



REPUBLIC OF KENYA



**Maighacho v Republic (Criminal Appeal E056 of 2023)
[2025] KEHC 5219 (KLR) (26 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 5219 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E056 OF 2023
AN ONGERI, J
MARCH 26, 2025**

BETWEEN

SHADRACK ELIJAH MAIGHACHO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence by Hon. D. Wangeci (SPM) in
Wundanyi Sexual Offence Case No. E001 of 2020 delivered on 27th April 2022)*

JUDGMENT

1. The Appellant was convicted with the offence of defilement contrary to Section 8(1) as read with section 8(3) of the [Sexual Offences Act](#) No. 3 of 2006 and he was sentenced to fifteen (15) years imprisonment.
2. The Appellant was convicted with a second count of kidnapping contrary to Section 257 of the [Penal Code](#) and sentenced to five (5) years imprisonment. The sentence were to run concurrently.
3. The particulars of the offence was that the Appellant kidnapped M.E, a girl aged sixteen (16) years between 6th and 15th September 2020 and during that period, he defiled her.
4. That the incident occurred at Mwakingali area in Voi Sub County within Taita Taveta County.
5. The Appellant pleaded not guilty and the prosecution called four (4) witnesses in support of the case.
6. The prosecution evidence in summary was that the Appellant carried the complainant on his motor cycle on 6th September 2020. The complainant said at 10a.m while she was going to church. She went to her Aunt's house to take her sister who was staying there.
7. The complainant said on her way back, she met the Appellant riding a motor cycle and he offered to give her a lift to drop her at her home near Moi Referral Hospital.



8. When they got to the complainant's home, the Appellant did not stop and when she asked him why, he told her to stop asking him questions and if she continued asking he would take her to the place people are taken.
9. The complainant said the Appellant took her to the hills. He took her to his house at 3p.m. He drew a knife like a blade. She said it was a surgical blade which he pointed to her neck and forced her to have sex with him.
10. The complainant said the Appellant undressed her and had sex with her without protection. She said he also had sex with her on 7th September 2020 without a condom.
11. The complainant said the Appellant used to lock her in his house everyday between 6th September 2020 to 15th September 2020.
12. She said he took away her phone and he would not allow her to talk to anyone. She said the appellant had sex with her on 9th, 11th and 12th. She said that he threatened her and told her he would kill her if she made any noise.
13. The complainant said she stayed for 8 days in the Appellant's house without food. That on 15th September 2020 he bought her food. She asked him why he had brought food that day yet he had not brought her food before.
14. The complainant said they quarreled. The Appellant told her that he would sacrifice her. She grabbed her phone and called her father.
15. The complainant said she told her father to go for her. He asked for directions. She asked the Appellant for directions and he gave her the wrong directions.
16. The Appellant said she could not tell where they were because the day they arrived at the house it was at night. She said he told the Appellant to take her to the place he had picked her. She lied to him that she sells bhang and that police were after her.
17. The complainant said the Appellant released her at around midnight. As she was leaving he grabbed her and gave her his contacts. She started walking and she met her father in the company of police officers.
18. The complainant said she took her father to the Appellant's house with the police officers and he was arrested and she was taken to hospital.
19. PW3 Joto Nyawa examined the complainant on 16th September 2020 and noted that her hymen was absent. He also noted presence of epithelia cells and few pus cells. He said absence of hymen was highly suggestive of recent habitual sex.
20. The Appellant said in his defence that he met the complainant at Mwakingali while he was with his lover Elnorah whom he called as his witness (DW4).
21. He said the complainant was scantily dressed and she had a foul smell.
22. The complainant asked DW4 for a charger and it was DW4 who gave the complainant the Appellant's charger when they went to the Appellant's house.
23. The Appellant said DW4 left before the complainant returned the charger. He later refused to open the door when she returned the charger. The complainant came with police officers who forced him to open the door at 3a.m and arrested him.



