



REPUBLIC OF KENYA



KENYA LAW
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**Kaingu v Republic (Criminal Appeal E006 of 2023)
[2026] KEHC 3187 (KLR) (11 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 3187 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E006 OF 2023**

JN NJAGI, J

MARCH 11, 2026

BETWEEN

BARAKA KAINGU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. R. Amwayi, Senior Resident Magistrate, in Kaloleni Principal Magistrate's Court Sexual Offence Case No. E017 of 2022 delivered on 15/12/2022)

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 the month of 1st May 2022 and 20th May 2022 at (name withheld) in Kaloleni sub county within Kilifi county he intentionally and unlawfully caused his penis to penetrate into the vagina of GW (herein referred to as the complainant/victim), a girl aged 15 years.
2. The Appellant was sentenced to serve 30 years imprisonment. He was aggrieved by the conviction and the sentence and lodged the instant appeal. The grounds of appeal as per his undated amended grounds of appeal are that:
 1. The learned trial magistrate erred in law and facts by failing to consider that the prosecution did not conduct *voire dire* to the victim according to the threshold required by law of Kenya.
 2. The learned trial magistrate erred in law and facts by failing to consider that there are massive discrepancies and invariances which did not corroborate altogether to sustain a safe conviction and sentence to the alleged Appellant.



3. The learned trial magistrate erred in law and facts by failing to consider that the Appellant's alibi defence evidence.
4. Conviction against weight of evidence and sentence was manifestly harsh and excessive.
5. No cogent evidence to connect appellant to the commission of the alleged offence.

Case for prosecution

3. The evidence of the complainant, PW1, was that the complainant was at the material time aged 15 years and was living with her grandmother PW2. That she did her KCPE exam in April 2022 but when the results were out her grandmother did not have money to take her to secondary school. She then met the Appellant who was their neighbour. He told her that he was in love with her. She also told him that she loved him. He asked her to go to his home. She went and started living with him as man and wife. The Appellant went to her mother and asked her grandmother for her hand in marriage. Her grandmother gave him her clothes. The 2 continued to live together. During the time they were engaging in sex. They stayed together for 2 weeks. They were then summoned by the chief. She went there with the Appellant, his mother and her (PW1's) grandmother. The chief called for her birth certificate from her school. It was sent. Policemen were called and they were taken to the police station.
4. The grandmother to the complainant testified that the mother to the Appellant went to her and asked her to allow the complainant to be married by the Appellant. She told her that the complainant was in school. After that the complainant disappeared from home. She started to live with the Appellant as husband and wife. On 20/5/2022 policemen went to her home and asked her to take them where the complainant was. She took them to the home of the Appellant. They found her there together with the Appellant. They were arrested and taken to the office of the chief and then to the police station. The complainant was taken to hospital.
5. The chief PW testified that she learnt that the complainant had not opened school in the month of May 2022 and that she had gotten married to the Appellant. She sent policemen to bring them to the office. The complainant went with her grandmother PW2 while the Appellant was accompanied by his mother. She called the police and handed over the complainant and the Appellant to them.
6. The complainant was taken to Mariakani sub county hospital where she was examined and found with a normal genitalia and a broken hymen. A clinical officer at the hospital PW5 completed her P3 form.
7. PC Mureyi PW4 of Kaloleni police station testified that she received a report of marriage between the Appellant and the complainant. She went and arrested them. She did investigations and learnt that the complainant was under age. She issued her with a P3 form and escorted her to Mariakani sub county hospital where she was examined in the complainant. She charged the Appellant with the offence.
8. During the hearing of the case in court, the complainant produced her birth certificate in court as exhibit, P.EXH.1. It indicated that she was born on 10/10/2007.
9. The clinical officer PW4 produced the P3 form, the treatment notes and the lab request form as exhibits, P.Exh. 2 – 4 respectively.

Defence Case

10. The appellant in his defence stated in a sworn statement that she was asking the court to allow him to go and solve the case at home.



11. The Appellant called one witness in the case, his brother DW2 who told the court that the Appellant had married the complainant and the family had done all the traditional procedures. They conducted a traditional ceremony. That they then went to the office of the assistant chief. Policemen went there and arrested the appellant and the complainant.

