



REPUBLIC OF KENYA



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**Maingi v Republic (Criminal Appeal E072 of 2023)
[2025] KEHC 2315 (KLR) (28 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2315 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E072 OF 2023
MW MUIGAI, J
FEBRUARY 28, 2025**

BETWEEN

ANTONY SILA MAINGI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Antony Sila Maingi , the appellant herein was charged with the offence of defilement contrary to Section 8(3) of the [Sexual Offences Act](#) .The particulars of the charge sheet are that : On diverse dates between 19/9/2021 and 15/10/2021 at Arthi River sub county within Machakos , the appellant intentionally and unlawfully caused his male genital organ vagina of P.K a child aged 14 .
2. In the alternative, the appellant is was charged with Indecent Act with a minor contrary to Section 11 of the Act. It is alleged that the appellant did an unlawful act which caused contact of his hands with the breasts of P.K a child aged 14 years.
3. The charges were read out on 18/10/2021 and the appellant pleaded Not Guilty. The appellant was also advised of his right to legal representation.
4. The prosecution called 4 witnesses in proof of the charges, the appellant was also heard on his sworn defense. The trial court convicted him on the main charge and he was sentenced to serve 20 years jail term.

The Trial

5. The prosecution’s evidence was that the appellant stayed with the complainant for a period of 3 weeks and had sexual intercourse with her during the indicated period. The complainant was a minor aged 14 years old and was school going but had stopped attending school and she ran away from home during this period.



6. Pw1, RB, the minor's mother was a resident [Particulas Withheld] where she also worked as a security guard. She said that she came from work on 12/10/2021 and she later went to pick her younger child from daycare leaving others in the house. That P (PK) immediately left the house when she returned.
7. That P, (PK) the complainant left the home immediately and she did not come back that night. The next day, PW1 left for work and thereafter went to report to the Chief that she did not know where her daughter was. PW1 went to her school and found she dropped off from school. PW1 went to work later her schoolmates told her that she came and left. The daughter's absence went on for the week. Her daughter came to the house only to leave before PW1 came home.
8. That she received a call from a neighbor who informed her that the minor was at home, PW1 took a motor bike to get to the house, the minor saw her and she tried to jump the balcony. PW1 promised not to beat her and she asked her what happened. She interrogated her but she was not responding.
9. That she interrogated her but she did not respond, they later went to the Chief and she refused to respond, when the minor was disciplined, She admitted spending the night at the house of a boda boda rider. PW1 went back to work. The minor took the Chief to the boda boda rider's house The appellant was arrested. He was identified as Sila and PW1 was informed about the arrest and she went back to the Chief.
10. They all went to the police station and later went to Nairobi Women hospital where the child was confirmed to have been defiled. The child's mother blamed corona virus for the incident. She stated that did not know the appellant. She identified the minor's birth certificate in court and stated that the child was 13 years old.
11. In cross examination PW1 stated she did not know the names Cynthia Nyaboke and that the child lied to the appellant about her name. Her daughter was/is Priscillah Kemunto.
12. Pw2, PK the minor in the case, gave sworn testimony following voire dire examination by the court. She testified that she met the appellant on 14/9/2021 at 6:00pm. She introduced herself as C although this was not her real name. They talked and later went to his home where they started living together. That the appellant would leave in the morning and to go to work and would return in the evening. They stayed together for 3 weeks after this her mother started looking for her.
13. That her mother found her at the Plot and she was reported to the Chief. She said that she would sleep with the appellant for 3 weeks and that was not going to school. That she would leave home for school and would return on the way. She did not know why she refused to go to school and she would also disobey her mother.
14. PW2 stated that the Appellant did not know that she was school going as she had told him she was not going to school. PW2 said that she was staying with Sila as his girlfriend also told him that she was staying with her Aunt, his residence was also not far from their house. That the appellant is the one who told her to go to his house. He did not know her age.

