



REPUBLIC OF KENYA



KENYA LAW
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**Ingosi v Republic (Criminal Appeal 28 of 2023)
[2026] KEHC 2023 (KLR) (20 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 2023 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL APPEAL 28 OF 2023
H NAMISI, J
FEBRUARY 20, 2026**

BETWEEN

PAUL KHAVUCHI INGOSI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the conviction and sentence in the Judgment
of the Chief Magistrate's Court at Thika by Hon. E. Riany, SRM
delivered on 4 April, 2022, in Original Criminal Case No. 117 of 2018)*

JUDGMENT

1. The appellate jurisdiction of this Court is invoked by the Appellant who seeks to overturn the judgment of the Chief Magistrate's Court at Thika, delivered in Original Criminal Case No. 117 of 2018. The Appellant was arraigned before the trial court and charged with the primary offence of Defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. The particulars of the charge sheet alleged that on an unknown date in the month of February 2017, at Fort [Particulars Withheld] in Ruiru Sub-County within Kiambu County, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of S.N., a child said to be aged 15 years, who was also his step-daughter.
2. In the alternative, the State preferred a charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the alternative count alleged that during the same temporal and spatial jurisdiction, the appellant intentionally and unlawfully touched the vagina of S.N. with his penis.
3. The Appellant entered a plea of not guilty to both the primary and the alternative charges, effectively placing the burden of proof strictly upon the prosecution to establish every ingredient of the alleged offences beyond a reasonable doubt. The prosecution sought to discharge this burden by calling a total



of 4 witnesses. Upon the close of the prosecution's case, the trial court found that a prima facie case had been established and placed the Appellant on his defence. The Appellant elected to give an unsworn statement and subsequently called 2 witnesses to support his narrative.

4. Following the conclusion of the full trial, the trial court found the Appellant guilty of the primary offence of defilement, entered a conviction, and proceeded to sentence the Appellant to serve a term of 15 years imprisonment.
5. Aggrieved by both the conviction and the severity of the sentence, the Appellant filed a Petition of Appeal before this Court. The appeal fundamentally challenges the evidentiary standards applied by the trial court, the substantive evaluation of forensic and medical evidence, the procedural mishandling of documentary exhibits, the resolution of glaring inconsistencies within the prosecution's narrative, and the overall statutory interpretation of the *Sexual Offences Act* undertaken by the learned trial Magistrate.

Prosecution's Case

6. The prosecution's case was anchored primarily on the testimony of the complainant, S.N., who testified as the first prosecution witness. The complainant informed the trial court that she was left in the custody of her step-father, the Appellant herein, after her biological mother travelled to their rural village for a period of 2 weeks. The complainant testified that on a particular night during this period, while she was sleeping on a chair in the sitting room and her brother was sleeping on a mattress on the floor, the Appellant emerged from his bedroom and attempted to force her into sexual intercourse. According to her testimony, she cried and refused, prompting the Appellant to retreat to his room.
7. The complainant further alleged that the following day, after she had attended school and visited a pastor's residence, she returned home late. She testified that the Appellant gave her money to purchase food, but later that night, he approached her on the chair and began fondling her breasts. The culminating event allegedly occurred on a Sunday afternoon. The complainant stated that she returned from church at approximately 3:00 PM and was alone in the house when the Appellant blocked her path, forcibly removed her undergarments, and defiled her in the sitting room. She testified that the Appellant inserted his penis into her vagina, describing the act as painful. Curiously, the complainant admitted that following this traumatic incident, she went to her friends crying but deliberately chose not to disclose what had transpired. Furthermore, upon her mother's return from the village, the complainant remained silent about the alleged defilement. It was only much later, when schools were closed and the mother attempted to transfer her to a school in Mathare, that the complainant refused to reside with her step-father, leading to the eventual disclosure of the allegations.
8. PW2 was JNW, the biological mother of the complainant and the wife of the Appellant. Her testimony provided a disturbing context to the timeline of the disclosure. She confirmed that she had travelled to the village, leaving the complainant in the Appellant's care. However, her testimony revealed a significant delay in the reporting of the offence. She testified that on 5 December 2018—nearly 22 months after the alleged incident in February 2017—she had to actively search for her daughter, who had taken refuge at a friend's house. When she demanded that the complainant return home, the complainant adamantly refused. The mother testified that she believed her daughter was bewitched and possessed, prompting her to summon a local pastor, Pastor Kubai, to pray for the minor. It was during this chaotic intervention that police officers arrived, and the complainant finally alleged that the Appellant had defiled her. The mother's testimony explicitly highlighted that the complainant had initially refused to provide any reason for her reluctance to return home.



