Kaingu v Republic (Criminal Appeal E069 of 2023)
[2026] KEHC 1672 (KLR) (18 February 2026) (Judgment)

Neutral citation: [2026] KEHC 1672 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL E069 OF 2023

JN NJAGI, J

FEBRUARY 18, 2026

BETWEEN

MANENO KAINGU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. R. M. Amwayi, Senior Resident Magistrate, in Kaloleni Principal Magistrate's Court Sexual Offence Case No. E035 of 2021 delivered on 21/7/2022)

JUDGMENT

1. The Appellant herein was tried and 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 14th August 2021 (name withheld) village within Kilifi county he intentionally and unlawfully caused his penis to penetrate the vagina of TK (herein referred to as the complainant), a child aged 13 years.

2. The Appellant was sentenced to serve 10 years imprisonment. He was aggrieved by the conviction and the sentence and lodged the instant appeal. The grounds of appeal are that:

    1. The learned trial magistrate erred in law and fact by convicting the Appellant in reliance on the evidence of PW1 who was a child of tender years without physically conducting a voire dire examination hence violated his rights to fair trial.

    2. The learned trial magistrate erred in law and fact by convicting the Appellant for the offence of defilement without proper finding that the medical evidence did not prove the charge.

    3. The learned trial magistrate erred in law and fact by considering the evidence of PW4 which was not corroborated by the complainant (PW1).

4. The learned trial magistrate erred in law and fact by holding that the prosecution proved their case beyond reasonable doubt.

Prosecution case

3. The case for the prosecution is that the complainant was at th material time a class 4 primary school pupil. She was living with her father PW3. That on the material day the complainant was at home when the Appellant who is from her village found her washing dishes. He held her hand and took her to a nearby house which was unoccupied. He removed her panties and removed his trousers and panties. He ordered her to lie on her back on the floor. He inserted his penis into her vagina. After he finished he dressed up and left. The complainant went and reported to a neighbour called Mama Mishi who informed her father. They reported to the police. She went for treatment at Mariakani sub county hospital.

4. A neighbour to the complainant Jefwa Martin PW4 testified that the complainant and the Appellant are his neighbours. That on the material day at around 1pm he was on his way to his shamba when he heard a girl screaming in a house that had no door. He went to check and found the Appellant and the complainant inside the house. They were standing while facing each other. The Appellant had his trousers lowered to his knees. There were sacks spread on the floor. He inquired what was the problem was. The Appellant said they were not doing anything wrong. The complainant told him that the Appellant had done something bad to her. He went and informed his mother what he had seen.

5. A clinical officer at Mariakani sub county Hospital PW2 told the trial court that the complainant was taken to their hospital on 19/8/2022 with allegations of sexual abuse. He examined her and found her with a missing hymen. A laboratory test was done that turned negative. He completed her P3 form.

6. The case was investigated by PC Winnie Murrei PW5 who said that the complainant and her father reported the incident to the police on 19/8/2022. She interrogated the complainant and escorted her to hospital. That the complainant led her to the Appellant and arrested him. She charged him with the offence. During the hearing of the case in court, the clinical officer PW2 produced the P3 form, the treatment notes and lab request form as exhibits, P.Exh.1, 2 and 3 respectively.

Defence case

7. When placed to his defence the Appellant stated in a sworn statement that he was arrested by a “nyumba kumi” elder on 20/8/2021 and taken to the police station. He was not told the reason for his arrest. He was then charged with an offence he did not know anything about. He denied that he defiled the complainant. He said that his parents have a boundary dispute with the parents of the complainant. That the fact that the witnesses gave varying evidence on the age of the complainant showed that they were lying.

Submissions

8. The Appellant submitted that the trial court did not conduct voir dire examination properly as it never put questions and answers to the child before allowing her to give sworn evidence in court. It was submitted that the trial magistrate just wrote a ruling without conducting voir dire examination which fell short of the standard required by the law.

9. It was submitted that the medical evidence presented before the court did not support the charge. That absence of hymen is not proof of defilement. That the complainant was not found with any injuries in her genitalia.

10. It was submitted that the complainant did not mention that PW4 went to the scene where she was defiled. In any case the complainant did not explain what he had done to her apart from saying that he had done something bad to her. That that does not mean that he defiled her. It was submitted that the charge against the Appellant was not proved.

11. The Respondent on the other hand submitted that the charge of defilement was proved beyond reasonable doubt. That the age of the complainant was proved by the child health card that indicated the date of birth of the complainant which placed the age of the complainant at the material time at 13 years. That penetration was proved by the oral evidence of the complainant. That her sole evidence was sufficient that penetration occurred as stipulated by section 124 of the *Evidence Act*. That notwithstanding that the evidence of the complainant was corroborated by PW4 who is a neighbour to the minor who found the Appellant and the complainant in a house where PW4 had heard a child crying. That PW4 saw the Appellant`s trousers lowered to his knees and there were sacks spread on the floor. That the evidence of the complainant was supported by the evidence of the clinical officer, PW2. Therefore, that penetration was proved.

