



REPUBLIC OF KENYA



**KENYA LAW**  
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**Maigo v Republic (Criminal Appeal E037 of 2024)  
[2025] KEHC 8423 (KLR) (Crim) (16 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8423 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYANDARUA  
CRIMINAL  
CRIMINAL APPEAL E037 OF 2024**

**KW KIARIE, J**

**JUNE 16, 2025**

**BETWEEN**

**WILLY WAWERU MAIGO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in the S.O.A. case NO. E002 of 2023 of the Principal Magistrate's Court at Engineer by Hon. E.N. Wanjala-Principal Magistrate)*

**JUDGMENT**

1. Willy Waweru Maigo, 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 the 16<sup>th</sup> day of January 2023 at Njabiini Town of South Kinangop Sub County, within Nyandarua County, he intentionally and unlawfully caused his penis to penetrate the vagina of G.W.M, a child aged thirteen 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 magistrate erred in both law and fact by convicting the appellant in the present case, yet failed to find that the complainant was economical with the truth and thus her evidence was devoid of belief.
  - b. That the learned magistrate erred in law and fact by convicting the appellant, yet failed to find that penetration was not proved.



- c. That the sentence imposed is both harsh and excessive and did not consider the appellant's mitigation and the case's unique circumstances.
4. The state did not file any grounds of opposition or 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 v Republic* [1972] EA 32.
6. An offence of defilement is established against an accused person when the prosecution has proved the following elements:
  - 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 v 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. G.W.M (PW1), the complainant, said she was 13 years old when she testified on the 3<sup>rd</sup> day of March 2023. A copy of her Certificate of Birth was produced. It was indicated that she was born on 20<sup>th</sup> May 2009. As of the 16<sup>th</sup> day of January 2023, she was 13 years and seven months. I am satisfied that her age was proven.
9. The medical evidence presented by Peter Maingi Maina (PW5), a clinical officer, who examined the complainant on 16 January 2023, the day of the alleged defilement, indicated that the complainant had a swelling on her forehead, which she attributed to being hurt by a wall. Upon examining her genitalia, there were no visible marks apart from an old, broken hymen.
10. Had she been defiled on the 16<sup>th</sup> of January 2023, the tear in the hymen should have been fresh.
11. On 17 January 2023, she was presented to Dr. Martin Owuor for the completion of the P3 form. She informed the doctor that her hands had been tied with a handkerchief by her defiler and that she had hit her head on the wall.
12. In her evidence of 3 March 2023, the complainant stated that she first encountered the appellant on 16 January 2023 at 7 p.m., when she went to retrieve a (jiko) brazier. The following morning, on 17 January 2023, he found her while she was basking. It was then that he pulled her to his house, where he defiled her.
13. When the appellant pushed her to the bed, she hit her forehead on the bed.
14. Her version changed on the 15<sup>th</sup> of May 2023, when the matter started de novo. This time, she stated that the incident occurred on the 16<sup>th</sup> of January 2023. When she attempted to scream, the appellant covered her mouth with a handkerchief. As the appellant left, he encountered her sister Beatrice, whom he slapped. The two then began to fight. She went to her sister's house and locked herself inside.



15. B.W.M. (PW2) said she woke up at 7 a.m. and found her sister, the complainant, missing. She started searching for her. She went to the appellant's house and asked him if he had seen her. Before he could answer, she saw the complainant's shoes. She slapped the appellant and enquired what he was doing with a class 7 girl. When the appellant wanted to beat her, she raised an alarm that attracted neighbours.
16. The evidence of the complainant and her sister is contradictory. The medical evidence contradicted the complainant's evidence on the alleged defilement. Much of what she told the medical team contradicted her evidence in court. The Court of Appeal in the case of *Ndungu Kimanyi v 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 learned trial magistrate chose to believe the complainant's evidence over that of the medical staff without explaining why. This constituted a grievous error. It was prejudicial to the appellant. Given the numerous discrepancies, some of which I have not bothered to outline, it was unsafe to convict the appellant based on the evidence on record. The conviction is quashed, and the sentence is set aside. The appellant is released unless otherwise lawfully detained.

**DELIVERED AND SIGNED AT NYANDARUA ON THIS 16TH DAY OF JUNE 2025**

**KIARIE WAWERU KIARIE**

**JUDGE**

