



**Maina v Republic (Criminal Appeal E017 of 2024)  
[2026] KEHC 282 (KLR) (21 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 282 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
CRIMINAL APPEAL E017 OF 2024  
LN MUTENDE, J  
JANUARY 21, 2026**

**BETWEEN**

**DAVID MUTHONDIO MAINA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. David Muthondio Maina, the Appellant, was charged with the offence of Defilement contrary to Section 8(1) (4) of the *Sexual Offences Act*. Particulars of the offence were that on the 13<sup>th</sup> July, 2023 at around 1500 hours at [Particulars Withheld] in Nyandarua North Sub-County within Nyandarua County intentionally and unlawfully caused his male organ namely penis to penetrate the vagina of M.W.K. a child aged 17 years.
2. In the alternative, he faced the charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the 13<sup>th</sup> July, 2023 at around 1500 hours at [Particulars Withheld] in Nyandarua North Sub-County within Nyandarua County intentionally and unlawfully touched the vagina of M.W.K. with his penis.
3. Having denied the charges he was taken through full trial, convicted and sentenced to serve ten (10) years imprisonment for the alternative count of committing an indecent act with a child.
4. Aggrieved, the Appellant appealed on the grounds as follows;
  - a. That the standard of proof of beyond reasonable doubt was never attained at least, as the Appellant was convicted on the strength of the evidence of a witness who was not the victim.
  - b. That the learned trial Magistrate erred in law and fact by allowing M.W.(PW1) to testify as the victim whereas she is not the one who recorded statement at the police station as the victim.



- c. That the victim (PW1) was not a credible and truthful witness for failure to take an oath with the sole intention of avoiding cross – examination.
  - d. That the learned trial Magistrate erred in law and fact in failing to consider that the victim’s (PW1) testimony could not be relied upon to convict the accused.
  - e. That the learned trial Magistrate erred in law and fact by allowing LWM (PW2) to testify whereas she never recorded a witness statement at the police station.
  - f. That the learned trial Magistrate erred in law and fact by allowing police officers from Ng’arua Police Station to testify in court whereas the police station with jurisdiction of this case is Ndaragwa Police Station.
  - g. That the learned trial Magistrate erred in law and fact by allowing totally different witnesses to testify against the Appellant thus leading to miscarriage of justice.
  - h. That the learned trial Magistrate erred in law and fact by failing to note that there was no independent witness in this case to clear the doubt whether indecent act took place at all.
  - i. That the learned trial Magistrate erred in law and fact by handing over an illegal sentence to the accused after allowing strangers to testify against the Appellant.
  - j. That the learned trial Magistrate erred in law and fact by sentencing the accused to imprisonment on the alternative charge while there is no analysis and reason on how the court arrived at the conviction.
  - k. That the learned trial Magistrate erred in law and fact in rejecting the Appellant’s defence without giving any cogent reason.
  - l. That the sentence is illegal, dangerous and against the weight of the evidence tendered by the defence and the law and ought to be overturned.
5. Briefly, facts of the case were that PW1 the complainant was herding cows on 13<sup>th</sup> July, 2023, at about 3.00pm when the person she identified as the Appellant went and asked her to get close to him. He took her to a nearby bush, removed her clothes, lay on her and violated her sexually. She went home but did not divulge the information to her parents out of fear.
  6. However, PW2, NW was informed of the incident by the complainant’s friend, she reported the matter to Nyonjoro Police Station.
  7. The complainant was examined by PW3 Martha Wacheke Mbogo, a Clinical Officer on 25/07/2023. She had an old ruptured hymen. But, there were no bruises or lacerations. Therefore, she failed to establish if defilement occurred. The Appellant was arrested and handed over to PW4 No. 76246 PC Joshua Ngetich who investigated the matter and caused the Appellant to be charged.
  8. Upon being placed on his defence the Appellant stated that he left at 4.00pm and arrived home at 5.00pm then did some work. That he has been having a dispute with his neighbours. He denied having committed the offence and argued that the child was couched.
  9. The appeal was disposed through written submissions by the Appellant. The Respondent did not file submissions.
  10. It is urged that there was material contradiction in witnesses who recorded statements at the police station and witnesses who testified. As correctly submitted there is some inconsistency in the names in the charge sheet, evidence and what ultimately appears in the judgment. The name of the complainant



in the charge sheet is M.W.K. The complainant stated her name to be M.W. (“Mar.... Wam...”). But the judgment introduced a totally different name, “Mau... Wan...”.

11. Secondly, PW2 in proceedings was NWK. But the name captured for PW2 in the Judgment appears as LWM.
12. Apparently, the complainant’s name is materially incorrect in the judgment. Misnaming the complainant by the Judicial Officer is a matter that went to the substance of the case which is prejudicial to the complainant. The question to be posed is who lodged the complaint, and to whom was the determination of the matter concerned? This is a challenge that goes to the root of the case as far as identification of the complainant/victim is concerned.
13. This is a peculiar case where the trial is vitiated by a mistake of the court. In *Fatehali Manji v Republic* [1996] EA 343 it was held that;  

“In general a retrial court will be ordered when the original trial was defective of illegal; it will be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial Court for which the prosecution is not to blame, it does not necessarily follow that a retrial should only be made where the interests of justice require it.”
14. Each case is considered depending on its facts and circumstances. Interest of justice would call upon the case being heard by an upright court that will consider evidence and witnesses that appear before it. Due to the peculiarity of the case. I do quash the conviction, set aside the sentence imposed and direct that the Appellant be remanded at Nyahururu Police Station to be produced before the Chief Magistrate’s Court, Nyahururu, for a retrial on 22<sup>nd</sup> January, 2026.
15. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 21<sup>ST</sup> DAY OF JANUARY, 2026.**

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**L.N. MUTENDE**

**JUDGE**