9. The investigative framework of the case was detailed by PW3, Sergeant Lucy Kagwiria. The Investigating Officer testified that the mother was made aware of the allegations upon her return from the village but chose to ignore them. In August 2017, the mother relocated the victim to live with a relative. The Investigating Officer noted that the victim continuously questioned why her mother took no action against the Appellant. According to the Investigator, it was not until 2 December 2018 that the victim disclosed the events to a pastor at her church. Following this, she went to a friend's house, and upon being interrogated about her refusal to return home, the investigative agencies were finally involved. During her testimony, the Investigating Officer attempted to introduce a baptismal card to establish the age of the complainant, a document that was merely marked for identification by the trial court.
10. The forensic medical evidence was adduced through PW4, Dr. Koome Daniel, a clinician who testified on behalf of the examining physician, Dr. Munke. Dr. Koome presented medical findings based on an examination conducted in December 2018, a staggering one year and ten months after the alleged defilement. He testified that the complainant was calm and presented with no physical injuries. Upon examining her genitalia, the clinician noted that the anatomy was normal with no lacerations, but observed that the hymen was absent. Based solely on this localized anatomical observation, the clinician concluded that the findings were consistent with vaginal penetration.
11. Upon the prosecution closing its case, the Appellant gave an unsworn statement in his defence. He vehemently denied the charges, framing the allegations as a malicious fabrication orchestrated to settle a domestic dispute. The Appellant testified that on the night of his arrest, his wife had returned from the village, and he had instructed her to purchase meat and prepare a meal. He claimed that it was at this juncture that a serious altercation ensued, during which his wife issued a chilling threat, stating that he "would know that he doesn't know." The Appellant testified that he locked his gate at around 10:00 PM and attempted to call his wife, but she ignored his calls. At around midnight, the complainant arrived from Mathare crying, followed almost immediately by police officers who executed his arrest. The Appellant maintained that the defilement claim was a weaponized allegation born of marital discord.
12. The defence further sought to dismantle the medical presumption of penetration by introducing evidence regarding the complainant's prior physical state. The Appellant called his nephew, Abinayo Mumia, as DW2. This witness testified unequivocally that the complainant had previously been pregnant, though the paternity of the pregnancy remained unknown. This critical assertion was corroborated by DW3, Jedrix Nasilia Atochi, a neighbour who testified that the Appellant's wife had returned with two girls, one of whom was the complainant, and that the complainant was visibly pregnant. The witness further testified that the complainant subsequently disappeared to Mathare, and upon her return, she was no longer pregnant. This witness averred that she knew nothing about any defilement, reinforcing the defence's narrative that the absent hymen could be attributed to prior sexual activity and a subsequent pregnancy rather than the alleged actions of the Appellant.

The Appeal

13. The Appellant's dissatisfaction with the trial court's judgment materialized in a Petition of Appeal containing several substantive grounds. These grounds assert that the trial Magistrate erred in law and fact by concluding that the prosecution had proved its case beyond a reasonable doubt as mandated by Section 107 of the *Evidence Act*. Specifically, the Appellant contends that the crucial ingredients of penetration and the age of the victim were not established to the requisite legal standard. Furthermore, the Appellant argues that the trial court failed to properly evaluate the defence's evidence regarding the victim's prior pregnancy, ignored the grave contradictions and inconsistencies within the prosecution's



case, and unlawfully relied on medical evidence that lacked a direct temporal or causal nexus to the Appellant.

