



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Mgindo (Sexual Offence E008 of 2021)
[2025] KEMC 117 (KLR) (14 May 2025) (Judgment)**

Neutral citation: [2025] KEMC 117 (KLR)

**REPUBLIC OF KENYA
IN THE MAKINDU LAW COURTS
SEXUAL OFFENCE E008 OF 2021
YA SHIKANDA, SPM
MAY 14, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

JUMA MBASHU MGINDO ACCUSED

JUDGMENT

The Charge

1. Juma Mbashu Mgindo (hereinafter referred to as the accused person) is charged with the offence of defilement as well as an alternative charge of committing an indecent act with a child. In the main count, the accused person is charged with the offence of defilement contrary to section 8(1) as read with 8(4) of the *Sexual Offences Act*. The particulars of the offence are that on diverse dates between April, 2020 and 27/7/2020 at Mtito Andei area within Makueni County, the accused person intentionally and unlawfully caused his penis to penetrate the vagina of DMM (name withheld), a child aged 17 years. The accused person is alternatively charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the offence are that within the same period and at the same area, the accused person intentionally and unlawfully touched the vagina of DMM aged 17 years using his penis. When the plea was taken, the accused person pleaded not guilty to both counts. The matter was then set down for hearing.

The Evidence

The Prosecution Case

2. The prosecution case was wholly heard by another Magistrate who was subsequently transferred. The accused person disappeared after the prosecution case was closed but before the court delivered its ruling on whether or not the accused person had a case to answer. The Ruling was delivered virtually on



6/10/2023 in the absence of the accused person. The accused person was later arrested and brought to court on 30/1/2025 whereupon the court explained the ruling to him. Upon taking directions under section 200(3) of the *Criminal Procedure Code*, the matter proceeded from where it had reached.

3. The prosecution called a total of six (6) witnesses in a bid to prove its case against the accused person. PW 1 DMM (hereinafter referred to as the complainant) testified that the accused person was known to her and that he was her boyfriend. That they met in the year 2020 during the Covid-19 pandemic when schools had closed. The complainant stated that the accused person invited her to his house and asked her to be his girlfriend. The complainant agreed. At the house, the two had sex. The accused person gave Ksh. 200/= to the complainant who then returned to her home. The two continued with the relationship and in July, 2020 the complainant started vomiting. When she informed the accused person about it, the latter stated that the complainant might be pregnant.
4. It was the evidence of the complainant that she had sexual intercourse with the accused person for the last time on 27/7/2020. That on 15/10/2020, she got tested and was found to be pregnant. When she informed the accused person, the accused person started avoiding her. That the accused person offered her Ksh. 10,000/= in order to procure an abortion. The complainant decided to report the matter when the accused person neglected her. The complainant stated that she gave birth on 14/2/2021. PW 2 was Veronica Kawi Mutinda. The witness stated that the complainant was her neighbour. Her evidence was that on 28/1/2021 she accompanied the complainant to the police station where the latter made a report and indicated that the accused person had impregnated her. PW 2 took the complainant to hospital.
5. PW 3 EM (name withheld) testified that the complainant was her daughter. That on 15/10/2020 she found out that the complainant was pregnant. She reported to the Assistant chief. PW 4 Rose Mbogo testified that she was a Clinical Officer at Mtito Andei Sub-county hospital. The witness produced medical documents in respect of the complainant. PW 5 Joyce Kihoro, a Government Analyst produced in evidence a DNA report on the paternity of the complainant's child. PW 6 Police Constable Margaret Mwhaki testified that she was the investigating officer in the matter. The witness narrated the steps she took when the matter was reported to the police station.

The Defence Case

6. The accused person opted to give a sworn testimony without calling any other witness. The accused person denied ever having a relationship with the complainant. He stated that he did not even know her. That he was transferred to Mtito Andei in February, 2020. The accused person stated that the DNA results confirmed that he was not the father to the complainant's child. According to the accused person, he was framed up because of a dispute at the rental residence where he stayed. That he raised security concerns with their Landlord and the route that led to the complainant's residence, was closed due to security reasons. When the tenants learnt that it was the accused person who had complained to the Landlord, causing the route to be closed, they framed him up. The accused person denied committing the offence.

