



**DMK v Republic (Criminal Appeal E118 of 2023)
[2026] KECA 340 (KLR) (27 February 2026) (Judgment)**

Neutral citation: [2026] KECA 340 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CRIMINAL APPEAL E118 OF 2023
SG KAIRU, AK MURGOR & P NYAMWEYA, JJA
FEBRUARY 27, 2026**

BETWEEN

DMK APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the Judgement of the High Court of Kenya at Malindi
(A.K. Ndungu, J.) dated 9th November, 2023 in CRA No. E018 of 2022)*

JUDGMENT

1. The Appellant, DMK, was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the offence were that on the 4th September 2021, at around 1800 hours, at [Particulars withheld] Village within Rabai Sub-County, Kilifi County, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of BNK, the complainant, a female child aged 13 years.
2. In the alternative charge, the Appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, No. 3 of 2006. The particulars being that on the same day and place, he unlawfully and intentionally committed an indecent act by touching the complainant's private parts using his penis.
3. The Appellant pleaded not guilty to both the main and alternative charges, whereupon the case proceeded to hearing where the prosecution called four (4) witnesses in support of its case.
4. Barrington Charo, PW1 a Clinical Officer at Mariakani Sub-County Hospital stated that the complainant was brought to the hospital on 6th September 2021 with allegations of defilement by a person known to her. Upon examination of the complainant's genitalia, PW1 found that the hymen was broken and that the vaginal sphincter muscles were loose. He further testified that laboratory tests



were conducted and all results were negative. PW1 treated the complainant, completed the PRC Form and P3 Form, which concluded that the findings were consistent with a confirmed case of defilement, as there was proof of penetration. He produced the complainant's P3 Form, treatment notes, Post Rape Care (PRC) Form, and scan report.

5. BNK PW2, the complainant testified that she was 13 years old and a Grade 4 pupil. She stated that on 4th September 2021, she was at home with her grandmother and the Appellant, who is her cousin and was well known to her. She stated that her sister M called her from church and informed her that the Appellant was looking for her. PW2 went to the Appellant's house and found him inside; that he instructed her to remove her panty, and told her to lie on the bed, which she did. The Appellant also undressed and had sexual intercourse with her by penetrating her vagina using his penis, and she felt pain. PW2 stated that the Appellant warned her not to tell anyone and thereafter went to the sitting room, leaving her in the bedroom.
6. The Appellant's wife, S, later entered the house and found PW2 naked in the bedroom lying on the bed where the Appellant had left her. PW2 lied to S that she was looking for clothes. S questioned both PW2 and the Appellant, and an argument ensued. S reported the incident to PW2's grandmother, who took no action. She then reported the matter to the area chief who summoned all the parties. They later proceeded to the police station, and PW2 was taken to Mariakani Sub-County Hospital, where she was examined, treated, and issued with a P3 Form.
7. MB PW3 is the Appellant's mother and the complainant is the child of her late sister. She stated that the complainant was born on 1st January 2008 and produced the Birth certificate. She stated that on 4th September 2021 at about 6.00 p.m., the Appellant arrived home from work and went to his room. He intended to take a shower but there was no soap prompting PW3 to send the complainant's elder sister to purchase soap. The following day, PW3 was informed by the Appellant's wife that the Appellant had defiled the complainant. The matter was reported to the chief and later to the police, after which the complainant was taken to hospital for medical examination.
8. Police Constable Umu Musa No. xxxxxx PW4 attached to Kambe Ribe Police Station was the investigating officer. She stated that in September 2021, the complainant reported to the station accompanied by her in-law and the Appellant's wife, alleging defilement; that the complainant reported that, the Appellant, her cousin, called her into the house where he undressed her and defiled her; that the Appellant's wife entered the house and found the Appellant in the sitting room wearing a leso and the complainant in the bedroom appearing confused. She also found the complainant's underwear on the floor. She stated that thereafter a report was made, and the complainant was examined, treated, and issued with a P3 Form, and that the Appellant who was positively identified by the complainant as the perpetrator was subsequently arrested, and charged, with the offence.
9. DMK DW1, the Appellant stated that he is a crane operator. He denied committing the offence, and claimed that he was falsely implicated by his wife; that she had travelled to Saudi Arabia, where she claimed she was not married; that she was mistreated, and later returned home; that due to marital disagreements he had decided to marry another wife, whereupon, his wife threatened him with consequences. He stated that on 13th October 2021, he travelled home, and the following day, he was informed that he was required at home. Upon arrival, he found a crowd at his house, and was accused of defiling the complainant.
10. He testified that he was summoned by the village elder and taken to the police station, where he was arrested and charged without being given an opportunity to explain himself. In cross-examination, he stated that the medical officer had no reason to falsely implicate him and that the medical report was not biased or compromised.