Submissions

12. The Appellant submitted that voir dire examination was not conducted in the case.

Analysis and determination

13. This court being the first appellate court in this matter is alive to and is cognizant of the principles laid down in the case of *Okeno vs. Republic* (1972) EA 32 where the Court of Appeal for Eastern Africa stated that:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected 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; it must make its own findings and draw its own 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.”

14. The appellant was convicted for the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No3 of 2006. The section provides as follows:
 - (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - (2)
 - (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
15. In the case of *Dominic Kibet Mwareng v Republic* (2013) eKLR, it was held that the ingredients for the offence of defilement are: proof of the age of the victim, proof of penetration on the victim and positive identification of the assailant.
16. The appeal revolves on three things: that voir dire was not conducted in the case, that the ingredients of the offence of defilement were not proved beyond reasonable doubt; that there was no corroboration of the evidence, that the trial court failed to consider his alibi defence and that the sentence imposed on him was harsh.
17. As regards the age of the complainant a birth certificate was produced that indicated that she was born on 10/10/2007. The offence was said to have been committed in May 2022 which placed her age at the material time at 14 ½ years. The age of the victim was proved at that age.
18. On penetration, the same is defined in Section 2(1) of the *Sexual Offences Act* penetration as:

“The partial or complete insertion of the genital organs of a person into the genital organ of another person.”



19. Penetration can be proved by the oral evidence of the victim or by way of circumstantial evidence which can be corroborated by medical evidence.
20. The medical evidence adduced by the clinical officer only indicated that the complainant had a normal genitalia and a broken hymen. There was no evidence that the hymen was recently broken. A mere broken hymen is not proof of defilement. The medical evidence available did not offer support to the evidence of the complainant that she had been defiled.
21. The victim herein was a child in terms of section 8 of the *Sexual Offences Act*. Her evidence has to be taken in the context of section 124 of the *evidence Act* which provides that in sexual offence cases involving children the court can convict on the sole evidence of the child victim if the court is satisfied that the child is telling the truth and gives reasons for finding so.
22. The trial magistrate in convicting the Appellant of the offence stated that the Appellant had married the complainant who was a child under the age of 18 years. That he knew that she was a minor and being so she had no capacity to consent to sexual intercourse. That it was not a defence that the Appellant had married her.
23. The complainant gave evidence that the Appellant had married her. She said that she used to engage in sexual intercourse with the Appellant in the course of the marriage. The fact that the Appellant had eloped with the complainant and was living with her as his wife was corroborated by the complainant's grandmother, PW2, whose only request was for the court to allow them to go and resolve the issue at home. The Appellant also in his defence did not deny marrying the complainant. He in fact called a witness, his brother DW2 to prove that he had indeed married the complainant.
24. There was then no doubt that the Appellant was cohabiting with the complainant as his wife. There is no reason to disbelieve the evidence of the complainant that they were engaging in penetrative sex when they were living together. The complainant being a minor could not consent to penetrative sex. Unlawful penetration on the complainant was therefore proved against the Appellant.
25. In view of the forgoing, I find the appellant was convicted on solid evidence. The conviction for the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* is upheld.

Sentence

26. The sentence for defiling a child between the age of twelve and fifteen years is imprisonment for a term of not less than twenty years. The Appellant was sentenced to 30 years imprisonment. The trial magistrate in sentencing the Appellant to that period stated that it was meant to deter other people in the jurisdiction from marrying children. In my view, even the minimum sentence of 20 years provided by section 8(3) of the *Sexual Offences Act* is deterrent enough. There was no evidence that the Appellant had a previous conviction. He in that case ought to have been treated as a first offender. The sentence imposed by the trial court was harsh and excessive for a first offender. I consider a sentence of 20 years as provided by the Act to be appropriate.
27. The upshot is that the conviction of the Appellant by the trial court is upheld but the sentence of 30 years imprisonment is substituted with one of twenty years imprisonment.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 11TH DAY OF MARCH, 2026.

J. N. NJAGI

JUDGE



In the presence of:

Ms Mutua for the Respondent

Appellant – present virtually at GK Prison Malindi

Court Assistant - Rahma

