



**Muvumba v Republic (Criminal Appeal E063 of 2024)  
[2025] KEHC 16620 (KLR) (14 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16620 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL APPEAL E063 OF 2024  
M THANDE, J  
NOVEMBER 14, 2025**

**BETWEEN**

**MANGALE MUVUMBA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Appellant herein, was convicted of the offence of defilement contrary to section 8(1) as read with section 8(2) of the *akn ke act 2006 3 Sexual Offences Act* and sentenced to 12 years imprisonment. The particulars of the offence are that on 1.4.22 at Maji ya Chumvi area, Mariakani Location, Kaloleni subcounty within Kilifi county, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of H. G., a child aged 11 years.
2. Being aggrieved by the decision of the trial Magistrate, the Appellant has appealed to this Court against both the conviction and sentence. The summarized grounds of appeal are that the prosecution did not prove its case to the required standard and further that his defence was not considered. The Appellant urged that his conviction be quashed and his sentence set aside.
3. The Respondent did not file written submissions.
4. As a first appellate Court, I have subjected the evidence adduced before the trial Magistrate to a fresh analysis and evaluation while giving due allowance for the fact that unlike the trial court, I neither saw nor heard the witnesses. See *Okeno v. Republic* [1972] EA 32.



5. To sustain a conviction for the offense of defilement, 3 ingredients must be established by the prosecution. This is was set out in Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013 where the Court stated:

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

6. This Court is required to determine whether in the court below, it was demonstrated that the Complainant was below 18 years of age. Secondly, that there was penetration of the Complainant's genitalia. Lastly, that the evidence identified the Appellant as the perpetrator.
7. The record contains a copy of the birth certificate of the Complainant which indicates that she was born on 30.7.09. On 1.4.22, when the offence is alleged to have been committed, the Complainant was 12 years and about 8 months.
8. Section 8(2) of the SOA under which the Appellant was charged provides that a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life. The Appellant ought to have been charged under Section 8(3) of the SOA which relates to the offence of defilement with a child between the age of twelve and fifteen years.
9. As regards penetration, the Complainant testified that on the material day at around 12 noon, she had taken the family cows to pasture. While there, the Appellant came towards her and as she let him pass, he tripped her and she fell. She was injured on her right hand and leg. The Appellant then sat on her chest, removed her blouse and skirt and tore her trouser in the middle. He then lay on top of her and inserted his penis into her vagina. PW3 Chigulu Mwangolo, Senior Clinician at Mariakani Sub county Hospital, who examined the Complainant of 1.4.22 produced the P3 form, treatment notes and lab request. He stated that her clothes were stained with blood and wet sand soil. She had a painful neck, painful tender right chest, painful supra pubic area, painful right forearm and right lower limb. Her genitalia was normal, labia were hyperemic, She had vaginal at 6 o'clock by position. The hymen was ruptured and she was bleeding minimally. No spermatozoa was seen. He concluded that there was forceful penetration. From the Complainant's testimony and this medical evidence, I am satisfied that penetration was established.
10. On identification of the assailant, the Complainant stated that it was the Appellant who had defiled her. He is known to her as he is her cousin. PW2 Aisha Kizi Diyo, the Complainant's mother stated that she had told the Complainant to take the cows to the river and that she would follow her. After she finished cooking, as she was going to the river to join the Complainant, she heard someone screaming "Mama ee Mangale waniumiza!". When she got to the river, she saw the Appellant running away from the river. She called him and asked what was going on, but he did not look back and continued fleeing. She then saw the Complainant by the riverside covered with soil. She did not have a shirt or skirt on and her trouser was on one leg. She did not also have her inner wear. The Complainant was unable to lift herself up and PW2 helped her dress up. She then followed the Appellant and found him at home. She asked him to get some water for her from her house. When he got in, she locked him in there. When she asked him what he had done to the Complainant he abused her. She then went to the river to get the Complainant and bring her home. She however admitted she did not see the Appellant commit the offence.
11. In his defence, the Appellant denied committing the offence. He stated that on the material day at about 9 am, he went to his brother's quarry which is near their home and worked there until lunch time when he went home for lunch. He then went to his grandfather's. After lunch, while he was resting, PW2 called him and sent him to her house. When he got inside, she locked the door. She then called