14. The Appellant filed exhaustive written submissions amplifying these grounds. The Appellant's primary contention is that the trial magistrate unlawfully relied on a baptismal card to determine the age of the victim, despite the fact that this document was never formally produced as an exhibit, having only been marked for identification. The Appellant asserts that this procedural anomaly stripped the prosecution's case of the essential proof regarding the victim's age, a strict liability element under the *Sexual Offences Act*. Secondly, the Appellant challenges the medical evidence, arguing that an examination conducted nearly 2 years after the alleged offence cannot conclusively prove penetration by the accused, particularly when defence witnesses testified un-rebutted that the victim had previously been pregnant. The Appellant relied on the appellate jurisprudence in *P.K.W v Republic eKLR*, which cautions against over-relying on the status of the hymen. Thirdly, the Appellant argues that the charge was fundamentally defective and prejudicial. He notes that while he was charged under section 8(1)(3) of the Act, the trial Magistrate concluded the victim was 17 years old and proceeded to sentence him under the parameters of section 8(1)(4), effectively substituting the statutory foundation of the conviction without amending the charge sheet.
15. Conversely, the Respondent submitted written arguments urging this Court to uphold the conviction and the sentence. The Respondent maintains that the prosecution meticulously discharged its burden of proof. On the issue of penetration, the Respondent relies on the Court of Appeal's definition in *Mark Oiruri Mose v Republic eKLR*, arguing that the law requires only partial or complete insertion, and that the oral testimony of the complainant, corroborated by the medical finding of a broken hymen, satisfied this requirement beyond a reasonable doubt. Regarding the identity of the perpetrator, the Respondent argues that this was a case of recognition, as the Appellant was the victim's step-father, thereby eliminating any possibility of mistaken identity. Finally, the Respondent strongly defends the legality of the 15-year sentence. Citing the Supreme Court decisions in *Francis Karioko Muruatetu & Another v Republic* and the recent *Republic v Joshua Gichuki Mwangi* (Petition No. E018 of 2023), the Respondent argues that the mandatory minimum sentences prescribed by the *Sexual Offences Act* remain constitutional and binding upon trial courts, leaving no room for judicial discretion to impose a lesser penalty.

Analysis & Determination

16. Before embarking upon a substantive analysis of the contested issues, it is a constitutional and procedural imperative to delineate the boundaries of this Court's jurisdiction as a first appellate court. The jurisprudential philosophy governing first appeals in criminal matters is deeply entrenched in Kenyan legal history.
17. This Court is guided by the enduring principles articulated by the predecessor to the current Court of Appeal in the locus classicus case of *Okeno v Republic EA 32*. This foundational decision mandates that a first appellate court must subject the entire evidence on record to a fresh, exhaustive, and independent review, scrutiny, and re-evaluation. The appellate court must reach an independent conclusion on the evidence, constantly bearing in mind that they did not have the distinct advantage of the trial Magistrate to observe the demeanour of the witnesses as they testified. Therefore, while due allowance must be given to the trial court's findings on credibility, the appellate court is not relieved of its duty to ensure that the evaluation of evidence aligns with the principles of logic and the strictures of the law.
18. This rigorous standard of appellate review was recently reaffirmed by the High Court in *Doris Kemunto v Republic eKLR* and *Nicholas Chelanga Tanui v Republic eKLR*. In *Tanui*, the Court



emphasized that the appellate evaluation must extend to a critical analysis of the appellant's defence to ensure it was given an objective and open-minded consideration by the trial court. The appellate process is designed to act as a robust safeguard against miscarriages of justice, ensuring that the trial court did not draw erroneous inferences from the established facts.

19. Furthermore, this Court operates under the overarching shadow of the standard of proof in criminal trials. As eloquently stated in *Woolmington v DPP* AC 462, it is the golden thread of criminal jurisprudence that it is the duty of the prosecution to prove the prisoner's guilt beyond a reasonable doubt. Any material gap, evidential discrepancy, or procedural anomaly that raises a reasonable, abiding doubt must invariably be resolved in favour of the accused person.
20. Having established the operative legal framework, this Court distils the following fundamental issues for determination:
 - a. Whether the age of the complainant was proved beyond a reasonable doubt, and the legal implications of a trial court relying on a document Marked for Identification (MFI);
 - b. Whether the charge was fundamentally defective and prejudicial, specifically concerning the disparity between the statutory provisions in the charge sheet and the ultimate conviction;
 - c. Whether the medical evidence and the complainant's uncorroborated testimony conclusively established the ingredient of penetration, particularly in light of the 22-month delay in reporting;
 - d. Whether the evidence adduced can safely sustain a conviction for a minor and cognate offence;
 - e. The legality and constitutional standing of the sentence imposed.

