



**MNB alias M v Republic (Criminal Appeal E086 of 2023)
[2025] KEHC 6832 (KLR) (14 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6832 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E086 OF 2023
WM KAGENDO., J
MAY 14, 2025**

BETWEEN

MNB ALIAS M APPELLANT

AND

REPUBLIC RESPONDENT

*(Originating From Criminal Case Number S.o No.52 Of 2017 In The
Chief Magistrate's Court At Mombasa (Hon. David O. Odhiambo S.R.M))*

JUDGMENT

1. The Appellant was charged with the offence of defilement of a girl contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. It was alleged that on diverse dates between 5th June 2016 and 26th April 2017 in Jomvu Sub-County within Mombasa County the appellant intentionally and unlawfully caused his penis to penetrate the vagina of RML a girl aged 17 years old.
2. The appellant was convicted on the charge and sentenced to serve 15 years imprisonment.
3. Being dissatisfied with the said judgment the appellant through his counsel on record lodged an appeal with grounds as follows:
 - i. That the learned trial magistrate erred in law and fact in coming to a finding that the prosecution had proved its case against the accused beyond reasonable doubt.
 - ii. That the learned magistrate erred in law and fact in proceeding with a trial to convict on a charge that was defective.
 - iii. That the learned trial magistrate erred in law and fact in allowing evidence that ought not to have been admitted.



- iv. That the learned trial magistrate erred in law and fact in dismissing the appellant's defence without analysis.
 - v. That the learned trial magistrate erred in law and fact in arriving at a conviction against the weight of evidence.
 - vi. That the learned trial magistrate erred in law and fact in ignoring the inconsistencies and clear falsehoods which rendered the prosecution witness unreliable.
 - vii. That the learned trial magistrate erred in law and fact in failing to comply with statutory provisions to the prejudice of the appellant.
 - viii. That the sentence was manifestly excessive and harsh.
4. I have considered the appeal and submissions. I have also read the record of the trial court and the impugned judgment. As a first appellate court, this court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See *Okeno vs. Republic* [1972] E.A 32.
5. The issues that arises for determination in this appeal
- i. Whether the prosecution proved its case to the desired threshold on the basis of the elements of the offence of defilement.
 - ii. Whether the trial court failed to comply with section 200 of the *Criminal Procedure Code* and if so, the effect thereof.
6. The record of proceedings show that section 200 of the CPC was fully explained to the appellant who then elected to proceed with the case from where it had reached. The issue for consideration is therefore whether the case against the appellant was proved to the required threshold.
7. 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* which provides:
- 8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - 8(4) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”
8. The specific elements of the offence defilement arising from Section 8 (1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are:
- 1. Age of the complainant;
 - 2. Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*; and
 - 3. Positive identification of the assailant.



9. See the case of Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013 where it was stated that:

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

Age of the complainant

10. In a charge of defilement, the age of the victim is important for two reasons:
- i. defilement is a sexual offence against a child; and
 - ii. age of the child has also been used as an aggravating factor for purposes of determining the sentence to be imposed; the younger the child the more severe the sentence.
11. A child is defined as a person under the age of eighteen years. Is the victim herein a child? PW1, the complainant’s father produced a birth certificate showing that she was born on 6/7/2001. The father stated that the Complainant was in class 7 and that she had refused to school making him suspect that she was pregnant. He testified that a pregnancy test at the Coast General Hospital confirmed the pregnancy and at that point the complainant confessed that it was the appellant who was responsible.
12. PW2, the complainant, in her testimony stated that she had consensual sexual intercourse with the appellant and that somehow she was convinced not to worry about the fact that she was still in school or even the risk of pregnancy. She testified that the appellant denied responsibility when confronted and that this offended her and that a subsequent DNA test after the child was born confirmed the appellant as the biological father of the child.
13. PW3, a doctor, produced the completed P3 and PRC forms on behalf of the doctor who examined the complainant. The report indicated that at the time of examination on 30/11/2017, the complainant was 21 weeks pregnant. The report also notes an old scar and broken hymen.
14. PW4, Hyrine Mwariga, a government analyst at the Government Chemist, produced the DNA report, exhibit No.5, prepared by her colleague and her boss one George Oguda. Her boss, was said to be away in another case in Kilifi law Courts. As per PW4, the DNA report revealed that the appellant was the biological father of the complainant’s child.
15. The defence raised allegations of there being a grudge between the appellant and the complainant’s father (PW1). It also emerged that there was an agreement between the father of the complainant and a person described as the baby’s father other than the appellant.
16. The appellant, (DW1) gave sworn evidence and called another witness in his favor. The Complainant stated that he was a neighbor to the Complainant’s family and that there was a grudge with the Complainant’s father over a plot he had purchased and built. According to him the Complainant’s father vowed to evict him and have him arrested. The Complainant also stated that he had information that the child who was allegedly sired by him was being taken care of by another man. He also alleged that a police officer who was involved in the case had warned him that he unless he acceded to the Complainant’s father’s wishes the DNA result will show that he was the father of the child.
17. After the appeal was emergence of the agreement between the complainant and another man emerged showing that this other man had taken parental responsibility over the child that the Appellant had allegedly fathered, the appellant through Mr. Magolo, his learned advocate f moved the court for



leave to file additional evidence and to have the subject and the parents undergo a second medical application. He submitted that they had expressed their displeasure with the initial DNA results even before the trial court.

18. By a ruling dated I allowed the application.
19. I have considered all the evidence afresh. The appellant denied that he defiled the Complainant as alleged or that he had sexual intercourse as alleged.
18. DW2, the appellant's wife also gave evidence. According to her, the Complainant had informed her that the person who impregnated her had ran away and that she didn't have a problem with the appellant other than that it was her father who was pushing the whole issue.
19. The written agreement between the Complainant's father and the man who supposedly impregnated the Complainant has poked holes in the Claimant's evidence making it fall short of the required threshold notwithstanding the DNA evidence on record which was challenged. It casts down on the credibility of the complainant and her intentions. The appellant had raised these concerns at the trial stage and I find that they are valid.
20. Accordingly the appeal against both the conviction and the sentence is merited and is hereby allowed and the conviction is hereby quashed the appellant acquitted of the offence of defilement of a girl contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006 and the sentence set aside.
18. The Appellant is set at liberty unless if otherwise lawfully held.
19. It is so ordered.

DATED SIGNED AND DELIVERED IN OPEN COURT THIS 14TH DAY OF MAY 2025.

WENDY KAGENDO

JUDGE

In the presence of;

Appellant and Mr Magolo Mr advocate Mr Ngiri prosecutor

Ms Bebora court assistant

Result: Acquittal

SIGNED BY: HON. LADY JUSTICE WENDY MICHENI

THE JUDICIARY OF KENYA.

