. Although the charge sheet cited section 8(1) as read with section 8(4) of the [Sexual Offences Act](#), the prosecution's evidence established a violation of section 8(3), based on the complainant's proven age. This was a procedural rather than substantive error and is curable under section 382 of the



Criminal Procedure Code. The appellant was not prejudiced, as the charge particulars were clear, and he understood the case against him. The conviction was grounded in credible and corroborated evidence proving all elements of the offence under section 8(3). The defect does not invalidate the proceedings. The conviction is upheld.

15. The appellant was sentenced to twenty-five (25) years' imprisonment. During sentencing, the court considered the pre-sentence report and the aggravating circumstances surrounding this case and exercised discretion. Based on this premise, I see no reason to interfere with the sentence.
16. 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 20TH DAY OF MAY 2025

D. KAVEDZA

JUDGE

