

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

HCCRA NO. E008 OF 2025

(From Naivasha CM CR Case No. E037 of 2022)

BONIFACE MAINA.....

APPELLANT

VERSUS

REPUBLIC.....

RESPONDENT

(Being an appeal against the conviction and sentence of Hon. Ndeng'eri (PM) dated 19th March 2025 in Naivasha CM's CR SO. 037 of 2022)

JUDGMENT

- 1. Boniface Maina**, the Appellant herein, was convicted of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act, 2006 and sentenced to serve 15 years imprisonment.
- The particulars of the charge were that on 17th October 2021 at Kanairobi area, Maai Mahiu Township in Naivasha Sub-County with Nakuru County, Intentionally and unlawfully caused his genital organ namely penis to penetrate into the genital organ namely vagina of E.W. (*particulars withheld*) a girl aged 15 years.
- A summary of the evidence was as follows: -

- 4.** PW1, E.W. (*particulars withheld*) the Complainant herein testified that she was on 17th October 2021 on her way to church when she met the Appellant along the way. The Appellant dissuaded her from going to church after which she accompanied him to a shop before luring her to a house where he defiled her and thereafter warned her not to tell anyone what had transpired.
- 5.** PW1 however informed her cousin and her mother (PW2). She sought treatment at a hospital where she was diagnosed with a sexually transmitted infection. The matter was reported to the police and the Appellant arrested 3 months later.
- 6.** PW2 testified that sometime in October 2021, she noticed her minor daughter was walking in an unusual manner. She went to the child's school and was allowed to take her to hospital. Upon examination, the minor was found to have been defiled and infected with a sexually transmitted disease (STD). PW2 stated that the minor did not immediately reveal the perpetrator of the offence.
- 7.** PW2 further stated that in April of the following year, the minor returned home crying and reported that the perpetrator of her defilement was chasing and threatening her. PW2 then reported the matter, particularly after learning that the accused had resumed work as a gateman. PW2 testified that the accused was arrested and produced before court, and she positively identified him as the suspect.
- 8.** The minor was initially examined by Clinical Officer Tabitha Ndung'u, who was unavailable to testify. With the consent of

the accused, Catherine Kimani, a clinical officer from Maai Mahiu Health Centre, produced the medical documents on behalf of the examining officer.

- 9.** The Clinical Officer testified that the minor reported that she was defiled by someone known to her. The examination was conducted about six months after the incident was reported. The medical findings included a missing hymen, vaginal discharge, presence of bacteria in urine, evidence of sexually transmitted infection, including trachoma and vaginitis
- 10.** The P3 form was produced as P Exhibit 1 and the Post Rape Care (PRC) form as P Exhibit 3. The P3 form was dated 27th May 2022, and the incident was recorded as defilement.
- 11.** The matter was investigated by PC Susan Njogu, who was then stationed at Maai Mahiu Police Station at the time. She received the report from PW2, recorded witness statements, and upon receiving the P3 and PRC forms, decided to charge the accused with the offence of defilement. She also produced the minor's birth certificate as P Exhibit 3.
- 12.** In his sworn defence, the accused denied the offence and claimed that the charges were fabricated after he denied PW2 access to the gas refilling plant where he worked. He further challenged the identity of the complainant, stating that the name on the charge sheet differed from that appearing on the medical documents and birth certificate.
- 13.** The Appellant was aggrieved by the conviction and sentence. He lodged this appeal in which he raised numerous grounds including; inconsistencies on the complainant's age, contradictions in testimonies, alleged defective charge sheet,

doubtful identity of the perpetrator, improper reliance solely on complainant's evidence and lack of medical evidence linking him to the alleged sexually transmitted disease (STD).

