



**Maloba v Republic (Criminal Appeal E001 of 2024)
[2026] KEHC 2383 (KLR) (27 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 2383 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL APPEAL E001 OF 2024
H NAMISI, J
FEBRUARY 27, 2026**

BETWEEN

FREDRICK NYONGESA MALOBA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against conviction and sentence on judgement delivered
on 28 June 2022 in Ruiru SPM Court Criminal Case No. E041 of 2021)*

JUDGMENT

1. The matter placed before the Court for determination is an appeal arising from the judgment, conviction, and sentence delivered by the Senior Principal Magistrate's Court at Ruiru (Hon. C.A. Otieno-Omondi, SPM) in Ruiru S.O. Case No. E 41 of 2021. The Appellant was arraigned and charged with the principal offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. The particulars of the principal charge alleged that on diverse dates between 15 June 2021 and 28 June 2021, at Ruiru town in Ruiru Sub-County within Kiambu County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of M.N., a child aged 14 years.
2. In the alternative, the Appellant faced a charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, based on the identical factual matrix. Following a full trial wherein the prosecution called 4 witnesses and the Appellant offered an unsworn statement in defence, the trial court found the prosecution's evidence to be cogent, consistent, and overwhelming. The trial court dismissed the Appellant's alibi as unbelievable. Consequently, on 28 June 2022, the trial court convicted the Appellant on the main count of defilement and sentenced him to serve 10 years of imprisonment. Having secured a conviction on the principal count, the trial court correctly refrained from making a finding on the alternative count.



3. Aggrieved by the decision of the subordinate court, the Appellant filed a Petition of Appeal dated 2023, articulating 6 substantive grounds challenging the evidentiary basis of the conviction and the legality of the sentence. The Respondent not only opposed the appeal against conviction but simultaneously filed a formal Notice of Enhancement. The Respondent prayed that the sentence be enhanced from 10 years to 20 years of imprisonment, arguing that the trial court erred in law by imposing a sentence that fell below the statutory mandatory minimum prescribed under Section 8(3) of the *Sexual Offences Act*.
4. Before embarking on the substantive evaluation of the grounds of appeal, it is a constitutional and procedural imperative to establish the parameters of this Court's jurisdiction. As a first appellate court, the duty placed upon this Court is neither perfunctory nor superficial. It is a rigorous mandate to subject the entire evidentiary record—comprising witness testimonies, documentary exhibits, and forensic reports—to a fresh, exhaustive review and analysis.
5. The jurisprudential bedrock for this duty is found in the celebrated decision of the predecessor to the Court of Appeal in *Okeno v Republic* EA 32. In that precedent, it was definitively stated that an appellant on a first appeal is entitled to expect the appellate court to rehear the case, weigh the conflicting evidence, and draw its own independent conclusions. The appellate court must evaluate the evidence de novo, making allowance for the fact that it did not have the distinct advantage of observing the witnesses' demeanour as they testified in the witness box.
6. This principle has been consistently echoed and expanded upon in subsequent binding decisions. In *Selle v Associated Motor Boat Co Ltd* EA 123, an authority the parties did not cite but which remains highly applicable to the standard of appellate review, it was held that a first appellate court is bound to reconsider the evidence, evaluate it itself, and draw its own conclusions, subject to the caveat that it should not lightly differ from the trial judge on findings of fact based on the credibility of witnesses.
7. This principle operates as a fundamental safeguard against miscarriages of justice. It requires this Court to step into the shoes of the trial Magistrate, sift through the transcripts, and ascertain whether the factual findings are logically deduced from the evidence and whether the legal inferences drawn from those facts are jurisprudentially sound. To this end, the Court has carefully perused the trial record, the witness statements, the documentary exhibits, the Appellant's Petition of Appeal, and the Respondent's written submissions.

