



REPUBLIC OF KENYA



**Wambua v Republic (Criminal Appeal E003 of 2025)
[2025] KEHC 14891 (KLR) (23 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14891 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E003 OF 2025
KW KIARIE, J
OCTOBER 23, 2025**

BETWEEN

SHADRACK MUTISO WAMBUA APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O. Case No. E020 of 2021 of the Senior Principal Magistrate's Court at Tawa by Hon. S. Jalang'o, Senior Principal Magistrate)

JUDGMENT

1. Shadrack Mutiso Wambua, 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 diverse dates between March 2020 and the 22nd May 2021, at [Particulars Withheld], Mbooni East Sub-County within Makueni County, intentionally and unlawfully caused his penis to penetrate the vagina of MW, a child aged seventeen years.
3. The appellant was sentenced to five years' imprisonment and has appealed against the conviction. He raised the following grounds of appeal:
 - a. The trial court erred in both law and fact by convicting the appellant when the case against him had not been proved beyond a reasonable doubt.
 - b. The trial court erred both in law and fact by failing to find and hold that the prosecution's evidence was full of doubts, which ought to have been resolved in favour of the appellant.
 - c. The trial court erred in law by dismissing the appellant's defence and shifting the burden of proof to the appellant



- d. The trial court erred in law and fact by reaching conclusions based on its own opinions rather than on evidence.
 - e. The learned trial magistrate erred in law by convicting and sentencing the appellant herein on a charge sheet that was defective.
 - f. The learned Magistrate erred in law by making and delivering a judgment that was not consistent with the provisions of section 169 of the Criminal Procedure Code.
 - g. The learned magistrate erred in law by failing to find and hold that the appellant's defence of alibi, which was not falsified or contradicted, was watertight and acquitted the appellant herein.
 - h. The trial magistrate erred in law and in fact by failing to appreciate that, indeed, there existed bad blood between the complainant's mother and the appellant herein.
4. Mr Victor Kazungu, learned counsel, represented the state in opposing the appeal. He argued that all the elements of the offence had been proven to meet the required standards.
 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, CM (PW1), stated that she was seventeen in the year 2020. The medical treatment card indicates that in May 2021, when she was examined, she was 17 years old. No document was produced to establish her age. If she were 17 years old in 2020, then by May 2021, she would have been 18 years old.
8. The medical evidence was adduced by Francis Kilonzo (PW2), a clinical officer at Kisau Sub-County Hospital on the 26th day of May 2021. His findings were normal external genitalia except for fresh lacerations on the vaginal walls. The hymen was broken, but he did not state whether it was a fresh or an old perforation. I find that penetration was proved.
 1. The complainant argued that the appellant was her boyfriend and that the sexual intercourse was consensual
 2. The age of the complainant is a crucial element. There was no evidence to establish that sexual intercourse occurred in 2020. Therefore, it was the prosecution's responsibility to gather evidence proving the complainant was 17 years old in 2021. The record contained conflicting



evidence regarding her age. This creates a reasonable doubt that should be resolved in favour of the appellant.

3. From the foregoing, I quash the conviction and set aside the sentence. The appellant is to be released unless otherwise lawfully detained.

DELIVERED AND SIGNED AT MAKUENI, THIS 23RD DAY OF OCTOBER 2025

KIARIE WAWERU KIARIE

JUDGE

