



**Makupe v Republic (Criminal Appeal E018 of 2025)  
[2026] KEHC 918 (KLR) (30 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 918 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARSEN  
CRIMINAL APPEAL E018 OF 2025  
JN NJAGI, J  
JANUARY 30, 2026**

**BETWEEN**

**MWANDONGA YAWA MAKUPE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence by Hon.  
R. C. Mwachi, RM, in Mpeketoni Principal Magistrate's Court  
Sexual Offence Case No. E004 of 2024 delivered on 18/12/2024)*

**JUDGMENT**

1. The Appellant herein was convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on diverse dates between 1<sup>st</sup> September 2023 and 15<sup>th</sup> January 2024 at (name withheld) in Lamu West Sub County within Lamu County he intentionally caused his penis to penetrate the vagina of NCK (herein referred to as the complainant), a child aged 13 years.
2. The appellant was sentenced to serve 20 years imprisonment. He was aggrieved by the conviction and the sentence and lodged the instant appeal. The grounds of appeal are that;
  1. That the learned magistrate erred in law and facts by failing to consider that the prosecution did not prove their case beyond reasonable doubt as required by the law in breach of section 109 and 110 of the *Evidence Act*.
  2. That the learned trial magistrate erred in law and facts by failing to consider sharp contradictions by the prosecution in contravention of Section 163(1)(c) of the *Evidence Act*.
  3. That the learned magistrate erred in law and facts by failing to consider the negligence and ignorance of the police service unit.



3. The case for the prosecution was that the complainant was a 13 year-old school going child. She was living with her mother PW4 at M. village. That the Appellant was their neighbor and was living about 200 meters from the complainant's home. That the Appellant started to make advances at the complainant and went to her home several times. That on a date she could not remember in the month of January 2024 the Appellant called her and asked her to go to his house. She went there and found him alone in his house. He undressed her and defiled her on a mat on the floor. After the incident she went home.
4. Later on the 17<sup>th</sup> January 2024, the Appellant and the complainant were taken to Witu police station by a village elder PW2 and a National Police Reservist officer PW3 on allegations that the village elder had received a report that the Appellant was living with the complainant as a wife. The mother to the complainant was taken to the police station. The complainant was then taken to Witu health centre where she was examined by a clinical officer PW 5 who found her with normal genitalia, a whitish discharge and a missing hymen. The clinical officer completed a P3 form for the complainant.
5. The case was investigated by PC Mengich PW6 then of Witu police station who interrogated the complainant and recorded her statement. He obtained her birth notification certificate that indicated that she was aged 13 years. He charged the Appellant with the offence of defilement. During the hearing of the case in court, the investigating officer produced the complainant's birth notification certificate as exhibit, P.Exh.1. The clinical officer PW5 produced the treatment notes and the P3 form as exhibits, P.Exh. 2 and 3 respectively.
6. When placed to his defence, the Appellant stated in an unsworn statement that on the 17/1/2024 he was at his farm when he was attacked by Hussein Ramadhan PW2, Joseph Kamaru PW3 and one Charles Mkora. They asked him whether the complainant was at his house. He said he did not know her. They took him to his house where they searched but did not find her. They took his money amounting to Ksh.20,000/= . He was taken to a village unknown to him where the people called the complainant. She said she did not know him. He was taken to the police station where he was beaten while being forced to admit that he knew the complainant.
7. It was further evidence of the Appellant that the police reservist, PW3, had on the 10/1/2024 gone to him, the Appellant, and told him to leave his land as he (PW3) had entered into a land sale agreement with the Appellant's boss. That if he did not leave he was going to teach him a lesson.

### **Submissions**

8. The appeal was canvassed by way of written submissions. The appellant submitted that the age of the complainant was not proved and that what was presented before the court in regard to the age were mere assertions.
9. It was submitted that the evidence of PW1, 2, 3 and 4 was full of inconsistencies. That no evidence was placed before the court to prove that he was living with the complainant as alleged by PW2 and PW3.
10. The appellant submitted that the case was fabricated due to a grudge between his father and the mother to the complainant. Further that the trial court did not consider his defence which was credible.
11. The Respondent on the other hand submitted that the age of the complainant was proved by the birth notification certificate that indicated that she was aged 13 years. That the evidence of the clinical officer supported the evidence on defilement. That the appellant was well known to the complainant and there was no possibility of mistaken identity. That the trial court warned itself of the danger of convicting on the evidence of a single witness. That the evidence of the complainant that the appellant defiled her was believable.



## Analysis and determination

12. This being a first appeal, this court is mandated to analyze and re-evaluate the evidence afresh in line with the holding of the Court of Appeal in the case of *Kiilu & another v Republic* [2005]1 KLR 174 that:

An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. 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 findings 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."