24. The Appellant called his neighbor (DW2) and his landlord (DW3) who said they lived in the same compound with the Appellant and that they did not see the complainant at the house of the Appellant from 6th September 2020 to 15th September 2020 as alleged.
25. The trial court found the Appellant guilty as charged and convicted him with the two charges of defilement and kidnapping and sentenced him to 15 years imprisonment respectively. The sentences were to run concurrently.
26. The Appellant has appealed to this court on the following grounds:-
 - i. The learned trial Magistrate erred in both facts and law in failing to appreciate the fact that the charges as laid out were not proved to the required standards since penetration, age and identity of the alleged perpetrator of the crime was not proved as required in law.
 - ii. That the instant matters evidence was materially embarrassed by the medical evidence, which dislodged any claims on the alleged defilement occasioning a prejudice.
 - iii. That the learned trial Magistrate again erred in law and fact in failing to appreciate that the instant matter was plagued with material contradictions and inconsistencies capable of unsettling the verdict so arrived at occasion prejudice.
 - iv. That again the learned trial Magistrate further erred in law and in fact in not considering that the Appellant's statement in defence was pragmatic, plausible and was dislodged hence still stands and seek its reinstatement rendering an acquittal.
 - v. That since the Appellant cannot recall all what transpired during the trial process, he seeks to be furnished with court records and judgment to enable him proffer other grounds during the hearing of this appeal.
27. The parties filed written submissions as follows:-
28. The appellant submitted that the Prosecution did not established their case beyond reasonable doubt, based on the following reasons:
29. That the Accused Shadrack Elijah Maighacho was charged with Defilement contrary To Section 8(1) as read with Section 8 (4) of the [Sexual Offences Act](#) No.3 of 2006.
30. It was alleged that "on divers dates between 6th September 2020 and 15th September 2020 at Mwakingali area in Voi Sub County within Taita Taveta County intentionally and unlawfully caused your genital organ (penis) to penetrate the female genital organ (vagina) of M.E a girl aged 16 years"
31. The accused faced an alternative charge of committing an indecent act with a Child contrary to Section 11(1) of the [Sexual Offences Act](#), No 3 of 2006.
32. It was alleged that "on divers dates between 6th September 2020 and 15th September 202.0 at Mwakingali area in Voi Sub County within Taita Taveta County intentionally and unlawfully touched the female genital organ (vagina) of M.E a girl aged 16 years"
33. The accused faced also a second Count of Kidnapping contrary to Section 257 of the [Penal Code](#), whose particulars are that on diverse dates between 6th September 2020 and 15th September 2020 at Mwakingali area in Voi Sub County within Taita Taveta County kidnapped from lawful guardianship of Chrispine Mwa IiIi"
34. The Complainant (PW1) aged 16-a form 3 student at [particulars withheld] High School, Voi , testified under oath and stated that on 6th September, 2020, a Sunday, she left her home at [particulars



- withheld] Hospital Quarters at about 10. 00 am heading for the Pentecostal Church in [Particulars Withheld].
35. After Church, she went to her aunt's house within [Particulars Withheld] to see her sister who apparently lived with the aunt. As she was walking back home from her aunt's home, she was given a ride by the Accused who offered to drop her at her home. She referred to the accused as "Rashid".
 36. On reaching near her home, however, the accused did not stop to let her alight, but, rode on instead. When the Complainant demanded to know why the accused was not letting her alight, he merely told her that he was taking her "where people are taken".
 37. She said that and the accused person stayed with her at Mwakingali Hill for about six hours, from 2 pm until 7 pm. For all those hours, the accused was touching her, after threatening to harm with a knife/ surgical blade which he pointed at her. There were no people around, as the herders were far away.
 38. She said she did not know where Elnorah, the accused's girlfriend was. Thereafter, the accused took her to his house around 8.00 pm, where he forced her to have sex with him without any protection. It was the first time she was having sex with a man. Between 5th September 2020 and 15th September 2020, he continued having sex with her without protection.
 39. Meanwhile, she said having starved her all along, he only brought her some food on 15th September. and he did not even allow her to receive any calls on her phone. The accused did not receive any visitors during the entire period of her stay at accused's house. Although she screamed but not so loudly, nobody came to her rescue. She went to Hospital a day after leaving the accused's house, where she was examined and handed over her clothes to the Hospital. She described the clothes she was wearing on the material day as a jump suit and flat shoes.
 40. According to Complainant's father (PW2-CWM) on the material Sunday, his daughter left for Church in [Particulars Withheld], riding on a motor cycle ("boda boda") which he had commandeered. She was to call him after the Church service so that he would send a motor cycle to pick her up.
 41. Unfortunately, she had not returned home by 5pm, prompting him to report to Voi Police Station to report her disappearance where he was asked to return the following day. In the meantime, his wife (Complainant's mother) had called Complainant's aunt who lived in Msambweni who had allegedly informed her that Complainant had borrowed a phone from her cousin to make a call but, had left the phone behind, with the cousin. On 15th September at around midnight, a telephone call came through from the Complainant, who directed them to a place near Native Bar in Mwakingali area. They met the Complainant as she was walking down.
 42. She claimed to have come from a certain man's house whom she had tricked in order to escape from his custody. When they walked back to the said house accompanied by Police officers, they found the man, who turned out be the accused. According to him, the accused explained that he had assisted the Complainant, who had been missing for eight days. In cross-examination, he could not remember nor, was he keen on the type of clothes the Complainant was wearing on the material day, as he did not expect that she would go missing.
 43. PW2 admitted that his wife (Complainant's mother) was not approached by the Police investigators to record a statement.
 44. PW 3 - Joto Nyawa, a Clinical Officer who examined the Complainant, testified that the Complainant had changed her clothes. He further stated that there was no evidence of intoxication and no injuries were noted on the Complainant. As regards the medical examination of Complainant's genitalia, he