Main Issues for Determination

7. Having considered the nature of the charges and the evidence on record, I find that the main issues for determination are as follows:
 - a. Whether the complainant was defiled on between April, 2020 and 27/7/2020;
 - b. If so, whether it was the accused person who defiled the complainant;



- c. If not, whether an indecent act was committed against the complainant during the aforementioned period;
- d. If so, whether such indecent act was committed by the accused person;
- e. Whether the prosecution has proven its case against the accused person to the required standard.

Submissions by the Accused Person

8. At the close of his defence, the accused person submitted typed submissions wrongly titled “Defendant’s written submissions of a no case to answer.” The accused person argued that the prosecution case was full of glaring inconsistencies, discrepancies and uncorroborated evidence. That the investigating officer did a shoddy job. The accused person further argued that the complainant alleged that she was “forcefully” defiled but there was no evidence of any injuries on her body nor genital organs. The accused person relied on the DNA report and stated that the implication was that the complainant had sexual relations with other men. That the complainant was not a reliable witness. The accused person contended that the prosecution relied on hearsay and fabricated evidence. That penetration was not proved beyond reasonable doubt as the prosecution evidence was not corroborated by medical evidence. The accused person submitted that no evidence was adduced to prove the alternative charge.

Analysis and Determination

9. I have carefully considered the evidence on record as well as the law applicable. Section 8 (1) of the [Sexual Offences Act](#) provides as follows:

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

10. Section 2 of the [Sexual Offences Act](#) defines the term “penetration” as the partial or complete insertion of the genital organs of a person into the genital organs of another person. The same section refers to the definition of a child as provided for under the [Children Act](#). Section 2 of the [Children Act](#) defines a child as an individual who has not attained the age of eighteen years. From the above provisions, I gather that the key ingredients of the offence of defilement are as follows:
 1. The accused person must have committed an act which causes the partial or complete insertion of his or another person’s genital organ into the genital organ of another person or the accused person’s genital organ. My understanding of the law is that it does not matter who inserts, what matters is who causes the insertion. For instance, a woman who causes a male child to insert his penis into her vagina may be guilty of defilement if all the key ingredients are satisfied. In a nutshell, the prosecution must prove penetration;
 2. The alleged victim must be below the age of eighteen years. The prosecution must prove that the alleged victim was below the age of eighteen years at the time of incident, that is, proof of age;
 3. Positive identification of the accused person. The evidence of the prosecution must show that the accused person was positively identified as the person who committed the impugned act against the child.



11. My view is buttressed by the authority of *Dominic Kibet Mwareng v Republic* [2013] eKLR where the High Court observed thus:

"The critical ingredients forming the offence of defilement are; the age of the complainant, proof of penetration and positive identification of the assailant".

12. Similarly, in the case of *CWK v Republic* [2015] eKLR, Kimaru J (as he then was) held that for the prosecution to sustain the charge of defilement, the prosecution must establish penetration, the perpetrator of the offence and the age of the victim.

Age

13. The particulars of the offence indicate that the complainant was seventeen (17) years old at the time of incident. In the case of *Moses Nato Raphael v Republic* [2015] eKLR, the Court of Appeal pronounced itself thus:

"On the challenge posed by the uncertainty in the complainant's age, this Court had occasion to deal with a similar issue in *Tumaini Maasai Mwanyia v. R, Mombasa CR.A. No. 364 of 2010*, where we held that proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. As long as there is evidence that the victim is below 18 years, the offence of defilement will be established. The age, which is actually the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child's age cannot therefore assist the appellant to avoid criminal culpability".

14. In *Francis Omuroni v Uganda*, Criminal Appeal No. 2 of 2000, it was held that:

"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense".