The Appellant knew her mother and she also told him where they lived the day they met. That the Appellant was a boda boda rider who used to carry her mother to work That she would go home during the day when mum was at work.
15. Her further evidence was that the Appellant was the one who told her to have sex and that they had unprotected sex during the 3 weeks. He did not promise her anything. That the distance between the stage where the appellant works and the school is 500 meters, there is a day they met as she was coming from phase II but she changed route that day. They later coincidentally but they did not talk.



16. PW2 identified Silas; the Appellant in court. In cross examination, and she stated that her name was PK but she identified herself as C because she did not want to disclose her real name. She also told him that her name was S. That she was student at [particulars withheld] when she met the appellant and she was transferred to [particulars withheld] Primary in August. She had no reason to lie to the appellant, she just lied. She also lied about being orphaned. She said her mother is RB. PW2 denied that she told the Appellant that she was locked out, her mother PW1 did not lock her out. She said that her mother did not lock her out and they had not disagreed. She denied telling him that she was not happy how her mother treated her.
17. That the first day they went to the Appellant's house they cooked, ate and slept, she returned home the next day but the appellant called her back. She also testified that she was not comfortable when she lived with him. She kept coming back to his house because the appellant would call her.
18. She stated during re-examination that she had a phone which she used to communicate with the appellant. She was not comfortable at the appellant's house. Her Mum did not know where she was and that is why she reported her as missing. PW2 did not want the appellant to know her name he kept calling her Cynthia.
19. PW3 No 80453 Sergeant Edith Mukiri who was attached at Mlolongo police station who investigated the case. She was assigned the case on 15/10/2021. The case was reported vide OB No. 72/15/10/21. She took the victim to Nairobi women hospital where she was examined and the Post rape care and P3 forms were filled.
20. The child recorded her statement on 17/10/2021 and she stated that the appellant convinced her to go to his house on 19/8/2021 at 7:00pm. That they engaged in unprotected sex twice. She also visited him severally and they had sexual intercourse.
21. That her mother told her to go to school on 12/10/2021 but she instead went to an unknown place. Her mother reported the case to the chief where she was advised to look for her. She did not find her but the child came back on 15/10/2021 when she was taken to the chief. The case was handled by a community police officer who went to the appellant's house where he was arrested and was taken to the chief. The chief brought them to the police station where the appellant was detained.
22. That the minor identified the appellant as the one who defiled her. He produced the birth certificate as Exhibit 5.
23. PW3 stated during cross examination that the report was made on 15/10/2021 by PW1. The defilement started on 19/8/2021 when the child ran away from home, she wrote her statement on 17/10/2021. She indicated that the defilement was on 19/9/2021 which was an error. The matter was reported OBXX of 15/10/2021.
24. PW3 stated in reexamination that the defilement started on 19/9/2021 and that the mother did not report immediately because the child had not told her about the incident. It is true that the mother had disagreements with the minor/victim as she refused to go to school. That the child also had another defilement case in Mavoko.
25. PW4, John Njuguna a clinical officer from Nairobi Women Hospital gave expert evidence and referred the Trial Court to the medical documents authored by his colleague Fred Siga. His colleague had left the hospital for studies and he had also worked with him for over 3 years and was conversant with his handwriting and signature.
26. The prosecution's application to produce the documents was allowed although the appellant had objected to the same.



27. The witness testified that the victim was brought to the hospital on 15/10/2021 by her mother stating that the minor had disappeared from home on 12/10/2021. The minor said that she had a boyfriend called Sila and they had been engaging in sexual relations on different occasions. The child's genitalia was examined and was noted to have a broken hymen and a cleft at 6'Oclock position. The gender recovery report form (GRVC) was produced as Exhibit 4. He stated that the post rape care indicated that the broken hymen was not fresh in nature and this was suggestive of previous penile vaginal penetration.
28. The P3 form indicated that the child had whitish discharge at the vagina although no bleeding was noted. He produced the P3 form and the post Rape care form as exhibit 1 and 3. He testified during reexamination that the examination was consistent with vaginal penetration, the doctor could not determine the date of penetration. However, the child stated that she had engaged in sex with the boyfriend about 4 times and she had no ailment.

