



**Majimbo v Republic (Criminal Appeal E033 of 2022)
[2025] KEHC 6174 (KLR) (16 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6174 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E033 OF 2022**

M THANDE, J

MAY 16, 2025

BETWEEN

NELSON MWANYOHA MAJIMBO APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant herein, was convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* and sentenced to 15 years imprisonment. The particulars of the offence are that on diverse dates between the 2.8.22 and 12.8.22 within Kilifi county, intentionally and unlawfully caused his penis to penetrate the vagina of HS., a child aged 16 years.
2. Being aggrieved by the decision of the trial Magistrate, the Appellant has appealed to this Court against both the conviction and sentence. The summarized grounds of appeal are that the trial Magistrate erred in:
 - i. failing to consider that the prosecution evidence was full of inconsistencies and contradiction and did not prove their case beyond reasonable doubt.
 - ii. convicting him on unreliable and questionable documents.
 - iii. failing to appreciate that the matter was poorly and shoddily investigated.
3. As a first appellate Court, I have subjected the evidence adduced before the trial Magistrate to a fresh analysis and evaluation while giving due allowance for the fact that unlike the trial court, I neither saw nor heard the witnesses. See *Okeno v. Republic* [1972] EA 32.
4. The Respondent opposed the appeal in submissions dated 13.1.25. The Respondent submitted that prosecution was able to establish all 3 ingredients of the offence of defilement.



5. To sustain a conviction for the offense of defilement, 3 ingredients must be established by the prosecution. This was set out in *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013 where the Court stated:

The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.

6. This Court is required to determine whether in the court below, it was demonstrated that the Complainant was below 18 years of age. Secondly, that there was penetration of the Complainant's genitalia. Lastly, that the evidence identified the Appellant as the perpetrator.
7. The record contains the birth certificate of the Complainant which indicates that she was born on 12.6.06. In August 2022 when the offence is alleged to have been committed, the Complainant was 16 years old. This was not challenged by the Appellant. The test of age was thus established.
8. As regards penetration PW4 Chigulu Mwangolo, a Senior Clinical Officer at Mariakani Sub County Hospital produced the PRC and P3 forms, treatment notes, lab request and results. He stated that on examination, on 12.8.22, the Complainant was found to have no injuries in the head, neck, thorax and upper limbs. She had no hymen and there was a bruise on the lower vaginal wall with loose vagina sphincter muscles. The pregnancy test was negative and no spermatozoa was seen. PW4 stated that the P3 form confirmed that there was penetration. From this medical evidence, it is clear that the ingredient of penetration was established.
9. I now turn to the issue of identification of the perpetrator. The Appellant denies committing the offence with which he was charged.
10. The Complainant testified that she had gone to the Appellant's shop in May 2022 at night when he told her to go to his house. Once there, he began to caress her. He then removed her panty, pushed her skirt up to her stomach, lay her on a mattress and inserted his penis into her vagina. She stated that she had sex with the Appellant twice on different dates.
11. PW3, EM the Complainant's cousin stated that on 11.8.23, the Complainant went to the Appellant's shop and overstayed. After discovering the Complainant was not in the house, he and Jane went to the Appellant's shop at around 3am and heard the Complainant's voice. They peeped through the window and saw her on the bed with the Appellant. They then went and reported the matter to their grandmother. When their grandmother went looking for the Complainant, she found her at her mother's grave.
12. PW5 JDC, also a cousin to the Complainant who lives with the Complainant and their grandmother testified that on 2.8.22 and 12.8.22 at around 2am, she noticed that the Complainant was missing. PW3 told her that he had overheard the Complainant and the Appellant planning to meet. She stated that she and PW3 went to the Appellant's shop. They stood by the window and heard the Complainant and the Appellant speaking. They went and reported the matter to their grandmother and the Complainant went to her mother's grave. In cross examination, she said the Complainant was not found in the Appellant's house.
13. The Complainant, the only eye witness stated that she had sex with the Appellant in May 2022. The charge sheet indicates that the offence took place between 2.8.22 and 12.8.22. This variance was not explained at all.



14. In the case of MTG v Republic (Criminal Appeal E067 of 2021) [2022] KEHC 189 (KLR) (15 March 2022) (Judgment), Mativo, J. (as he then was) stated:

Contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. It is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from.

15. I associate with the sentiments of the learned Judge. The variance in the date the offence is said to have been committed and in the evidence of the Complainant is substantial and fundamental to the main issue in question before the court. While the medical evidence confirms the fact of penetration, as to who defiled the Complainant on diverse days between 2.8.22 and 12.8.22, cannot be ascertained from the evidence on record and there is no evidence to demonstrate that it was the Appellant who did so. Doubt has been created in the mind of the Court and the Appellant is entitled to benefit therefrom.
16. In light of the foregoing, I find that the Appellant's conviction was unsafe and quash the same. The sentence is set aside and the Appellant is set at liberty unless otherwise lawfully held.

DATED, SIGNED and DELIVERED in Malindi this 16th day of May 2025

M. THANDE

JUDGE