The Prosecution's Case

8. The prosecution's case was anchored on the testimony of 4 witnesses, whose identities, roles, and core evidentiary contributions are summarized below.
9. The prosecution's narrative established that the Appellant and the minor were neighbours residing in the same vicinity. PW1 testified that on 15 June 2021, the Appellant lured her into his house under the guise of sending her on an errand. Upon her entry, he secured the door with a padlock, laid her on a seat, removed her clothing, and engaged in non-consensual sexual intercourse without a condom. Following the completion of the act, he utilized a white piece of cloth to wipe her, gave her Kshs. 100/=, and sternly warned her against disclosing the incident to anyone.
10. The second incident, according to the prosecution, occurred approximately two weeks later, on 28 June 2021. PW1 testified that the Appellant intercepted her and instructed her to accompany him to his store. Upon arrival, he secured the door using nails, physically restrained her by grasping her neck, forced her to bend, and defiled her a second time. Crucially, during this second ordeal, PW1 exhibited active resistance; she refused to dress and began screaming vociferously. Her distress calls alerted members of the public in the vicinity, who converged at the store, locked the door from the



outside to prevent the assailant's escape, and subsequently apprehended the Appellant as he attempted to flee the scene. PW2 was subsequently notified by an unknown caller and arrived at the location to find her daughter and the Appellant in the custody of the public.

11. The medical evidence adduced by PW3 was pivotal to corroborating the actus reus of the offence. The clinical examination of the minor, conducted on the very day of the second incident, 28 June 2021, revealed a broken hymen, genital bruising, and a whitish discharge, unequivocally indicating recent vaginal penetration. Furthermore, PW3 examined the Appellant, noting injuries to the back of his head and right hand—injuries highly consistent with the prosecution's narrative that he had been subjected to mob justice upon being caught in flagrante delicto.

The Defence Case

12. Upon the close of the prosecution's case, the trial court found that a prima facie case had been established, thereby shifting the evidential burden to the Appellant to offer a defence. Electing to give an unsworn statement, the Appellant raised an alibi for both dates in question.
13. Regarding 15 June 2021, the Appellant asserted that he was gainfully employed at a company known as "Spinners and Spinners," working a 12-hour shift from 7:00 a.m. to 7:00 p.m., and arrived home at 8:00 p.m., where his wife was present. Regarding 28 June 2021, he claimed that while approaching his store, he was abruptly accosted and assaulted by three unknown men who harboured a malicious grievance against him for operating a private business while concurrently employed at Spinners and Spinners. He alleged that these individuals orchestrated his arrest and that he only encountered the minor and her mother when they alighted from the front of the police vehicle transporting him to the station. Furthermore, he capitalized on the absence of forensic DNA linking him to the minor, positing this omission as a fatal flaw in the prosecution's case. The Appellant called no witnesses to corroborate his alibi.
14. The trial court, evaluating this competing evidence, dismissed the Appellant's alibi as a complete fabrication unsupported by independent evidence or internal logic. The trial Magistrate specifically noted the Appellant's failure to call his wife to substantiate his whereabouts on 15 June 2021, and the inherent implausibility of a complex conspiracy orchestrated by business rivals utilizing a 14-year-old girl.

The Appeal

15. The Appellant formulated a Petition of Appeal raising 6 grounds. These grounds challenge the evidentiary thresholds, statutory interpretation, and sentencing mechanics applied by the trial court.
16. The fundamental pillar of criminal jurisprudence is that the burden of proving the guilt of the accused rests entirely upon the prosecution, and this burden must be discharged to the exacting standard of beyond any reasonable doubt. This principle, enshrined in section 107 of the *Evidence Act*, is the operational mechanism of the presumption of innocence.
17. To secure a conviction for defilement under section 8(1) of the *Sexual Offences Act*, the prosecution is legally bound to prove three critical ingredients conjunctively. As accurately submitted by the Respondent and articulated in *Kyalo Kioko v Republic eKLR*, these ingredients are:
 - (i) the age of the complainant,
 - (ii) proof of penetration, and
 - (iii) positive identification of the assailant.



The Age of the Complainant

18. The *Sexual Offences Act* categorizes penalties strictly based on the specific age bracket of the victim. Section 8(3) mandates specific sentencing parameters for children between the ages of 12 and 15 years. Establishing the precise age of the victim is therefore an absolute prerequisite, not merely to prove the victim is a child, but to activate the correct penal bracket.
19. The trial court correctly initiated the evidentiary process by conducting a *voire dire* examination of PW1, confirming her intelligence and cognitive capacity to testify. During her substantive testimony, PW1 stated her date of birth as 21 December 2006. This oral assertion was unequivocally corroborated by her mother (PW2).
20. More importantly, the oral testimony regarding age was cemented by incontrovertible documentary evidence. The Investigating Officer (PW4) produced a certified copy of the minor's Birth Certificate, marked and admitted as P. Exh. 4, which confirmed the date of birth as 21 December 2006.
21. The offences in question were committed on 15 and 28 June 2021. Simple mathematical computation dictates that on these dates, the minor was 14 years and six months old. This places her squarely within the ambit of section 8(3) of the Act.
22. The Court of Appeal has repeatedly established that a birth certificate is the most reliable, and often conclusive, proof of age in defilement proceedings. In *Kyalo Kioko v Republic* eKLR, the Court reaffirmed that a Birth Certificate is accepted as sufficient and reliable evidence of a victim's age. The Appellant offered no evidence at trial to impeach the authenticity, issuance, or accuracy of the Birth Certificate. The documentary evidence remained unchallenged. Consequently, this Court finds that the prosecution proved the exact age of the minor beyond any shadow of a doubt. Ground 2, in so far as it relates to the failure to prove age, is entirely devoid of merit and fails.

