Maragia v Republic (Criminal Appeal E042 of 2024)
[2026] KEHC 2867 (KLR) (19 February 2026) (Judgment)

Neutral citation: [2026] KEHC 2867 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E042 OF 2024

TW CHERERE, J

FEBRUARY 19, 2026

BETWEEN

REUBEN MARAGIA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from conviction and sentence in Keroka MCSO E044 of 2021 by Hon. C. Ombija, (SRM) on 29th August 2025)

JUDGMENT

1. The Appellant was charged with defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* No. 3 of 2006. The particulars alleged that between 11th and 14th August 2021 at Mochenwa area in Masaba North Sub County within Nyamira County, he intentionally and unlawfully caused his male genital organ to penetrate the vagina of VI, a child aged 14 years. He was also charged with an alternative charge of touching the vagina of VI contrary to section 11(1) of the *Sexual Offences Act*.

2. The matter proceeded to hearing and culminated in his conviction. He was sentenced to twenty (20) years' imprisonment pursuant to section 8(4) of the *Sexual Offences Act*.

3. Being dissatisfied with both conviction and sentence, he lodged this appeal. From the Petition of Appeal and the Appellant's Written Submissions dated 05th January 2026, the grounds advanced by the Appellant, when properly consolidated, give rise to the following issues for determination:

    1. Whether the prosecution proved beyond reasonable doubt the essential elements of the offence of defilement, namely the age of the complainant, penetration, and the identity of the Appellant as the perpetrator.

2. Whether the alleged contradictions in the prosecution evidence, investigative gaps, and the nature of the medical evidence created reasonable doubt sufficient to warrant interference with the conviction.

3. Whether the complainant's alleged maturity, voluntary association with the Appellant, or absence of force could in law negate criminal liability.

4. Whether the sentence of twenty years' imprisonment was lawful and constitutional, and whether the trial court complied with section 333(2) of the Criminal Procedure Code.

4. On a first appeal, this Court is enjoined to conduct its own independent review of the evidence on record and to arrive at its own conclusions, while giving due regard to the fact that the trial court had the opportunity to hear and see the witnesses. This approach is firmly grounded in Selle v Associated Motor Boat Co. Ltd [1968] EA 123.)

5. The offence of defilement under section 8(1) of the *Sexual Offences Act* requires proof of three essential elements: the age of the complainant, proof of penetration, and identification of the accused person as the perpetrator. The burden of proof rests upon the prosecution throughout and must be discharged beyond reasonable doubt, as emphasized in JOO v Republic [2015] eKLR and reaffirmed by the Supreme Court in Ahmed Abolfathi Mohamed & Another v Republic [2018] eKLR.

6. On the question of age, the complainant testified and a birth certificate was produced confirming that she was born on 10th May 2007. The offence occurred between 11th and 12th August 2021; at which time she was fourteen (14) years old.

7. On the issue of penetration, the complainant testified that during the material period she spent nights at the Appellant's residence and that they engaged in sexual intercourse. The clinical officer who examined her testified that upon examination there were findings consistent with penetration, and the medical report produced in evidence corroborated her account. When the complainant's narrative is considered together with the medical findings, the evidence establishes the element of penetration to the required standard.

8. The law permits a conviction in sexual offences to rest on the sole testimony of the complainant provided the court records reasons for believing the witness. Section 124 of the *Evidence Act* (Cap 80) expressly authorises such a course. In the present matter, the trial court recorded that it found the complainant truthful and consistent, and further observed that her account was supported by medical evidence. There is nothing on record to suggest that the trial magistrate misdirected himself in assessing her credibility.

9. The next question is whether the prosecution proved that it was the Appellant who caused the penetration. The complainant testified that she knew the Appellant well and described him as her boyfriend. She stated that between 11th and 12th August 2021 she was in his company, accompanied him to his residence in the company of two other girls, and slept on his bed while the other girls slept on the floor. She further testified that they engaged in sexual intercourse on that night and that similar conduct continued for consecutive days. Her evidence was therefore one of recognition rather than identification of a stranger.

10. In his sworn defence, the Appellant denied having sexual intercourse with the complainant. However, his argument that the complainant consented to sexual intercourse implicitly acknowledges that she was in his company and at his residence. The real dispute is therefore not whether he was present, but whether sexual intercourse occurred as alleged and whether the complainant's account was credible.

The trial court, having had the advantage of seeing and hearing the witness, believed her testimony, and this Court, upon re-evaluation of the record, finds no basis to disturb that finding.

