



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MAKUENI
CRIMINAL APPEAL NO. E064 OF 2023

MICHAEL KIAMBA MUINDE..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O. Case No. E020 of 2022 of the Senior Principal Magistrate's Court at Makindu by Hon. B. Ireri, Senior Principal Magistrate)

JUDGMENT

1. Michael Kiamba Muinde, 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 No.3 of 2006.
2. The particulars of the offence were that on the 24th day of March 2022, at Mtito Andei location, Kibwezi Sub-County within Makueni County, intentionally and unlawfully caused his penis to penetrate the vagina of J.M., a child aged twelve years.
3. The appellant was sentenced to fifteen years' imprisonment. He was aggrieved and has appealed against both his conviction and sentence. He raised the following grounds of appeal:
 - a) The prosecution's case is replete with monumental inconsistencies and contradictions, which would have attracted an acquittal verdict.
 - b) The trial court erred both in law and fact by failing to conduct a holistic scrutiny of the evidence on record to base its conviction and sentence.
4. The state opposed the appeal through M/s Nyakibia M. Mburu, learned counsel, on the following grounds:
 - a) All the offence's ingredients were proven to meet the required standards.
 - b) The sentence is the prescribed one.

5. This is the first appellate court. As expected, I have analyzed and evaluated all the evidence adduced before the lower court. I have concluded, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of **Okeno vs the Republic [1972] EA 32**.
6. To establish an offence of defilement against an accused person, the prosecution has to prove 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 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.

Therefore, I will endeavour to establish whether the prosecution met the required standards.

7. The complainant, J.M. (PW1), stated that she was twelve at the time of the alleged offence. A report of her age assessment indicates that she was between 11 and 13 years old when she was examined. I find that her age was proven.
8. The medical evidence was adduced by Jacinta Mbonz Mumudau (PW3). Her evidence was that the complainant's genitalia were normal except for the hymen, which was torn. A broken hymen alone cannot serve as the sole 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 the 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 the absence of a 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 proven

that some girls are not even born with a hymen. Those who are, there are times when the 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.”

9. In the instant case, a red flag was raised by the description of the incident by the complainant. Where it was expected of her to testify to pain, she talked of feeling the appellant’s penis inside her vagina. This could not be expected from a twelve-year-old child. In the case of **Ben Maina Mwangi v Republic [2006] eKLR Lesiit, J.** (as she then was) observed:

Bearing in mind she was a child of tender years being only 4 years at the time, for the offence to be proved there should have been evidence adduced to show that the Appellant used some force on her or something tending to show an assault or infliction of pain. At least some evidence needed to be adduced from which it could be construed that defilement took place. Considering the Complainant’s age as compared to the Appellant, if any attempt were made to penetrate the Complainant’s private parts, it would be expected that the Complainant must have felt pain, if not excruciating pain. There is no way the Complainant would forget the experience or that detail in her evidence.

10. I share the sentiments of the learned judge. This casts doubt on whether she was defiled.
11. According to the complainant, the appellant invited her and two other children and sexually abused her in front of the others. This occurred after he had given her some Kshs 20.00 and asked her to buy a cake, instructing her not to tell her mother about it. When customers came, the appellant told her to move out and go away. During cross-examination, she changed her version and said the other children were outside the plot when the defilement was taking place. This evidence was self-contradictory.
12. J.M. (PW2) is the complainant’s sister. She testified that she was present in the kitchen when the appellant asked the complainant to undress and when the defilement occurred. She observed the complainant being given Kshs. 20.00 and mandazi. Later, she contradicted herself and stated that she went outside; when she tiptoed back into the kitchen, she saw the appellant doing “tabia mbaya” to the complainant.

13. PC Charity Janagyan (PW4) testified that the complainant informed her that the appellant gave her Kshs. 50.00. There were many contradictions that the prosecution did not bother to reconcile. 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, raise 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.

14. The proviso to section 124 of the Evidence Act states:

15. 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.

16. The complainant's evidence was not corroborated due to the numerous discrepancies I have highlighted. Consequently, it was unsafe to rely on it for a conviction. The conviction is quashed, and the sentence is set aside. The appellant is released unless otherwise lawfully detained.

Delivered and signed at Makueni, this 22nd day of October 2025

KIARIE WAWERU KIARIE

JUDGE