- Mnyaka Mgandi. They took him to Mariakani Hospital and later to the police station and then to court. The Appellant stated that he lived with the Complainant's family for 7 years and had never done anything to her, but that PW2 hates her. He stated that he had not seen the Complainant that day, but only saw her in hospital. He sat next to her but never saw any injuries on her or torn clothes.
12. DW2 Shaban Mgandi, an uncle to the Appellant stated that the Appellant had gone to his home at 6 am to get help to go to school. He was with the Appellant until 1 pm. He was called by his brother and told that the Appellant had defiled the Complainant at 1 pm. He too stated that PW2 does not like the Appellant.
  13. DW3 Mwambeyu Chidzigo stated that the Appellant went to the quarry where DW3 works. The Appellant told him that he had passed his exams and wanted to go to school. Later they went to Ismael's house and ate. After they left Ismael's house, DW2 called him and told him that the Appellant had defiled the Complainant. He stated that the Appellant was very well behaved and that being with girls is not his behaviour. He then stated that the problem was that the Complainant's mother did not want her husband to sponsor the Appellant's schooling as he had done his brother's. He urged that the Appellant be set free.
  14. DW4, Ismael Mgandi, the Complainant's father and uncle to the Appellant stated that the Appellant was accused falsely as he did not defile his daughter. He stated that he had taken the Appellant and his brother in, as their mother had no one to assist her. He stated that his wife and the Appellant's mother were always arguing because he was taking care of her boys. He then told the Appellant to go back to his mother's house and redo his Class 8. He got 378 points and called DW4 seeking assistance to proceed with school. 3 days later the defilement case came up. Later when he asked the Complainant what happened, she told him that her mother PW2 had told her to lie so that the Appellant does not go to school. DW4 stated that the Appellant was a charming and very well behaved boy and urged the court to release him.
  15. After hearing the testimony of DW4, the trial court directed that investigations be carried out with a view to charging the Complainant and PW2 with perjury. Upon this order being given, DW4 came back to court, apologized and asked the trial court to review the orders made to charge his wife PW2 and the Complainant for perjury. He said he had made up the story to save the Appellant.
  16. I have carefully considered the testimony of the Complainant and her mother PW2. The Complainant said that there were no people at the river. The Appellant fled after defiling her and left her crying. PW2 came after a short while and asked her why she was crying and she told her what had happened. PW2 helped her dress up. She also held her up and they walked slowly to the flat land. Afterwards, she pointed to the direction where the Appellant had fled. Her mother told her she was going home and told her to stay there. She then came back and took her home.
  17. On her part, PW2 stated that after she finished cooking, she went to the river to join the Complainant. When she got there, she saw the Appellant running away from the river. She called out to him but he did not look back and continued fleeing.
  18. The evidence of the Complainant and PW2 is contradictory. On the one hand, PW2 says she saw the Appellant fleeing, while the Complainant says she pointed to PW2 the direction the Appellant had fled. I also find it incredible that as a mother, PW2 would leave her injured daughter by the river where she had allegedly been molested, to go after the Appellant. She then went home and asked the Appellant to fetch water for her from the house and upon entering, she locked him inside. She began to interrogate him asking what he had done to the Complainant. It was only after this that she went back to the river to fetch her daughter. One would have expected that PW2's motherly instincts would have driven her to first get help for her injured daughter and deal with the Appellant later.



19. From the record, the only evidence that the Appellant was the assailant is that of the Complainant. None of the other witnesses witnessed the offence. The proviso to Section 124 of the *Kenya Evidence Act 1963 46 Evidence Act* allows the court to receive evidence of an alleged victim of a sexual offence, notwithstanding that it is the only available evidence and to record the reasons for believing the evidence. Section 124 provides as follows:

Notwithstanding the provisions of section 19 of the *Kenya Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

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.

20. For a court to convict an accused person of a sexual offence only on the basis of the uncorroborated evidence of the victim, such court must be satisfied that the victim is telling the truth and must record the reasons for so believing.
21. In her judgment, the trial Magistrate stated that the present case, the trial Magistrate stated that she found the evidence of the Complainant credible. She maintained eye contact and answered the questions succinctly and firmly.
22. In spite of the finding of the trial Magistrate, I find that the testimony of the Complainant and PW2 to be contradictory and inconsistent. The said contradictions and the inconsistencies remain unresolved. Then there is the conduct of PW2 of leaving her injured daughter unattended by the river while she went after the Appellant. Further, if the Appellant fled when he saw PW2 by the river, why did he not flee again when she found him at home and asked him to fetch water for her, if indeed he had defiled her daughter? As regards the time the incident took place, the Complainant was not sure and only stated it was in the afternoon and the sun was hot. PW2 did not also indicate the time she went to the river and heard the Complainant scream and saw her in the state she was in. The foregoing raises questions of the credibility of the evidence of the Complainant and PW2.
23. The Appellant denied committing the offence and stated that he had not seen the Complainant on the material date. Further, the Appellant and all his witnesses stated that PW2 did not like him. DW3 and DW4 vouched for his character, stating that he was well behaved. It is noted that DW4 later recanted his testimony that the Complainant had been told by PW2 to frame the Appellant. He said he had lied in a bid to save the Appellant. The question that then lingers in the Court's mind is whether his recanting of his earlier testimony was to save his wife and daughter from being charged with perjury. All these factors taken together place doubt in the mind of the Court. This doubt coupled with the contradictions and inconsistencies of the testimony of the Complainant and PW2 as well as the lack of credibility thereof, must be resolved in favour of the Appellant.
24. Section 111(1) of the *Kenya Evidence Act 1963 46 Evidence Act* provides:

When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:



Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

25. While it is not disputed that the Complainant was defiled, the time it happened and by whom cannot be determined from the evidence on record.
26. Section 8(1) and (2) under which the Appellant was charged provides:
  1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
  - (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
27. The court has already found that given the Complainant's age at the time the offence is alleged to have been committed, the Appellant ought to have been charged under Section 8(3) of the SOA. Even assuming the Complainant was 11 years old as per the charge sheet, upon conviction, the trial court was required to sentence him to the mandatory life imprisonment. In the premises, the sentence imposed of 12 years imprisonment is illegal and cannot stand.
28. After considering the entire record and analyzing the evidence, I find that the prosecution did not discharge its burden of proof against the Appellant, to the required standard. The evidence adduced was not sufficient to sustain the conviction. In the premises, I quash the conviction and set aside the sentence. The Appellant is hereby set at liberty unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED IN MALINDI THIS 14<sup>TH</sup> DAY OF NOVEMBER 2025**

**M. THANDE**

**JUDGE**