14. The State opposed the appeal and supported both the conviction and sentence.

15. The appeal was canvassed by way of written submissions a summary of which I will highlight hereinbelow.

The Appellant's Arguments

16. The appellant submitted that the conviction was unsafe due to material contradictions in the identity of the complainant and her parents. He noted the difference in the names stated on the charge sheet and the P3/PRC forms. He also disputed the date of the offence which was stated as 16th /17th October 2021 as against an April 2022 incident. He questioned the delay in reporting the offence to the police and the lack of corroborative evidence, reliance on the complainant's sole testimony, an alleged STD diagnosis that was not medically linked to him and the failure to medically examine him.

17. The Appellant cited the decision in ***Ng'ang'a vs. Republic (Criminal Appeal 112 of 2023)*** where it was held that: -

“Whenever a victim of defilement or rape contracts a sexually transmitted disease, the best practice is to subject the alleged perpetrator to a medical examination. Should the finding be positive, it strengthens the prosecution's case and

corroborates the complainant's identification of the culprit. The prosecution failed to subject the appellant to a medical examination, and no evidence was provided to explain this failure. This was a critical omission.”

18. It was submitted that the cumulative effect of all the gaps and contradictions casts doubt on the credibility of the prosecution’s case. The Appellant highlighted some of the gaps as the inconsistency in the name of the Complainant’s mother (PW2) and lack of corroboration of evidence on penetration.

The Respondent’s Submissions

19. The Respondent, on the other hand, maintained that the conviction was sound because penetration was proved through the testimony of PW1 and the medical evidence which revealed that the hymen was missing and discharge observed.

20. It was submitted that all the ingredients of defilement were proved beyond reasonable doubt and that the any contradictions in the prosecutions evidence were minor and immaterial.

21. It was the Respondent’s case that the trial court was justified in convicting and sentencing the Appellant.

22. Reference was made to the decision in ***Hadson Ali Mwachingo vs. Republic, Criminal Appeal E011 of 2024***

where the importance of proving the age of the victim was discussed and the case of **Peter Musau Mwanzia vs. Republic (2008) eKLR** where the court dealt with the issue of recognition and held that: -

“...for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him... must show, for example, that the suspect is known to him for sometime, is a relative, a friend or somebody within the same vicinity...”

Issues for Determination

- 23.** Having reviewed both the submissions and the record, I find that the following issues arise for my determination: -
- a) ***Whether all the ingredients of the offence of defilement were proved to the required standard.***
 - b) ***Whether the charge sheet and related documents contained material defects.***
 - c) ***Whether contradictions in the prosecution’s case created reasonable doubt.***
 - d) ***Whether the failure to medically examine the appellant fatally weakened the prosecution’s theory of STD transmission.***
 - e) ***Whether the conviction was safe and the sentence lawful.***

Analysis and Determination

24. This being a first appeal, this court is obliged to re-evaluate the evidence afresh, analyze it and draw its own independent conclusions, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify. This principle is now settled and was restated in ***Okeno vs. Republic [1972] EA 32.***

25. The offence of defilement under section 8(1) of the Sexual Offences Act has three key ingredients which the prosecution must prove beyond reasonable doubt, namely; **the age of the complainant, penetration, and positive identification of the perpetrator.** (See ***Fappyton Mutuku Ngui vs. Republic [2012] eKLR; George Opondo Olunga vs. Republic [2016] eKLR.***)

26. In the instant appeal, the appellant faults the trial court on several fronts including inconsistencies on the complainant's identity and age, contradictions on the date and circumstances of the alleged offence, reliance on uncorroborated evidence, and the failure by the prosecution to medically examine the appellant notwithstanding the allegation of Sexually Transmitted Disease (STD) transmission.

Ingredients of the Offence of Defilement

(i) Age of the complainant

27. On the age element, the prosecution was required to prove that the complainant was a child as defined under the Children Act and the Sexual Offences Act. The importance of

proving age in defilement cases cannot be over-emphasized, as it not only forms an essential ingredient of the offence but also determines the applicable sentence. (See ***Hadson Ali Mwachingo vs. Republic, Criminal Appeal E011 of 2024; Alfayo Gombe Okello vs. Republic [2010] eKLR***).