Proof of Age and the Evidentiary Value of Documents Marked for Identification

21. The offence of defilement is an age-specific statutory crime. The *Sexual Offences Act* was purposefully drafted to categorize victims by age, recognizing that the vulnerability of a child increases inversely with their age. Consequently, section 8 of the Act creates distinct tiers of the offence, each carrying a different mandatory minimum sentence. To secure a lawful conviction, the prosecution bears the strict burden of not merely proving that the victim is a child (under the age of 18 years), but must conclusively place the child within the specific age bracket alleged in the charge sheet.
22. As the Court succinctly articulated in *George Opondo Olunga v Republic* [2016] eKLR, the critical ingredients forming the offence of defilement are the age of the complainant, proof of penetration, and positive identification of the assailant. The age ingredient cannot be assumed, inferred, or left to judicial speculation.
23. In the present matter, the charge sheet explicitly stated that the complainant was a child aged 15 years. During her testimony, the complainant stated she was 16 years old, claiming a birth date of 17 September 2004. The mother, who would ordinarily be the most competent witness to establish the date of birth, provided no documentary evidence and did not state the child's exact age in her substantive testimony. The Investigating Officer, PW3, attempted to introduce a baptismal card to clarify the issue. The trial Magistrate marked this document for identification as MFI 3.
24. In her judgment, the trial Magistrate observed the glaring discrepancies and concluded: "That notwithstanding, though the court was told that as at the time of the alleged offence, the minor was 15 years, the baptismal card availed before court revealed that she was born on 22/01/2000. There is thus no way that she could be 15 years as at February, 2017 but 17 years."



25. The Appellant challenges this finding, arguing that it was a fatal error of law for the trial Magistrate to extract the date of birth from a document that was merely marked for identification and never formally admitted into evidence as an exhibit.
26. This contention forces the Court to examine a fundamental tenet of the law of evidence regarding documentary proof. There is a profound jurisprudential and procedural distinction between a document that is "Marked for Identification" (MFI) and one that is formally produced as an exhibit. A document is marked for identification solely as a case management tool; it allows the court and the parties to keep track of a document that a witness has referred to, pending the laying of a proper foundation for its admission.
27. For a document to transition from an MFI to a formal exhibit, the party relying upon it must authenticate it. This typically requires calling the maker of the document to testify to its contents and subject themselves to cross-examination, or explaining the absence of the original pursuant to the strictures of section 65 and section 35 of the *Evidence Act*. Until this formal production occurs, the document forms no part of the substantive evidentiary record and possesses absolutely zero probative value.
28. This procedural absolute was authoritatively settled by the Court of Appeal in *Kenneth Nyaga Mwige v Austin Kiguta & 2 Others* [2015] eKLR. In that case, the Court of Appeal was confronted with a trial judge who had based his decision on a document marked as "MFI 2." The Court of Appeal held that this was a fatal error, articulating the legal position as follows:

"The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through stages before it is held proved or disproved... Until a document marked for identification is formally produced, it is of very little, if any, evidential value."
29. The rationale is clear: a trial court cannot base a criminal conviction, which strips a citizen of their liberty, on unauthenticated documents that the defence has had no proper opportunity to interrogate. In applying this binding precedent to the case at hand, it is incontrovertible that the trial Magistrate committed a grave error of law by elevating MFI 3 (the baptismal card) to the status of substantive evidence. The Investigating Officer merely marked it; neither the author of the document (the issuing religious authority) nor the custodian of the child's records was utilized to formally produce it.
30. Consequently, the baptismal card must be expunged from the record of evidence by this Court. Once this inadmissible document is removed, the prosecution's case regarding the exact age of the victim collapses into a mass of contradictions. The charge sheet stated 15 years; the victim claimed 16 years; the trial court relied on inadmissible evidence to conclude 17 years.
31. As held in *Hillary Nyongesa v Republic* [2010] eKLR, age is a critical aspect in sexual offences that must be conclusively proved. The prosecution's failure to formally produce valid, authenticated documentary evidence of age, compounded by the trial court's reliance on legally excluded material, renders the specific age of the complainant unproved beyond a reasonable doubt. This failure is fatal to the prosecution's case.

