



REPUBLIC OF KENYA



KENYA LAW
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**M'Tabari v Republic (Criminal Appeal E010 of 2025)
[2026] KEHC 6125 (KLR) (6 May 2026) (Judgment)**

Neutral citation: [2026] KEHC 6125 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL E010 OF 2025**

JM CHIGITI, J

MAY 6, 2026

BETWEEN

JOHN KITHURE M'TABARI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

Appellant's Submissions

1. The Appellant sought the leave to amend his petition of appeal under section 350 (v) of the Criminal Procedure Code with the following grounds;
 1. That the trial Court magistrate erred in law by relying on evidence of PW1 and PW3 whose credibility and truthfulness were questionable hence cannot be cured by section 124 of the *Evidence Act*.
 2. That the Hon. Magistrate failed in matters of law and fact by failing to observe that the Elements of the Defilement were not proved which include identification and penetration.
2. He urged that the elements of defilement were set out in Fappyton Mutuku Ngui Vs Republic Criminal Appeal 296 of 2010, where the High Court held that the ingredients to look out for in a defilement case are: Whether there was penetration of the Complainant's genitalia; Whether the complainant was a child and; Whether penetration was by the appellant.
3. The Appellant cited Articles 50 2(c) and (j) of *the Constitution* and urged that the right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms. He cited the case of 'Thomas Patrick Gilbert Chepmimondeley vs Republic' (2008) eKLR in this regard and urged that Article 50(2)



- (j), correctly interpreted, means that an accused person should be furnished with the witness statements and exhibits which the prosecution intends to rely on in their evidence in advance.
4. He cited the case of *Natasha Singh vs CB* (2013) 5 SCC 741 and urged that the appellant's right to fair trial was violated by the Hon. Magistrate.
 5. It is the Appellants' case that after he took plea on 28th October 2019 there was no order for witness statements to be availed to the accused.
 6. Being a layman who didn't know the court process, he was subjected to mentions whereby there was no day he was informed of his right to have the prosecution witness statements.
 7. This went on until 3rd November 2020 when the hearing stalled.
 8. That the Learned Magistrate never enquired from the appellant if he was ready to proceed with the hearing or not.
 9. He urged that it is evident, in the way the appellant cross-examined the witnesses, that he was not ready to continue with the hearing process, but could not raise the issue because of being a layman who was not given legal representation or even informed of what he needed to have as an accused person.
 10. He urged that the Hon. Magistrate never warned herself of convicting the appellant on evidence that breached the appellant's right to fair trial.
 11. Consequently, it would be an injustice to order a retrial having been in custody since 26th October 2019.
 12. He urged that principles of a retrial were stated in numerous decisions among them *Aimer Suna vs Republic* (1964) EALR 483 and urged that the retrial would subject the appellant to double jeopardy as was stated in the case of *Morris Kaberia HCCR Appeal No. 125 of 2017*.
 13. The Appellant submitted that the credibility of a witness is his or her worthiness of belief, determined by the following considerations: Character, acuteness of powers of observation, accuracy and retentiveness of memory, general manner in giving evidence, relation to the matter before the court, appearance, deportment, and prejudices, general reputation for truth in his or her community, a comparison of his or her testimony with other statements made by him or her out of court, and a comparison of his or her testimony with that of others and more. He urged that where circumstances suggest that a witness may have been compelled, coerced or intimidated to give evidence, then, such evidence ought to be treated with caution.
 14. The Appellant submitted that the trial Magistrate concluded that the complainant understood what oath was, yet looking at the questions given to the Complainant, there was nowhere the trial magistrate tested if the child understood what it meant to carry a bible and be sworn to give evidence. Further, that it is worth noting that the evidence was full of contradictions which were to be scrutinized well to base a safe conviction.
 15. Counsel reproduced the evidence of PW1 and submitted that PW4, who was actually the person who came up with the story, stated that "the child would say at times it would happen on a Sunday when the mother was away". He urged that it is worth noting that the Complainant stated that he was being defiled on weekdays and not on weekends, and there is nowhere a complainant was raised that the complainant used to miss school or that she used to be late for school. That this removes the point that he was defiled on weekdays. Further, that the child categorically insisted that the alleged offence never happened during Sundays.