28. While the record shows that a birth certificate was produced, the appellant raised a plausible challenge that the complainant's particulars as captured in the charge sheet differed from those reflected in the PRC form and other related documents as while the charge sheet shows that the complainant is E.W, the PRC form shows she is E.N. The P3 form and the Birth Certificate however show that the name E.W.

29. In my view, where such discrepancies arise, the court must satisfy itself that the documentary evidence produced relates to the very complainant who testified before court. Documentary exhibits are only probative where their nexus to the complainant is clear and uncontroverted.

30. I am therefore not satisfied that the prosecution proved the age of the complainant beyond reasonable doubt, in light of unresolved doubts as to the identity particulars attaching to the birth certificate and the PRC form.

(ii) Penetration

31. On penetration, the prosecution relied on the testimony of PW1 and medical evidence produced in court. The law on penetration is that it may be proved by oral testimony alone and need not be supported by medical evidence in every

case. (See ***Kassim Ali vs. Republic [2006] eKLR***; ***George Opondo Olunga vs. Republic [2016] eKLR***). Further, the definition of penetration under section 2 of the Sexual Offences Act includes partial or complete insertion.

32. However, medical evidence, where produced, must still be weighed carefully against the totality of the evidence, particularly the timing of the report to the police and medical examination which were done many months after the alleged incident. In this case, the medical examination was conducted several months after the alleged incident and the witness who testified did not personally examine the complainant but produced the documents on behalf of another clinician. Although such production may be admitted with consent, its evidential weight still depends on the surrounding circumstances and whether the rest of the evidence is coherent.

33. This court is persuaded that while the complainant's evidence may have pointed to penetration, the overall circumstances of this case, the long and unexplained delay in the reporting, the unsettled documentary contradictions and uncertainties in dates, meant that the evidence on penetration was not free from doubt.

(iii) Identity of the perpetrator

34. On identity, PW1 testified that she met the Appellant on her way to church, accompanied him and that he thereafter defiled her. The case therefore hinged on recognition evidence. The law is settled that recognition is generally

more reliable than identification of a stranger, but it is not foolproof and must still be tested with greatest care. (See ***Peter Musau Mwanzia vs. Republic [2008] eKLR; Wamunga vs. Republic [1989] KLR 424***).

- 35.** In this appeal, identity was further muddled by uncertainties and contradictions regarding the reporting timeline and the date of the alleged offence, as well as inconsistencies in names and identity particulars in the charge sheet and supporting documents. Those inconsistencies were not satisfactorily explained or reconciled.
- 36.** I find that the Appellant's argument that the contradictions went to the root of the case is not without merit. The prosecution bears the burden of proof throughout and that burden never shifts. Any doubt on identity must be resolved in favour of the accused person. (See ***Miller vs. Minister of Pensions [1947] 2 All ER 372***, as applied locally).
- 37.** I therefore find that the prosecution did not prove beyond reasonable doubt that it was the appellant who committed the alleged act.

Charge Sheet Defects

- 38.** The appellant argued that inconsistencies in the names of the complainant and parentage rendered the charge defective and prejudicial. The general principle is that not every defect is fatal, and under section 382 of the Criminal Procedure Code the court may disregard errors that do not occasion a miscarriage of justice.

39. The defect in this case related to the name on the PRC form which was different from the name in the charge sheet and the Birth Certificate. In ***Yongo vs, Republic [1983] eKLR*** it was held that where the defect relates to the identity of the complainant or the particulars of the offence to such an extent that the accused person is left uncertain as to the case he is to meet, the defect cannot be cured as a mere technicality.

40. In the present case, I find that the inconsistencies in names and documentation were not minor. They touched on the foundational aspects of the case including the complainant's identity, her age and were therefore material.

