



REPUBLIC OF KENYA



KENYA LAW
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**Muhihia v Republic (Criminal Appeal E012 of 2024)
[2025] KEHC 5564 (KLR) (Crim) (6 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5564 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
CRIMINAL
CRIMINAL APPEAL E012 OF 2024**

KW KIARIE, J

MAY 6, 2025

BETWEEN

FRANCIS MUTERU MUHIHIA APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O. case NO. E025 of 2023 of the Senior Principal Magistrate's Court at Olkalou by Hon. J.N. Ntbuku- Principal Magistrate)

JUDGMENT

1. Francis Muteru Muhihia, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars of the offence are that on diverse dates between the 1st day of January 2023 and the 29th day of May 2023, in [Particulars Withheld], Nyandarua Central sub-county within Nyandarua County, he intentionally and unlawfully caused his penis to penetrate the vagina of J.W.W., a child aged nine years.
3. The appellant was sentenced to thirty years' imprisonment. He was aggrieved and filed this appeal against conviction and sentence. Maxwell M. Njehu, advocate, represented him. He raised grounds of appeal as follows:
 - a. The learned trial magistrate erred in law and fact in holding that the ingredients required for the offence of defilement had been proved to the required standard.
 - b. The learned magistrate erred in law and fact in relying on the prosecution's evidence that was scanty, inconsistent, disjointed, unreliable and full of glaring and material contradictions.



- c. The learned trial magistrate erred in law and fact that the prosecution's case had been made out, which case was premised on half-truths, hearsay, and uncorroborated evidence.
 - d. The learned magistrate erred in law and in fact by failing to find that the voir dire examination did not meet the standards set by the law.
 - e. The learned magistrate erred in law and fact by reaching conclusions on facts and giving opinions not founded in law and or supported by the evidence tendered by any of the witnesses.
 - f. The learned magistrate erred in law and fact in finding that the prosecution had proved its case beyond a reasonable doubt.
 - g. The learned magistrate erred in law and fact by disregarding the appellant's evidence, witnesses, submissions, and authorities cited on behalf of the appellant.
 - h. The learned magistrate erred in law and fact by imposing an excessive sentence upon the appellant.
4. The state did not file any grounds contesting the appeal or submissions regarding that matter.
 5. This court is an appellate court. As expected, I have carefully reviewed and assessed all the evidence presented to the lower court, keeping in mind that I did not witness any witnesses testify. Therefore, I will follow the well-known case of *Okeno vs Republic* [1972] E. A 32 to guide my decision-making process.
 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.
 7. This position was echoed in the case of *Fappyton Mutuku Ngui vs Republic* [2012] eKLR. Therefore, I will endeavour to establish whether the prosecution met the required standards.
 8. A copy of the Certificate of Birth that was produced as prosecution exhibit 5 indicates that she was born on the 2nd day of April 2014. As of January 1, 2023, she was eight years and nine months old. The complainant's age was proved for section 8 (2) of the *Sexual Offences Act*. The section provides:

A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
 9. The complainant was taken to J.M. Memorial Hospital. Dr. Alex examined her on May 12, 2023. He was represented in court by Dr. Winny Ndegwa (PW2). At the time of examination, there was no prior treatment. He noted an old, broken hymen. According to the treatment notes dated 11th May 2023, the last defilement incident occurred on the 29th day of April 2023. The treatment notes captured a history by the complainant alleging that she had been defiled more than ten times by the same perpetrator. No laceration or fresh injury was noted.
 10. J.W.W. (PW1), the complainant, testified as follows:

Early we used to stay at our home in Matura. On 10th November 2022. Since May 2022, I have not been going to school due to school fees, and I have stayed at home. While at home,



I had gone to Guffaa trading centre, and while coming back home, I met this one (Mike Mburu- accused) while he was herding sheep at the road near the dam, and he told me that my mother was looking for me, and I told him I would go for her. My mother called me, and I went, and she sent me to the shop. I was carrying the baby whom I gave my mother and I went to the shop. On coming back from the shop, the accused was on the road again and since my mum had sent me for callers, he asked for one and another old lady who is our neighbour had sent me medicine to buy her and I took medicine to her before going home.