16. The Appellant questioned why three people gave different versions of an occurrence that happened and urged that the evidence of the complainant does not pass the test prescribed by the Court of Appeal in the case of *Ndungu Kimanyi vs Republic* [1979] KLR 283 (Madan, Miller and Potter JJA). He additionally cited *Chinja v Republic* [2025] KEHC 1744 (KLR) Criminal Appeal 86 of 2023 on the same.
17. The Appellant contended that there was no penetration of PW1 's genital organ and that it is not normal that a child of the age of PW1 can be penetrated on her anus and stay comfortable for so long without reporting. He submitted that PW3 allegedly from Kimera hospital stated that the P3 form was filled on 25.10.2019, that the child alleged to have been defiled by a person known to him in the anus, that the child was in pain and was bleeding in the anus, that the incident occurred 5 days prior to P3 form being filled. He urged that from the complainants' statements, various questions arose to wit; If the child was defiled 5 days earlier where was the bleeding in the anus coming from?; Why were the clothes not produced to confirm that indeed the Complainant was bleeding from the anus? And; If the Complainant was defiled 5 days from 25.10.2019 that should be on 20.10.2019 why were the witnesses stating different dates?
18. The Appellant submitted that Penetration is defined as the partial or complete insertion of a person's genital organ to another person's genital organ. He reproduced the complainants' evidence and urged that the complainant did not explain how she was defiled. Further, that the doctor never gave a description of what exactly they observed. He maintained that the evidence on penetration of the Complainant's genitalia was not conclusive. He cited the case of *Michael Mugo Musyoka v Republic* (2015) eKLR in this regard.
19. On identification, he produced the testimonies of PW1 and PW2 and urged that the statements were contradictory. He also questioned the testimony of PW4 who was a crucial witness whose evidence ought to have been taken seriously because he was the person who was given the first report by the Complainant. He questioned why she gave two different statements.
20. He urged that the first report did not disclose if it is the Appellant who committed the said act. He cited *Weeper vs Republic*, CR. APP. No. 228 OF 1980(unreported) and urged that the trial magistrate didn't evaluate the defence case which the appellant produced an alibi defence and instead just convicted the appellant. He urged that placing the appellant at the scene of crime is not sufficient evidence to warrant the conviction of the appellant, citing *Mwangi vs Republic* (1983) KLR 75 in this regard.
21. The Appellant prayed that the court allow the appeal and set aside the conviction and sentence.

Respondent's case:

22. The Appellant herein 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 as per the chargesheet were that on diverse dates between 2018 and 20th October 2019, in [Particulars withheld] farm in Gatanga subcounty, within Murang'a County, the appellant intentionally caused his penis to penetrate the anus of JWW, a child aged 8 years.
23. In the alternative he was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006.
24. After the trial, the court convicted the appellant in light of the evidence presented by the prosecution and sentenced him to life imprisonment.



