



**Mweru v Republic (Criminal Appeal E024 of 2024)
[2025] KEHC 18911 (KLR) (18 December 2025) (Judgment)**

Neutral citation: [2025] KEHC 18911 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E024 OF 2024
WM KAGENDO., J
DECEMBER 18, 2025**

BETWEEN

CHAKA SAMUEL MWERU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Judgment delivered by Honourable David Odhiambo (SRM) on 8th May 2024 in Mombasa Chief Magistrate's Court Sexual Offence Case No. E021 of 2021)

JUDGMENT

Background

1. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act*, 2006. The particulars were that on diverse dates between February 2020 and 18th January 2021, at Bangladesh area of Jomvu Sub- County within Mombasa County, he unlawfully and intentionally caused his penis to penetrate the vagina of a girl aged 16 years.
2. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, particulars being that during the same period and place, he unlawfully touched the vagina of the complainant, a child aged 16 years, with his penis.
3. Upon trial, the Appellant was convicted and sentenced to ten (10) years' imprisonment.
4. Being dissatisfied with the conviction and sentence, the Appellant lodged the present appeal.

Grounds of Appeal

5. The appeal is premised on the following summarized grounds:



- a. The learned trial magistrate erred in law and fact by relying entirely on the evidence of the complainant.
- b. The trial court failed to resolve material contradictions, particularly regarding the identity of the Appellant and the amount of money allegedly given to the complainant.
- c. The learned magistrate failed to properly evaluate medical evidence showing that the complainant's hymen was not freshly broken, suggesting possible involvement of another person.
- d. The trial court misdirected itself by shifting the burden of proof and disregarding the Appellant's defence of a pre-existing grudge between him and the complainant's mother.
- e. The essential ingredients of defilement—penetration, age, and positive identification—were not proved beyond reasonable doubt.
- f. The benefit of doubt ought to have been resolved in favour of the Appellant.

Duty of the First Appellate Court

6. As a first appellate court, this Court is required to reconsider and re-evaluate the evidence afresh and draw its own conclusions, while bearing in mind that it did not see or hear the witnesses testify, as stated in *Okeno v Republic* [1972] EA 32.

Prosecution Case

7. PW1 (A.M), the complainant, testified that she was 16 years old. She stated that in February 2020, while on her way to church, a man known to her as James, whom she identified in court as the Appellant, used to give her money and he operated a shop within the estate.
8. She testified that on one occasion, the Appellant asked her to enter his shop, instructed her to undress, and defiled her. She alleged that this conduct continued over time, accompanied by gifts of money (“sadaka”).
9. On 17th January 2021, her mother found her with Kshs. 20, which she stated she had received from James. The following day, she was taken to hospital and the matter reported to the police.
10. Under cross-examination, PW1 admitted that her mother instructed her on what to write in her police statement and further admitted that she had previously had sexual intercourse with another man.
11. PW2 (Dr. Hadija Bashir) testified on behalf of the examining doctors. She confirmed that the complainant's hymen was broken, with no fresh injuries, bleeding, or discharge, and conceded that she did not personally examine the complainant.
12. PW3 (RML), the complainant's mother, produced the birth certificate confirming the complainant's age as 16 years and testified on the events leading to the report.
13. PW4 (PC William Kibuye), the investigating officer, testified on receiving the report, escorting the complainant for medical examination, and arresting the Appellant.

Defence Case

14. The Appellant gave sworn testimony. He stated that on 17th January 2021, the complainant's parents confronted him regarding a man named James allegedly giving their daughter money.



15. He denied the allegations and advised them to caution their daughter against soliciting money from people. He testified that the complainant's mother threatened him thereafter.
16. The Appellant further stated that when the alleged offence began in February 2020, he was with his expectant wife.

Submissions

17. The Appellant submitted that the complainant admitted being coached by her mother and having had sexual relations with another man, and that the prosecution evidence was inconsistent.
18. The Respondent submitted that the prosecution proved all elements of defilement beyond reasonable doubt, relying on the complainant's testimony, medical evidence, and proof of age.

Analysis and Determination

19. The offence of defilement is provided for under Section 8 of the *Sexual Offences Act*, while Section 11(1) provides for the offence of committing an indecent act with a child.
20. The prosecution must prove beyond reasonable doubt:
 - i. Penetration
 - ii. Age of the victim
 - iii. Positive identification of the perpetrator

Penetration

21. Penetration is defined under Section 2 of the *Sexual Offences Act* as the partial or complete insertion of the genital organ of a person into the genital organs of another person.
22. Penetration may be proved by direct or circumstantial evidence, including the testimony of the victim, as held in *Bassita Hussein v Uganda*, Supreme Court Criminal Appeal No. 35 of 1995.
23. In the present case, the complainant testified that the Appellant defiled her. This evidence was supported by medical documents, namely the PRC form and P3 form, which indicated that the complainant's hymen was broken.
24. However, the medical evidence revealed no fresh injuries, no bleeding, and no discharge. Further, the examining doctor testified that the examination was conducted nine days after the alleged incident, and the witness who produced the medical documents did not personally examine the complainant.

Age of the Victim

25. Proof of age is a critical element in sexual offences, as emphasized in *Kaingu Kasomo v Republic*, Criminal Appeal No. 504 of 2010.
26. In this case, the complainant's birth certificate was produced in evidence and showed that she was born on 1st June 2004, making her 16 years old at the time of the alleged offence.
27. The Court therefore finds that the age of the complainant was sufficiently proved beyond reasonable doubt.



Positive Identification of the Assailant

28. The complainant and her mother identified the Appellant in court. However, the complainant consistently referred to the alleged perpetrator as “James” and not “Samuel”, despite alleging that the acts occurred over a prolonged period of approximately one year.
29. Given the alleged long-standing interaction, it would reasonably be expected that the complainant knew the correct name of a neighbour operating a shop next door, who routinely gave her money and allegedly engaged in sexual acts with her.
30. The complainant further admitted under cross-examination that she had previously had sexual intercourse with another man and that her mother instructed her on what to record in her police statement.
31. No forensic or scientific evidence was adduced to directly link the Appellant to the alleged penetration.
32. While minor discrepancies in evidence may be overlooked, contradictions that go to the root of the prosecution case cannot be ignored, as held in *Joseph Maina Mwangi v Republic and Philip Nzaka Watu v Republic*.
33. In the present case, the inconsistencies relating to the identity of the assailant, the complainant’s admission of involvement with another man, and the acknowledged coaching by her mother substantially weakened the prosecution case.
34. The Appellant’s defence that he was framed following a confrontation with the complainant’s parents, when viewed together with the complainant’s admissions, raised a reasonable doubt in the prosecution’s case.

Conclusion

35. Having carefully re-evaluated the entire evidence on record, this Court finds that the prosecution failed to prove its case against the Appellant beyond reasonable doubt.
36. The doubts arising from the evidence must be resolved in favour of the Appellant.
37. Consequently, the conviction was unsafe.
38. The appeal therefore has merit, and it is allowed.
39. The conviction is quashed, and the sentence is set aside.
40. The Appellant shall be released forthwith, unless otherwise lawfully held.
41. It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF DECEMBER 2025.

WENDY KAGENDO JUDGE

In The Presence

The Appellant and His Advocate Mr Oduor Mr Ngiri And Mr Sirima For The State

Bebora Court Assistant

Signed By/for:

HON. LADY JUSTICE WENDY MICHENI