The Appellant's Defence

29. The court delivered its ruling on 31/3/2022. The appellant gave sworn evidence on 24/4/2022 and also called a witness to corroborate his case.
30. The Appellant in a sworn statement, testified that he was a bodaboda rider and that he went to the stage on 14/10/21 when a lady approached him and wanted to be taken to her aunt to pick a child. They found the aunty who was angry. He told the girl pay for the fare but the girl told him that the aunt would pay .The aunty declined and said the girl would pay this led to a commotion between the two.
31. That he was not paid his money and he went back to the stage hoping to return to collect the money. On 15/10/2021 he went back to the girl's aunt place of work to get his money. She directed him to the girl, again, they could not agree and he went back to the stage.
32. Later in the day, the lady came with 2 nyumba kumi men who took him to the Chief's office .The lady said that he had threatened her and was that he demanding money from her. He explained that he demanded his due though he admitted he had threatened her. They reconciled and he was paid his money. He left the lady and girl's mother/Aunt at the Chief's office.
33. In the evening, same day 15/10/2020 the girl's aunt /lady came back with other community policing officers different from the Officers in the morning, who told him he was required at the Chief's office again. The girl's mother said that the girl had been away from the house for 3 weeks and that she suspected he was with her. The Chief asked the lady why she did not say so in the morning and the lady did not agree since she had not raised it earlier in the morning. He denied the allegation and indicated that he had only known the girl the previous day. The Chief recommended that the issue to be handled by higher Authority. The girls' mother asked for money to be paid to the Chief so as to let him go/leave. The matter was handed over to the Police. He was detained on 15/10/2020 and was arraigned before court on 18/10/2020 .
34. The Appellant stated during cross examination that the dispute related to fare charges that the girl did not say she was with him for the 3 weeks. He had only seen her at the stage twice when he carried her and she said her name was Cynthia . He was not her boyfriend That the girl was told to frame him by the mother. He did not defile he and he had no relationship with her. It is the girl's mother who suspected him because of the dispute on fare charges. In his statement to the Police, he said he is married to Peris.
35. DW2 , Michael Nzioka testified that he was a resident at Mlolongo and that the appellant was his nephew .He was also an orphan and a son to him .He said that the girl has 2 other cases of defilement ,



one case was in Kisii and the other at Mlolongo with a butcher .The case at Mlolongo was resolved at the chief's place . The other accused was a boda boda rider called Sila who had stayed in remand for a year and later released. DW2 promised the girl's mother Ksh 15,000/- and requested for time but she later turned back and came to Court to testify. She said she was given fare and cost to pick the Complainant. That the girl was in Phase III and she does not go to school and that she was pregnant. DW2 stated during cross examination that the appellant had a wife who had been formally introduced to the family. She had also had child. He did not know if Sila lived with the Complainant for 3 weeks and he did not know that the Appellant defiled her it is untrue. That the case with the butcher involved having a relationship with the complainant. The butcher was alleged to have a relationship with the complainant. He went to the Police Station and was told that since the case was in Court nothing could be done.

The Trial Court's Judgment

36. The court delivered judgement on 29/6/2022 and found that the prosecution had proved its case beyond doubt .That penetration was proved through the GVRC and Post Rape care form. The history given by complainant who had slept with the appellant for 3 weeks also proved the case.
37. The appellant was positively identified and there was no room for mistaken identity. The court also interrogated the appellant's defense .He was convicted for the offence of defilement under Section 215 of the [Sexual Offences Act](#).
38. The appellant was heard on mitigation when he stated he was an orphan and that he supported his family of 3 siblings. The Court sentenced him to 20 years imprisonment under the [Sexual Offences Act](#).

