



**Mwanzui v Republic (Criminal Appeal E114 of 2022)  
[2025] KEHC 14674 (KLR) (22 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14674 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CRIMINAL APPEAL E114 OF 2022  
KW KIARIE, J  
OCTOBER 22, 2025**

**BETWEEN**

**MAKUYU MWANZUII ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in S.O. Case No. E058 of 2021 of the Senior Principal Magistrate's Court at Makindu by Hon. B. N. Iveri–Senior Principal Magistrate)*

**JUDGMENT**

1. Makuyu Mwanzuii, the appellant herein, was convicted of the offence of defilement of a girl contrary to section 8 (4) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars of the offence are that in the month of December 2020 at [Particulars Withheld], Makindu sub-county, within Makueni County, he intentionally caused his penis to penetrate the vagina of DKD, a child aged seventeen years.
3. The appellant was sentenced to serve fifteen years' imprisonment in person. He was aggrieved and filed this appeal. He raised the following grounds of appeal:
  - a. The facts used in the court were all framed and not true.
  - b. The appellant is in dispute with the sentence that the law court magistrate imposed.
4. The state opposed the appeal through Omollo Vera, learned counsel. She argued that the prosecution proved the case to the required standards and that the sentence imposed was appropriate.
5. This is a first appellate court. As expected, I have analyzed and reevaluated all the evidence presented before the lower court, and I have drawn my own conclusions, 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.



6. Section 8(1) of the *Sexual Offences Act* defines defilement in the following terms:

A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

An offence of defilement, therefore, 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 age of the complainant was below eighteen years.

These ingredients were restated in *Fappyton Mutuku Ngui vs. Republic* [2012] eKLR as follows:

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 that the prosecution must prove against an accused person.

7. The copy of the birth certificate for DKD. (PW1) indicates that she was born on the 14<sup>th</sup> day of January 2003. As of December 2020, she was 17 years and 11 months. I am satisfied that her age was sufficiently established.
8. DKD (PW1) testified that the appellant had sexual intercourse with her on diverse dates in the year 2020. She, however, did not attempt to find out where the incidents took place except for one. In this one incident, she said that when she was leaving their shamba, the appellant was near his mother's home. He called her, but she declined to go where he was. He tripped her down when she walked near where he had planted some trees. There were very scant details about whether he followed her or what transpired. This is when he defiled her on her parents' land. During cross-examination, she said that Kithongo, a brother of the appellant, had also defiled her.
9. According to the account of PC Elizabeth Maina (PW3), who was the investigating officer, the complainant informed her that the incident happened when she was going home from school. The appellant defiled her in their (appellant's) shamba, removed her school dress, and pulled her to a bush where he defiled her.
10. These are two different versions attributed to the complainant. There was no attempt by the prosecution to reconcile the variance between the evidence of the complainant and that of PW3. This variance raised doubts about who was telling the truth between the complainant and PW3. 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.
11. There was evidence that the complainant had been defiled by Kithongo, a brother of the appellant, after the incident by the appellant.



12. The prosecution did not, therefore, prove that the appellant defiled the complainant. The conviction was unsafe.
13. From the foregoing analysis of the evidence on record, I find that the prosecution did not prove its case against the appellant to the required standards. I accordingly allow the appeal. The conviction is hereby quashed and the sentence set aside. The appellant is set at liberty unless otherwise lawfully held.

**DELIVERED AND SIGNED AT MAKUENI, THIS 22<sup>ND</sup> DAY OF OCTOBER 2025**

**KIARIE WAWERU KIARIE**

**JUDGE**

