



**Makunza v Republic (Criminal Appeal E053 of 2023)
[2026] KEHC 359 (KLR) (23 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 359 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E053 OF 2023
M THANDE, J
JANUARY 23, 2026**

BETWEEN

LAKI KALUME MAKUNZA 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(4) of the *Sexual Offences Act* (SOA). The particulars of the offence were that on diverse dates between June 2022 and 9.1.23 at [Particulars Withheld], Kayafungo location, Kaloleni subcounty within Kilifi county, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of S. S. F. (the Complainant), a child of 16 years. The Appellant was sentenced to serve a term of 10 years imprisonment.
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 that the trial court failed to consider his defence.
3. The Respondent opposed the appeal vide written submissions dated 25.3.24. The Respondent submitted that the 3 elements of the offence of defilement, namely age of the Complainant, the act of penetration and identification of the Appellant as the perpetrator were proved. The Respondent concluded by stating that “it is our humble submission that this Application lacks merit and hence the same to be dismissed with costs”. This is a clear misapprehension of what the Respondent was submitting on.
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. The Complainant testified on 9.3.23, and stated that the Appellant was known to her and that he was her neighbor. She then stated that she did not know him. At this point, prosecution applied to step down the Complainant “as she is not talking and is refractory”. The prosecutor further applied that the Complainant be remanded as she was unwilling to cooperate. The trial Magistrate stood down the Complainant and remanded her at Malindi Children’s Remand until she testified.
6. On 6.4.23, the Complainant was taken to court where she testified that she met the Appellant, a boda boda rider in June 2022 and that they began an affair. He used to come for her and take her to his house and they had sexual intercourse on several occasions. At this point, the prosecution applied to step down the Complainant and have her remanded in custody. The trial court allowed the application and remanded the Complainant in custody until 20.4.23. On that date, the Complainant was not taken to court and on the prosecution’s application, the trial court committed her to Mahali Pa Usalama Rescue Centre, Mombasa for 6 months to undergo counselling.
7. On 22.5.23, the Complainant was brought back to court and testified. She stated that the Appellant used to eat at her mother’s hotel. He befriended and seduced her. A week after their relationship began in June 2022, the Appellant took her to his house where they undressed and the Appellant penetrated her vagina with his penis. The Appellant took the Complainant home at about 3am. After a few days, he came for her at 9pm and they had sexual intercourse and he returned her home at 3am. This was repeated again in October 2022. In December, when she developed signs of pregnancy, her mother took her to hospital in Gotani and the pregnancy was confirmed. Her mother gave her tablets which she took and she lost the pregnancy. Later her mother began to abuse the Complainant and she went to the Appellant’s home. While there, her father came with police and both the Complainant and the Appellant were arrested. The Complainant was taken to hospital for examination and the P3 form was filled.
8. The manner in which the trial Magistrate handled the Complainant is rather unsettling. To begin with, she allowed the Complainant to be stood down and remanded in custody until she testifies, on the claim by the prosecution that she is a refractory witness.
9. The law on refractory witnesses is contained in Section 152 of the Criminal Procedure Code which provides as follows:
 1. Whenever a person, appearing either in obedience to a summons or by virtue of a warrant, or being present in court and being verbally required by the court to give evidence—
 - a. refuses to be sworn; or
 - b. having been sworn, refuses to answer any question put to him; or
 - c. refuses or neglects to produce any document or thing which he is required to produce; or
 - d. refuses to sign his deposition, without offering sufficient excuse for his refusal or neglect, the court may adjourn the case for any period not exceeding eight days, and may in the meantime commit that person to prison, unless he sooner consents to do what is required of him.
 2. If the person, upon being brought before the court at or before the adjourned hearing, again refuses to do what is required of him, the court may again adjourn the case and commit him for the same period, and so again from time to time until the person consents to do what is so required of him.