11. The Appellant further contends that the prosecution failed to call the two other girls who were allegedly present in the same house and that the Court should draw an adverse inference from that omission. Section 143 of the *Evidence Act* provides that no particular number of witnesses is required to prove any fact. Nevertheless, in Bukenya & Others v Uganda [1972] EA 549, the Court held that where essential witnesses are not called and their evidence would have been material to the case, an adverse inference may be drawn.

12. The critical inquiry, therefore, is whether the uncalled witnesses were essential to the proof of penetration or identity. Although the other girls were said to have been present in the same premises, described as a single room subdivided by a sheet, they were not alleged to have been participants in or eyewitnesses to the act of sexual intercourse itself. Sexual intercourse is inherently private, and the mere presence of other persons in the same dwelling does not necessarily mean that they observed the act. In the absence of evidence that the uncalled witnesses were material to the core ingredients of the offence, their omission does not create a material evidentiary gap.

13. Upon an independent re-evaluation of the entire record, I am satisfied that the prosecution proved beyond reasonable doubt that penetration occurred and that it was caused by the Appellant.

14. I now turn to the Appellant's contention that the complainant voluntarily accompanied him and that there was no evidence of coercion, force or inducement. He relies on Eliud Waweru Wambui v Republic [2019] eKLR and the English decision in Gillick v West Norfolk and Wisbech Area Health Authority [1985] 3 All ER 402 to argue that adolescents may possess sufficient maturity to make personal decisions and that the complainant's conduct was voluntary.

15. This argument must be considered against the statutory framework governing defilement. Section 8(1) of the *Sexual Offences Act*, No. 3 of 2006 provides that a person who commits an act which causes penetration with a child is guilty of the offence of defilement, and section 2 defines a child as a person under the age of eighteen years. The statute does not make lack of consent an ingredient of the offence where the complainant is under eighteen years, and in that respect the offence is one of strict liability as to age.

16. The Court of Appeal in Eliud Waweru Wambui v Republic (supra) reaffirmed that once age and penetration are proved, consent of a minor is immaterial. That authority does not support the proposition that a minor's perceived maturity can negate criminal liability; rather, it affirms the strict statutory regime established by Parliament. Similarly, Gillick v West Norfolk and Wisbech Area Health Authority (supra) concerned the capacity of a minor to consent to medical advice within the English civil law context, and it does not displace the express criminal prohibition contained in section 8 of the *Sexual Offences Act*.

17. The Appellant also invokes Elizabeth Waitheigeni Atimu & Others v Republic [2018] eKLR and JOO v Republic [2015] eKLR for the principle that the burden of proof rests upon the prosecution and that any reasonable doubt must benefit the accused. That principle remains foundational in criminal law; however, it applies to proof of the ingredients of the offence. It does not reintroduce consent as a defence where the statute has rendered it legally immaterial.

18. The correct legal position is therefore that voluntariness on the part of a child under 18 years does not constitute a defence to a charge of defilement. Once the prosecution proves that the complainant was a child and that penetration was caused by the accused, criminal liability attaches irrespective of apparent willingness.

19. On the issue of sentence, section 8(3) of the *Sexual Offences Act* provides that a person who defiles a child aged between twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years. The Appellant relies on Francis Karioko Muruatetu & Another v Republic [2017] eKLR to argue that mandatory sentences are unconstitutional. However, the Supreme Court in Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 Others (Amicus Curiae) [2021] eKLR clarified that the earlier decision applies strictly to the mandatory death sentence under section 204 of the Penal Code and does not invalidate mandatory or minimum sentences prescribed under other statutes, including the *Sexual Offences Act*.

20. Section 8(3) therefore remains valid law, and the sentence of 20 years' imprisonment imposed by the trial court was the statutory minimum.

21. The record reveals that the Appellant was arrested on 14th August 2021 and remained in custody throughout the trial. In compliance with section 333(2) of the Criminal Procedure Code, the sentence shall run from the date of arrest.

Disposition

22. From the foregoing analysis, I make the following orders:

    1. The appeal against conviction and sentence has no merit and it is hereby dismissed.

    2. In compliance with section 333(2) of the Criminal Procedure Code, the sentence of twenty (20) years' imprisonment shall run from 14th August 2021, being the date of arrest.

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DELIVERED AT NYAMIRA THIS 19TH DAY OF FEBRUARY 2026.

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Anita

Accused - Present in person

For the DPP - Mr. Chirchir (SADPP)