Defective Charge and the Prejudice of Statutory Substitution

32. The failure to prove the specific age of the victim segues directly into the appellant's second major grievance: the procedural legality of the charge and the ultimate conviction.



33. The *Sexual Offences Act* imposes a rigid statutory framework based on the age of the victim. The Appellant was formally charged with defilement contrary to section 8(1) as read with section 8(3) of the Act, which corresponds to the prosecution's initial assertion that the victim was 15 years old. However, as noted in the preceding analysis, the trial Magistrate concluded—based on the inadmissible baptismal card—that the victim was 17 years old at the time of the offence. A 17-year-old victim falls squarely under the purview of section 8(1)(4). Consequently, the Magistrate sentenced the Appellant to 15 years imprisonment, which is the mandatory minimum prescribed under section 8(1)(4), not section 8(1)(3).
34. By charging the Appellant under section 8(1)(3) but effectively convicting and sentencing him under the parameters of section 8(1)(4), the trial court engaged in an unlawful substitution of the statutory foundation of the charge without formally amending the charge sheet.
35. Section 134 of the Criminal Procedure Code mandates that every charge or information shall contain a statement of the specific offence with which the accused is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence. The purpose of this provision is to guarantee the accused person's constitutional right to a fair trial by ensuring they know the exact nature of the allegations they must meet.
36. As articulated by the Court of Appeal in *Benard Ombuna v Republic* [2019] eKLR, the test for whether a charge sheet is fatally defective is substantive rather than formalistic. The core question is whether the defect prejudiced the appellant to the extent that he was unaware of, or confused by, the nature of the charge preferred against him, resulting in an inability to put up an appropriate defence.
37. In cases of defilement, the distinction between a charge under section 8(1)(3) and section 8(1)(4) is not a mere typographical nuance; it has profound implications for the substantive defences available to an accused. Under section 8(5) of the *Sexual Offences Act*, if an accused is charged with defiling a child aged between 16 and 18 years (Section 8(1)(4)), it is a valid statutory defence if the accused can prove that the child deceived them into believing they were over 18, and the accused reasonably believed it.
38. While section 8(8) nullifies this specific defence if the parties are related by affinity, as is the case here between a step-father and step-daughter, the broader procedural principle remains absolute: an accused person prepares their legal strategy based on the specific statutory provision cited in the charge sheet. As noted in *Martin Charo v Republic* [2016] eKLR, a judge has no authority to substitute the law with what they think it ought to be, or to shift the statutory parameters of a charge at the judgment stage without allowing the accused an opportunity to respond. By springing a conviction under a different statutory sub-section at the eleventh hour, the trial court severely prejudiced the Appellant, rendering the conviction fundamentally defective.

Evaluation of Medical Evidence

39. The second mandatory ingredient of defilement that the prosecution must prove is penetration. Section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of the genital organs of a person into the genital organs of another person.
40. The trial court relied on two evidentiary pillars to satisfy this ingredient: the oral testimony of the complainant, who stated that the Appellant inserted his penis into her vagina, and the medical evidence presented by Dr. Koome (PW4), who testified that his examination revealed an absent hymen, leading him to conclude that vaginal penetration had occurred.
41. The evaluation of medical evidence in cases of sexual violence, particularly where there is an extreme temporal gap between the alleged incident and the forensic examination, requires profound judicial



circumspection. In the present case, the alleged defilement occurred in February 2017. The medical examination, however, was not conducted until December 2018. This represents a staggering delay of 22 months.

42. The Appellant rightly relies on the Court of Appeal’s persuasive jurisprudence in *P.K.W v Republic eKLR*, where the Court issued a stern warning against trial courts placing an unjustifiably high premium on the finding of a broken hymen. In that landmark decision, the Court of Appeal observed:

“...hymen is not only broken or ruptured by sexual intercourse since medical evidence has proved that some girls are not even born with hymen and other factors can cause the rupture of a female’s hymen such as; horse riding, bicycle riding, and gymnastics. The hymen can also tear naturally.”

