



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. E053 OF 2021

FRANCIS MUHISIA alias WEKESA..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O. Case NO. E001 of 2020 of the Chief Magistrate's Court at Migori by Hon. H. Maritim, Resident Magistrate)

JUDGMENT

1. Francis Muhisia alias Wekesa, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006.
2. The particulars of the offence are that on an unknown date in the month of August 2020, at Ngege area, Suna East sub-county within Migori County, he intentionally and unlawfully caused his penis to penetrate the vagina of F.W., a child aged fifteen years.
3. The appellant was sentenced to serve twenty years' imprisonment. He was aggrieved and filed this appeal against the conviction and sentence. He raised grounds of appeal as follows:
 - a) The trial court erred in both law and fact by not complying with Article 50(2) (g)(h) of the Constitution of Kenya 2010.
 - b) The trial court erred in both law and fact by not considering that the ingredients of the offence herein were not proved to the required standard in the law.
4. The respondent did not submit any grounds of opposition or any other submissions.
5. This is the first appellate court. As expected, I have analyzed and evaluated all the evidence adduced before the lower court. I have concluded, having neither seen nor heard any witnesses. I will be guided by the celebrated case of **Okeno vs Republic [1972] EA 32**.
6. Article 50 (2) (g) and (h) of the Constitution of Kenya provides:

Every accused person has the right to a fair trial, which includes the right—

(g) to choose and be represented by an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

7. Although the appellant contended that the trial court failed to comply with this Article, the record displaces this contention. Before the commencement of the trial, the appellant informed the trial court that he was not ready to proceed, for he had not gone through the statements which had been supplied. This ground, therefore, lacks merit.
8. An offence of defilement is established against an accused person when the prosecution has proved the following ingredients:
 - a) That there was penetration of the complainant's genitalia;
 - b) That the accused was the perpetrator and
 - c) The victim must be below eighteen years old.

This position was echoed in the case of **Fappyton Mutuku Ngui vs Republic [2012] eKLR**. Ngugi J. (as he was then) said:

Going by this definition of defilement... the issues which the court needs to determine...first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.

9. I will determine if the prosecution proved these ingredients to the required standards.
10. The complainant underwent an age assessment performed by Dr. Otieno, a dental surgeon, who estimated her age at approximately 16 years. This aligns with her Child Health card, which shows a date of birth of 28 January 2005 and was issued at Khwisero Health Centre. In August 2020, she was 15 years and 8 months old, confirming her age was proven to the required standard.
11. During the incident, F.W.'s (PW1) parents were in Kakamega attending a funeral. The complainant stated that the appellant, their employee living outside the home, requested that she open the gate for him at 7 p.m. When she went to open, he grabbed her and defiled her. This was the only time he defiled her. Out of fear, she did not inform her parents. They learned of the incident when her pregnancy became apparent. She, however, conceded that in July 2020, Emmanuel defiled her four times.

12. C. A. O. (PW2) is the girl's father. His evidence was that a friend informed him that his daughter was in a relationship with the appellant. He denied that one Emmanuel had defiled his daughter.
13. Moindi Justus Magati (PW4) is a clinical officer at Migori County Referral Hospital. He examined the complainant on 6th November 2020. She was found to be expectant. She concluded there was defilement.
14. Francis Muhisia alias Wekesa, the appellant, denied any participation in the offence. He contended that this was a frame-up.
15. The proviso to section 124 of the Evidence Act states:
- Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.***
16. The medical evidence supported the complainant's claim of defilement. However, there are notable gaps and contradictions that the prosecution should have clarified. When her father testified about being informed of his daughter's relationship with the appellant, the informant should have been called to testify, especially since the complainant now admits that Emmanuel defiled her in July 2020. The appellant's claim of being framed makes it crucial to call this witness to explain how they knew about the relationship. The court of appeal in The Court of Appeal in the case of **Bukenya vs Uganda [1972] EA 549** (Lutta Ag. Vice President) held:
- The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent.***
- Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.***
17. This oversight was crucial to the prosecution's case, raising doubts about whether the appellant was sacrificed to protect Emmanuel from the repercussions of his actions.
18. C.A.O. (PW2), based on his cross-examination testimony, was unaware that Emmanuel had defiled his daughter. This suggests he either had not been informed by his daughter or intentionally withheld the information from the court. The complainant talked about it after being cross-examined about it. This paints the complainant as an untrustworthy witness. The Court of Appeal in The Court of Appeal, in the case of **Ndungu Kimanyi vs Republic [1979] KLR 283** (Madan, Miller and Potter JJA), held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

19. After reviewing the evidence on record, I conclude it was unsafe to depend on the complainant's uncorroborated testimony to determine that the appellant defiled her. The conviction is hereby quashed and the sentence set aside. The appellant is set free unless otherwise lawfully held.

Delivered and signed at Migori on this 27th day of February 2026

**KIARIE WAWERU KIARIE
JUDGE**