



**Musembi v Republic (Criminal Appeal E079 of 2023)  
[2025] KEHC 14676 (KLR) (21 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14676 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CRIMINAL APPEAL E079 OF 2023  
KW KIARIE, J  
OCTOBER 21, 2025**

**BETWEEN**

**DAVID MUSYOKA MUSEMBI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in S.O. Case No. E026 of 2020 of the Senior Principal Magistrate's Court at Makindu by Hon. J. D. Karani—Senior Resident Magistrate)*

**JUDGMENT**

1. David Musyoki Musembi, the appellant herein, was convicted of the offence of defilement contrary to section 8 (2) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars of the offence were that on unknown dates, at Makindu location in Makindu sub-county within Makueni County, he intentionally caused his penis to penetrate the anus of O.M.M., a child aged 9 years.
3. The appellant was sentenced to serve 40 years' imprisonment. He has appealed against both conviction and sentence. He was in person. He raised the following grounds of appeal:
  - a. The learned trial magistrate erred both in law and fact by convicting the appellant despite inconsistent, insufficient and contradictory evidence.
  - b. The trial court erred both in law and fact by failing to conduct a holistic scrutiny of the whole evidence on record to base its conviction and sentence.
  - c. The learned trial magistrate erred in both law and fact by rejecting the appellant's defence.
4. The state opposed the appeal through Vincent Maina, learned counsel, because the prosecution proved its case to the required standards.



5. This court is the first appellate court. As expected, I have carefully reviewed and assessed all the evidence presented to the lower court, keeping in mind that I did not witness any of the witnesses give their testimonies. Therefore, I will follow the well-known case of *Okeno vs Republic* [1972] E. A 32 to guide my decision-making process.

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 victim must be below eighteen years old.

This position was echoed in the case of *Fappyton Mutuku Ngui vs Republic* [2012] eKLR when Joel Ngugi J. said:

Going by this definition of defilement, I agree with Mr. Mwenda on the issues 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 complainant was taken for age assessment at Makindu Sub-County Hospital. He was found to be between 8 and 9 years old. The victim's age was proven to meet the required standards.

8. At the time of the alleged incident, the appellant had separated from his wife and was living with his sons, including the complainant in this case. The complainant narrated a harrowing incident where his father defiled him per anus severally. Before sodomising him, the appellant would apply some baby oil at his (complainant's) anus and his (appellant's) penis.

9. Janet Kanini (PW3) testified that a brother of the complainant had complained to her that their father was used to "tumba" them. She understood the word to mean caning. She only realized that it meant defilement. This must have been the Kiswahili word "tomba", which means fuck in English. She only realized it was defilement after the police summoned her to explain to them what had been reported to her.

10. Though the appellant testified that PW3 colluded with the complainant to falsely implicate him, this contention is unconvincing.

11. Daniel Mulinge Mutinda (PW4) examined the complainant and found lacerations around the anal area. The anal opening had been widened. The medical evidence supported the complainant's account.

12. The upshot of the foregoing analysis of the evidence on record is that the conviction was based on the evidence on record, which sufficiently proved the offence against the appellant to the required standards. The appeal is therefore dismissed.

**DELIVERED AND SIGNED AT MAKUENI, THIS 21<sup>ST</sup> DAY OF OCTOBER 2025**

**KIARIE WAWERU KIARIE**



**JUDGE**

