



REPUBLIC OF KENYA



**Maybe v Republic (Criminal Appeal 98 of 2023)  
[2025] KEHC 5328 (KLR) (Crim) (29 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5328 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYANDARUA  
CRIMINAL  
CRIMINAL APPEAL 98 OF 2023  
KW KIARIE, J  
APRIL 29, 2025**

**BETWEEN**

**DAMIANO MAYEBE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in S.O. Case No. E092 of 2022 of Senior Principal Magistrate's Court at Engineer by Hon. E.N. Wanjala – Principal Magistrate)*

**JUDGMENT**

1. Damiano Maybebe, the appellant herein, was convicted of the offence of defilement of a girl contrary to section 8 (1) as read with section 8 (4) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of the offence were that at unknown date in October 2022, at Kinangop sub county, within Nyandarua County intentionally caused his penis to penetrate the vagina of J.W.M., a child aged ten years.
3. The appellant was sentenced to life imprisonment. He has appealed against the conviction. He was in person and raised the following grounds of appeal:
  - a. The learned trial Magistrate erred in law and fact when he convicted the appellant, where the victim's age was not proved.
  - b. The learned trial magistrate erred in law and fact when he convicted the appellant in the prosecution case where penetration was not proved.
  - c. The learned trial magistrate erred in law and fact by applying the wrong standard of proof in a criminal case, which was a standard of probability instead of the reasonable doubt standard.



4. The state opposed the appeal through M/s Odero Vena, learned counsel, who argued that the prosecution's case had been proven to the required standards.
5. This court is an appellate court. As expected, I have carefully reviewed and assessed all the evidence presented to the lower court, keeping in mind that I did not witness any of the witnesses testify. Therefore, I will follow the well-known case of *Okeno v Republic* [1972] E. A 32 to guide my decision-making process.
6. Section 8(1) of the *Sexual Offences Act* defines defilement in the following terms:

A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

An offence of defilement, therefore, 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 v Republic* [2012] eKLR when Joel Ngugi J. said:

Going by this definition of defilement, I agree with Mr. Mwenda on the issues the court needs to determine. The 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.

These are the ingredients that the prosecution must prove against an accused person.
7. The copy of the birth certificate presented as an exhibit indicates that J.W.M. was born on 3 January 2012. As of October 2022, she was 10 years and nine months old. Contrary to the appellant's contention, the complainant's age was proved.
8. Section 8 (4) of the *Sexual Offences Act* provides:

A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.
9. The appellant ought to have been charged under section 8 (2) of the *Sexual Offences Act*, which provides as follows:

A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
10. Harriet Wanjiku Mbutia (PW4) testified that on the 2<sup>nd</sup> day of November 2022, while at Mkungi Primary School, it was reported that the complainant and another girl were exhibiting "bad manners" in the toilet. When she summoned the two girls separately, the complainant, in this case, informed her that they had removed their pants, and she licked B's genitals. She said she had learned from their house help and that they used to lick each other's genitals. This is when she volunteered that the appellant used to penetrate her with his penis which she would also lick. This is what triggered this case.
11. When Doctor Agnes examined the complainant on November 7, 2022, the complainant indicated that her last day of defilement was October 2, 2022. This was the evidence of Dr. Patrick Maina Wakahiu (PW3), who produced the P3 form on her behalf.



12. J.W.M. (PW2) testified partially on December 14, 2022, and stepped down when she became emotional. The prosecution sought time to take her for counselling. Before she was stepped down, she said that the appellant had asked her to enter her uncle's house. He then asked her to remove her pair of trousers. When she complied, he inserted his penis into her genitalia. She did not tell anybody about the incident until her mother asked.
13. When she was recalled on the 5<sup>th</sup> day of April 2023, during cross-examination, she stated that her aunt had asked her to lick her genitalia. She said she did not know why her aunt had run away. She also conceded that she was found in a school toilet with another girl, inserting fingers into each other's genitalia.
14. At this stage of the complainant's evidence, the learned trial magistrate should have been vigilant for three reasons. First, she raised a credibility issue regarding the timing of the alleged offence. In her testimony, she stated that the appellant defiled her on an unspecified date in October 2022. However, she informed Dr. Agnes that the last incident occurred on October 12, 2022. Was this a matter of genuine forgetfulness or selective amnesia? The Court of Appeal in the case of *Ndungu Kimanyi v Republic* [1979] KLR 283 (Madan, Miller and Potter JJA) held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.
15. The second reason is whether the injuries noted, that is, broken hymen and erythematous perineum and external genitalia, could be attributed to the fingering she was involved in with the other girl and her aunt.
16. The third and most important reason was the way she talked about her sexual involvement with the appellant. This was a ten-year-old child at the time, and any sexual intercourse with an adult must have been very painful. She never talked of any pain or bleeding, and one is tempted to conclude that it never happened.
17. The evidence of the complainant that implicated the appellant required corroboration due to the reasons cited. The proviso to section 124 of the *Evidence Act* states:

Provided that where in 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.
18. When Harriet Wanjiku Mbuthia (PW4) confronted the complainant on what she was found doing in the toilet, she was not candid. She only talked of licking each other's genitalia and concealed the fact of fingering their genitals. The learned trial magistrate ought to have made a finding that she was not truthful and should have sought to find if her evidence against the appellant was corroborated. I find that it was not.
19. From the foregoing, I find the appellant's conviction unsafe. It is quashed, and the sentence set aside. The appellant is set at liberty unless otherwise lawfully held.

**DELIVERED AND SIGNED AT NYANDARUA THIS 29TH DAY OF APRIL 2025**

**KIARIE WAWERU KIARIE**

**JUDGE**