The Fact of Penetration and Medical Linkage

23. The Appellant vehemently argues in Grounds 2 and 4 that the medical evidence failed to link him to the offence, resting his defence heavily on the absence of forensic DNA evidence or the detection of spermatozoa.
24. This argument represents a fundamental jurisprudential misunderstanding of the statutory definition of penetration under modern Kenyan law. Section 2 of the *Sexual Offences Act* explicitly defines "penetration" as "the partial or complete insertion of the genital organs of a person into the genital organs of another person".
25. The jurisprudence governing this ingredient deliberately departed from archaic common law requirements that often demanded corroborative physical evidence such as semen to conclusively prove sexual violence. The landmark decision in *Mark Oiruri Mose v Republic* [2013] eKLR elegantly dissects this issue. The Court of Appeal held that the offence of defilement is complete upon the slightest penetration. The assailant does not need to achieve a full sexual act, nor is ejaculation a prerequisite. As long as there is evidence of penetration, however minimal or superficial, the ingredient is met in law. The Court expressly noted that the law does not mandate the availability of spermatozoa.
26. In the present case, the evidence of penetration is twofold and mutually corroborative. First, there is the direct, uncontroverted oral testimony of the minor (PW1). She vividly and consistently described how the Appellant removed her clothes and had sex with her on two separate occasions. Her testimony was coherent, detailed, and remained unshakeable during cross-examination.



27. Second, the clinical medical evidence is highly corroborative. PW3, the medical officer, examined the minor on 28 June 2021, the exact date of the second assault. The objective clinical findings were wholly consistent with recent, forceful vaginal penetration: bruises on the genitalia, a recently broken hymen, and a whitish discharge.
28. The Appellant's insistence that the lack of DNA evidence vitiates the prosecution's case is legally untenable. While DNA evidence is a sophisticated forensic tool that can definitively link a suspect to a crime scene or victim, its absence does not automatically spell doom for a prosecution case if other forms of evidence are overwhelmingly conclusive. In *Michael Saa Wambua & Another v Republic* [2017] eKLR, it was held that the failure to conduct a DNA test is irrelevant where other evidence, such as eyewitness testimony and circumstantial evidence, is sufficient to meet the 'beyond reasonable doubt' threshold.
29. Here, the medical evidence proved conclusively that the minor was defiled. The oral evidence of the minor established how and by whom she was defiled. The legal threshold for penetration requires no more. Therefore, Grounds 2 and 4, relating to penetration and the lack of forensic medical linkage, are legally unfounded.

Identification of the Assailant

30. The most critical point of contention in criminal appeals of this nature is the identity of the perpetrator. The Appellant contends that the prosecution failed to positively identify him as the assailant, raising issues of truthfulness (Ground 5) and alleged contradictions (Ground 6).
31. The law approaches visual identification with extreme caution, particularly where a conviction relies heavily on a single identifying witness. The locus classicus on this subject is *Maitanyi v Republic* KLR 198. In that case, the Court of Appeal ruled that while a fact may be proved by the testimony of a single witness, the Court must test such evidence with the greatest care, especially when conditions favouring correct identification are difficult. A trial court must inquire into the nature of the light, the distance, and the time available for observation. This principle was further underscored in the older but highly relevant case of *Abdulla Bin Wendo & Another v Republic* (1953) 20 EACA 166, which demands careful testing of identification evidence to prevent wrongful convictions based on honest but mistaken witness observations.
32. However, jurisprudence draws a sharp, definitive distinction between the identification of a stranger and the recognition of a known individual. As was elucidated in *Mwangi v Republic* [2004] eKLR, recognition of an assailant who is well known to the victim is inherently more reliable than the identification of a stranger. When an accused person is known to the witness, the stringent requirements of testing light and distance are somewhat mitigated, because the cognitive process relies on established familiarity rather than fleeting observation.
33. In this case, PW1 was explicit: the Appellant was a neighbour whom she knew well by his name, "Fredrick". This is a case of pure recognition. The first incident occurred inside the Appellant's own house, an intimate proximity that effectively rules out mistaken identity. The second incident occurred in the Appellant's store, during the daytime on her way to school.
34. Beyond mere recognition, the circumstances surrounding the Appellant's apprehension on 28 June 2021 provide airtight circumstantial corroboration. PW1 testified that she screamed, attracting members of the public who locked the door and apprehended the Appellant as he tried to escape. PW2 testified that upon arriving at the scene, she found the Appellant under citizen arrest. Furthermore,