The accused used to visit our house and I also go their home and the first time he called me and I went and I did not know what he wanted and I went with him on 10/11/2022 till the cattle dip and he asked me to sit down and I told him I will stand. I stood and he forced me to sit down and he asked me if I was afraid and I told him I was afraid. He had started removing my clothes and laid me down and he did bad things to me and he raped me, he removed my pant, laid me on the ground and he opened his trouser and he slept on me and I told him I was feeling pain in my private parts as he was having sex with me. I shook my head due to too much pain and I stood up and it was in the evening but the sun was still out.

He then stood and I also stood and he said he was going to untie the sheep so to graze. I put on my pant and he left as I also left.

I went and stayed at home and did not leave again, as my mother was around and asked me to prepare supper. Our children said they saw me while with the accused standing, and it is my brother who told my mother that he saw me with Baba Kimani (Mike Mburu) and that he did not know what I was doing with the accused. My brother had come from the road, and he saw the two of us standing near the gate.

My mother then quarrelled with me about what I was doing with the accused. I told her there was nothing. She said I do not lie to her, and I told her it was not a lie. She kept quiet.

Another woman called Mama Shiko came and told my mother what I was doing, and she talked with my mother behind the house. Lydia is Mama Shiko who came to see my mother; I do not know who told my mother what happened. My mother then told me that she heard I used to be with the accused.

Another day I did not recall exact day the accused came again and found me while sat at the road and asked what I was doing and I told him I was doing nothing and since the wife was at the neighbour's place, I told him the wife was at the neighbours and that he leaves and he was fearing the wife to find him as the wife had personally told me she will cut me with the knife as I spent most time with the husband.

11. I have quoted the complainant at length for her narration raises fundamental issues about whether a child her age can experience defilement as simply as playing with a toy. I have been very hesitant to conclude that there was defilement in cases like this one. I am not alone. In the case of *Ben Maina Mwangi v Republic* [2006] eKLR, Lesiit, J.(as she then was)observed:

Bearing in mind she was a child of tender years, being only 4 years at the time, for the offence to be proved, there should have been evidence adduced to show that the Appellant used some force on her or something tending to show an assault or infliction of pain. At least some evidence needed to be adduced from which it could be construed that defilement took place. Considering the Complainant's age as compared to the Appellant, if any attempt was made to penetrate the Complainant's private parts, it would be expected that the Complainant



must have felt pain, if not excruciating pain. There is no way the Complainant would forget the experience or that detail in her evidence.

12. This matter was prompted by some money the complainant had in school. When her teachers made enquiries, she implicated the appellant.
13. The complainant in this case, being eight years and nine months old, could not withstand the rigours of defilement by an adult even once, let alone the more than twenty times she claimed to have been defiled. If that were the case, there would have been clear signs for everyone, particularly the relatives staying with her, to notice.
14. A good case can be lost due to perfunctory or incompetent investigations and poor prosecution. In this case, I see a combination of inadequate investigations and tactless prosecution, where material facts were not elicited from the complainant. I have been in this region for three months, and I have been confronted on appeal by cases where small girls aged 10 were caught in the toilets fingering each other's genitals.[see High Court at Nyandarua Criminal Appeal No.98 of 2023] Innocence can no longer be a currency attached to young girls. Strict proof is required.
15. The finding of a broken hymen may have influenced the decision of the learned trial magistrate. A broken hymen alone cannot be used as proof of penetration. This was also the view of the Court of Appeal in the case of *P. K.W. vs Republic* [2012] eKLR. The court observed as follows:
 - “ 15. In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified” Is hymen only ruptured by sexual intercourse.
 16. Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina (sic) with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. For those who are, there are times when the hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons, masturbation injury, and medical examinations can also rupture the hymen when a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be a natural tearing of the hymen. See the Canadian case of *The Queen vs Manuel Vincent Quintanila* [1999] AB QB 769.”
16. There was, therefore, no sufficient evidence to prove that the appellant defiled the complainant.
17. Francis Muteru Muhihia, the appellant, contended that he was framed. His evidence was that the complainant stayed with others. This was confirmed by PC Kaltum Nunie(PW4), the investigating officer. She did not record any statements from them; however, they are compellable witnesses. This defence is plausible.
18. The learned trial magistrate did not have adequate evidence to convict. The conviction is quashed, and the sentence set aside. The appellant is set at liberty unless otherwise lawfully held.

DELIVERED AND SIGNED AT NYANDARUA THIS 6TH DAY OF MAY 2025



KIARIE WAWERU KIARIE
JUDGE

