



**Maina & 3 others v Republic (Criminal Appeal E028, E029, E030 & E031 of 2024  
(Consolidated)) [2025] KEHC 4982 (KLR) (28 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4982 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL E028, E029, E030 & E031 OF 2024 (CONSOLIDATED)**

**DR KAVEDZA, J**

**APRIL 28, 2025**

**BETWEEN**

**KENNEDY IRUNGU MAINA ..... 1<sup>ST</sup> APPELLANT**  
**EMMANUEL MUTEMI ..... 2<sup>ND</sup> APPELLANT**  
**PETER MWAURA ..... 3<sup>RD</sup> APPELLANT**  
**BEN THUO KOMO ..... 4<sup>TH</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered  
by Hon. P. Mutua (SPM) Kibera Chief Magistrate's Sexual Offense  
Case no. E006 of 2022 Republic v Kennedy Irungu Maina and 3 others)*

**JUDGMENT**

1. The appellants were jointly charged and after a full trial convicted for the offence of gang defilement contrary to section 10 of the *Sexual Offences Act* No 3 of 2006. The particulars are that on 1<sup>st</sup> January 2022 between 0600h and 0630h, the appellants intentionally and unlawfully caused their male genitalia to penetrate the female genitalia of A.S a girl aged 14 years. They were each sentenced to serve thirty (30) years imprisonment.
2. Aggrieved, they filed their respective appeals which challenging their conviction and sentence. The appeals were consolidated by this court. The coalized grounds are that the appellants challenged the totality of the prosecution's evidence against which they were convicted. They urged the court to quash their conviction and set aside the sentences imposed.
3. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, re-evaluate, and re-analyse the evidence afresh and come to its own conclusion on that evidence. The court should



however bear in mind that it did not see witnesses testify and give due consideration for that. (See *Okeno v Republic* [1972] EA 32).

4. The prosecution called six (6) witnesses in support of their case. PW1, S.A.D, gave a sworn testimony after a voir dire examination. She testified that at midnight on New Year's Eve, she was coming from church with her friend PW2, D.O.B when they were accosted by five boys who frisked them for their belongings. PW2 managed to escape even after being chased down by one of them. One of the boys had a panga, which they used to deter her from escaping, and proceeded to take her to an empty house where each of them took turns defiling her till dawn. In the morning she left with the 1<sup>st</sup> and 3<sup>rd</sup> appellants. She managed to see their faces which aided her in identifying them during the identification parade and thereafter in court.
5. When PW1 arrived home crying, PW3 BM her mother observed that her clothes were stained with blood after which she examined her genitalia further where she was informed what had taken place. She then took her to Nairobi Women's Hospital, and later to the police station. PW3 stated that PW1 was 14 years old as she had been born on 16<sup>th</sup> April 2007.
6. PW4, John Njuguna a clinician at Nairobi Women's Hospital adduced her P3 and PRC forms. When she was examined, it was observed that she was well aware of her assailants, she had swelling on her right eyelid, he clothes were dirty, she had fluid in her panties, her vagina was swollen, she had lacerations on her genitalia, a tear on the lower part of her vagina and blood from her hymen.
7. Samples were taken from the accused persons at Nairobi Women's Hospital where they had been escorted by PW8, Sgt Shallet Shirindo the investigating officer, and analyzed by PW5, Pamella Khamala Okello the government analyst in view of a semen sample. The sample matched the DNA profile of the 4<sup>th</sup> appellant. PW6, Inspector Salim Mohmood, and PW7, Inspector Evans Murage conducted an identification parade where the 3<sup>rd</sup> and 4<sup>th</sup> appellants were identified respectively and produced an identification parade form to that effect. PW8 testified that it was the appellant who led him to the other three suspects who appeared before court.
8. In their respective defences, the 1<sup>st</sup> appellant testified that on 3<sup>rd</sup> January 2022, he was arrested as he was heading home, and afterwards taken to Nairobi Women's Hospital where a sample of his DNA was obtained. Later on, an identification parade was carried out where he was not identified but was identified in court. The testimonies of DW3 Peter Mwaura, DW4 Ben Thuo Komo, and Emmanuel Mutemi were similar to those of DW2 the 1<sup>st</sup> appellant.
9. The appeal was canvassed by way of written submissions which have been duly considered. The issues are whether the prosecution proved their case beyond reasonable doubt and whether the appellants' conviction was proper.
10. To prove the offence of gang defilement under Section 10 of the *Sexual Offences Act*, the prosecution was required to prove penetration, the victim's age (under 18), lack of consent, and identification of multiple perpetrators acting in association.
11. On the element of penetration, PW1 testified that five boys took turns defiling her in an empty house. PW4, a clinician, observed vaginal swelling, lacerations, a tear, and blood from the hymen, confirming penetration. PW5's DNA analysis linked semen to a co-accused, further evidencing sexual intercourse.
12. PW3, the victim's mother, confirmed PW1 was 14 years old, born on 16 April 2007, satisfying the requirement that the victim be under 18.



13. On whether there was consent, PW1 gave evidence that she was accosted at midnight, threatened with a panga, and forcibly taken to an empty house, indicating coercion. Her distress, blood-stained clothes, and injuries corroborate non-consensual intercourse.
14. In addition, PW1 identified the appellants during an identification parade and in court, aided by seeing their faces during the sexual assault. PW8 confirmed the 1<sup>st</sup> appellant led to other appellants, establishing their association with the offence.
15. The prosecution's evidence, including PW1's testimony, medical findings, DNA, and identification parades, proved the offence of gang defilement beyond reasonable doubt. The upshot of the analysis above is that the appellants' conviction was proper and is affirmed.
16. The appellants were each sentenced to serve thirty (30) years imprisonment. During sentencing, the court considered the pre-sentence report, and the aggravating circumstances surrounding this case and exercised discretion. Based on this premise, I see no reason to interfere with the sentence.
17. In the end, the appeal is found to be lacking in merit and is dismissed in its entirety.

Orders accordingly.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 28<sup>TH</sup> DAY OF APRIL 2025**

**D. KAVEDZA**

**JUDGE**

In the presence of:

Appellants Present

Mr. Chebii for the Respondent

Tonny Court Assistant

