



**Mugaira v Republic (Criminal Appeal E039 of 2023)
[2025] KEHC 1161 (KLR) (Crim) (26 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1161 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E039 OF 2023
AM MUTETI, J
FEBRUARY 26, 2025**

BETWEEN

STEPHEN WAINAINA MUGAIRA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

Introduction

1. Appellant was charged with the offence of defilement under Section 8 (1) (3) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars of the offence being that on 18/8/2021 at [particulars withheld] in [particulars withheld] County intentionally accused caused his penis to penetrate the vagina of C.M a child aged 13 years.
3. The prosecution called 4 witnesses in support of the charges.
4. The appellant was convicted of the offence and sentenced to serve 20 years imprisonment.
5. The appellant dissatisfied with the decision has appealed against both conviction and sentence.
6. The main grounds set out in hid petition of Appeal are that:-
 - a. There was no positive identification and that the learned Honorable magistrate erred in relying on the evidence of PW1 to convict.
 - b. There was no proof of age which is a key ingredient of the offence.
 - c. The trial court shifted the burden of proof to the appellant.



- d. That the sentence of 20 years imposed on the appellant was excessive and harsh in the circumstances.

Analysis

7. The duty of the first appellate court is that in determining the appeal the court must undertake a re-evaluation of the evidence and draw its own independent conclusions from it. The appeal is in the nature of a rehearing. The court is ably guided by the decision of *Okeno v. Republic* [1972] EA 32
8. In discharging that duty this court has analyzed the evidence tendered in the Lower Court to ascertain whether the ingredients of the offence of defilement and draw its own conclusions remaining alive to the fact that unlike the trial court this court has not had the opportunity to see or hear the witnesses.
9. PW1 who was the complainant was taken through a *voire dire* examination by the learned Honorable magistrate to determine whether she understood the nature and importance of an oath.
10. The learned Honorable magistrate was satisfied as to her understanding and proceeded to order that she gives testimony.
11. In her evidence she stated that she was born in 3/3/2008 thus at the time she was giving evidence she was aged 14 years.
12. According to her while she was in the house on the 18th August 2021 the appellant came to their house and asked her to accompany him in the house of another gentleman whom they called T. She declined telling the appellant that she wanted to take a bath since the following day was school.
13. The witness went further and testified that the appellant drew a knife and forced her to carry her water and the appellant carried her clothes to the house of T.
14. In T's house the witness testified that they found C. C told her that she was going to spend in that house but PW1 indicated that she wanted to leave.
15. The witness went further to testify that the appellant refused to open the gate for her to leave.
16. According to PW1, she spent the night in the same house with the appellant, T and C.
17. The complainant said that she was sleeping on the same mattress with C. However, in the course of the night she woke up to find the appellant sleeping next to her and C had moved to the mattress where T slept.
18. She went further to state

“ when I found accused naked I also found I did not have clothes on. I did not feel them being removed. C told me the accused drugged me.....he had sex with me.”
19. The victim went further to state that she felt pain inside the vagina and when she checked she saw that she was bleeding. The bed sheet was blood stained.
20. The victim contradicted herself when she testified that

“I did not feel him having sex with me. I woke up felt pain and saw my self bleeding.... I just felt pain and also saw accused on top of me having sex.”
21. However, that contradiction is not material considering that the victim indicated that she was drugged before the commission of the offence.



22. The witness did however state that at night she found the appellant on top of her putting his penis inside her vagina.
23. That evidence established the act of penetration which is a key ingredient of the offence of defilement.
24. The victim identified the appellant as Neddie a friend to the mother whom she used to meet. The identification ingredient was therefore not in doubt. It was a case of recognition which is more reliable than the identification of a stranger.
25. Upon cross-examination PW1 maintained that she was not coached to implicate the appellant and that she was indeed defiled.
26. The prosecution called PW2 who was the victim's mother and in her evidence she stated that on the 18/8/2021 she did not spend the night in her house since she was on duty at a her cake shop. She informed the court that when she came in the morning, she saw Wainaina (the appellant) opening the gate and PW1 was behind him.
27. PW2 took the daughter to a doctor who confirmed that she had been defiled and a condom had been used . PW2 confirmed that the appellant used to come to their home thereby corroborating the evidence of PW1.
28. PW3 a clinical officer at MSF Mathare testified on behalf of one Linet Kwamboka whom she said used to work with her and produced Exhibit 2 which was a medical certificate prepared by the said Linet Kwamboka a nurse.
29. According to the report, on genital examination there was mucoid discharge pink in color,a fresh tear and the posterior fourchette the junction between left and right side at the hymen.
30. PW3 also produced a PCR Form filled by the same nurse marked Exhibit 3 and a P3 form Exhibit 4. The injuries noted on the three documents were consistent.
31. The evidence of PW3 corroborated the evidence of penetration tendered by PW1.
32. On whether there was penetration of the victim's genital organ, it is now well settled that penetration can be proved by direct or circumstantial evidence. The Supreme court of Uganda put it succinctly in *Bassita v Uganda* S.C. Criminal Appeal No. 35 of 1995 which was quoted with approval in [*Sammy Charo Kirao v Republic*](#) [2020] KLR where the court stated;

“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the proved by the victims own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victims evidence and medical evidence must always be adduced in every case of defilement to proved sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt.”
33. PW4 was the investigating officer and she testified that they arrested after about 2 months and commenced investigations into the matter that's why they could not escort him to hospital for any examination.
34. PW2 produced the birth certificate N0. 40XXXXXX dated 3rd March 2008 which had been MFI 1 Exhibit 1. The birth certificate indicated that the victim was aged 14 years at the time of the incident.



35. When the appellant was put on his defence he alleged that PW2 wanted him to be her lover and when he indicated to her that he intended to go to Qatar to go to work there that is when PW2 arched the scheme to frame him up and that the two were lovers a fact that was known to the entire neighborhood. He denied having any affair with the victim.
36. The appellant called DW2 Gladys Nduta his sister and his mother DW3. In their evidence DW2 and DW3 stated that the appellant and PW2 were indeed close to each other and at times PW2 would even call out the appellant at the middle of the night. The two witnesses did not say anything regarding the events of 18th August 2021.
37. The analysis of the prosecution case leaves no doubt in my mind that the victim PW1 was defiled and that the person who did it was the appellant. The appellant though he claims to have had a relationship with the victim's mother, he did not address himself to the facts as narrated by PW1 surrounding the night of 18th August 2021 when he was said to have slept together with PW1.
38. PW1 was emphatic that the person who defiled her was the appellant and throughout the evidence this court did not find any evidence to indicate that she may have framed up the appellant.
39. The defence of the appellant was a mere denial and the appellant only succeeded in tainting the character of the victim's mother but unfortunately failed to answer all the allegations against him by PW 1.
40. In the end, this court finds that the offence of defilement was adequately proved and the defence of the appellant did not create any doubt in the prosecution's evidence. The conviction was therefore safe.
41. It is therefore the finding of this court that the appeal by the appellant has no merit and is hereby dismissed.
42. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF FEBRUARY, 2025.

A. M. MUTETI

JUDGE

In the presence of:

Court Assistant: Kiptoo

In person absent for the appellant

Ms Ogega for the Respondent

Appellant: Present