The Appeal

39. Aggrieved by the decision , the appellant preferred his appeal on AMENDED GROUNDS on his submissions that :
 1. The learned magistrate erred in law and fact in misconstruing section 8(5) of the [Sexual Offences Act](#) which was a defense in the circumstances of the case.
 2. The magistrate erred in shifting the burden of proof to the appellant.
 3. That the 20 years sentence meted on the appellant was harsh and excessive under the circumstances.

The Appellant's Submissions

40. The parties filed submissions with the appellant submitting that Section 8 (5) of the [Sexual Offences Act](#) was applicable in the case. He framed issues as whether the child deceive the appellant, whether the appellant believed it and whether he took steps to ascertain the age .His case is that the victim portrayed adult like behaviors and that any reasonable person would believe she was an adult
41. That she intended to have a relationship with him and she also stated that she was agreeable to have sexual relations more than once. They stayed as boyfriend and girlfriend with the hope they would marry each other. He referred court to page 8 and 9 of the proceedings where the minor admitted that she was not going to school. He submitted that the minor deceived him and that she was pushing him into a relationship.
42. Further that the complainant lied about her age and his mother's identity. The minor's was not a credible witness. That the prosecution's evidence was contradictory. That Pw2's narration of the offence was made of untruthful statements. Reliance is placed on the case of MTG v Republic [2022]



KEHC 189 KLR , Richard Munene v Republic [2018] eKLR ,if proved must be resolved in favour of the accused . John Mutua Munyoki v Republic [2017] eKLR.

43. She claimed that she was not going to school but stated that she attended [Particulars Withheld] during her evidence. She admitted giving a false name and was also disobedient to her mother. Further, that these lies can affect the weight a court places in witness testimony as ruled in the case of Republic v Wilson Wanjala Wanyonyi Criminal Appeal 59 of 2019. He also relied on the case of Ephantus Mwangi v Republic [1983] KLR 150, Mohammed Abdall v Republic Criminal 39 of 2019 and Republic v Peter Nyaga Ndegwa Criminal Appeal No. 59 of 2011.
44. That the child had a dishonest disposition and her history and conduct should be considered by the court.
45. The Appellant further contends that age was not proved and that independent evidence was not brought to prove that the victim was 14 years or that she school going .Lastly , that identification was not proved since the victim’s credibility is doubtful. That the case was not investigated and the victim was also used to swindle him money.
46. On sentence, the appellant submits that his mitigation was ignored. He was a young boy aged 22 years who had been deceived by the victim. He had a right to benefit from the least severe sentence. The appellant refers court to Article 50 (2) (p) of *the Constitution*. It is submitted that trial is about achieving the right balance and proportionality.
47. He refers court to the case of Republic v Otieno 1983 where the court held that the maximum sentence should not be imposed on the first offender. He also refers to the case of R v Arisol [1957] and the judiciary sentencing policy guidelines.
48. The appellant further prays for consideration of the time spent in custody and that his sentence be substituted with 10 years’ imprisonment. That he has been engaged in rehabilitation at Kamiti Maximum prison where he has been detained.

The Respondent’s Submissions

49. The prosecution submitted that penetration was proved through evidence of sexual intercourse done multiple times and the medical evidence. That age was proved through the birth certificate and the investigating officer who also established age .Reliance is placed on the case of Kaingu alias Kasomo v [Republic Criminal Appeal No 504 of 2010](#) and Fappyton Mutuku Ngui v R 296 2010 . That PW1 also stated that the child was 13 years.
50. Further that the inconsistencies in the case were not substantial to the main issue. Lastly that the court considered the defence and found that it was an afterthought.

Analysis & Determination

51. The duty of the first appellate court was spelt out in the case of Kiilu & Another v Republic [2005]1 KLR 174, the Court of Appeal stated thus:

- “ 1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
2. It is not the function of the first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s



findings and 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.”

