

KENYA / JUDGMENT

Makumbi v Republic

[2026] KEHC 13603 (KLR)

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COURT

High Court

BEFORE

JK Biomdo

CASE / FILE NUMBER

Criminal Appeal E041 of 2025

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Makumbi v Republic (Criminal Appeal E041 of 2025) [2026] KEHC 13603 (KLR) (17 September 2026) (Judgment) Neutral citation:

[2026] KEHC 13603 (KLR) Republic of Kenya In the High Court at Makueni Criminal Appeal E041 of 2025 JK Biomdo, J September 17, 2026 Between Jackson Mwanzia Makumbi Appellant and Republic Respondent (Being an appeal against the conviction and sentence by Hon. P.N Gesora (CM) in Makueni Chief Magistrate's Court (SO) Case No. E009 of 2024)

Judgment

1. The appellant herein Jackson Mwanzia Makumbi, was convicted and sentenced to 15 years imprisonment by the Chief Magistrate's Court at Makueni for the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the Sexual Offences Act , No. 3 of 2006. The particulars of the offence were that on the 25 th April 2024 at 17.00 hours in [Particulars Withheld] village Mukuyuni Sub-location within Makueni County, intentionally and unlawfully caused his penis to penetrate the vagina of J.N a child aged 16 years. In the alternative, he was charged with committing an indecent act with a child contrary to section 2 (1) of the Sexual Offences Act , to wit, intentionally and unlawfully touching the vagina of J.N a child aged 16 years. Having been convicted on the principal charge, the court did not make any finding on the alternative charge. 2. Aggrieved by the finding, conviction and sentence by the trial court, the appellant filed the instant appeal where he raised the following grounds: i. That the learned trial court erred in law and fact by convicting him on evidence that did not meet the minimum threshold required by law. ii. That the learned trial court erred in law and fact by failing to find that the prosecution's case was mired by contradictions and inconsistencies that rendered the conviction unsafe. iii. That the learned trial court erred in law and fact by failing to find that penetration was not proved beyond reasonable doubt. 3. A background of the case is that on 29 April 2024, the appellant was arraigned and charged with the offence of defilement contrary to Section 8 (1) and (3) of the

Sexual Offences Act . He also faced an alternative charge of committing an indecent act contrary to Section 2 (1) of the said Act. He denied the charges prompting the trial where the prosecution to called six (6) witnesses to prove its case. 4. PW1 the complainant, testified that on 25 April 2024 at about 5pm she was sent by her mother, PW3 to the market to buy beans. She was given Ksh.60 but lost Ksh. 50 along the way prompting her to turn and head back home. She met the appellant who was well known to her, they had brief conversation before he held her tightly, led her to the bush, removed his and her trousers, had sexual intercourse with her by penetrated her vagina. Her cousin PW2, appeared at the scene and the appellant told her he was answering a call of nature before going away. She went home, reported to her grandfather who called his father, PW4. He directed them to report the matter to the police which they did where she was issued with a P3 form and was examined at the hospital. She identified the appellant as responsible maintaining that she saw him very clearly. 5. PW2, MK's evidence was that on 25 April 2024 while in the company of a friend by the name Grace, went to fetch firewood in the bush. They saw a jacket on the ground, the appellant who was a neighbour wearing his trouser and PW1 on the ground with her trouser by her side. On inquiry, the appellant informed them that he was answering a call of nature before leaving the scene. After he had left, PW1 told them that the appellant had defiled her. 6. PW3, MK the complainant's mother testified that on 25 April 2024, she sent PW1 to the market to buy beans. She delayed and went back at about 8pm where she started crying upon arrival. PW2 appeared and reported was had transpired. She reported the incident at Mukuyuni Police station and accompanied PW1 to the hospital for medical examination. She knew the appellant who was a neighbour. 7. PW4, JK, the complainant's father was informed that the appellant had defiled PW1. He sent a boda boda rider that ferried the complainant and her mother to the police and later to the hospital. He apprehended the appellant and handed him over to the police. He produced the complainant's birth certificate (exhibit 1) which showed that she was born on 8 August 2008. 8. PW6 Stella Ndambi Muasya a clinical officer at Makueni hospital testified that the appellant was examined at the facility on 24 April 2024 having been presented with history of defilement. Examinations showed that she a difficulty in walking, was bleeding in her private parts, her hymen was broken and had lacerations in the vagina, leading to a conclusion that there was penetration. She produced the P3 form (exhibit 1) and Post Rape Care form (exhibit 3) as evidence thereof. 9. PW5, PC Stella Baraza the investigating officer at Mukuyuni police station confirmed that the incident was reported at the station on 25 April 2024 at around 7.30pm by PW1 who was accompanied by PW3 and PW4. She referred them to the hospital for medical examination and upon completion of investigations, the appellant was arraigned and charged with the offence. 10. At the close of the prosecution case, the court ruled that a prima facie case had been established and placed the appellant on his defence. The appellant gave sworn testimony where he denied committing the offence stating that he was framed. After considering the evidence on record, the trial court rendered judgment, returned a verdict of guilty, convicted and sentenced the appellant as stated above. 11. The appeal was argued by way of written submissions which were duly filed and relied on by both parties. The appellant, who appeared in person, submitted that