12. It was submitted that the defence of the Appellant that there a boundary dispute means that the Appellant and the complainant are neighbours and therefore that the Appellant was properly identified by the complainant.

13. It was submitted that the Appellant's defence was an afterthought as he did not raise it when he cross-examined the prosecution witnesses.

Analysis and determination

14. This being a first appeal, this court is mandated to analyze and re-evaluate afresh the evidence adduced before the trial court in line with the holding in the case of Odhiambo v Republic Cr. App No. 280 of 2004 (2005) 1 KLR where the Court of Appeal held that:

> "On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".

15. The appeal herein is based on grounds that the trial court did not conduct a proper voir dire examination; that the medical evidence did not support the charge; that the evidence of PW4 was not corroborated by the complainant and that the charge was not proved beyond reasonable doubt.

16. I have considered the grounds of appeal, the evidence adduced before the trial court and the submissions filed by the Appellant and the Respondent.

17. The ingredients of the offence of defilement are proof of the age of the victim, proof of penetration and proof of identity of the perpetrator, see George Opondo Olunga v Republic [2016] eKLR.

18. On the question of age of the complainant herein, the complainant told the trial court that she was aged 15 years though she could not remember her year of birth.

19. The father to the complainant on the other hand stated that the complainant was aged 14 years though he referred to he child health card, P.Exh.4, that indicated that she was born on 1/3/2008 which placed her age at the material time at 13 years. The trial court considered the evidence and went by the age indicated in the child health card and held that the girl was at the time aged 13 years. The age of a person may be proved in various ways including by way of documentary evidence and oral evidence.

20. The age of a person may be proved in various ways including by way of documentary evidence and oral evidence. In the case of Mwalongo Chichoro Mwajembe -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."

21. The child health card which was issued immediately after the birth of the complainant was a proper way of proving the age of the complainant. I therefore agree with the trial court that the complainant was at the material time aged 13 years.

22. The record of the trial court indicates that the trial magistrate conducted a voir dire examination in the following manner:

> Voir dire
>
> I have orally examined the complainant minor who informs me she is 15 years old at (particulars withheld) primary school. She is in class 7 at (particulars withheld) primary school. She is an intelligent girl who has answered my questions correctly. She is aware of her court environment. She understands the importance of telling the truth in court. She also understands the meaning of taking oath. She shall be sworn.

23. The law requires voir dire examination be conducted on children of tender age before their evidence is taken in court. A child of tender age was defined in the case of Kibageny Arap Kolil v Republic [1959] EA 92 to mean a child under the age of fourteen years.

24. The purpose of voir dire was explained by the Court of Appeal in Johnson Muiruri vs Republic [1983] KLR 445 as follows:

1. "Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.

2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.

3. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.

4. A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.

5. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction."

25. The complainant herein was of the age of 13 years. The court record indicates that after the voir dire examination, the trial magistrate recorded down her opinion in the proceedings that the child understood the importance of telling the truth and appreciated the meaning of taking oath. She then ordered that child gives sworn evidence. The question is whether failure by the trial court to record the questions and answers during voir dire examination vitiated the trial.

24. In the case of DMK V Republic (Criminal Appeal E056 of 2022 (2023) KEHC 25235 (KLR) (19 November 2023) (Judgment) the trial magistrate conducted a voir dire examination in a similar manner as in this case in the following words:

> Court- 'I have orally examined the complainant minor who informs me she is 13 years old and in grade 4 at (particulars withheld) Primary School. She is aware of her court environment. She is an intelligent girl who has answered all my questions satisfactorily. She is aware that she must tell the truth in court and that lying is a sin. She therefore understands the importance of telling the truth in court and appreciates the meaning of taking oath. She shall be sworn.'

26. In an appeal against the judgment, Justice A. Ndung`u cited the Court of Appeal decision in DWM v Republic (2016) eKLR where the court expressed itself as follows on the manner of conducting voir dire examination:

> "It is evident from the above that the learned trial magistrate did not reflect in the record the questions put to HW during the voir dire administration but reflected her responses to those questions. The need for the administration of voir dire on minor witnesses before reception of their testimonies especially in criminal trials is entrenched in Section 19 of the *Oaths and Statutory Declarations Act* Cap 15 Laws of Kenya. This provision does not of itself provide for the format to be applied in the course of such administration. The format used has basically evolved through case law. In Sula v Uganda [2001] 2EA 556 the Supreme Court of Uganda approved two formats. The first one is where the trial court can write down the questions put to the witness and the answer of the witness in the first person in the words spoken by the witness in a dialogue form and then make its conclusion after the dialogue. In the second format the court may omit to record the questions put to the witness but record the answers verbatim in the first person and then make his conclusion thereafter. In Patrick Kathurima v Republic Nyeri CRA 137 of 2014 this Court after reviewing case law on the subject observed thus:-
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> "It is best, though not mandatory, in our context that the questions put and the answers given by the child during voir dire examination be recorded verbatim as opined by the English Court of Appeal in Regina v Compell (Times) December 20, 1982 and Republic v Lalkhan [1981] 73 CA 190 for the benefit of the appellate court which must satisfy itself on whether that important procedure was properly followed.
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> "On account of the above observation this court in the Kathurima case vitiated the prosecution case totally on account of it having been anchored on the minor's contradictory

evidence and on that account allowed the appeal in its entirety. There was however no hard and fast rule laid down by this Court in the Kathurima case (supra) that in all cases where voir dire procedure had not been strictly administered the prosecution case stood vitiated. Each case has to depend on its own set of facts and that is why the court observed thus:-

"It is best though not mandatory in our context that the question put and the answers given by the child during the voir dire examination be recorded...

