



**Munyoro v Republic (Criminal Appeal 117 of 2023)
[2025] KEHC 5614 (KLR) (Crim) (6 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5614 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
CRIMINAL
CRIMINAL APPEAL 117 OF 2023**

KW KIARIE, J

MAY 6, 2025

BETWEEN

WYCLIFFE MUNYORO APPELLANT

AND

REPUBLIC RESPONDENT

(from the original conviction and sentence in the S.O.A. case NO. E048 of 2022 of the Principal Magistrate's Court at Engineer by Hon. E.N. Wanjala-Principal Magistrate)

JUDGMENT

1. Wycliffe Munyoro, 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 May and April 2022 in Nyandarua Central sub county, within Nyandarua County, he intentionally and unlawfully caused his penis to penetrate the vagina of Z.W.W, a child aged twelve years.
3. The appellant was sentenced to serve twenty years' imprisonment. He was aggrieved and filed this appeal against the conviction and sentence. He raised the following grounds of appeal:
 - a. That the learned trial magistrate erred in law and fact by convicting the appellant with inconsistent evidence, theorizing conspiracy and fabrication against the appellant.
 - b. That the learned magistrate erred in law and fact by convicting the appellant. penetration was not proved.
 - c. That the learned trial magistrate erred in law by convicting the appellant, and yet the identification of the appellant was not proved.



4. The state did not file any grounds of opposition and 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 vs 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 vs 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. Z.W.W. (PW1), the complainant, said she was 12 years old when she testified on the 5th day of October 2022. Her mother (PW4) said she was born in 2010. Dr. Anthony Mureithi Gitonga (PW2), who examined her, estimated her age on May 17, 2022, to be 12 years old.
9. Though no copy of the Certificate of Birth was produced, I am satisfied that her age was proven.
10. The medical evidence adduced by Doctor Mureithi (PW2) was that when he examined the complainant on the 17th day of May 2022, he did not observe any lacerations to the genitalia but had a brownish discharge, and the hymen had multiple lacerations. He, therefore, concluded that there was penetration. 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. Those who are, there are times when 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.”

11. In this appeal, the complainant is 12 years old. I will seek to determine if the medical finding could serve as a basis for conviction and whether the complainant’s evidence of defilement is supported by other material evidence.
12. The circumstances under which the complainant claimed she was defiled raise significant facts that need to be examined further before the trial court can convict based on her uncorroborated evidence. Her evidence in chief was that she was defiled on four different occasions in her sister’s house. Her sister and the appellant were present at all material times. This was a three-roomed house. The appellant would go to her bedroom and defile her. The last instance occurred on May 1, 2022, at approximately 8 p.m. The lights were on when the appellant entered the room. He ordered her to undress, and he switched off the lights before defiling her. This narration raises some unanswered questions.
13. Although the house where the alleged offence is said to have been committed was not described adequately, we gather from the complainant’s evidence that it was given to the appellant by his employer, Francis Thuku. Without any evidence of its size, we can assume that it was not a big house. The prosecution failed to prove why the appellant’s wife and the complainant’s sister did not hear what was happening. The complainant, being a minor aged 12, it is unimaginable that an adult could defile her, and the other person in the house did not hear any commotion.
14. Secondly, Doctor Mureithi’s (PW2) evidence was that the complainant said she was defiled on the 24th day of April 2022. This was captured in the PCR form. This date contradicted the complainant’s evidence. There was no attempt by the prosecution to reconcile the two versions. During the examination, she did not mention the events of May 1, 2022, yet according to the complainant, this was the most recent.
15. T.W.N. (PW4) is the complainant’s mother. She introduced another twist to the prosecution’s case. Her evidence was that the complainant informed her that she was defiled by Wycliffe, whom she (complainant) did not know where he was staying. She was declared a hostile witness. The evidence of a hostile witness has very little, if any, evidential value. The Court of Appeal in *Batala vs Uganda* [1974] E.A. 402 at page 405 said:

The giving of leave to treat a witness as hostile is equivalent to a finding that the witness is unreliable. It enables the party calling the witness to cross-examine him and destroy his evidence. If a witness is unreliable, none of his evidence can be relied on, whether given before or after he was treated as hostile, and it can be given little, if any, weight.
16. Further, the Court of Appeal in the case of *Ndungu Kimanyi vs Republic* [1979] KLR 283 (Madan, Miller and Potter JJA), held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.
17. The proviso to section 124 of the *Evidence Act* states:

Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and



proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

18. The complainant's evidence was not corroborated owing to the many discrepancies, as I have pointed out. It was, therefore, unsafe to rely on it for a conviction. The conviction is quashed, and the sentence set aside. The appellant is set at liberty unless otherwise lawfully held.

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

KIARIE WAWERU KIARIE

JUDGE