11. MK DW2 is the complainant's sister and the Appellant is her cousin. She stated that the complainant was allegedly instructed by her sister-in-law to claim she had been defiled; that she later spoke to the complainant, who told her that she had been forced to lie. During cross-examination, DW2 stated that her sister-in-law did not beat the complainant and that she did not question the complainant further as she was taken to the police station.
13. Safimu Nazoa Jilima DW3 is a nyumba kumi elder and a neighbor of the Appellant. She stated that she became aware of the case after it had already been reported to the chief and to the police; that the complainant was living with her aunt Miriam, but she never interrogated her as she was taken by the police and that she was therefore unable to tell if she was defiled or not.
14. After evaluating the evidence and submissions on record, the trial court found that the prosecution had proved all the essential ingredients of the offence of defilement beyond reasonable doubt.
15. On the age of the complainant, the court found that based on the Birth certificate, the complainant was a minor aged 13 years at the time of the alleged offence.
16. On the issue of penetration, the court held that penetration was sufficiently proved, since the complainant gave a clear and consistent account that the Appellant penetrated her vagina using his penis; that this testimony was corroborated by the medical evidence tendered by PW1, the clinical officer.
17. Regarding identification of the perpetrator, the court found that the Appellant was positively identified, particularly since the complainant and the Appellant were cousins, lived within the same homestead, and were well known to each other.
18. The court also considered the defence evidence and found it insufficient to displace the prosecution case. The Appellant's defence that he was framed by his wife was found to be unsupported by any independent evidence. The testimonies of the defence witnesses were found to be largely hearsay and did not directly rebut the complainant's account or the medical evidence on record.
19. In conclusion, the trial court found that the Appellant was at the scene of the offence at the material time, had the opportunity to commit the offence, and indeed committed the act of defilement as alleged. The court held that the prosecution had discharged its burden of proof to the required standard and consequently found the Appellant guilty as charged and sentenced him to serve 20 years imprisonment.
20. Being dissatisfied with the decision of the trial court, the Appellant preferred an appeal to the High Court. The first appellate court, upon considering the matter, found that the prosecution proved all the elements of the offence beyond reasonable doubt, upheld the conviction and dismissed the appeal in its entirety.
21. Aggrieved, the Appellant has filed an appeal to this Court on grounds that; the learned Judge failed to consider that the offence was not proved beyond any reasonable doubt; failed to appreciate the requirements of Article 49 (1)(f) of *the Constitution*; that the learned judge violated Article 50(2)(d) of *the Constitution* and Section 211(1) of the Criminal Procedure Code; and failed to consider that Sections 24 of the National Police Act and Article 263 of *the Constitution*
22. In an amended supplementary grounds of appeal, he contended that the learned Judge failed to appreciate that Section 110 of the *Evidence Act* was violated; failed to consider Sections 26 and 27 of the *Evidence Act*; failed to consider that Sections 31 and 32 of the *Sexual Offences Act*; failed to consider the Appellant's defence.