43. This judicial holding aligns perfectly with contemporary global medical and forensic consensus. Extensive scientific literature and clinical guidelines dictate that an examination of the hymen is neither an accurate nor a reliable test of a previous history of sexual activity, especially when conducted months or years after the fact. The hymen is a small membranous tissue with no known biological function that definitively records sexual assault; it is subject to natural anatomical variation, congenital absence, and accidental trauma. Clinicians tasked with forensic examinations are increasingly urged to avoid conclusions based solely on an intact or broken hymen due to its exceptionally low predictive value regarding nonconsensual intercourse.
44. Furthermore, the defence in this case introduced direct testimony that severely undermined the prosecution’s medical presumption. DW2 and DW3 testified that the complainant had previously been pregnant and that she had left the area visibly pregnant before returning no longer pregnant. If the complainant had indeed engaged in prior sexual activity resulting in pregnancy, the absence of a hymen during a clinical examination 22 months later offers absolutely no corroborative value to the specific allegation that the Appellant penetrated her in February 2017.
45. Dr. Koome concluded that the absent hymen showed vaginal penetration. While technically an accurate description of the localized physical state, this conclusion jumps to a legally dangerous and scientifically unsupportable presumption when utilized to corroborate a delayed report of defilement. The medical evidence in this case proves nothing more than the anatomical state of the complainant’s genitalia in December 2018. It does not —and scientifically cannot— establish a causal or temporal link to an action allegedly committed by the appellant nearly two years prior.
46. The Respondent, in its submissions, relied on *Mark Oiruri Mose v Republic eKLR* to argue that penetration need only be partial to sustain a conviction. While that statement of law is accurate, the facts are distinguishable. In *Mark Oiruri Mose*, the prosecution proved penetration not merely through ambiguous hymenal observations, but through conclusive clinical evidence of pregnancy resulting from the assault. In the instant case, the Respondent relies on an inherently unreliable anatomical marker observed after an egregious delay, in the face of un-rebutted testimony regarding the victim’s prior sexual history.
47. Therefore, the trial Magistrate misdirected herself in law by heavily relying on this delayed and scientifically ambiguous medical finding to corroborate the act of penetration. Consequently, the proof of penetration rests entirely and exclusively on the uncorroborated oral testimony of the complainant.



The Credibility of Uncorroborated Testimony and the Implication of Delayed Reporting

48. Given the collapse of the medical corroboration, the conviction hinges entirely on the complainant's uncorroborated oral testimony. Section 124 of the *Evidence Act* permits a court to convict on the uncorroborated evidence of a victim of a sexual offence, provided the court warns itself of the dangers of doing so and meticulously records its reasons for being satisfied that the victim is telling the truth.
49. The trial Magistrate invoked this statutory provision to uphold the conviction. However, this Court must assess whether that judicial discretion was exercised reasonably, logically, and in accordance with the totality of the circumstances on record.
50. The most glaring anomaly in the prosecution's narrative is the conduct of the primary parties and the extraordinary delay in reporting the offence. The alleged defilement occurred in February 2017. The victim testified that she did not raise an alarm, did not inform her friends immediately, and deliberately chose not to inform her mother upon her return from the village. She continued to reside in the same household with the Appellant. It was only in December 2018—when the mother demanded that the victim return home from a relative's house, and the victim refused—that the allegation of defilement finally surfaced as a justification for her refusal.
51. As noted in the persuasive authority of *Tekerali s/o Korongozi & 4 Others v Republic (1952) 19 EACA 259*, the importance of a first report made at the right time can scarcely be exaggerated, as it provides a critical safeguard against later embellishment, coaching, or a deliberately made-up case. While a delay in reporting sexual offences is not uncommon due to factors such as psychological trauma, fear of retaliation, or familial pressure, the law demands that the delay must be reasonably explained.
52. In this instance, the trial Magistrate herself was struck by the bizarre dynamics of the case, noting in her judgment: "The conduct of the parties herein left a lot to be desired... When she tells the mother Pw2, instead of dealing with the issue, she instead moves her to Mathare. Prior to the hearing, the investigating officer tried to withdraw this matter on allegation that the mother had stated that she was no longer interested in the matter... The mother to the victim was brought under warrants of arrest having tried to obstruct justice."
53. When a trial court explicitly identifies highly suspicious conduct by the primary witnesses, active attempts to obstruct justice by the victim's own mother, and a 22-month silence broken only when the victim needed an excuse to avoid returning home, the uncorroborated testimony of the minor must be scrutinized with the highest degree of judicial suspicion.
54. The defence posited a plausible alternative narrative: that the accusation was a retaliatory fabrication born out of a severe domestic dispute between the Appellant and his wife (PW2) on the very night of the arrest, intertwined with the victim's desire to avoid parental control. Given the established timeline, the mother's initial hostility to the prosecution, her belief that the child was merely bewitched, and her subsequent attempt to withdraw the case entirely, the defence's theory of fabrication cannot be lightly dismissed.
55. The standard required for a criminal conviction is proof beyond a reasonable doubt. The chain of a 22-month delay, the total absence of corroborative medical evidence, the mother's evasive and obstructive conduct, and the plausible defence of fabrication introduces a massive shadow of doubt over the prosecution's entire case. The trial Magistrate's decision to rely solely on the complainant's testimony, in the face of such overwhelming circumstantial contradictions, constituted a gross misdirection in law.