52. This court has considered the evidence and the parties case represented in the grounds of appeal and submission filed before this court
53. . The following issues are framed for determination of the appeal: whether the prosecution proved the offence, whether the appellant's defence is credible whether the sentence was harsh.
54. In ordered to obtain a conviction, the prosecution must prove that the appellant did an act that caused penetration, that the victim was below 18 years and further that the perpetrator was positively identified by the victim. In the case of Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013 the court of appeal held that “The critical ingredients forming the offence of defilement are; the age of the complainant, proof of penetration and positive identification of the assailant...”
55. The burden of proof in criminal cases is always on the prosecution to prove an accused person guilty beyond any reasonable doubt. (see Oketch Okale v Republic [1965] EA 555). A conviction in a criminal case has to be based on the weight of the actual evidence adduced, and it is the duty of the trial court to consider the evidence as a whole.
56. PW3 Investigation Officer produced copy of Birth Certificate Exh 5 showing the victim was born in 2007.
57. PW2 testified that she met with the appellant on the way on 14/9/2021 at 6:00pm. That, she introduced herself as C and they spoke and that the two went to the appellant's where from that day, they stayed together for 3 weeks. The Appellant would go to work each day and come back in the evening. PW2 also testified that she went home the next day but the appellant called her and told her to return. At the time she did not go to school.They had sex the 2nd night and subsequent nights .She said that they had unprotected vaginal sex and that the appellant was the one who said they should have sex.
58. The evidence of PW4 who produced P3 Form Exh 1 which confirmed whitish discharge in the vagina and no bleeding noted. Post Rape Care Form and the report from Gender Recovery and Violence Care at Nairobi Women Hospital Exh 3 & 4 confirmed hymen not intact and cleft at 6 o clock relied on by the prosecution also proved that there was vaginal penetration when the victim was examined .
59. Also, in Okale v R [1966] E.A. at 555 the court stated inter alia
“.....the burden of proof in criminal proceedings is through out on the prosecution,
and it is the duty of the trial court to look at the evidence on a whole”
60. The evidence of PW2 the victim was/is corroborated by the medical evidence which depict upon examination, PW2 was defiled but it was not clear when or by whom. The examination indicated discharge and cleft dislocation consistent with penetration.
61. On identification, the evidence of PW2 confirmed the Appellant was known to her, interacted with and lived with him. He was arrested when found with her. The evidence on record confirms all ingredients of defilement.
62. The Appellant gave sworn testimony that the case was framed against him by the victim's mother on account of payment of fare that resulted in commotion between him her mother and the victim. Secondly, evidence by DW1 suggested the case was a frame up by the victim and mother, as victim had



2 other defilement cases, one in Mavoko with a butcher, alleged to have had a relationship and another in Kisii. DW1 also intimated that the victim's mother extorted payment of KSh 15,000/- to withdraw the matter, DW1 asked for time later PW1 testified in Court.

63. This court reading through the Trial court record found the following discrepancies inconsistencies and contradictions;

- a. The Victim /child PW2 as per evidence of PW1 her mother refused to tell her where she was the previous night and when taken to the Chief refused to speak until she was disciplined [read beaten up] that she disclosed she was with/at the appellant's house. The evidence by victim was not voluntary on defilement but through force.
- b. The Victim/child admitted that she gave wrong name to the Accused person/appellant Cynthia and not Priscilla Kemunto. The Appellant discovered the lie during arrest.
- c. The victim/child lied that she was not going to school as admitted in her testimony
- d. The victim/child lied that she was an orphan with no parents and her mother PW1 was her Aunt
- e. The victim/child testified that she lived with Sila as his girlfriend for 3 weeks. Sila told her to go to his house he did not know her age. He knew where she lived with her Auntie.

The Appellant challenged the minor's testimony as being doubtful and that the witness was not truthful. The account of deceit and her history of disobedience should also be used in favour of the appellant and the evidence of the victim discredited.