found her normal, save that her hymen was missing. Although the examination found no spermatozoa, there was a creamish vaginal discharge.

45. There were few pus cells and numerous epithelia cells. He concluded that the absence of the hymen and, presence of epithelia cells were indicative of recent habitual sexual activity. He too could not recall the clothes the Complainant had been wearing. Significantly, however, PW 3 categorically denied that the accused was medically examined.
46. The Investigating Officer (PW4- No 936XX Cpl, Elma Mtwana) confirms having received a report of a missing person on 7th September, 2020 at 10 am, from Complainant's father (PW2- CM). She further confirms having received a telephone call from Complainant's mother on 16th September, 2020 informing her that they had found the Complainant on 15th September. She described the clothes worn by the Complainant as "black long trouser and a black T-Shirt"
47. The appellant (DW1-Shadrack Elijah Maighacho). on the other hand, contends that on Sunday 6th September at about 2.30 pm he, in the company of his girlfriend Elnorah Mkiwa (DW4) left his house and went for a ride with his TVS motor cycle. Later that afternoon, they rode to Shamba La Bibi (Mwakingali Hill) arriving at about 4.00 pm. They remained there for about four hours during which time they took pictures using a phone.
48. The Complainant approached them and narrated her predicament, including the fact that she was "an orphan" and her phone, which had lost power needed re-charging. Upon further interrogation, the Complainant narrated how she had been there since about 11.00 am with her friend "Patrick" who was known to the accused; that Complainant and "Patrick" had left at some point for Bartholomew, where after, the said Patrick returned her back to Shamba La Bibi where they found her.
49. According to the appellant, Complainant was dressed skimpily or "scandalously", and in open shoes. All three left on his motor bike for his house at about 5.30 pm, where his girlfriend Elnorah fetched a charger from accused's house and gave it to the Complainant who had entered the compound but, did not enter the accused's house. The Complainant went to charge her phone elsewhere, at a nearby shop.
50. According to the appellant, they parted ways at about 6 pm. It was not until later about 10 pm when the Complainant brought the charger back to the accused, who, however, declined to open for her. Later that night/morning at about 3am, the accused was woken up by Police officers who, accompanied by the Complainant and her father (PW2) arrested him from his house for allegedly kidnapping and detaining the Complainant in his house for eight (8) days.
51. DW2-Esther Ndisha who is accused's neighbor and a mother of a one-year old child, confirmed knowing and seeing accused's girlfriend Elnorah (DW4) regularly at accused's house, whereas, she denied, however, ever seeing the Complainant there on the material day as alleged or, at all. She only saw the Complainant when the latter arrived in company of the Police on the morning of 16th September, 2020. Although she told the Police investigators that she had seen a different girl (Elnorah) at accused's house, they did not, nevertheless, summon her as a witness for the Prosecution despite recording a statement.
52. DW2 further explained that there was no way the Complainant could have been in the appellant's house for all that time, without her seeing her since she (DW2) is a house wife who stays at home most of the time, raising up her young baby. Besides, for one to access the toilet from the individual units, one has to go outside the block of houses. Moreover, she can hear everything that takes place in accused's house. She describes the Complainant's mode of dressing in shorts and, exposing her bare back as "skimpy".



