



REPUBLIC OF KENYA



**Maina v Republic (Criminal Appeal E204 of 2022)
[2025] KEHC 18984 (KLR) (Crim) (11 December 2025) (Judgment)**

Neutral citation: [2025] KEHC 18984 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E204 OF 2022
AM MUTETI, J
DECEMBER 11, 2025**

BETWEEN

GEORGE WAWERU MAINA APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal against both conviction and sentence of 20 years imprisonment
in Criminal Case No. SO E 146 of 2016 at MAKADARA Law Court
by Hon. Kivuti and judgement delivered on 30th August, 2022)*

JUDGMENT

1. The appellant in this matter was tried for the offence of Defilement and convicted by the lower court. Aggrieved by the decision of the learned Honorable Magistrate he appealed to this court raising the following grounds;-
 - i. That , the learned Magistrate erred in law and in fact by failing to observe that the prosecution did not prove the elements of the offence beyond any reasonable doubt.
 - ii. That , the learned Magistrate erred in law and in fact by failing to inform the appellant of his right to representation thereby convicting him on a trial that was procedurally unfair contrary to Article 50 of *the constitution*.
 - iii. That , the learned Magistrate erred in law and in fact by failing to note and find that the medical evidence was benign and unable to prove penetration as a key element of defilement hence conviction cannot be safely sustained.



- iv. That , the learned Magistrate erred in law and in fact by upholding conviction and sentence without observing that the entire prosecution witnesses were incredible and unreliable thus unworthy of credit.
 - v. That , the learned Magistrate erred in law and in fact by failing to give my defense adequate consideration, and further failed to enact Section 169 (1) of the CPC while disowning my defense.
2. The duty of this court as a first appellate court is to re-evaluate the evidence tendered before the trial court and drawn it own conclusions as to whether the findings of the learned Hon. Magistrate can be supported by the evidence available.
 3. The High Court must however remain cognizant of the fact that unlike the trial court, this court did not have the opportunity to see and hear the witnesses thus due allowance must be made in that regard.
 4. The duty of the first appellate court is aptly captured in the case of of Okeno vs Republic [1972] EA 32 where the Court of Appeal stated as follows:-“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs Republic (1957) EA 336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs R (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs Sunday Post [1958] EA 424.”
 5. The conclusions drawn by the trial court do not bind the appellate court thus the court must draw its own independent conclusions based on the evidence and the law.
 6. This court has considered the submissions by the parties and scrutinized the record of the lower court from which the following emerged;-

Prosecution’s Case

7. PW1 Yvone Iganga was the complainant in this case and she gave evidence stating the following;-

“I am Yvone iganga we live in Bungoma. I am in class 7. On 16.10.2016 I had gone to take socks at the flat upstairs and George called me. He told me it's an important thing to tell me and I need to go to his house for him to tell me.

I went and he told me to remove my panty. I entered the house first and I removed the panty and he did sex on me he told me to remove it by force. I had fear and I just agreed to remove the panty. I had a full dress. He told me to lie on bed and he had sex. He removed his trouser and underwear and slept on me on his bed. He did not use condom. I felt pain when he did it. It was the 2nd time with the accused. The following day was Monday. I didn't feel well and I went to house and I felt bad, physically and I slept. The next day I still felt bad and the teacher told me to go back home. I felt dizzy as I went home my aunt asked me to say the truth and she noted

I was walking bad as if I was in pain, I was scratching walking as I had pain on the abdomen. I told her and she took me to the chief. My aunty is Carolyne .



I told her Waweru did it and we went to chief and two police went with us to arrest and an ambulance came for us to take us to Mama Lucy where I was treated. They tested me I was negative and I was given drugs for a month. We were given documents at Mama Lucy. I told aunty at night and we went to chief the next day the 18th. This is the document.

- Medical certificate - MFI - 1(a)

-PRC form -MFI-1 (b)” (emphasis added).

The evidence of Pw1 left no doubt that she was defiled and that it was the appellant who did it. The evidence was clear on identification of the appellant, age of the victim and on the issue of penetration.

8. The evidence of the victim was clear that the appellant on this particular occasion was doing it the second time.
9. The evidence of PW1 on penetration was corroborated through medical evidence by PW3 Jacinta Gatuyu of Mama Lucy Hospital who produced a PCR Form as Exhibit 1 confirming that PW1’s hymen was torn and was healing at the time of examination. PW3 further testified that PW1 informed her that her neighbor called her into her house and broke her virginity with no condom. The witness went further to state that he healing hymen was fresh and PW1 had a discharge.
10. PW4 Kezze Shako produced a P3 Form Exhibit 2. According to her, she examined PW1 on 2nd March 2017 after about 4 months from the date of the incident. PW4 confirmed that he observed an old tear at the hymen. The witness further stated that PW1 was 12 years old at the time and the evidence on age was corroborated by PW7 who produced the birth certificate as PEXH-4 confirming that PW1 was 12 years old at the time of the incident.
11. PW7 also testified that PW1 complained that she had been defiled by the appellant and produced her birth certificate in evidence. The birth certificate confirmed that she was barely 12 years of age at the time of the incident.
12. PW2 Caroline Wangila aunty to PW1 together with PW1 led the police to arrest the appellant.