23. When the appeal came up for hearing on a virtual platform the Appellant appeared in person while learned prosecution counsel Mr. Kariuki appeared for the Respondent. The Appellant filed written submission where it was submitted that the trial court and the first appellate court failed to appreciate that the offence was not proved beyond reasonable doubt; that the burden of proof lay wholly with the prosecution under Section 110 of the *Evidence Act* which burden was not discharged. The Appellant argued that the prosecution failed to adduce cogent incriminatory facts, which rendered the conviction unsafe. It was further submitted that although the age of the complainant was not in dispute, the prosecution failed to satisfactorily prove the essential ingredients of defilement, namely penetration and identification of the perpetrator. He relied on the case of Charles Wamukoya Karani vs Republic, Criminal Appeal No. 72 of 2013, for the proposition that proof of age, penetration, and positive identification are mandatory ingredients of the offence; that the evidence on record revealed serious inconsistencies regarding identification, given the complainant's close familial relationship with the Appellant and the admission by the investigating officer that the Appellant was not previously known to him. The Appellant maintained that these circumstances created reasonable doubt which ought to have been resolved in his favour.
24. On penetration, the Appellant submitted that the complainant's testimony was unreliable, having been extracted under coercive circumstances, and that the medical evidence did not conclusively support the charge. He argued that the P3 form and medical findings were inconclusive and failed to establish recent or forcible penetration, thereby weakening the prosecution's case. The Appellant also faulted the trial court for failing to properly appreciate and apply sections 26 and 27 of the *Evidence Act* on confessions and admissions; that the complainant's reluctance to testify, the repeated adjournments, and the eventual placement of the complainant in a children's home demonstrated undue influence and pressure by the prosecution, rendering the evidence unreliable and prejudicial.
25. In addition, the Appellant contended that the trial court violated Sections 31 and 32 of the *Sexual Offences Act* by failing to comply with the mandatory procedural safeguards relating to vulnerable witnesses. He argued that despite clear indicators of vulnerability, the court neither made the requisite inquiry nor implemented the protective measures prescribed by law, resulting in a miscarriage of justice. Finally, the Appellant submitted that the courts below failed to consider and fairly evaluate his defence, particularly his alibi, contrary to Article 50(2) of *the Constitution* and Section 211 of the Criminal Procedure Code. He relied on a host of authorities to argue that an alibi need only raise reasonable doubt and must be weighed against the prosecution evidence. He maintained that his defence was improperly dismissed, thereby occasioning a grave miscarriage of justice. Accordingly, the Appellant urged the Court to allow the appeal, quash the conviction, and set aside the sentence imposed.
26. In their written submissions, counsel for the Respondent submitted that the appeal before this Court was devoid of merit, having been properly determined by both the trial court and the High Court. Counsel pointed out that this being a second appeal, the Court's jurisdiction under Section 361(1) of the Criminal Procedure Code was confined strictly to matters of law, unless it was demonstrated that the two courts below considered matters they ought not to have considered, failed to consider relevant matters, or arrived at plainly wrong conclusions. Reliance was placed on the case of Moses Nato Raphael vs Republic [2015] eKLR to underscore the settled principles.
27. On the conviction, counsel submitted that the prosecution proved all the essential ingredients of the offence of defilement beyond reasonable doubt as required under Section 8 of the *Sexual Offences Act*, namely the age of the complainant, penetration, and the proper identification of the perpetrator. With regard to proof of age, counsel submitted that the evidence of the complainant's aunt, coupled with the production of the Birth certificate, conclusively established that the complainant was 13 years old at the material time. Counsel relied on the case of Edwin Nyambogo Onsonglo vs Republic [2016] eKLR,



where this Court held that age may be proved by documentary evidence or credible oral testimony, provided such evidence is reliable.

28. Turning to the issue of penetration, counsel submitted that the complainant gave a clear, consistent, and detailed account of how the offence was committed, which was corroborated by medical evidence; that the treatment notes, PRC form, and P3 form, all revealed a broken hymen and other clinical findings consistent with penetration. It was argued that both the trial court and the High Court correctly evaluated this evidence and properly concluded that penetration had been proved within the meaning of Section 2 of the *Sexual Offences Act*.
29. Regarding identification, counsel submitted that the Appellant was well known to the complainant as he was a close relative and that there was no possibility of mistaken identity. The complainant's testimony placed the Appellant squarely at the scene, and this evidence was accepted by both lower courts. Counsel maintained that the prosecution evidence, taken as a whole, irresistibly pointed to the Appellant as the perpetrator, and that the case was proved beyond reasonable doubt.
30. Addressing the procedural complaints raised by the Appellant, on the alleged violation of Section 107 of the Criminal Procedure Code, counsel submitted that the Appellant's arrest without a warrant was lawful, as the offence was cognisable and the circumstances justified such arrest. Similarly, on the alleged violation of Article 49(1)(f) of *the Constitution*, counsel submitted that the Appellant was presented to court within the constitutionally permissible time, having been arrested on a weekend and arraigned on the next court day.
31. On the right to a fair trial under Article 50(2) of the Constitution and Section 211 of the Criminal Procedure Code, counsel submitted that the Appellant was accorded a full and fair hearing.
32. Finally, on the allegation that the learned judge failed to consider Section 24 of the *National Police Service Act* and Article 263 of *the Constitution*, counsel submitted that the Appellant had not demonstrated any abuse of police powers. Counsel urged that the conviction was safe, the sentence lawful, and that the appeal be dismissed in its entirety.
33. In a second appeal like this, by dint of Section 362(1)(a) of the Criminal Procedure Code, this Court confines itself only with matters of law, the issues of fact having been settled in the two courts below. The Court explained its approach in a second appeal as follows, in the case of *Dzombo Mataza vs Republic* [2014] eKLR:

"As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court...By dint of the provisions of section 361(1)(a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong."