25. The Appeal In his Petition of appeal, the appellant raises various grounds of appeal which can be summarised into one issue for determination that:
- i. Whether the prosecution proved its case to the required standard and the credibility and reliability of the prosecution witnesses (grounds 1, 2, 3, 4 & 5).
 - ii. The prosecution case was proved beyond reasonable doubt.
26. In accordance with *Okeno v. R (1972) EA 32*, this Court, as a first appellate court ought to examine the evidence before the trial court and make its own conclusions, giving deference to the fact that it did not as the trial court observe or hear the witnesses, before considering whether the finding of the trial court is to be upheld or otherwise.
27. In this limb of his appeal, the appellant challenges the following aspects:
- Proof of penetration.
 - Identification of the perpetrator.
 - Age of the complainant.
 - Credibility and reliability of key prosecution witnesses.
28. The prosecution called a total of 5 witnesses to prove the case against the appellant.
29. It submits that the prosecution proved the case against the appellant beyond reasonable doubt. Section 8(1) of the *Sexual Offences Act*, No. 3 of 2006 provide:
- "(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."
30. From the above provision of the law, the offence of defilement is rooted on three main ingredients being the age of the victim, proof of penetration and the proper identification of the perpetrator.
31. On the age of the complainant - This was proved by the birth certificate produced by PW5 proving that he was 8 years at the time of the offence, having been born on 20/10/2011 hence a child.
32. On the proof of penetration, Section 2(1) of the *Sexual Offences Act*, 2006 provides the following definition:
- "penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;
33. The complainant (PW1) narrated how the appellant called him to his house, told him to lie on the bed, removed his clothes, applied Vaseline in his anus, defiled him and gave him Khs. 5 and threatened to kill him if he told anyone.
34. He used to do it all days except Sundays. He finally revealed the defilement to his teacher, who informed his mother.
35. Further, PW3, the doctor testified that the complainant was examined and they noted that the child was complaining of pain and was bleeding in the anus. He concluded that he had been defiled. The medical documents were produced.
36. We submit that the testimony of the complainant, coupled with the medical evidence overwhelmingly proves the element of penetration.



37. On identification of the perpetrator:

- the complainant stated that the appellant was very well known to him as he was his neighbour. PW2, her mother corroborated this, and further added that the appellant was his supervisor. The identity of the perpetrator was therefore not in doubt.

Credibility and reliability of key prosecution witnesses

38. We submit that on the contrary the account of events given by the complainant is coherent, and credible.

39. The Court, at Paragraph 14 of the judgement (page 21 of the record) recorded its reasons for reliance of Section 124 to convict on the evidence of the Complainant in this case, I do find the victim was honest. He is quite young and I found him to be honest.

40. The appellant, in unsworn statement raised a defence of being framed by PW2; the complainant's mother.

41. The court, in arriving at a conviction indeed weighed the defence raised and found the defence hard to believe. The fact that the defilement was disclosed to the teacher after the teacher noticed the victim's strange behaviour, precludes a frame up.

Analysis and determination

Issues for determination:

- i. Whether the appeal has merit.
 - ii. Whether the appellant's right to be heard was violated.
 - iii. Whether the accused was identified.
42. This being a first appeal, the duty of the court was well stated in *Okeno v Republic* [19721 EA 32 thus:

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to afresh and exhaustive examination (*Pandya vs. Republic* (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala vs. R.* (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters vs. Sunday Post* [19581 E.A 424. "

Whether there was penetration:

43. The offence of defilement must have the following ingredients:

identification of the perpetrator, age of the victim and proof of partial or full penetration. (see section 81(1) of the Act.)



44. All the three (3) ingredients must be proved in order to sustain a conviction. (see the case of George Opondo Olunga v Republic (2016) eKLR. In the present case, the age of the complainant is not in issue.
45. Section 2 of the Act defines penetration as;
- “The partial or complete insertion of the genital organ of one person into the genital organ of another person”.
46. The crucial question in this case is, whether penetration was proved.
Proof of penetration is based on the testimony of the complainant.
47. Under Section 124 of the *Evidence Act*, corroboration is not necessary in sexual offences. The section provides as follows:
- “Notwithstanding the provisions of section 19 of the oaths and statutory declaration Act, where the evidence of an alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence; the accused shall not be liable to be convicted on such evidence unless it is corroborated by other Material Evidence in support thereof implicating him provided that wherein 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”.
48. That notwithstanding, the court is convinced and satisfied from the doctor’s evidence that there was penetration.
49. From the medical report it is clear that the child sustained injuries.