53. DW3-Daniel Kilelo Stephen, who is the appellant's landlord-cum-neighbor, admitted to having known and seen the appellant's girlfriend Elnorah (DW4) regularly at appellant's house for some months. According to him, he saw the appellant in the company of the latter's girlfriend Elnorah in the evening at about 5PM, on the same night the appellant was arrested. He denied seeing the Complainant at the accused's house, nor, in the compound for eight days as alleged, or at all. Whereas the appellant and his other witness (DW2-Esther Ndisha) contradicted each other on the exact numbering of the housing units, he, DW3, however, clarified that the appellant's house is number 7, while his own unit is number 3. The appellant had been his tenant for the last five years. He also confirms that the toilet is outside the block of houses.
54. Finally, DW4-Elnorah Mkiwa, confirmed not only that, indeed, she was with the appellant at Mwakingali Hill (Shamba La Bibi) on the material Sunday, the 6th September 2020 where they were approached by the Complainant who emerged from the bushes in the vicinity but, also, that, the latter had sought to be assisted with a telephone charger, after narrating her ordeals in the hands of her male friends Patrick and Godfrey. Basically, she corroborated the appellant's story in material particulars, save that she placed the accused's door as number 7, thereby, agreeing with the appellant's landlord (DW3). For instance, she confirmed that she was the one who fetched the charger from the appellant's house, while the Complainant, who did not enter appellant's house, kept a certain distance.
55. By the time she left the appellant's compound at about 7 pm, the Complainant had not returned the accused's charger. She was however familiar with the layout of the accused's compound, whose toilet is outside, although cooking takes place inside the housing units. She too describes the Complainant's dressing mode as comprising "shorts and a top that looked like a petticoat". According to her, the Complainant was not wearing a biker.
56. The appellant submitted that the Complainant's allegation that she was given a ride by the appellant from Kaloleni area as hollow and false.
57. In any case, right from the start, the Complainant was inconsistent on the mode and manner of her transport from her home to Church on the material morning. Who ferried her to Church? Although she claimed that her mother was to pay for the morning ride, there was, however, apparently, a problem with obtaining "change" for Kshs 1000 to pay the rider. Although the Complainant hardly mentioned her father in that regard, on the other hand, however, the Complainant's father (DW2) claims to be the one who procured the boda boda rider for his daughter that morning. So who did so, as between the Complainant's mother and father?
58. The appellant further submitted that the Complainant's story was mutually in conflict with that offered by the appellant and his girlfriend. Whereas the Complainant alleges abduction and/or kidnapping by the appellant across the Town, the appellant and his girlfriend, on the other hand, however, testify to being approached from the bushes by the Complainant at Mwakingali Hill (Shamba La Blbl) around 4pm that afternoon. The consistency in both the appellant and his girlfriend's stories, and their corroborative nature, totally destroy the Complainant's version.
59. Whereas Complainant told the appellant (and the latter's girlfriend) that she was an orphan, she actually has a father (PW2) CM.
60. Further, how did she come by the telephone set in her possession that she claimed had lost its charge, whereas, her father (PW2) testified that the Complainant had borrowed her cousin's telephone set only briefly that Sunday while at her aunt's house in Kaloleni/Msambweni?



61. The complainant alleged having been detained at appellant's house for eight (8), consecutive days, incommunicado, and without food nor, going to the toilet outside the housing units where she would have been seen or, heard screaming and wailing by at least a neighbor.
62. Although the Complainant claims to have been so detained, neither DW 2, DW3, and DW-4 ever saw her enter or, leave the appellant's house.
63. DW2-Esther Ndisha's testimony that she could hear everything taking place within the appellant's house disproved Complainant's allegations;
64. The complainant's own father PW2-CM, testified that they met the complainant walking down towards them and, rather significantly, that she was not found physically sequestered within the appellant's house on the material night. She merely accompanied the Police investigators to the appellant's house to "point out" the appellant and/or the latter's house, to the investigators;
65. The Complainant claims to have tricked the appellant to let her off the hook and out of the appellant's house, as she allegedly "escaped".
66. Whereas the Complainant claims to have handed her stained clothes to the Hospital where she was examined, she further claims, however, in the same breath, that the clothes "were at home". She contradicted herself.
67. The Complainant purported to describe the items in the appellant's house such as mattress, etc, and yet, evidently, she never set foot inside the appellant's house;
68. The Complainant claims that the appellant was the first man she had had sex with, whereas, PW3-Joto Nyawa, alluded to habitual sex on her part, upon examining her.
69. From the foregoing, the appellant concluded that the accused did not indecently assault the Complainant at Mwakingali (Shamba La Bibi) nor kidnap her as alleged or at all instance, the appellant was with his girlfriend throughout on the material day.
70. That although the Complainant willingly accompanied the appellant and his girlfriend to the appellant's compound she did not set foot inside the appellant's house.
71. Further that the Complainant was not defiled by the appellant at the latter's house, since all the appellant's witnesses truthfully disprove the Complainant's version. The only inexplicable aspect arising out of the Complainant's testimony however, is the motive for her disappearance, and having the appellant as a scapegoat. Going by her own fathers' testimony,
72. The respondent on their part submitted that the complainant, a 16-year-old, testified that the appellant kidnapped her, took her to his residence, and repeatedly defiled her over several days. The appellant also threatened her and confiscated her phone to prevent communication.
73. That the prosecution presented four witnesses, including the complainant, who clearly identified the appellant as the perpetrator. A birth certificate confirmed the complainant was a minor. Medical evidence showed she had a sexual encounter within 72 hours before the examination on 16/09/20.
74. The respondent argued that the trial court was correct in convicting the appellant based on the complainant's testimony, which was consistent and credible. Under Section 124 of the *Evidence Act*, a conviction can be based solely on the victim's testimony if the court is satisfied the victim is telling the truth. The trial court recorded its reasons for believing the complainant, and the appellant's defense did not weaken the prosecution's case.



