



**Kuduka v Republic (Criminal Appeal E037 of 2023)  
[2024] KEHC 22 (KLR) (11 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 22 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL APPEAL E037 OF 2023  
KW KIARIE, J  
JANUARY 11, 2024**

**BETWEEN**

**MWANGOLO KUDUKA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in S.O case NO.49 of 2020 of the Principal Magistrate's Court at Msambweni by Hon. S.A. Ogot–Principal Magistrate)*

**JUDGMENT**

1. Mwangolo Kuduka, 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 1<sup>st</sup> day of March 2020 and 17<sup>th</sup> August 2020 at Lungalunga location, within Kwale County, intentionally and unlawfully caused his penis to penetrate the anus of DN, a child aged 6 years.
3. He was also 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.
4. The particulars of the offence are that on diverse dates between June 2020 and July 2020 at Lungalunga location, within Kwale County, intentionally and unlawfully caused his penis to penetrate the anus of DC, a child aged 15 years.
5. The appellant was sentenced to life imprisonment in count one and 20 years' imprisonment in count two. The sentence in count two was ordered to be held in abeyance. He was aggrieved and filed this appeal against both conviction and sentence. He raised grounds of appeal as follows:



- a. That the learned trial magistrate erred in law and fact by convicting me the appellant to serve life imprisonment and 20 years' imprisonment without considering that identification being an essential element of defilement was not proved beyond a reasonable doubt.
  - b. That the learned trial magistrate erred in law and fact by convicting the appellant to serve life imprisonment and 20 years' imprisonment without considering that the appellant was denied a right to a fair trial under article 50(2)(p) of *the Constitution*.
  - c. That the learned trial magistrate erred in law and fact by convicting the appellant to serve life imprisonment and 20 years' imprisonment without considering that the sentence meted on me was harsh and excessive.
  - d. That the learned trial magistrate erred in law and fact by convicting me the appellant to serve life imprisonment and 20 years' imprisonment without considering the defence.
6. M/s. Keya Ombele learned counsel, conceded the appeal on the following grounds:
- a. That the prosecution case was not proved to the required standards.
  - b. That there were material contradictions in the prosecution evidence.
7. This is the first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn. Inclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of Okeno vs. Republic [1972] EA 32.
8. To sustain a conviction for the offense of defilement, the prosecution has to prove the following ingredients:
- a. Whether there was penetration;
  - b. Evidence must show that the accused is the perpetrator; and
  - c. The age of the victim must be below eighteen years.

In the case of Fappyton Mutuku Ngui vs. Republic [2012] eKLR Joel Ngugi J. said:

Going by this definition of defilement, I agree with Mr. Mwenda on the issues which the court needs to determine. The 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.

These are the ingredients I will endeavour to find if they were proven.

1. The complainant in count one (PW2) testified that while herding cattle, the appellant instructed him to remove his pair of trousers. When he complied, the appellant inserted his penis into his [complainant's] anus. He said he did not tell anyone and wondered how his "mama M" learned about it. According to this witness he was defiled once. However, the particulars of the charge state that he was defiled on diverse dates between the 1<sup>st</sup> day of March 2020 and the 17<sup>th</sup> day of August 2020. The evidence of PW3 contradicted this complainant's evidence. She testified that he told one of his siblings. The contradictions can be traced back to the complainant who was the source of the information. This paints a picture of a person who cannot be relied upon to tell the truth.
2. The medical evidence that was adduced by Dr Ngenya Harrison (PW5) was that upon examination of the anal area of the complainant, he did not see any abnormality.



3. DC (PW1) was the complainant in count two. His evidence was that in June 2020 the appellant sodomised him while he was asleep. He was awakened by the act and he hit the appellant who returned to his bed. Juma who was sleeping in a different room with his wife heard the commotion and asked him about it the following day. He informed him what had transpired. This was a material witness who was not called to testify and there was no explanation as to why he was not called. When a material witness is not called and the evidence on record is barely adequate, the court is entitled to make an adverse finding in respect of the prosecution case. The Court of Appeal for Eastern Africa in the case of *Bukenya vs. Uganda* [1972] EA 549, (Lutta Ag. Vice President) held:

The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

In the instant case, this omission was grave and left the court with the allegation by the complainant against that of the appellant. The Court of Appeal in the case of *Ndungu Kimanyi vs. Republic* [1976-80] I KLR 1442 said:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression on 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.

In the instant case, the prosecution witnesses were unreliable and could not be trusted to tell the truth.

12. The appellant was accused of committing the offences while he was under the age of eighteen years. His trial ought to have been as provided for under sections 186 to 189 of the *Children Act*, 2001 (repealed). The punishment meted out ought to have considered that he was a child at the time of the commission of the offences. Since the conviction was not safe, I will not say any more in this regard.
13. I therefore agree with the respondent's counsel that the conviction was not safe. The convictions on both counts are quashed and the sentences thereof are set aside. The appellant is at liberty unless otherwise lawfully held.

**DELIVERED AND SIGNED AT MOMBASA THIS 11<sup>TH</sup> DAY OF JANUARY, 2024**

**KIARIE WAWERU KIARIE**

**JUDGE**