The age of the complainant

50. As at the time the offence was committed, the child was 8 years old.

Whether the appellant was identified

51. The child and the mother knew the appellant as a supervisor and the neighbours identified the appellant.
52. The appellant has also raised a concern around the violation of his right to fair hearing under article 50 of *the constitution*
53. I have looked at the proceedings and noted that the plea was taken on the 20th October 2019.
54. The Matter was slated for Hearing on 11th February 2020 when a Voir dire hearing was conducted.
55. On 3rd November 2020 subsequently PW 1 testified after which the appellant cross examine the witness. PW 2 subsequently testified the same day.
56. On 26th June 2021 the doctor testified and produced a P3 form and a treatment card which were admitted as exhibits number two and three respectively.
57. I’ve also looked up the evidence of the Teacher PW4.



58. The court has further looked at the evidence of PW five the investigating officer.
59. I have also read the judgment keenly and noted that at paragraph 12 the trial court highlighted the evidence of Dr. Kamau to the effect that he examined the victim and stated that the victim had pain and blood in the anus.
60. All this time the appellant did not find it necessary to request to be supplied with the said witnesses statements and documents that were relied on that he is now raising.
61. I have looked at the nature of the documents that were in the hands of the prosecution, which include the P3 form medical documents from the minister of health.
62. The court has also taken time to look at the cross examination that the accused person advanced.
63. It is clear to the court that the gave careful consideration to the evidence before the conviction.
64. The appellant faulted the findings of the High Court citing violation of Article 50(2) of *the Constitution* which provides as follows; -
- “50. Fair hearing
1. Every person has the right to have any dispute that can be resolved by the hearing before a court or, if appropriate, another independent and impartial tribunal or body. application of law decided in a fair and public
 2. Every accused person has the right to a fair trial, which includes the right; —
 3. to have adequate time and facilities to prepare a defence;” (Emphasis supplied).
65. The appellant alleges violation of his constitutional rights in that he was not afforded adequate opportunity to defend himself, as he was not availed the witness statements.
66. A careful perusal of the entire record of the proceedings reveals that:

the appellant was charged and the charges in respect of the offences were read to him in a language which he understood and he pleaded not guilty.

67. After plea there was no application for him to be supplied with witness statements.
68. On all subsequent occasions when the matter came up for hearing, there is no indication that the appellant requested for witness statements and he was denied them.
69. This therefore denotes that at no time did the appellant face any challenges or handicap in the course of the hearing on account of having not been availed witness statements.
70. In settling this issue, this court is guided by the case of Richard Munene –Vs - Republic (2018) eKLR this Court held as follows; -

“Dealing with the right to a fair trial under Article 50(2) (c) and (j) this Court said in Simon Githaka Malombe V R,Criminal Appeal No. 314 of 2010 that;

“... Indeed, the availability of witnesses statements to the defense has always been a fundamental facet of this guarantee and avoids the spectre of trial by ambush especially in a criminal case. The High Court, sitting as a Constitutional Court had in the case of Juma – Vs- Republic [2007] EA 461 reasoned as follows, and we agree;



“We hold that the state is obliged to provide an accused person with copies of witness statements and relevant documents.

This is included in the package of giving and affording adequate facilities to a person charged with a criminal offence...”

71. The trial court record for 10th January, 2013, in so far as it relates to this question, is to the effect that the prosecution was ordered to furnish the appellant with the charge sheet and witness statements. Subsequently, on 14th March, 2013, the prosecution applied for adjournment to call three witnesses; the clinical officer, one Macharia, the complainant’s and one M, as the last two had recorded their statements. On account of that, the trial was stood over to 28th March, 2013 when the complainant and M testified. From that testimony, at least that of the complainant’s grandmother, she reiterated that her evidence in court was the same as that in her statement to the police.
72. The appellant exhaustively cross-examined both witnesses and at no stage did he complain that he was handicapped due to witness statements. This ground, for these reasons, must fail.” (emphasis added).
73. From the record of appeal, it is evident that the appellant to cross- examine the witnesses who testified and at no point was any objection raised that he was incapable of proceeding with the hearing for lack of witness statements.
74. This ground must fail.

Order:

The appeal has no merit and the same is dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ITEN THIS 6TH DAY OF MAY 2026.

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J. CHIGITI (SC)
JUDGE