The Applicability of Minor and Cognate Offences

56. Having determined that the primary charge of defilement under section 8(1) cannot be sustained due to the failure to prove age and penetration beyond a reasonable doubt, the Court must consider whether the evidence could lawfully support a conviction for a minor and cognate offence. The Appellant was, in fact, facing an alternative charge of committing an indecent act contrary to section 11(1) of the *Sexual Offences Act*.
57. The jurisprudence governing the substitution of convictions to minor and cognate offences is well-settled. In *Ali Mohamed Hassani Mpanda v Republic* [1963] eKLR, the Court held that a minor offence can only be applied where it is arrived at by a process of subtraction from the major charge, and where the evidence unequivocally proves the elements of the lesser offence without prejudicing the accused. Furthermore, in *Benjamin Juma Khamili v Republic* [2018] eKLR, the Court quashed a defilement conviction due to lack of proof of penetration but substituted it with a conviction for an indecent act, finding that the lesser act of indecency was fully supported by the evidence on record. Similarly, in *P.O.O. (A Minor) v DPP* eKLR, the Court noted that if the main charge fails due to a missing element, the evidence does not evaporate; it must be examined to see if it supports a cognate offence like indecent assault.
58. However, the application of a minor and cognate offence is strictly predicated on the foundational credibility of the prosecution's evidence. A lesser charge cannot be utilized as a judicial safety net to salvage a prosecution case that is inherently riddled with credibility deficits and fundamental doubts.
59. As exhaustively analysed above, the entire prosecution narrative in this case is compromised. The 22-month delay in reporting, the total lack of objective medical corroboration linking the Appellant to any sexual act, the conflicting evidence regarding the victim's prior pregnancy, and the mother's obstructive conduct cumulatively destroy the credibility of the primary witness. If this Court cannot believe the complainant's testimony regarding penetration beyond a reasonable doubt due to these factors, it is logically and legally inconsistent to rely on that exact same flawed and doubtful testimony to uphold a conviction for an indecent act. The reasonable doubt that infects the major charge inevitably bleeds into the alternative charge, rendering a substitution of conviction untenable in the circumstances of this case.
60. The criminal justice system is anchored on the bedrock constitutional principle that the burden of proof rests squarely on the prosecution and never shifts to the accused. It is a fundamental maxim that it is better for ten guilty persons to escape than for one innocent person to suffer the deprivation of their liberty based on flawed evidence.
61. In view of the foregoing, the Appeal is hereby allowed.
- i. The conviction entered against the Appellant, Paul Khavuchi Ingosi, on 4 April 2022 by the Chief Magistrate's Court at Thika in Criminal Case No. 117 of 2018 is hereby quashed.
 - ii. The sentence of 15 years imprisonment imposed upon the Appellant is set aside.
 - iii. The Appellant shall be set at liberty forthwith unless he is otherwise lawfully held in custody for any other cause.

DATED AND DELIVERED AT THIKA THIS 20 DAY OF FEBRUARY 2026.

HELENE R. NAMISI

JUDGE OF THE HIGH COURT



Delivered on virtual platform in the presence of:
For the Appellant: Present at Kamiti Medium Prison
For the Respondent: Ms Torosi
Court Assistant: Lucy Mwangi