3. Nothing contained in this section shall affect the liability of any such person to any other punishment or proceeding for refusing or neglecting to do what is so required of him, or shall prevent the court from disposing of the case in the meantime according to any other sufficient evidence taken before it.
10. Flowing from the foregoing, it is clear that a refractory witness is one who, on being verbally required by the court to give evidence, refuses to be sworn, or having been sworn, refuses to answer questions put to him, or declines or neglects to produce a document or thing that is required of him, or without sufficient excuse, refuses to sign his deposition. When any of the foregoing happens, the court may adjourn the matter and for a period not exceeding 8 days, and may also commit such a witness to prison, until he agrees to do that which is required of him. Further failure to comply will attract the consequences in Section 152(2) and (3).
11. From the record, there is no evidence that the Complainant declined to be sworn or to answer any question put to her on 9.3.23 when she was put on the stand. It would appear that the prosecution sought that she be stood down and remanded for stating that she does not know the Appellant. From the Complainant's testimony, she did not qualify to be declared a refractory witness as provided under Section 152 of the Criminal Procedure Code. If anything, she could only have been said to be a hostile witness. Black's Law Dictionary Tenth Edition defines a hostile witness as:

A witness who is biased against the examining party, is unwilling to testify, or is identified with an adverse party.
12. The trial Magistrate then, without applying her mind to the requirements of the law, proceeded to stand down the Complainant and remanded her in custody. Notably, she did not remand the Complainant for a period not exceeding 8 days as required by law, but remanded her until she testifies. She then fixed the next hearing date for 27.3.23. On that date, the trial Magistrate ordered that the Complainant remain in custody until 3.4.23. The Complainant was brought to court on that day and no sooner had the Complainant began to testify, than the prosecution applied to have her stood down and remanded in custody. Without being given any reasons, the trial Magistrate obliged and remanded the Complainant until 20.4.23. On this day, the prosecution told the court that the Complainant had not been brought to court due to a logistical problem and applied that she be referred to Mahali pa Salama Rescue Centre Mombasa. Again, the trial Magistrate, without being given any grounds committed the Complainant to the said centre for 6 months to undergo counselling. A month later on 22.5.23, the Complainant was brought to court and she testified.
13. The procedure adopted by the learned trial Magistrate was clearly wrong especially the decision to remand the witness in custody and that for a period exceeding that provided in law. It is clear to this Court that the remanding of the Complainant in custody as the trial Magistrate did was unjustified and unsupported by law.
14. From the circumstances herein, it would appear that the Complainant being a hostile witness, was locked up in custody for over 2 months to secure her co-operation. She apparently became co-operative on 22.5.23 when she was brought to court, changed her testimony and implicated the Appellant. Her evidence was unreliable.
15. It is for instance noted that although the Complainant stated that she was pregnant but lost the pregnancy, PW1 Chigulu Mwangolo a senior clinical officer at Mariakani Sub-county Hospital who examined the Complainant testified that there were no pregnancy features. PW3, the Complainant's mother also did not say that the Complainant was or had been pregnant. The Complainant was evidently an unreliable witness and her evidence ought to have been construed accordingly. I am



fortified in this regard by the holding in Daniel Odhiambo Koyo v Republic [2011] KECA 66 (KLR) where the Court of Appeal stated:

There is a thin line between a hostile and refractory witness. Both are people who display reluctance in giving evidence as required of them. Normally a court will take a perverse view of the credibility of the hostile or refractory witness in view of his shift in position regarding his statement to the police regarding the case against the accused or is reluctance to testify.

16. In her judgment, the trial Magistrate found the prosecution case believable and firmly corroborated. As the record shows, the Complainant initially stated that she did not know the Appellant. It was after being held in remand for a period of over 2 months that she changed her story and implicated the Appellant.
17. Given that the Complainant was the primary witness, my view is that the trial Magistrate fell in error in finding that the prosecution case was proved to the required standard, as it clearly was not.
18. In light of the foregoing, my finding is that the conviction of the Appellant on the Complainant's evidence was unsafe. I accordingly allow the appeal, quash the conviction and set aside the sentence imposed on the Appellant. He is forthwith set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 23RD DAY OF JANUARY 2026

M. THANDE

JUDGE