75. The respondent submitted that the appeal should be dismissed, and the conviction and sentence should stand, as the prosecution proved its case beyond a reasonable doubt.
76. This being a first appeal, the duty of the first appellate court is as stated in the case of *Selle v Associated Motor Boat Co.* [1968] EA 123 where the Court of Appeal held that:
- “The first appellate court has a duty to re-evaluate the evidence presented before the trial court and arrive at its own independent conclusion. The appellate court must subject the entire evidence to a fresh scrutiny and draw its own inferences. While the appellate court should consider the trial court’s findings, it is not bound by them and must form its own independent judgment”.
77. The Court of Appeal in *Okeno vs Republic* [1972] EA 32 also held that:
- “An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh 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 v 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* [1958] EA 424.”
78. The issues for determination in this appeal are as follows:-
- i. Whether the prosecution proved that the appellant kidnapped and defiled the complainant.
 - ii. Whether the conviction herein is secure.
79. On the issue as to whether the prosecution proved that the appellant kidnapped and defiled the complainant, I have re-evaluate the evidence presented before the trial court and I find that there were material contradictions and inconsistencies in the prosecution evidence.
80. Based on the court’s review of the evidence and the submissions made, I find that the evidence presented by the complainant had inconsistencies and contradictions. For example, there were discrepancies in the accounts of how the complainant got to church on the day of the incident, with both the complainant and her father giving conflicting accounts.
81. I also find that the complainant’s version of events was contradicted by that of the appellant and his girlfriend (DW4). The complainant claimed abduction, while the appellant and his girlfriend testified that the complainant approached them at Mwakingali Hill.
82. DW4-Elnorah Mkiwa, the appellant’s girl friend confirmed she was with the appellant at Mwakingali Hill (Shamba La Bibi) on the material Sunday, the 6th September 2020 where they were approached by the Complainant who emerged from the bushes in their vicinity but, also, that, the latter had sought to be assisted with a telephone charger, after narrating her ordeals in the hands of her male friends Patrick and Godfrey.
83. The evidence of the complainant that she was abducted by the appellant while on her way home from church is unbelievable.



84. The testimony of DW4 corroborated that of the appellant in material particulars, Further, DW3- Daniel Kilelo Stephen, who is the appellant's landlord-cum-neighbor, admitted to having known and seen the appellant's girlfriend Elnorah (DW4) regularly at appellant's house for some months.
85. DW3 said he saw the appellant in the company of his girlfriend Elnorah in the evening at about 5PM, on the same night the appellant was arrested.
86. The complainant's claim of having been detained for eight days was called into question by the testimony of the appellant's neighbors and landlord, who stated they did not see her at the appellant's house during the alleged period.
87. There is evidence that the toilet was outside the block of houses.
88. The Appellant called his neighbor DW2 and his landlord DW3 who said they lived in the same compound with the Appellant and that they did not see the complainant at the house of the Appellant from 6th September 2020 to 15th September 2020 as alleged by the complainant.
89. The medical evidence indicated habitual sexual activity by the complainant, which contradicted her claim that the appellant was the first person she had sexual intercourse with.
90. In light of these inconsistencies and contradictions, I find that the trial court ought to have had reasonable doubt as to the veracity of the complainant's claims and the security of the conviction.
91. The appellant ought to have been given the benefit of doubt as by law required.
92. I find that the conviction herein is not secure and I accordingly quash it and set it aside the sentence.
93. The appellant is set free forthwith unless lawfully held for any other reason.

DATED, SIGNED AND DELIVERED THIS 26TH OF MARCH 2025 IN OPEN COURT VOI HIGH COURT.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistants: Maina/Millicent

