



REPUBLIC OF KENYA



KENYA LAW
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**Makunda v Republic (Criminal Appeal E063 of 2023)
[2025] KEHC 7985 (KLR) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7985 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E063 OF 2023**

EN MAINA, J

MAY 29, 2025

BETWEEN

JUSTUS AGGREY MAKUNDA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the Conviction and sentence delivered on the
21st day of September 2023 in the Mavoko Senior Magistrate's Court
Sexual Offence No. E026 of 2022 by Hon. S. Kandie, Resident Magistrate)*

JUDGMENT

1. The appellant was charged with the offence of Defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act*. The particulars of the charge were that on diverse dates between 1st January and 13th April, 2022 in Athi river Sub County within Machakos County, the Appellant intentionally and unlawfully caused his penis to penetrate the female genital organ (vagina) of one JMP, a child aged fourteen years.
2. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* the particulars of which were that on the same date and place he intentionally touched the breast and vagina of JMP.
3. At the trial five (5) witnesses testified against the accused who was found to have a case to answer on 10th May and he choose to give sworn evidence but did not call any witness. After evaluating the evidence, the trial Magistrate found the appellant guilty on the main charge, convicted him and sentenced him to a term of imprisonment for twenty (20) years.
4. Being aggrieved by the entire judgement, conviction and sentence, the Appellant has preferred this appeal via a Petition of Appeal dated 24th October 2023 on grounds that;



- a. The learned Trial Magistrate failed to direct himself properly with regard to prove the date of the alleged commission of offence and the glaring contradictions patent in the judgment with regard to the date the alleged offence was committed rendering the conviction unsafe;
 - b. The learned Trial Magistrate erred in failing to give the appellant the benefit of the doubt which was raised by the medical report, PCR findings and P3 that did not indicate penetration attributed and proved to be by the appellant;
 - c. The learned Trial Magistrate erred in concluding that the evidence of the minor has been corroborated without actual evidence of which aspect of the testimony had been corroborated;
 - d. The learned Trial Magistrate erred in not taking note of the contradictory testimony of PW4 as to how he was allegedly alerted to proceed to the upper floors of the building;
 - e. The learned Trial Magistrate erred in finding that penetration was proved without any evidence of penetration attributed and proved against the appellant;
 - f. The learned Trial Magistrate erred in making a finding that identification had been established by recognition yet there was no evidence as to how that recognition was made by the victim;
 - g. The learned Trial Magistrate erred in making a finding that the evidence of the victim had been corroborated by the testimony of PW4 without giving any reason as to how identification was established by the said witness.
 - h. The learned Trial Magistrate erred in law and fact in convicting the appellant on the basis of scant unsafe circumstantial evidence alone without applying the proper test;
 - i. The learned Trial Magistrate erred in law and fact in convicting the appellant when the weight of the evidence did not support the conviction;
 - j. The learned Trial Magistrate erred in convicting the appellant in the circumstances of the case.
 - k. That consequently the learned Magistrate erred in predisposing his discretion on sentence to the fetters apparent in section 8 (3) of the *Sexual Offences Act* resulting to an inappropriate sentence.
 - l. That in the alternative, the sentence of the court is manifestly excessive considering all the circumstances and mitigating factors such as there being no record of previous convictions of the appellant, the age of the appellant, the appellants contrition and plea for leniency.
5. The parties to the appeal consented to canvass it by way of written submissions. On his part the Appellant relied on the submissions dated 14th January 2025 in which Learned Counsel submitted that there was lack of proof of the alleged date of commission of the offence; that the charge sheet lacked specificity and the prosecution did not prove the exact date; that there were contradictions in the testimony of the minor and PW4 as well as the judgement.
 6. Counsel for the Appellant also submitted that the key ingredients for the offence of defilement were not proved beyond reasonable doubt; that penetration was not proven; no spermatozoa was seen in the medical report and there was nothing unusual noted on the minor's private parts; that the Appellant was not positively identified. As for the sentence he submitted that the sentence be substituted with a three year sentence from the date of sentence; that the declaration by the Supreme Court is unconstitutional. To support its case, reliance was placed on the case of *Thomas M. Wenyi v Republic* [2017] e KLR and *John M. Munyoki v Republic* [2017] eKLR.



7. On its part, the Respondent contended that the prosecution proved its case beyond reasonable doubt; the contradictions highlighted by the Appellant were immaterial; that there is possibility of the minor forgetting the dates as she had been defiled severally; that corroboration is not necessary in this type of case as per section 124 of the *Evidence Act*. Learned prosecution counsel urged this court to dismiss the appeal and instead uphold the judgment and sentence of the trial court.

Analysis and determination.

8. As the first appellate court, I have carefully considered and evaluated the evidence adduced in the trial court so as to arrive at my own independent conclusion, albeit keeping in mind that unlike that court I did not see or hear the witnesses – (see the case of *Okeno v Republic* [1972] EA 32). I have also taken into consideration the rival submissions, the cases cited and the law.
9. The Appellant was found guilty of defilement under Section 8 (1) and (3) of the *Sexual Offences Act* which provide as follows:
1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement’
 2.
 3. A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
10. The elements of the offence of defilement are: -
- a. That the complainant/victim is a child.
 - b. Penetration of the genital organ of the child with the genital organ of the perpetrator whether complete or partial.
 - c. Identification of the perpetrator.
- (see the case of *Manyeso v Republic* (Criminal Appeal 12 of 2012) [2023] KECA 827 (KLR) (7 July 2023) (Judgment).
11. On the issue of age, I am guided by the case of *Fappyton Mutuku Ngui v Republic* [2012] eKLR it was held that:
- “... That “conclusive” proof of age in cases under *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.”
12. The victim testified that she was 13 years old. Pw3 told the court that she was born on 6th May 2007 and was 13 years old. The birth certificate indicates that the date of birth is 6th May 2007. There being no evidence rebutting the contents of the birth certificate, this court is satisfied that in the year 2020 when the offence was committed the complainant was a child aged 13 years.
13. On the issue of penetration, the same is defined in Section 2 of the *Sexual Offences Act* as:
- “The partial or complete insertion of the genital organ of a person into the genital organs of another person.”



