



**Mwambui v Republic (Criminal Appeal E015 of 2024)  
[2025] KEHC 13102 (KLR) (19 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13102 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL APPEAL E015 OF 2024  
M THANDE, J  
SEPTEMBER 19, 2025**

**BETWEEN**

**TSUMA AMANI MWAMBUI ..... 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* (SOA) and sentenced to 10 years imprisonment. The particulars of the offence are that on diverse dates between the 18.12.21 and 21.12.21 at Maluwani village, Jibana location, Kaloleni sub-county within Kilifi county, intentionally and unlawfully caused his penis to penetrate the vagina of D. M. M. (the Complainant) a child aged 17 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 the case was not proved to the required standard.
  - ii. Failing to consider that the Complainant's conduct was inconsistent with that of a minor and hence the defence in Section 8(5) of the SOA obtained in the case.
  - iii. Meting a sentence that was harsh and excessive in the circumstances.
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 offence of defilement, 3 ingredients must be established by the prosecution. This is 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, the prosecution 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 health card of the Complainant which indicates that in 2021, she was 17 years old. This was not challenged by the Appellant. The test of age was thus established.
8. As regards penetration PW1 Chigulu Mwangolo, a Senior Clinical Officer at Mariakani Sub County Hospital stated that the Complainant was taken to hospital with a history of being sexually abused by 2 people known to her on different occasions, the last being 18.12.21. He produced the P3 form, treatment notes, lab request and results. He stated that on examination, on 29.1.21, the Complainant’s external genitalia was normal with loose vaginal sphincter muscles with broken hymen. 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 the Appellant is her neighbor and that they were in a relationship. On 17.12.21 they went to his home and at night, he undressed her and penetrated her vagina with his penis. She went home in the evening of 18.12.21 and returned to the Appellant’s home on 19.12.21 and remained there until 21.12.21. During that time, they had sexual intercourse. When she discovered her father had gone to the Police to report her disappearance, she fled to her grandmother’s home. The Appellant’s mother then went to her grandmother’s home and asked for forgiveness for her son’s conduct, which her mother rejected. The Complainant went to the police and recorded her statement after which the Appellant was arrested.
11. PW3, the Complainant’s father stated that he received a text message from the Appellant informing him that he was with the Complainant. He sent money to the number that had sent the message and it yielded the name of the Appellant. Notably the text message was not produced in evidence nor was the Court told the phone number of the Appellant. He further stated that some elders from the Appellant’s home came and told him that the Complainant was with the Appellant. He did not however say how many the old men were nor their number. This evidence raises doubt in the mind of the Court.
12. PW4 PC Winnie Murei testified that the Complainant’s father reported that his daughter was missing from 17.12.21. She proceeded and arrested the Appellant at St. Luke’s Hospital and he was later charged. She interrogated the Complainant who told her of her affair with the Appellant and that she had been staying with him from 17.12.21 to 21.12.21. The Complainant was taken to hospital where the doctor confirmed penetration. She then arrested and charged the Appellant.
13. In his defence, the Appellant while acknowledging that the Complainant was known to him, denied committing the alleged offence.



14. From the record, the only evidence that the Appellant was the perpetrator of the offence was that of the Complainant.
15. The proviso to Section 124 of the *Evidence Act* allows the court to receive evidence of an alleged victim of a sexual offence, notwithstanding that it is the only available evidence and to record the reasons for believing the evidence. Section 124 provides as follows:

“Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

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.”(emphasis)
16. For a court to convict an accused person of a sexual offence only on the basis of the uncorroborated evidence of the victim, such court must be satisfied that the victim is telling the truth and must record the reasons for so believing. In the present case, the trial Magistrate did not record the reasons why she was satisfied that the Complainant was telling the truth. There was noncompliance with the express provisions of the proviso to Section 124 of the *Evidence Act*.
17. Section 111(1) of the *Evidence Act* provides:

“When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”
18. The circumstances herein are that the trial Magistrate did not give reasons for believing the Complainant’s evidence. There is also paucity of corroborative evidence. The Appellant denied committing the offence. All these factors taken together more so given the fact that PW1 stated that the Complainant went to hospital with a history of being abused by 2 people, plant doubt in the mind of the Court as to the guilt of the Appellant. By dint of the second proviso to Section 111(1) of the *Evidence Act*, the Appellant was entitled to an acquittal.
19. In the end, I find that the conviction of the Appellant was unsafe. The Appeal succeeds and the same is allowed. I accordingly quash the conviction and set aside the sentence imposed on the Appellant. He is forthwith set at liberty unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED IN MALINDI THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2025.**



.....

**M. THANDE**  
**JUDGE**