15. In view of the foregoing, it cannot be said that age for purposes of sexual offences can only be proved by documentary or medical evidence. Nonetheless, the prosecution produced in evidence a copy of the complainant's certificate of birth which indicates that the complainant was born on 25/4/2004. Thus implies that as at April, 2020 when the offence is said to have been committed for the first time, the complainant was aged about 16 years. In cases of defilement, as far as age is concerned, all that the prosecution needs to prove is that the alleged victim was below the age of eighteen years at the time of offence. However, proof of age must be beyond reasonable doubt since age is a key ingredient of the offence. In the case of *Kaingu Elias Kasono v Republic* Criminal Appeal No. 54 of 2010, the Court of Appeal sitting at Malindi held as follows

"Age of the victim of the sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved in the same way as penetration in cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed upon conviction will be dependent on the age of the victim"

16. I have no doubt that the complainant was a minor at the material time.



Penetration

17. The only direct evidence in respect of the offence is that of the complainant herself. The complainant testified that the accused person undressed her then had sexual intercourse with her. She specifically mentioned an incident that occurred in 2020 during the Covid-19 pandemic and after the schools had closed and another incident on 27/7/2020. This was still during the Covid-19 pandemic period. Schools closed on 16/3/2020 owing to the pandemic. The complainant stated that she met the accused person in April, 2020. As already indicated, the only eye-witness who was called to testify was the complainant. Indeed, majority of sexual offences are usually committed in secrecy and as such, it would be difficult to get an eye witness apart from the alleged victim. Whether the testimony of the alleged victim is given on oath or not, the court must of necessity exercise great caution before convicting an accused person. The question as to whether there is corroborative evidence becomes paramount. I say so because, in criminal proceedings, it is the duty of the prosecution to prove its case against the accused person beyond reasonable doubt.
18. In view of the foregoing, I hereby warn myself that despite the fact that the complainant gave a sworn testimony, it would be unsafe to convict the accused person in the absence of corroborative evidence. I will seek to be satisfied that indeed, the complainant told the truth. In *Bassita Hussein v Uganda*, Criminal Appeal No. 35 of 1995, the Supreme Court of Uganda held as follows:
- "The Act of sexual Intercourse or penetration may be proved by direct or circumstantial evidence and corroborated by medical evidence or other evidence. Though desirable, it is not a hard and fast rule that the victim's evidence must always be adduced in every case of Defilement to prove sexual intercourse or penetration. Whatever evidence the Prosecution may wish to adduce to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt".
19. In most cases, penetration is proved by testimony which may be corroborated by medical evidence. However, absence of medical evidence does not ipso facto mean that there was no penetration-See the case of *Fappyton Mutuku Ngui v Republic* [2014] eKLR. The medical evidence on record indicates that the complainant was first examined on 1/2/2021. She was already pregnant then. The hymen was broken. With the pregnancy and the complainant's testimony, I am satisfied that there was penetration of the complainant's vagina by a penis within the period stated. According to the complainant, the accused person was the father to her child. She stated that she gave birth to her child on 14/2/2021.

Identification of the assailant

20. It is not in doubt that the complainant and the accused person were neighbours. The complainant alleged that the accused person was her boyfriend but the accused person denied the fact. When the complainant was cross-examined by the accused person, she stated that she met the accused person for the first time in April, 2020 and two days later, she had sex with him at the latter's house. As already indicated, the complainant was positive that as a result of her sexual interactions with the accused person, she got pregnant. I am aware that conception or proof of paternity is not an ingredient of the offence of defilement. What the prosecution must prove is that the accused person penetrated the complainant's genital organ.
21. However, it is my opinion that where the complainant alleges to have gotten pregnant as a result of having sexual intercourse with the accused person and maintains that the accused person made her pregnant, the issue of whether the accused person could have been responsible for the pregnancy becomes relevant particularly where the only direct evidence is that of the complainant alone. I have



considered the accused person's defence bearing in mind that he shoulders no duty to prove his innocence. The gist of the accused person's defence is that he was framed up. It is the word of the complainant against that of the accused person, bearing in mind that the burden is on the prosecution to prove the allegation against the accused person beyond reasonable doubt.

22. In *Philip Nzaka Watu v Republic* [2006] eKLR, it was held that to find a conviction in a Criminal case, the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt. On proof beyond reasonable doubt, the court stated in *Stephen Nguli Mulili v Republic* [2014] eKLR:

"It is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of *DPP V WOOLMINGTON*, (1935) UKHL 1 where the court eloquently stated that the "golden thread" in the "web of English common law" is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See *FESTUS MUKATI MURWA V R*, [2013] eKLR."

