



**Kavita v Republic (Criminal Appeal E062 of 2024)
[2025] KEHC 14854 (KLR) (23 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14854 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E062 OF 2024
KW KIARIE, J
OCTOBER 23, 2025**

BETWEEN

JOSEPH KAVITA APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O. Case No. E029 of 2022 of the Senior Principal Magistrate's Court at Kilungu by Hon. G. Okwengu –Senior Resident Magistrate)

JUDGMENT

1. Joseph Kavita, the appellant herein, was convicted of the offence of defilement of a girl contrary to section 8 [3] of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars of the offence were that on the 4th day of September 2022, at [particulars withheld] village, Mukaa Sub-County, within Makueni County, he intentionally caused his penis to penetrate the vagina of M.M., a child aged fourteen years.
3. The appellant was sentenced to serve 15 years' imprisonment in person. He was aggrieved and filed this appeal. He raised the following grounds of appeal:
 - a. The learned trial magistrate erred in both fact and law by convicting me on evidence that did not meet the minimum threshold, which hence lacked the probative value to uphold a conviction.
 - b. The learned trial magistrate erred in both fact and law by failing to note and put into consideration that the prosecution's case was full of inconsistencies, fabricated stories which were maliciously forged to aid in preferring trumped-up charges against the appellant.



- c. The learned trial magistrate erred in both law and fact when he shifted the burden of proof to the appellant and ended up reaching the wrong conclusion to the detriment of the appellant's justice.
4. The state opposed the appeal through M/s Linet Wataka, learned counsel. She argued that the prosecution had established 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 v the 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 v 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. M.M. [PW1], the complainant in this case, stated her age as 16 years when she testified on the 14th November 2022. A copy of her birth certificate confirmed that she was born on 17th November 2007. As of 4th September 2022, she was 14 years and 10 months old. Her age was proven.
8. The complainant's evidence was that on the 4th day of September 2022, she left the church where she had attended a service and voluntarily went to the house at Kithiani. She stated she stayed with him, and he raped her. However, when she testified again on the 6th day of February 2024, she appeared to suggest that the sexual intercourse was consensual. Although the complainant lacked the capacity to give consent, one wonders what actually transpired.
9. Kasiamani [PW3] was the clinical officer who examined the complainant. His evidence was that the hymen was perforated, but it did not indicate how recently this had occurred. Some spermatozoa were detected in the urine of the complainant.
10. On the 28th day of August 2023, the complainant told the court that she had no objection to the appellant being released.
11. Joseph Kavita, the appellant, denied any involvement in the offence. He argued that he was undergoing chemotherapy due to cancer and was unable to achieve an erection. Some documents were produced



that confirmed that he suffered from Non-Hodgkin Lymphoma. The diagnosis was made on June 26, 2021.

12. Mayo Clinic describes Non-Hodgkin Lymphoma as a type of cancer that affects the lymphatic system, the body's germ-fighting network. It occurs when specialised white blood cells called lymphocytes grow uncontrollably and can form tumours throughout the body. Non-Hodgkin lymphoma is a broad term that includes many different subtypes, each with distinct biological and clinical behaviours. According to Mayo Clinic, Non-Hodgkin Lymphoma can potentially lead to difficulty achieving or maintaining an erection [erectile dysfunction]. This can be a direct effect of the cancer or its treatments, such as chemotherapy or radiation therapy. The underlying causes may include hormonal changes, nerve damage, or systemic effects like fatigue and body image issues, which are common among cancer patients.
13. The complainant's mother testified that she knew that the appellant had cancer. Though his defence came late in the day, the prosecution ought to have applied to reopen their case to evidence on the issue of erectile dysfunction.
14. It is worth noting that there was no attempt to prove the origin of the spermatozoa found in the complainant's urine.
15. The proviso to section 124 of the *Evidence Act* states:

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. There were obvious gaps in the complainant's evidence that the prosecution expected the court to ignore. Combined with the defence raised by the appellant, this means the prosecution failed to prove that the appellant defiled the complainant. The conviction was unsafe.
17. 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 23RD DAY OF OCTOBER 2025

KIARIE WAWERU KIARIE

JUDGE