13. The elements of the offence of defilement that the prosecution is required to prove beyond reasonable doubt are: proof of the age of the victim, proof of penetration and proof of the identity of the perpetrator, see the *Charles Wamukoya Karani vs. Republic*, Criminal Appeal No. 72 of 2013.
14. Starting with the element of the age of the complainant, the trial court while relying on the birth notification certificate found that the complainant was aged 13 years at the time of the incident. The Appellant however argued that the age of the complainant was not proved.
15. The law is that the age of a person can be proved in various ways. In the case of *Mwalongo Chichoro Mwachembe -Vs- Republic*, Msa Cr.App. No. 24 of 2015 (UR), the Court of Appeal held as follows:

"... 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."

16. The complainant in this case stated that she was aged 14 years at the time she testified in court in May 2024. A birth notification certificate was produced in court that showed that the complainant was born on 26/7/2010, which placed her age in January 2024 at 13 ½ years. Proof by a birth notification certificate is a credible way of proving the age of a person. The complainant's age was therefore proved at 13 years.
17. On the element of penetration, section 2 of the *Sexual Offences Act* defines the same as:
- "the partial or complete insertion of the genital organs of a person into the genital organs of another person."
18. The prosecution had the duty to prove that the complainant was partially or fully sexually penetrated by the Appellant.
19. The trial court made a finding that penetration was proved by the evidence of the clinical officer who examined the complainant. However, the clinical officer only found the complainant with a missing hymen and nothing more. There was no evidence that the hymen was freshly broken. In the premises there was no medical evidence to support the evidence of the complainant that she was penetrated by



the Appellant. The finding of the trial court that medical evidence proved the defilement was a wrong finding on the part of the trial magistrate and not based on the facts that were before the court.

20. However, absence of medical evidence to prove a charge of defilement or rape is not fatal to the case as the offences can be proved in other ways other than by way of medical evidence. In *Kassim Ali v Republic* (2006) eKLR, the Court of Appeal stated that;

The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence.

21. The question then is whether there was sufficient oral or circumstantial evidence to support the charge of defilement.
22. Section 124 of the *Evidence Act* allows the court in sexual offence cases involving children to convict on the sole evidence of the child victim if the court is satisfied that the child is telling the truth. The court is required to record reasons for such a finding.
23. The trial court made a finding that the complainant was firm and consistent in her evidence. That her evidence was not shaken in cross-examination and there was no reason for her to lie against the Appellant. That the Appellant's defence was a lie.
24. The complainant in the case was the only witness on the defilement by the Appellant. The question was whether she was telling the truth that she was defiled the Appellant.
25. The Court of appeal in the case of *Ndungu Kimanyi v Republic* [1979] KLR 283, held the following on credibility of witnesses:

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.

26. The Appellant was charged with defiling the complainant on diverse dates between the months of September 2023 and January 2024. The investigating officer PW6 stated in his evidence that the complainant stated in her witness statement that she was defiled by the Appellant on diverse dates between September 2023 and January 2024. However, the complainant in her evidence in court mentioned only one incident when the Appellant defiled her in the month of January 2024 on a date she could not remember. What then is the truth of the matter? Did the Appellant defile her severally between the months of September 2023 and January 2024 or it was only once in January 2024? Why would the complainant have forgotten such a thing if the Appellant had defiled her for three months before January 2024? In my view, these discrepancies were enough to create doubt in the mind of the court that the complainant was an unreliable witness which made it unsafe to rely on her evidence to convict the Appellant.
27. The court takes note of the fact that the complainant never made a report of defilement to anybody before she was arrested. The evidence adduced before the trial court shows that the complainant was arrested by the village elder PW2 and a National Police Reservist PW3 on allegations that she was living with the Appellant as a wife. The two took her to the police station without even the knowledge of her mother, PW4. The witnesses however never called any evidence proving that the Appellant was living with the complainant as a wife. That allegation remained as heresy. The complainant herself did not explain why she was arrested by PW2 and PW3.



28. In view of the foregoing, I am not satisfied that the trial court properly assessed the credibility of the complainant as to come to the conclusion that she was a credible witness. In my assessment she did not come out clearly as a truthful witness when she could not tell the court the number of times, if there were such, the Appellant had defiled her. An accused person should not be convicted due to the weakness of his defence but only on the strength of the evidence of the prosecution witnesses. The reasons given by the trial court for believing the evidence of the complainant failed to consider the discrepancies in her evidence. In my view, it was not safe to convict on the sole basis of the evidence of the complainant, result whereof the Appellant should have been accorded the benefit of doubt.
29. The upshot is that this court finds that the charge against the Appellant was not proved beyond reasonable doubt and the appeal is therefore merited. Consequently, the conviction entered by the trial court on the Appellant is quashed and the sentence thereof set aside. I order the Appellant be set at liberty forthwith unless lawfully held.

**DELIVERED, DATED AND SIGNED AT GARSEN THIS 30<sup>TH</sup> DAY OF JANUARY 2026.**

**J. N. NJAGI**

**JUDGE**

In the presence of:

Mr. Oluoch for Respondent

Appellant – present virtually at GK Prison Malindi

Court Assistant - Rahma

