



**Mwasio v Republic (Criminal Appeal E003 of 2024)  
[2024] KEHC 17103 (KLR) (28 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 17103 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CRIMINAL APPEAL E003 OF 2024  
AN ONGERI, J  
FEBRUARY 28, 2024**

**BETWEEN**

**MWANGEMI MWASIO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment and sentence of Hon. D. Wangeci (SPM) in Wundanyi SPMC Sexual Offence Case No. E002 of 2022 delivered on 21st February 2024)*

**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 No. 3 of 2006 and he was convicted and sentenced to twenty (20) years imprisonment.
2. The particulars of the charge were that on 15<sup>th</sup> and 19<sup>th</sup> January 2022 at [Particulars Withheld] in Wundanyi Location within Taita Taveta County, the accused person intentionally caused his penis to penetrate the vagina of E.K.K, a child aged fifteen years.
3. The prosecution evidence in summary was that the Appellant and the complainant were neighbours and the Appellant at times used to assist the complainant with school assignments.
4. On 15<sup>th</sup> January 2022 the complainant met the Appellant along the road as she was going to hospital and she sought help from the Appellant with her homework.
5. After they did the homework, the Appellant started touching her breasts. He took her to his bedroom and forcefully removed her underwear, wore a condom and had sexual intercourse with her.
6. The Appellant told the complainant to go take a bath and not to tell anyone what happened.



7. A few days later on 19<sup>th</sup> January 2022 the complainant sought permission to go to hospital but instead she went to the house of the Appellant and again engaged in sexual intercourse with him.
8. The complainant said after that she was summoned to the office of the head teacher where she disclosed that she had been engaging in sexual intercourse with the Appellant.
9. The complainant was taken to Wesu Hospital on 21<sup>st</sup> January 2022 where she was examined and was confirmed that her hymen was broken and she had a whitish discharge and laceration observed on her outer genitalia.
10. The Appellant in his defence said that this case was fabricated by the village Chairman out of a grudge he had with him.
11. The trial court found the Appellant guilty as charged and convicted him and sentenced him to twenty (20) years imprisonment.
12. The Appellant has appealed to this court on the following grounds:-
  - i. That I pleaded not guilty to the offence.
  - ii. That the learned appellate judge erred in law and in fact by failing to find that the appellant's identification was not positive.
  - iii. That the learned appellate judge erred in law and in facts by failing to appreciate that the appellant's defence was cogent and believable but proceeded to dismiss the same nevertheless.
  - iv. That the learned appellate judge erred in law by failing to find that crucial witnesses were never availed by the prosecution.
  - v. That the learned appellate judge erred in law by failing to appreciate that the prosecution's case was marred with numerous contradictions and inconsistencies.
  - vi. That the learned appellate judge erred in law by failing to appreciate that the evidence relied on to found the appellant's conviction and circumstantial and as such could not sustain a safe conviction.
  - vii. That further grounds shall be adduced at the hearing of this appeal after I receive the record of appeal and judgment of the trial court.
  - viii. That I wish to present during the hearing and determination of this appeal.
  - ix. That I pray to be supplied with the record of trial proceedings and the judgment to enable me prepare for the hearing of my appeal.

13. The parties filed written submissions as follows:-

the appellant submitted that from the evidence there was nothing provided to prove that the complainant had lost her hymen the day before she was examined. The clinical officer was categorical that he was not in a position to ascertain the act of defilement after examining the complainant. He testified that he conducted the vaginal examination and found no tears, bruises nor hymen. There was in addition no spermatozoa, yeast or fungal cells. The complainant also confirmed that she had previously engaged in sexual intercourse and was therefore not a virgin. It was thus the appellants argument that the elements of defilement were not proved and hence he should have not been acquitted.



14. The appellant argued further that from the record it is clear that there were key crucial witnesses that were involved and during trial these witnesses were not brought to court. The appellant contended that the prosecution witnesses gave different version of stories which did not all add up. The inconsistencies that arise from the witness testimonies were clear and in the circumstances the trial court should have acquitted the appellant.
15. The prosecution alternatively submitted that penetration was proved when the complainant testified that the appellant defiled her on two occasions and each time he told her to wash herself using hot water. The medical reports showed that the hymen was broken and that the complainant had whitish discharge. It was the prosecutions argument that there was nothing in the testimony of the complainant that would cause doubt. She was consistent and her testimony was resolute.
16. On the age of the complainant the prosecution submitted that her age was not contested as there was a birth certificate produced which indicated that the complainant was 15 years old. On identification the prosecution submitted that there was no doubt that the complainant and the appellant were all well known to each other and that the complainant frequented the appellant's homestead. The appellant alleged that charges were leveled up against due to a grudge as he was the village elder but the witnesses confirmed that there was no grudge against the two families. The prosecution's position was that the evidence that was provided was sufficient, direct believable and credible to convict the appellant.
17. This being the first appeal, the duty of the first appellate court is as follows:- The Court of Appeal in *Okeno vs Republic* [1972] EA 32 held that:

“ An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya vs Republic* (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M Ruwala v R* (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters vs Sunday Post* [1958] EA 424.”
18. The issues for determination in this appeal are as follows:-
  - i. Whether the prosecution proved the guilt of the Appellant to the required standard.
  - ii. Whether the appeal should be allowed.
19. On the issue as to whether the prosecution proved the guilt of the Appellant to the required standard, the elements of defilement are as follows:-
  - i. Age of the complainant,
  - ii. Proof of penetration
  - iii. Positive identification of the assailant.
20. I find that the prosecution proved the elements of the offence of defilement.
21. The Appellant was properly identified since he was a neighbor of the complainant.
22. The prosecution proved penetration through medical evidence.



23. The age of the complainant was proved by production of the birth certificate which shows she was born on 17<sup>th</sup> December 2007 which proved that at the time of the incident she was a minor.
24. The appeal lacks in merit. The conviction is secure and the sentence lawful.
25. I dismiss the appeal and confirm the conviction and sentence.

**DATED, SIGNED AND DELIVERED THIS 28<sup>TH</sup> DAY OF FEBRUARY 2025 VIRTUALLY AND IN OPEN COURT AT VOL.**

**ASENATH ONGERI**

**JUDGE**

In the presence of:-

Court Assistant: Maina