PW3 examined the Appellant that very day and noted injuries on the back of his head and right hand—injuries sustained during the mob justice exacted by the public who caught him red-handed.

35. This unbroken chain of events creates an inescapable ring of truth around the minor's testimony. The Appellant was not picked out of a police lineup days later; he was physically restrained at the scene of the crime by independent members of the public reacting to the victim's immediate distress calls. To suggest mistaken identity or fabrication in these circumstances defies logic. The Court finds no basis to interfere with the trial court's conclusion that the minor was a truthful witness. Grounds 5 and 6 are therefore dismissed.

The Appellant's Defence of Alibi

36. A criminal accused who raises an alibi introduces a claim that they were at a different geographical location at the exact time the offence was committed, making it physically impossible for them to be the perpetrator. The Appellant raised an alibi for both 15 and 28 June 2021.
37. The law on the burden of proof regarding an alibi is well settled in Kenya. In the authoritative case of *Wang'ombe v Republic* KLR 149, a precedent the parties omitted but which governs this area of law, the Court of Appeal established that an accused person who puts forward an alibi does not assume the burden of proving it. The burden of proving guilt remains squarely on the prosecution throughout the trial. The prosecution must disprove the alibi by adducing sufficient evidence to place the accused at the scene of the crime beyond reasonable doubt.
38. The critical inquiry is whether the prosecution displaced the Appellant's alibi in this case. The answer is an unequivocal affirmative. The Appellant's claim that he was at work on 15 June 2021 and arrived home to his wife at 8:00 p.m. was a mere assertion made from the dock during an unsworn statement. While he possessed no legal burden to prove this assertion, he certainly had the evidentiary opportunity to call his wife or an official from his employer (Spinners and Spinners) to raise a reasonable doubt. He strategically chose not to do so. As held in *Michael Saa Wambua & Another v Republic* eKLR, while the prosecution bears the burden to disprove an alibi, they effectively discharge this burden by placing the accused at the scene through credible eyewitness testimony. The minor's highly detailed account of being in his house displaced this weak, uncorroborated alibi.
39. The alibi regarding 28 June is even more logically fractured. The Appellant claimed he was accosted by business rivals who assaulted him. This narrative requires the Court to believe that unknown rivals orchestrated an impossibly complex scenario where they assaulted him, somehow acquired a 14-year-old girl who had just been violently defiled and seamlessly framed him at his own store. This defence is inherently fantastic and logically bankrupt. The trial Magistrate correctly classified it as unbelievable.
40. The prosecution, through a combination of direct oral evidence, corroborative situational evidence of the citizen arrest, and objective clinical data, wove a complete and unbroken chain of evidence. The prosecution proved its case beyond any reasonable doubt. The conviction is sound and must be upheld.

Sentencing, the Notice of Enhancement, and Constitutional Validity

41. Having sustained the conviction, the Court must now navigate the most complex and consequential aspect of this appeal: the legality of the sentence and the Respondent's prayer for enhancement.
42. The trial Magistrate, upon convicting the Appellant, sentenced him to 10 years imprisonment. Ground 3 of the Appellant's petition challenges the calculation of this sentence, specifically the failure to factor in remand time. Conversely, the Respondent filed a Notice of Enhancement, arguing that 10 years is



an illegal sentence because section 8(3) of the *Sexual Offences Act* explicitly mandates a sentence of "not less than twenty years" for the defilement of a child between 12 and 15 years of age.