"The trial magistrates' failure to reflect on the record the questions put to HW during the voir dire examination was not therefore per se fatal to the prosecution case. The sustainability or otherwise of the prosecutions' case solely depended on whether the evidence on which it was anchored met the thresh hold of proof beyond reasonable doubt....

In this appeal, in response to a questions put to HW. during the voir dire examination, she responded that she would answer all questions put to her correctly. She was five (5) years old. Her testimony was coherent. When the appellant stood to cross-examine her she at first broke down. She was stood down for a while. After she composed herself and then took the witness stand again, she was cross-examined at length by the appellant but never faltered in her responses to questions put to her by the appellant. She was coherent. All the answers she gave were sensible. This is a clear indication that HW was intelligent, she had a good grasp of the events that occurred during the defilement and was obviously truthful in what she was telling the court. Both courts below believed HW was truthful. We find no justification to interfere with that finding. The appellant's trial was therefore not vitiated by the learned trial magistrate's failure to conduct the voir dire examination of HW in a particular manner, as asserted by the appellant."

27. The court in DMK V Republic (supra) followed the above cited Court of Appeal decision and came to the conclusion that the manner the voir dire examination was conducted was not fatal to the prosecution case. I am also of a similar view in the instant appeal. Though the manner the voir dire examination was conducted was not the best, it was not fatal to the prosecution case though the question and answer format is to be preferred. It is clear from the evidence of the complainant as given in the trial court that she was an intelligent girl. She ably answered the questions put to her by the appellant during cross-examination. The argument by the appellant that the manner the voir dire examination was taken was defective is dismissed.

28. The next issue is whether the Appellant penetrated the complainant. The trial court in its judgment held that the evidence of the complainant that she was penetrated by the Appellant was sufficiently corroborated by the medical evidence of the clinical officer, PW2.

29. 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'.

29. The medical evidence adduced against the appellant in this case is that the complainant had normal genitalia. The hymen was missing but there was no evidence to prove that it was freshly torn. Though the clinical officer formed an opinion that there was penetration into the girl's vagina, this was not supported by medical evidence. The mere absence of hymen is not proof of defilement. There was no conclusive evidence of penetration. There was thus no medical evidence to support penetration.

30. However, lack of medical evidence in support of defilement is not fatal to a charge of defilement as the same can be proved by the oral evidence of the victim. In Kassim Ali V Republic [2006] eKLR the court noted that:

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

31. More so, the proviso to Section 124 of the *Evidence Act* allows a court in sexual offence cases involving children to convict an accused where the only evidence in the case is that of the child victim if the court is satisfied that the child is telling the truth. The court is required to record down the reasons for believing that the child is truthful.

32. I have on my part keenly examined the oral evidence adduced before the trial court on penetration. The complainant gave a detailed narration of how the appellant picked her at her home, led her to an unoccupied house where he defiled her by inserting his penis into her vagina. The complainant then reported to a certain Mama Mishi who informed her mother. The trial court found the evidence of the complainant to be truthful. I have no reason to differ with the finding. The Appellant was a person well known to the complainant. She did not have any reason to lie against him.

33. The evidence of the complainant that the appellant took her to an unoccupied house was corroborated by Jefwa Martin PW4 whose evidence was that heard a girl crying in an unoccupied house and when he checked he found both the complaint and the Appellant in the said house. It was the evidence of Jefwa that he found the Appellant standing and his trousers had been dropped to his knees. It was clear from the evidence that Jefwa arrived at the scene after the Appellant had defiled the complainant. That could be the only reason his trousers were dropped to his knees. Though the complainant did not mention that Jefwa arrived at the scene and found the Appellant there, it was clear that the evidence of Jefwa was truthful. He had no reason to lie against the Appellant.

34. The Appellant raised a defence that the charges were fabricated because his parents had boundary dispute with the parents of the complainant. The father to the complainant PW3 testified in the case and the Appellant did not bring up the issue to him when he cross-examined him, despite the fact that PW3 had stated in his evidence-in-chief that he had no disagreement with the Appellant. Similarly, the Appellant did not ask Jefwa when he cross-examined him whether they had had any quarrel over money. Consequently, the defence can only have been a lie and an afterthought.

35. In view of the foregoing, I find that there was overwhelming evidence that the Appellant defiled the complainant. The Appellant was convicted on solid evidence and the conviction is upheld. There is no merit in the appeal and the same is dismissed.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 18TH DAY OF FEBRUARY, 2026.

J. N. NJAGI

JUDGE

In the presence of:

Mr.Oluoch HB Miss Mutua for Respondent

Appellant – present virtually at G.K. Prison Manyani

Court Assistant – Rahma