23. In the famous case of *Miller v Ministry of Pensions* [1947] 2 All ER 372, Lord Denning stated with regard to the degree of proof beyond reasonable doubt:

"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

24. In *Bakare v State* (1987) 1 NWLR (PT 52) 579, the Supreme Court of Nigeria emphasized on the phrase proof beyond reasonable doubt, stating:

"Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability." (Emphasis mine)

25. The standard of proof "beyond reasonable doubt" is grounded on a fundamental societal value determination that it is far worse to convict an innocent man than to let a guilty man go free. A reasonable doubt exists when the court cannot say with moral certainty that a person is guilty or that a particular fact exists. It must be more than an imaginary doubt, and it is often defined judicially as "such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause or hesitate before or taking the represented facts as true and relying and acting thereon" (see *Clarence Victor, Petitioner 92-8894 v. Nebraska*, 511 U.S. 1 (1994); *Rex v. Summers*, (1952) 36 Cr App R 14; *Rex v. Kritz*, (1949) 33 Cr App R 169, [1950] 1 KB 82 and *R. v. Hepworth*, *R. v. Feamley*, [1955] 2 All E.R. 918). Beyond reasonable doubt is proof that leaves the court firmly convinced that the accused is guilty. Reasonable doubt is a real and substantial uncertainty about guilt which arises from the available evidence or lack of evidence, with respect to some element of the offence charged.



26. It is the belief that one or more of the essential facts did not occur as alleged by the prosecution and consequently there is a real possibility that the accused person is not guilty of the crime. This determination is arrived at when after considering all the evidence, the court cannot state with clear conviction that the charge against the accused is true since an accused may not be found guilty based upon a mere suspicion of guilt. The record indicates that on 26/10/2021 the accused person applied for the court to order for a DNA test to be conducted to establish the paternity of the complainant's child. The prayer was granted then. The DNA report was later produced in evidence by the Government Analyst. It indicates that the accused person was excluded as the biological father of the complainant's child.
27. This implies that if the complainant conceived at the material time, then she was defiled by a person other than the accused. This does not however decisively mean that the accused person did not defile the complainant. The complainant could have had sexual relations with more than one man at the material time, a fact that is not strange. Before making a finding of guilt on the part of the accused person, the court must be convinced that the complainant is a credible witness. She is the only witness connecting the accused person to the offence. There is a dispute as to the romantic relationship between the complainant and the accused person and as to whether the accused person had carnal knowledge of the complainant at the material time.
28. The fact that the complainant stated that the accused person was the father to her child and the DNA results proved otherwise indicates that she may not have told the truth. It is highly probable that the complainant was in a sexual relationship with another man at the material time. Witnesses must say the truth, and nothing but the truth. This is contained in the oath that witnesses take once they enter the dock. The oath is not just a formality; it is a commitment to tell the truth. That is why the law creates the offence of perjury which entails lying in court. It is important for a witness to tell the truth because the court's decision will rely on the facts of the case as presented by the witnesses and the law. If a witness or witnesses lie and the court relies on their evidence, a miscarriage of justice is bound to occur.
29. The complainant herein is the key witness and all the other evidence is merely corroborative. In the case of *Republic v Oscar Ochieng Owenga* [2016] eKLR, a witness admitted to court that they had not told the truth. The court found the witness to be incredible. In *Mohammed Swale Kaeze v Republic* [2005] eKLR, the court observed that the credibility of a key witness is so important. The court held that:
- "The Complainant's integrity was quite questionable in the circumstances. The fact that she did not even try to describe any of those who robbed her and failed to disclose that the Appellant was pointed out to her until she was cross-examined by the Appellant raises great suspicion concerning the Complainant's trustworthiness."
30. In the authority of *Ndung'u Kimanyi v Republic* [1979] KLR 282, the Court of Appeal observed thus:
- "A 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."



