



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mukwana v Republic (Criminal Appeal E038 of 2022)  
[2024] KEHC 652 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 652 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL APPEAL E038 OF 2022**

**KW KIARIE, J**

**JANUARY 25, 2024**

**BETWEEN**

**DOUGLAS MUKWANA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in S.O case NO. E028 of 2020 of the Chief Magistrate's Court at Mombasa by Hon. R.M. Amwayi–Senior Resident Magistrate)*

**JUDGMENT**

1. Douglas Mukwana, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of the offence are that on diverse dates between the 9<sup>th</sup> day of November 2020, in the Malandi area, Changamwe sub-county within Mombasa County, intentionally and unlawfully caused his penis to penetrate the anus of I.S., a boy child aged ten years.
3. The appellant was sentenced to life imprisonment. He was aggrieved and filed this appeal against both conviction and sentence. The appellant was in person. He raised grounds of appeal as follows:
  - a. That the learned trial magistrate erred in law and fact for not appreciating that the prosecution case was not proved.
  - b. That the learned trial magistrate erred in law and fact by failing to consider that the prosecution party failed to bring sufficient evidence within a reasonable time frame to prove their case beyond reasonable doubt.
  - c. That the learned trial magistrate erred in law and fact for not noticing that the medical evidence did not corroborate the complainant's evidence.



- d. That the learned trial magistrate erred in law and fact for not considering that a crucial witness was not summoned in court.
  - e. That the learned trial magistrate erred in law and facts for dismissing the defence without any legal basis.
4. The state opposed the appeal through M/s Maureen Anyumba, who urged the appeal to be dismissed for want of merits.
  5. This is the first appellate court. As expected, I analysed and evaluated all the evidence presented before the lower court. I have drawn conclusions, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of *Okeno v Republic* [1972] EA 32.
  6. To sustain a conviction for the offense of defilement, the prosecution has to prove the following ingredients:
    - a. Whether there was penetration;
    - b. Evidence must show that the accused is the perpetrator; and
    - c. The age of the victim must be below eighteen years.

In the case of *Fappyton Mutuku Ngui v Republic* [2012] eKLR, Joel Ngugi J. said:

Going by this definition of defilement, I agree with Mr. Mwenda on the issues which 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 I will endeavour to find if they are proven.

7. The complainant was a ten-year-old child at the time of the offence. His evidence was that he went to play in a field near the school. This was on the 9<sup>th</sup> day of November 2020. After the game ended, the appellant asked him to meet with him. They completed in a bushy area near the field. The appellant removed the complainant's pair of shorts and likewise removed his pair of trousers and defiled him by penetrating his anus with his penis. He repeated the defilement on another occasion at the Social Hall. He said he did not go home, for he feared his mother was going to beat him. He slept in a kiosk and, in the morning, went to Kibarani Tank, expecting to get some free food.
8. G.A. (PW1) is the complainant's mother. Her evidence was that he did not return home when the complainant went to play on the 12<sup>th</sup> day of November 2020. She went looking for him all over without success. She found him the next day, and he said he had slept at a kiosk. This is when he disclosed to her what the appellant did to him. He took him to report to the police and later to the hospital.
9. The appellant denied that he defiled the complainant.
10. The direct evidence implicating the appellant was that of the complainant. 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.



11. Other than the complainant's evidence of what transpired, there was some circumstantial evidence adduced by Ferdinand Omondi Oloo (PW3). He testified that he worked with Global Opportunity Network, which dealt with advocacy for youth affairs. His evidence was that he had noted that the appellant was frequently in the company of the appellant and his brother. This raised some concern, and he went to find out from the complainant's mother whether he was their relative. In the case of *Mohamed & 3 Others v Republic* [2005] 1 KLR 722, Osiemo Judge explained what circumstantial evidence is as follows:
12. Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.
13. Though this evidence did not indicate that this was at the time of the offence, it rendered credence to the complainant's evidence as to the perpetrator of the offence. This was a person known to him.
14. When Dr Khai examined the complainant and the report produced by John Kingori (PW5), a clinical officer, on the 14<sup>th</sup> day of November 2020, he made the following findings: There were bruises at the anal orifice, which was tender. He concluded that there was evidence of forced penetration. This further corroborated the complainant's evidence.
15. The complainant's age was assessed, and a report was produced as an exhibit. His age was estimated at ten years. Section 8 (2) of the [Sexual Offences Act](#) provides:

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.

The prosecution, therefore, proved the age of the complainant.
16. Based on the foregoing analysis of the evidence on record, I find that the appeal lacks merits and is accordingly dismissed.

**DELIVERED AND SIGNED AT MOMBASA THIS 25<sup>TH</sup> DAY OF JANUARY, 2024**

**KIARIE WAWERU KIARIE**

**JUDGE**