Defence Case

13. The appellant gave an unsworn defense and according to him he was framed by the complainant together with one woman by the name Mama Njeri whom he alleged had a quarrel with his wife over water in the plot. In his testimony in defense the appellant stated:

“My name is George Waweru Maina. I live in Murang’a. Am unemployed. I understand the nature of charges against the child who is the complainant. The complainant told court that I defiled her more than 5 times but the medical documents indicate that I defiled her once. The evidence of the doctor and the child differed.”

Analysis And Determination

14. The prosecution in this case was under duty to establish the elements of the offence of defilement to wit; - penetration, identity of the perpetrator and the age of the victim. In *Fappyton Mutuku Ngui vs. Republic* [2012] eKLR, the Court held:-

“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”.



15. This court has anxiously scrutinized the evidence presented by the prosecution and it is clear that the victim PW1 was defiled by the appellant who was her neighbor. The appellant in his defense admitted that he actually defiled her once.
16. The evidence of the prosecution thus directly connected the appellant to the incident of defilement and all the three important ingredients of age of the victim, identity of the perpetrator and penetration were proved beyond a reasonable doubt.
17. PW1 in her testimony narrated vividly how the appellant had summoned her to his house, undressed her and had carnal knowledge of her causing her to bleed, suffer discomfort and pain in walking. PW1 was emphatic that the person who penetrated her was the appellant and she led PW2 and the police to arrest the appellant from his house.
18. It is therefore clear from the evidence of PW1 that the elements of penetration and identification were proved beyond a reasonable doubt thus the decision of the trial court on the two elements of the offence was supported by the evidence.,
19. Further PW1 was examined by PW3 and PW4 and the medical evidence confirmed that indeed she was penetrated.
20. The appellant in his defense took issue with what he referred to as contradiction between the victim's evidence and the doctor on the number of times that he was alleged to have had defiled the victim. The appellant in this court's view did not seem to realize that even by defiling the victim once, that evidence was sufficient enough and that any contradiction as to the number of times would only have had a bearing if the appellant was charged with various counts.
21. This court has considered the evidence of the prosecution witnesses and is satisfied that the offense of defilement was established and the issue of the number of times the appellant had committed the act would only have been material if at all the appellant was charged with numerous counts of defilement probably spanning over a period of time.
22. It is the view of the court that the contradiction identified by the appellant was immaterial and could not in any affect the decision of the trial court. In *Erick Onyango Odeng –vs- Republic (2014) eKLR* it was held:-“With regard to contradictions in the prosecutions cases the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case”
23. The contradiction on the number of times the appellant had committed the act are thus immaterial. The evidence of the victim Pw1 was credible and consistent. The same was corroborated by the appellant who admitted in his defense to having defiled the victim once.
24. On the issue of age of the victim, the birth certificate of the victim was produced by PW7 and it confirmed that at the time of the defilement PW1 was 12 years old thus satisfying the element of age as by law required.
25. The court of Appeal in *Edwin Nyambogo Onsongo vs Republic (2016) eKLR*, stated as follows in respect of proving the age of the victim in cases of defilement:

“....the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of



the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.”(emphasis added).

26. The birth certificate was sufficient prove of the ingredient of age and the evidence was corroborated by the evidence of Pw1, 2, 3 and 4.
27. In conclusion therefore this court finds that all the ingredients of the offence of defilement were adequately proved beyond a reasonable doubt thus the conviction of the appellant was safe. The appeal on conviction therefore fails.
28. In regard to the appeal on sentence, this court finds guidance in Kipkoech Kogo –vs- Republic Eldoret Criminal Appeal No.253/2003, where the Court of Appeal, stated as follows :-

“Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principal and must be interfered.”
29. The sentence imposed by the trial court in this matter is lawful and proper considering the age of the victim at the time the offence was committed.
30. This court finds that there is absolutely no basis to interfere with the sentence taking into account the totality of the circumstances in this case.
31. The appellant needs to know that engaging in sexual intercourse with minors comes with a heavy price. The punitive sentences under the *Sexual Offences Act* are meant to communicate to the wider public that the Kenyan society denounces such acts thus deterrent sentences ought to be meted out to deter would be offenders.
32. The appeal therefore has no merit on both conviction and sentence.
33. It is hereby dismissed and the appellant shall continue to serve the remainder of the prison term of 20 years.
34. It is so ordered.

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT AT NAIROBI THIS 11TH DAY OF DECEMBER 2025.

A. M. MUTETI

JUDGE

In the presence of:

Habiba: Court Assistant

Ms Ogwen for Appellant

Appellant - present