14. Section 124 of the *Evidence Act*, contains a proviso which removes the requirement for corroboration in cases of sexual offences. The proviso states-

“

Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, 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.”

15. In the case of *DS v Republic* [2022] eKLR, the court cautioned that;

“Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred. Where the medical examination may not be available or conclusive, the court ought to weigh with thorough scrutiny and utmost caution, the evidence of the child, in order to determine whether there was penetration.”

16. The complainant testified that in December 2021, the Appellant called her and told her to go with him. They went to the third floor of a house that was under construction. She stated that he told her to take off her trouser. She described what he then did to her as follows-

“..... he inserted his dudu after removing my clothes. He inserted his dudu inside my legs. I did not like it. He inserted it in my private parts. He used his hands/fingers.

Court- minor points at her private parts.”

17. The court heard that the victim was taken to a medical facility for examination, PW2 produced the PRC an P3 forms and testified that there was no injury on physical, hymen torn and healed; no bruises noted; white normal discharge noted. PW2 concluded that the genital examination was a healed blunt penetrator’s secondary to blunt trauma to genitalia. On further analysis there was no cell and no pregnancy. It was indicated that examination was done on 13th April 2021 at 11pm. The victim admitted to having sex before and not seeing it as an issue removing her trouser that would explain why the vagina was in the condition stated above. When PW2 was recalled, she stated that the findings were consistent with genital penetration and that according to the GVRC, the man had been having intercourse with the minor before. The conclusion was that there was blunt trauma on the genital organs.

18. On the issue of spermatozoa not being found, I am guided by the decision of the Court of Appeal in *Mark Olruvi Mose v R* [2013] eKLR where it was stated that;

“Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and penetration need not be deep inside the girl’s organ.”

19. On the identification of the Appellant as the perpetrator, the victim testified that she knew the Appellant as he used to sell bras. Her evidence was corroborated by PW4 who testified that he saw the Appellant lying on top of the complainant on the roof top of an incomplete building. The Appellant alleged that he had business grudge with PW4 over business, that he was framed despite the and the perpetrator being well known as a man who used to sell miraa(khat). That the Appellant conceded that



- he was well known by the complainant coupled with the evidence of PW3 and PW4 and the leaves no doubt in my mind that he was positively identified as the perpetrator of this offence.
20. As regards the issue of contradictions that have been raised by the Appellant, the manner in which to treat contradictions in a case was stated by the Court of Appeal in *Jackson Mwanzia Musembi v Republic* (2017) eKLR where the court cited with approval the Ugandan case of *Twahangane Alfred v Uganda* CR. Appeal No. 139 of 2002 [2003] UGCA,6 where it was held that:
- “with regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case”.
21. Also, in the case of *Joseph Maina Mwangi v Republic* *CA No. 73 of 1992* (Nairobi)(unreported) the Court of Appeal held that: -
- “In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the *Criminal Procedure Code*, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence.”
22. From the Charge sheet, this offence was committed on diverse dates between 1st January and 13th April 2022 whereas the complainant testified that it occurred towards the end of December 2021 and when she was recalled, she could not remember the date and time that the incident occurred. PW3, the mother of the victim stated that she was told about the incident on 13th April 2022 and that she took the complainant to the hospital the same day which has been corroborated by PW2 and the medical documents produced. PW4 is said to have found the Appellant in the act on 13th April 2022. On his part the investigating officer (PW5) testified that the victim was taken to the station on 14th April 2022, PW5 testified that the child had been defiled several times. Clearly there were contradictions as to the date of the offence. However, I am not satisfied that these go to the credibility of the witnesses. What the record speaks of the state of the complainant when she saw the Appellant in court speaks volume. She seemed very shaken and could not even respond to his questions. This nervousness may have caused her to confuse the dates. The law recognises that such variance between the charge sheet and the evidence as to the date of the offence can at times occur and makes provision for it in Section 214(2) of the *Criminal Procedure Code*. It is my finding that the variance is not fatal to the case which is otherwise water tight.
23. As regards the sentence, the Appellant was sentenced to twenty years imprisonment. The section under which he was charged provides for a minimum sentence of imprisonment for a term of twenty years. The sentence is therefore not excessive or harsh as alleged. It is a lawful sentence. It is worth noting that the sentences under the *Sexual Offences Act* are premised on the age of the child victim but not that of the perpetrator and hence the age of the Appellant was not therefore a relevant factor.
24. The upshot is that the case against the Appellant was proved beyond reasonable doubt and as the sentence is also lawful this court finds no reason to interfere.
25. The appeal is dismissed in its entirety and the conviction and sentence are upheld save that in order to take into account the period the Appellant spent in remand custody the sentence of imprisonment for twenty years shall be computed to commence from the date of his arrest which as per the charge sheet is 20th April 2022.



26. In the end, the Appeal is found to be without merit and the same is dismissed.

Orders accordingly.

JUDGMENT SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 29TH DAY OF MAY 2025.

E. N. MAINA

JUDGE

In Presence Of:

Miss Kaburu for the State/Respondent.

Mr Echessa Advocate for the Appellant.

Geoffrey Court Assistant/Interpreter.