Contradictions in the Prosecution's Case

41. It is true that witnesses do not always testify with mathematical precision and minor inconsistencies are expected. Courts have repeatedly held that minor contradictions that do not go to the root of the prosecution case are not fatal. (See ***Njuki & 4 Others vs. Republic [2002] 1 KLR 771***).

42. Nevertheless, contradictions relating to core elements such as identity, age, the date of the alleged offence and the sequence of events cannot be dismissed as minor. In my view, the contradictions in this case were material and created reasonable doubt, thereby rendering the conviction unsafe.

Section 124 Evidence Act - duty to record reasons

- 43.** The prosecution and the respondent placed reliance on section 124 of the Evidence Act which allows a court to convict on the evidence of the complainant in a sexual offence, even without corroboration, provided that the court believes the complainant and records the reasons for that belief.
- 44.** The requirement to record reasons is not a cosmetic procedural step; it is a substantive safeguard meant to ensure that convictions founded on uncorroborated testimony meet the constitutional threshold of a fair trial. In the absence of a clear record showing that the trial court appreciated the contradictions and explicitly recorded reasons for believing PW1, it becomes difficult for an appellate court to uphold the conviction where the evidence carries material doubt.
- 45.** In the circumstances of this case, I find that the contradictions and documentary uncertainties called for heightened caution and explicit reasons for belief, which were not sufficiently demonstrated on the record.

STD Transmission

- 46.** The Appellant argued that since PW1 allegedly contracted an STD after the incident, the prosecution ought to have subjected the appellant to medical examination to establish a nexus. The Appellant relied on ***Ng'ang'a vs. Republic (Criminal Appeal 112 of 2023)*** where the court held that where STD transmission is relied upon as part of the

evidential chain, failure to examine the accused creates a critical evidentiary gap.

- 47.** I agree with the reasoning in the said decision. While it is not mandatory, in every defilement case, to medically examine an accused person, where the prosecution introduces STD infection as a major supporting plank, the failure to establish medical linkage weakens the prosecution case. This is particularly so where the examination of the complainant was conducted long after the alleged incident and where there are other contradictions affecting credibility.
- 48.** This omission, taken together with the other evidentiary weaknesses, further renders the conviction unsafe.

Sentence

- 49.** Having considered the record, the submissions and the applicable law, I find that the prosecution evidence fell short of the threshold of proof beyond reasonable doubt. The contradictions and documentary inconsistencies were material, and the court cannot safely uphold the conviction. The conviction is therefore not safe and cannot stand. Consequently, the sentence imposed is hereby set aside.

Retrial

- 50.** The remaining question is whether this court should order a retrial. The principles guiding retrials are well settled. A retrial may be ordered where the interests of justice demand it and where it is unlikely to cause prejudice to the appellant, but it will not be ordered to enable the prosecution fill gaps

in its case. (See ***Fatehali Manji vs. Republic* [1966] EA 343; *Mwangi vs. Republic* [1983] KLR 522**).

51. In the present case, the evidence on record was riddled with unresolved doubts regarding identity particulars, the documentary linkage of exhibits to the complainant, and the evidentiary gaps highlighted above. In my view, ordering a retrial would afford the prosecution an opportunity to patch up deficiencies in its case. Further, the appellant has been under the burden of a conviction and sentence since March 2025 and I find that it would be prejudicial to subject him to a fresh trial in circumstances where the prosecution case was not merely affected by procedural errors but by substantive evidentiary weaknesses.

52. I therefore find that this is not a proper case for a retrial.

Disposition

53. In the result, the appeal herein is hereby allowed. The conviction for defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act is hereby quashed and the sentence of 15 years imprisonment is hereby set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

54. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIVASHA THIS 19TH DAY OF FEBRUARY, 2026.

HON. W. A. OKWANY

JUDGE
19/02/2026

FOR APPELLANT present
Miss Achieng for the state
COURT ASSISTANT Karani

File closed

ORIGINAL