The evidence was interrogated by the Trial Court in its judgment and relied on the cases of Joseph Maina Mwangi vs Republic Criminal Appeal no 73 of 1993 & Njuki & 4 Others v Republic [2002] and found that these issues were reconciled and ignored as they did not affect proof of the offence. These inconsistencies had no bearing with the age of the Complainant, and the fact that the appellant lived with the Complainant for 3 weeks and engaged in illicit sex . The Prosecution proved its case beyond reasonable doubt.

Although the evidence on record proves the Prosecution case I find the above lies preferred and admitted by the victim PW1 to marr the otherwise stated case of defilement.

If PW2 Admittedly lied her name , her status/activity that she was a school girl, lied that her mother was her Aunt yet was/is her mother, ran away from home refused to disclose the truth until forced, at what point did she start telling the truth then or during trial? Was/Is she a credible witness who provided cogent and tangible evidence of defilement by the Appellant in the Trial Court?

Her own testimony was irreconcilable, on the one hand she was uncomfortable while living with the appellant but stayed with him for 3 weeks without running away going back home permanently, screaming to neighbors if she was forced to stay etc. This Court is further disturbed that there were/are other cases of defilement involving the victim and allegations of extortion by the mother as evidenced by the Court Trial Court record. The totality of these issues unresolved impact adversely on the proof beyond reasonable doubt of the case against the appellant even before considering his Defense.

Lord Denning in Miller vs. Ministry of Pensions (1947) 2 All ER, 372 stated as follows:

“ That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the



shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

Any scintilla of doubt on the Prosecution is to the benefit of the Accused person. These inconsistencies go to the root of the offence.

Was there mens rea to commit offence of defilement by the Accused to the victim in light of the surrounding untrue/false circumstances of the case; the Complainant presented herself as non- school going girl and willingly lived with Appellant until his arrest?

Kaige v Republic (Criminal Appeal 121 of 2023) [2024] KEHC 2718 (KLR) (Crim) (19 March 2024) (Judgment), the Court

It is further submitted that the victim portrayed herself as an adult the entire time by admitting to multiple sexual encounters and her being married while still underage shows that she has treated and taken herself out as an adult, and no man should be held culpable for consensual sex to a 17 year old who curries herself as an adult and ends up being married while still underage on her own free will.

On this point, in the unlikely belief, there was intercourse between the victim and the appellant. One can only deduce the victim proffered herself as an adult. In that case, we resonate with the Judgment in the case of *Martin Charo v Republic* [2016] eKLR where the judge stated the following;

“

I do find that the appellant falls within the defence under section 8(5) of the *Sexual Offences Act*. It is PW1 who behaved like an adult and engaged in sexual intercourse. The appellant was not expected to inquire from several people about the age of the complainant. The relationship continued for quite a long time to the extent that age became a non-issue. I do find that the appeal is merited and is hereby allowed. The appellant shall be set at liberty unless otherwise lawfully held.”

Similarly, in the case of *Eliud Waweru Wambui v Republic (Criminal Appeal 102 of 2016)* [2019] KECA 906 (KLR) (22 March 2019) (Judgment) the three bench judges J. R.N Nambuye, D.K Musinga and P.O Kiage.

I find that the victim’s evidence was sufficient to prove sexual intercourse consistent with Section 2 of the Sexual Offence Act.

The Conduct and evidence of Pw1 created doubt as to the commission of the crime. The benefit of doubt goes to the Accused.

Disposition

1. The Appeal on conviction succeeds the resolved issues discrepancies/ inconsistencies by the Victim / child marred the burden and standard of proof beyond reasonable doubt.
2. The conviction and sentence are set aside and the Appellant is discharged forthwith.

DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS HIGH COURT VIRTUALLY/PHYSICALLY AT MACHAKOS THIS 28/2/2025.



M.W. MUIGAI
JUDGE