34. Similarly, the Supreme Court in the case of *Republic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* [2024] KESC 34 (KLR) stated thus:

"Thus, the Court of Appeal's jurisdiction on second appeals is limited to only matters of law and it could not interfere with the decision of the High Court on facts unless it was shown that the trial court and the first appellate court considered matters they ought not to have considered, failed to consider matters they should have considered, or were plainly wrong in their decision when considering the evidence as a whole. In such a case, such omissions or



commissions would be treated as matters of law. Consequently, the Respondent's appeal on the grounds that his sentence was harsh and excessive was not one that the Court of Appeal could lawfully determine as it fell outside the purview of the Court of Appeal's jurisdiction."

35. With the above guidance in mind, the issues that arise for determination are; i) whether the burden and standard of proof were met beyond reasonable doubt; ii) whether Article 50(2)(d) of *the Constitution* and Section 211(1) of the Criminal Procedure Code was infringed; iii) whether Sections 26 and 27 of the *Evidence Act* admissibility and reliability of evidence were properly applied; iv) whether Sections 31 and 32 of the *Sexual Offences Act* were complied with; and v. whether the Appellant's defence was properly considered.
36. Before determining the issues raised, it is observed that the Appellant has sought determination on certain issues that have been raised for the first time in this Court. These are firstly, the alleged violation of Article 49(1)(f) of *the Constitution* where it was alleged that his constitutional right to be brought before court within the prescribed time was violated, and secondly, the alleged improper police conduct during arrest and investigation. A consideration of the concerned issues discloses that they pertain to matters of fact, and therefore ought to have been raised before the lower courts, and not for the first time before this Court. As a 2nd appellate court, we are limited to addressing matters of law only. It is therefore too late in the day to consider the matters of fact raised in this regard.
37. As stated in the case of *Alfayo Gombe Okello vs Republic* [2010] eKLR:
- ... the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have."
38. As a consequence, we decline to address the two issues as they are not within our mandate to consider at this stage. The two grounds therefore fail.
39. Turning now to determine the question of whether the burden and standard of proof for the offence of defilement were discharged as required under Section 107 of the Criminal Procedure Code and Section 110 of the *Evidence Act*.
40. The essential elements of the offence of defilement are proof of the age of the complainant, proof of penetration, and positive identification of the perpetrator.
41. In the case of *John Mutua Munyoki vs Republic* [2017] eKLR, this Court stated that under the *Sexual Offences Act*, the main elements of the offence of defilement are as follows:
- i. The victim must be a minor, and
 - ii. there must be penetration of the genital organ and such penetration need not be complete or absolute. Partial penetration will suffice
 - iii. Proof of the identity of the perpetrator.
- See also *Muthama vs Republic* (Criminal Appeal 3 of 2018) [2022] KECA 1214 (KLR).
42. On the question of age, the complainant testified that she was 13 years old at the time of the alleged defilement. This evidence was corroborated by PW3, who produced the complainant's birth certificate, which indicated that she was born on 1st January 2008. As the offence occurred on 4th September 2021, the complainant was conclusively proved to have been 13 years old at the material time. The evidence on age was consistent, uncontroverted, and properly relied upon by the two courts below.