31. In *Peter Maina Njeri v Republic* [2016] eKLR the court held as follows:
- "Where a witness is found to have been insincere or untruthful in parts of her evidence then her entire evidence is placed in doubt. A witness cannot be found truthful in certain aspects but untruthful in others. The veracity of her entire evidence is placed in doubt."
32. In *Republic v Abdulrahman Hamisi Habo* [2021] eKLR, the complainant lied to court and while quashing the conviction of the Appellant (accused) on the offence of defilement, the court held that:
- "In this case there is evidence that the complainant lied in that the appellant went for her at home. She also lied that he was a stranger to her. Lastly, she lied that she had been chased away from home for stealing 20 kshs. These are the lies detectable from other available evidence. We do not know where else she may have lied. She was not entirely honest in her evidence. The lower court having established that she lied in relation to her prior relationship with the accused or her knowledge of him, ought to have been extra careful in relying on her uncorroborated evidence to arrive at a conviction.....there exists a possibility where the complainant could have lied about the real culprit. The doubt should have been resolved in his favour."
33. In view of the foregoing, I have reason to believe that the complainant may not have told the truth. It is worth noting that it was the accused person who applied for and insisted on a DNA test to be conducted. This would imply that either the accused person believed in his innocence or knew something that would raise reasonable doubt as to his guilt. It is possible that the accused person could have defiled the complainant and that he was not alone. However, that is a matter of conjecture. My assessment of the complainant is that she was not a credible witness. Where testimony of a prosecution witness is incredible, reasonable doubt is cast in their case. It matters not that the accused person may not have told the truth. What matters is whether or not the complainant told the truth.
34. As already indicated, I am not convinced that the complainant stated the truth. We cannot rule out the fact that she could have been defiled by another person other than the accused. There can only be one truth and not several versions of the truth. Different versions of the same incident cannot amount to several truths nor can they amount to corroboration of the truth. They only raise doubt as to the occurrence of the incident in issue. In as much as I may want to believe the complainant's testimony, I find difficulties in dismissing the accused person's defence. Having realised that the DNA report had exonerated the accused person in terms of paternity and given the complainant's testimony, the prosecution ought to have applied for the complainant to be recalled for purposes of clearing any doubts as to the accused person's involvement in the crime. Instead, they let the accused person capitalize on the report at the detriment of the prosecution case.
35. Having analysed the entire evidence on record, I tend to feel that the accused person could be innocent, but I am just gambling on probabilities. I may be wrong. I may be trying to return a guilty man to the community. No one can really know the truth apart from the accused person and the complainant. The accused person's defence is not far-fetched. I have a reasonable doubt, and this is a safeguard that has enormous value in our system. I cannot declare that the accused person is innocent, but I have reason to believe that he may not be guilty. Alan Dershowitz, an American Lawyer and former Law Professor once said that Scientists search for truth, Philosophers search for morality and a criminal trial searches for only one result: proof beyond a reasonable doubt. Has this proof been established? I think not.
36. It is possible that the complainant could have been defiled by the accused person during the material period but with the kind of evidence on record, that remains a mere suspicion which cannot form the basis for a conviction. In the words of the Court of Appeal in the case of *Joan Chebichii Sawe*



v Republic [2003] eKLR, suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. The prosecution must prove the case against the accused person beyond any reasonable doubt. The accused person is not under duty to prove his innocence. He may as well remain silent in defence. For avoidance of doubt, it is my finding that the prosecution has failed to prove its case against the accused person to the required standard. However, I must emphasise that the DNA report does not exonerate the accused person from the crime. If there is sufficient proof that the accused person penetrated the complainant's vagina, it does not matter that the complainant was impregnated by somebody else. The accused person is being left off the hook because of concerns with the complainant's credibility.

Disposition

37. In view of the foregoing, I find that the prosecution has failed to prove its case against the accused person beyond reasonable doubt. Consequently, I hereby find the accused person Not Guilty and proceed to Acquit him of the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act*, pursuant to the provisions of section 215 of the *Criminal Procedure Code*. Having acquitted the accused person on the main count of defilement, it follows that the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* suffers the same fate for the same reasons. For avoidance of doubt, the accused person is equally acquitted of the alternative charge. It is so decreed.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 14TH DAY OF MAY, 2025.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.

HON Y.A SHIKANDA	0
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