



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Maina v Republic (Criminal Appeal E004 of 2024)  
[2025] KEHC 3680 (KLR) (Crim) (25 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3680 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYANDARUA  
CRIMINAL  
CRIMINAL APPEAL E004 OF 2024  
KW KIARIE, J  
MARCH 25, 2025**

**BETWEEN**

**DUNCAN GITHINJI MAINA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in S.O.A case NO. E064 of 2021 of the  
Principal Magistrate's Court at Engineer by Hon. E.W. Wanjala-Principal Magistrate)*

**JUDGMENT**

1. Duncan Githinji Maina, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars of the offence are that on the 19<sup>th</sup> day of September 2021 within Nyandarua County, he intentionally and unlawfully caused his penis to penetrate the vagina of S.W.W, a child aged fourteen years.
3. The appellant was sentenced to serve twenty-five years imprisonment. He was aggrieved and filed this appeal against the conviction and the sentence through Wainaina Gikima & Company advocates. He raised the following grounds of appeal:
  - a. The learned trial Magistrate erred in law and facts in convicting the appellant to a severe sentence, yet there was no evidence of penetration or partial penetration.
  - b. The learned trial Magistrate erred in law and fact to convict the appellant on a sentence that was proved beyond reasonable doubt that is required by law.



- c. The learned Magistrate erred in fact and law in sentencing the appellant and meting an excessive sentence.
4. The state opposed the appeal through Ms. Odero Vena, learned counsel, who argued that the prosecution had proven its case to the requisite standards and that the sentence was suitable given the circumstances of this case.
5. This is the first appellate court. As expected, I have analyzed and evaluated all the evidence adduced before the lower court afresh. I have drawn my conclusions, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of *Okeno vs Republic* [1972] EA 32.
6. An offence of defilement is established against an accused person when the prosecution has proved the following ingredients:
  - a. That there was penetration of the complainant's genitalia;
  - b. That the accused was the perpetrator and
  - c. The victim must be below eighteen years old.

This position was echoed in the case of *Fappyton Mutuku Ngui vs Republic* [2012] eKLR. Ngugi J. (as he was then) said:

Going by this definition of defilement... the issues which the court needs to determine...first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child, and finally, whether the penetration was by the Appellant.

7. I will determine if the prosecution proved these ingredients to the required standards.
8. S.W.W. (PW1), the complainant, said she was 15 years old when she testified on 28 September 2022. Dr. John Njema Mbogo (PW3), who examined her, estimated her age on the 20<sup>th</sup> of September 2021 to be 14 years old.
9. Though no copy of the Certificate of Birth was produced, I am satisfied that her age was proven.
10. S.W.W. (PW1) testified that when the appellant grabbed her and took her to a bush, he unzipped his trousers and tried to insert his penis between her legs. According to her evidence, he did not penetrate deep, for he was interrupted by a lady who answered her screams. This was supported by the evidence of Dr. John Njema Mbogo (PW3), who concluded this was an attempted penetration.
11. The appellant contended that he was wrongfully implicated in the offence. The complainant stated that she had never known the appellant before, and in his defence, he asserted that he had never met her. As the two were strangers to one another, there is no evidence on record to suggest that the appellant was wrongfully implicated.
12. An attempt to commit a crime is defined in the *Oxford Concise Law Dictionary* (2<sup>nd</sup> Edition) as;
 

Any act that is more than merely preparatory to the intended commission of a crime; this act is itself a crime.
13. For an offence to be considered an attempt, it must meet the "but for" test. The description of the acts the appellant is alleged to have committed, as presented by the complainant, went beyond mere preparation. But for the appearance of the woman who interrupted him at the scene, he would have defiled the complainant.
14. Section 9 of the *Sexual Offences Act* provides:



1. A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.
  2. A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.
15. Based on the analysis of the evidence on record, the prosecution has proven the offence of attempted defilement to the required standards, contrary to section 9 (2) of the *Sexual Offences Act*. I quash the conviction by the trial magistrate and set aside the imposed sentence. The conviction is replaced with that of attempted defilement under section 9 (2) of the *Sexual Offences Act*. I sentence the appellant to serve ten years' imprisonment, effective from 11 December 2023. The appeal is successful to that extent.

**DELIVERED AND SIGNED AT NYANDARUA ON THIS 25<sup>TH</sup> DAY OF MARCH 2025**

**KIARIE WAWERU KIARIE**

**JUDGE**