43. On the issue of penetration, it is clear from the record that the complainant's testimony was corroborated by the medical evidence that was adduced. PW1, a Clinical Officer at Mariakani Sub-County Hospital, examined the complainant and confirmed that her hymen was broken and the vaginal sphincter muscles were loose, and concluded that there was penetration. The P3 Form, treatment notes, and PRC Form were duly produced in evidence. In the circumstances, the trial court and the first appellate court cannot be faulted for relying on the medical and documentary evidence to find that penetration had been proved beyond reasonable doubt.
44. Regarding identification, the complainant positively identified the Appellant as the person who defiled her. The Appellant was well known to her as her cousin, and the offence occurred in the Appellant's house in broad daylight, thereby eliminating any possibility of mistaken identity.
45. This Court in the case of *Shalen Shakimba Ole Betui & Shadrack Koitimet Ole Betui vs R*, Cr.A No. 284 of 2005 observed:
- “The present was a case of recognition rather than identification and on our part we have considered this issue and are satisfied that in view of the concurrent findings of the two courts below the appellants were positively identified, nay recognized by PW1 and PW2. There could be no possibility of a mistaken identify. We are satisfied that the appellants were convicted on very sound evidence of recognition in circumstances which were conducive to proper identification/recognition, *Anjononi and Another v. R* [1980] KLR 54 at p. 60.”
46. Further corroboration was evident from the Appellant's wife, who found the complainant naked in the bedroom shortly after the incident, and after she recovered the complainant's underwear at the scene. Both courts below were therefore justified in finding that the Appellant was positively and reliably identified as the perpetrator.
47. Both the trial court and the High Court independently evaluated this evidence and arrived at concurrent findings of fact for which we have no reason to interfere. Based on the evidence, just like the two courts below, we too are satisfied that the prosecution discharged its burden beyond reasonable doubt.
48. On the issue of whether the two courts failed to consider the admissibility and reliability of the evidence, as required by Sections 26 and 27 of the *Evidence Act* the Appellant's conviction was founded primarily on the complainant's testimony as corroborated by the medical evidence. No confession or admission through coercion was relied upon by the prosecution. Sections 26 and 27 of the *Evidence Act* were therefore not applicable to the circumstances of this case. This ground is without merit.
49. Next the Appellant argued that mandatory provisions relating to vulnerable witnesses as set out in Sections 31 and 32 of the *Sexual Offences Act* were not complied with. Although the complainant was a minor, the trial court satisfied itself of her competence and credibility. That said, the Appellant did not indicate how any procedural omission, if at all, occasioned prejudice or resulted in a miscarriage of justice. Procedural safeguards are intended to enhance fairness, not to invalidate otherwise credible and cogent evidence, particularly where nothing prejudicial has been demonstrated. This issue is also without merit.
50. The Appellant also complained that his right to a fair trial was infringed and that his defence was not properly considered contrary to the requirements of Article 50(2)(d) of the Constitution and Section 211(1) of the Criminal Procedure Code.



- 51. We do not agree. This is because according to the record, the Appellant was informed of the charge, he cross-examined all the prosecution witnesses, was placed on his defence under Section 211(1) of the Criminal Procedure Code, opted to give sworn testimony, and even called witnesses in his defence.
- 52. The trial court considered his defence, including the allegation that he had been falsely implicated, and gave reasons for rejecting it. The High Court, on first appeal, re-evaluated the defence afresh and similarly found it incapable of displacing the prosecution’s evidence. The High Court considered the Appellant’s assertion that he had been falsely implicated due to marital disagreements with his wife and examined it against the totality of the prosecution evidence. The court observed that the defence was unsupported by any independent or corroborative evidence, particularly since the alleged motive for fabrication was not put to the complainant during cross-examination.
- 53. The High Court further observed that the defence did not raise any reasonable doubt when weighed against the complainant’s consistent and credible testimony, which was corroborated by medical evidence and the surrounding circumstances of the case. The court found that the Appellant’s account failed to explain the presence of the complainant in his bedroom at the material time or to dislodge the cogent evidence that also placed him at the scene. Given the circumstances, the High Court correctly concluded that the defence was a mere denial and was incapable of displacing the prosecution’s case. Hence, there was nothing that pointed to any violation of Article 50(2)(d) of *the Constitution* or Section 211(1) of the Criminal Procedure Code in this case.
- 54. When the evidence is considered in its totality, we find that the trial court and the High Court properly analysed the evidence and rightly concluded that the elements of the offence of defilement, that is the age of the complainant, penetration and that the person identified as the perpetrator was the Appellant were proved. Without doubt, the prosecution proved its case to the required standard and as a consequence we uphold the Appellant’s conviction and sentence.
- 55. In sum, the appeal is without merit and is dismissed in its entirety.
It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF FEBRUARY, 2026.

S. GATEMBU KAIRU, FCI Arb, C.Arb.

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JUDGE OF APPEAL
A. K. MURGOR

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JUDGE OF APPEAL
P.NYAMWEYA

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JUDGE OF APPEAL

I certify that this is a True copy of the original Signed
DEPUTY REGISTRAR