43. This scenario requires the Court to address three intertwined legal issues: the procedural validity of enhancing a sentence on appeal, the constitutional debate surrounding mandatory minimum sentences, and the mechanical application of credit for pre-trial custody.
44. Can a first appellate court enhance a sentence handed down by a trial court, and what are the procedural prerequisites for executing such an enhancement.
45. Section 347(2) of the Criminal Procedure Code permits appeals to the High Court on matters of both fact and law. Sentencing is fundamentally a matter of law. When a trial court imposes a sentence that falls below a statutory minimum, that sentence is, ab initio, an illegal sentence.
46. The Court of Appeal has extensively addressed the procedure for rectifying illegal sentences on appeal. In *Stanely Nkunja v Republic* (Criminal Appeal No. 280 of 2012) and *SNT v Republic* eKLR, authorities highly pertinent to this procedural query, the court examined whether an appellant must be served with a formal Notice of Enhancement before an illegal sentence can be corrected. The appellate court determined that while it is prudent and a requirement of fair trial principles, enshrined in Article 50 of *the Constitution*, to warn an appellant of the impending risk of enhancement, such formal notice is not strictly mandatory where the sentence is manifestly illegal. An appellate court cannot permit an illegality to stand simply due to procedural omissions by the State.
47. In the present matter, however, the Respondent acted with commendable procedural diligence. The Respondent formally drafted, filed, and served a Notice of Enhancement upon the Appellant (served physically at Kamiti Medium Security Prison), explicitly stating their intention to pray for the enhancement of the sentence from 10 years to 20 years pursuant to section 8(1)(3) of the *Sexual Offences Act*. The Appellant was, therefore, not caught by surprise and had ample opportunity to respond to the State's intention. The procedural mechanisms for enhancement have been fully and validly engaged.
48. Having determined that the lawful statutory sentence is 20 years, the Court must finally address Ground 3 of the Appellant's petition: the application of section 333(2) of the Criminal Procedure Code, which contains a proviso:

Provided that where a person sentenced to imprisonment for an offence has been held in custody prior to the sentence being imposed, the sentence shall take into account the period spent in custody.
49. The jurisprudence regarding this section is strict and unforgiving of judicial oversight. Trial courts must actively and mathematically factor the pre-trial remand period into the final sentence. It is not enough for a magistrate to merely state in passing that they have considered the remand time; the time must be explicitly and visibly deducted from the tariff to ensure the constitutional principle of proportionality is not violated. This principle was forcefully articulated in *Abamad Aboulfathi Mohammed v Republic* eKLR and *Bethwel Wilson Kibor v Republic* eKLR, precedents which clarify that failure to deduct remand time results in an excessive punishment not proportional to the offence.
50. An exception exists in law that section 333(2) does not apply to sentences of life imprisonment, because a life sentence cannot be mathematically quantified in years, making it logically impossible to subtract a specific remand period. However, since the Appellant herein is facing a quantifiable term of years under the enhanced sentence, the provisions of section 333(2) apply forcefully and must be executed.



51. A review of the trial court record reveals the chronological timeline of the Appellant's incarceration. The Appellant was arrested and placed in police custody on 28 June 2021. He remained in remand custody throughout the pendency of the trial until the judgment and sentencing were delivered on 28 June 2022. This constitutes exactly 1 year spent in pre-trial custody. The learned trial Magistrate erred in failing to factor this period into the sentencing calculus. This Court is legally obligated to rectify this omission to prevent an injustice.
52. Accordingly, the orders of the Court are as follows:
- i. The appeal against the conviction for the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* is devoid of merit and is hereby dismissed.
 - ii. The Respondent's Notice of Enhancement is allowed.
 - iii. The illegal sentence of ten (10) years imprisonment imposed by the trial court is hereby set aside. In substitution thereof, and in strict compliance with section 8(3) of the *Sexual Offences Act*, the Appellant is hereby sentenced to serve twenty (20) years imprisonment.
 - iv. Pursuant to the mandatory provisions of section 333(2) of the Criminal Procedure Code, the exact one (1) year period the Appellant spent in pre-trial remand custody shall be factored into the sentence. Consequently, the Appellant shall serve a net prison term of nineteen (19) years, with the sentence deemed to have commenced on the date of his original conviction, being 28 June 2022.

DATED AND DELIVERED AT THIKA THIS 27 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

