



**Kimani v Republic (Criminal Appeal E027 of 2024)  
[2025] KEHC 16742 (KLR) (Crim) (18 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16742 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYANDARUA  
CRIMINAL  
CRIMINAL APPEAL E027 OF 2024  
KW KIARIE, J  
NOVEMBER 18, 2025**

**BETWEEN**

**MICHAEL MBURU KIMANI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in the S.O. Case NO. E004 of 2023 of the Principal Magistrate's Court at Ol Kalou by Hon. J.N. Nthuku -Principal Magistrate)*

**JUDGMENT**

1. Michael Mburu Kimani, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars of the offence are that on the 10<sup>th</sup> day of November 2022 at [Particulars withheld] village, Weru sublocation, Nyandarua West Sub-County, within Nyandarua County, he intentionally and unlawfully caused his penis to penetrate the vagina of MWN, a child aged fourteen years.
3. The appellant was sentenced to serve twenty years' imprisonment. He was aggrieved and filed this appeal against the conviction and sentence. He raised the following grounds of appeal:
  - a. The learned trial magistrate erred in both law and fact by considering the complainant's first narration before the court that nothing had been done, like defilement to her, and no medical examination took place, only that his uncle framed the whole thing.
  - b. The learned trial magistrate erred in both law and fact by convicting the appellant based on contradictory evidence.



- c. The learned trial magistrate erred in both law and fact by not adopting the investigating officer's report, which clearly told the court that there was nothing that connected the accused person with the act.
  - d. The learned trial magistrate erred in both law and fact by not noticing that the initial report at the police station was threatening to kill, which was alleged to have been committed by the accused person's wife, but not the accused person himself.
  - e. The learned trial magistrate erred in both law and fact by convicting the accused persons based on mere hearsay.
  - f. The learned trial magistrate erred in both law and fact by not noticing that the prosecution did not prove this case beyond a reasonable doubt.
  - g. The learned trial magistrate erred in both law and fact by convicting me based on a mandatory sentence without considering the circumstances of the alleged offence as preserved [sic] under section 104 of the Criminal Procedure Code
4. The state opposed the appeal through M/s Odero Vena, prosecution counsel. She contended that the offence was proved to the required standards and that the sentence was appropriate.
  5. This is the first appellate court. As expected, I have analyzed and evaluated all the evidence adduced before the lower court afresh. I have drawn my conclusions, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of Okeno vs Republic [1972] EA 32.
  6. An offence of defilement 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. Ngugi J. (as he was then) said:

Going by this definition of defilement... the issues which 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.
  7. I will determine if the prosecution proved these ingredients to the required standards.
  8. An age assessment report in respect of the complainant was produced. On 12<sup>th</sup> January 2023, she was assessed to be 14 years and 8 months old. Her age was therefore proven.
  9. MWN (PW1) testified that on the 10th of November 2022, she saw the appellant herding his sheep near the road. She called to him, and they proceeded to the area near the cattle dip. He asked her to sit down, but when she refused, he forced her to do so. He then removed her clothes and assaulted her. During cross-examination, she altered her statement and said that he assaulted her on Saturday, the 17th.
  10. M.W. (PW2), the complainant's mother, stated that in 2022, she learned that the appellant's wife had sent her son to warn the complainant to stay away from her husband, threatening to kill her if she did



not. When talking to the complainant, PW1 disclosed that the appellant had multiple times engaged in sexual intercourse with her in the bush.

11. The evidence of the mother and daughter was inconsistent in material aspects. According to the complainant, it was her brother who reported to her mother that he saw her and the appellant standing near the gate, but he did not know what they were doing. When her mother asked her about it, she did not disclose anything. Her evidence was that she did not know who informed her mother about what happened. There was no attempt by the prosecution to reconcile the glaring contradictions. 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, 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.

12. The evidence of these two witnesses was unreliable and therefore required corroboration.
13. The medical evidence was adduced by Joseph Gatheca (PW4), a clinical officer at J.M. Kariuki Hospital on the 12<sup>th</sup> day of January 2023. She had an old, broken hymen. It was therefore concluded that there had been penetration. This evidence explains the contradiction in the testimony of PC Clinton Wangica (PW3), who stated that when the defilement report was made on November 15, 2022, she took the complainant to J.M. Kariuki Hospital for examination. The P3 form that was produced bears a date stamp of December 13, 2022. There was no attempt to reconcile these contradictions.
14. It was not indicated how old the broken hymen was. Had it been established, it probably would have corroborated the complainant's assertion. A broken hymen alone cannot serve as 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 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 absence of 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 proved that some girls are not even born with hymen. Those who are, there are times when 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 Quintanilla* [1999] AB QB 769.”



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. The complainant's evidence was not corroborated. Due to the numerous discrepancies I have highlighted, 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 NYANDARUA ON THIS 18<sup>TH</sup> DAY OF NOVEMBER 2025**

**KIARIE WAWERU KIARIE**

**JUDGE**