the evidence adduced did not meet the requisite threshold to warrant a conviction. He contended that if indeed the complainant was forcefully defiled, why didn't she shout for help or struggle. He argued that there was not medical evidence that showed that the complainant suffered any injuries and that the complainant didn't state that she was threatened. 12. On the allegation that there were material contradictions in the prosecution's case, the appellant submitted that whereas PW2 testified that PW1 went back home at 8pm, PW5's evidence was that the report was made at 7.30pm. He argued that this was a serious contradiction as to the time the offence occurred. He relied on the case on *Mbogo vs Republic* (2025) KECA 374 (KLR) to support his case. 13. As regards proof of penetration, the appellant submitted that PW6 did not at any time point or ascertain any sign of penetration. He took issue with the fact that DNA was not conducted arguing that this would have conclusively addressed the matter. He submitted that without DNA, all other evidence amounts to hearsay and points out to shoddy and inconclusive investigations that cannot form the basis for a conviction. He urged the court to find in his favour and acquit him. 14. The Respondent represented by Mr Musyoki learned Counsel, opposed the appeal and relied on its written submissions dated 9 April 2026. The Respondent submitted that the offence of defilement has three ingredients; proof of age of the complainant, proof of penetration and positive identification of the perpetrator. 15. On proof of age, it was submitted that PW4 produced the complainant's birth certificate (exhibit 2) which showed that she was born on 8 September 2008 and hence 16 years at the time of commission of the offence. 16. On the issue of penetration, it was submitted that this was proved by oral evidence of PW1 which was corroborated by PW2 and medical evidence by PW6. As regards positive identification of the perpetrator, it was submitted that PW1 positively identified the appellant as the perpetrator. He was a neighbour and well known to her, thereby eliminating any possibility of mistaken identity. 17. On the issue of contradictions and inconsistencies in the prosecution's case, it was submitted that a case can only be affected by inconsistencies that go to the root of the case, and not peripheral discrepancies as was the case herein. Reliance was placed in the case of *MTG vs Republic* (2022) KEHC 189 (KLR) where the court held, inter alia, that contradictions in evidence would be fatal if they relate to material facts and are substantial. It was contended that the contradictions pointed out in this case relate to a slight discrepancy on the time the incident was reported to the police and did not go to the root of the case. 18. On the allegation that lack of DNA vitiated the case, the Respondent submitted that DNA is optional and not mandatory to prove a sexual offence case. Reliance was placed in the cases of *Munene vs Republic* (2025) KECA 1375 (KLR) and *Williamson Sowa Mbwanga vs Republic* (2016) eKLR. The court was urged to dismiss the appeal and uphold the conviction.

Analysis and Determination

19. This being the first appeal, the duty of this court, as set out in *Okeno Vs R* [1972] EA 32 and affirmed in various decisions including the case of *Mark Oiruri Mose vs Republic* (2013) eKLR, is to re-evaluate the evidence adduced before the trial court and arrive at its own

conclusion whether or not to support the findings of the trial court while bearing in mind that this court did not have the advantage of seeing or hearing the witnesses. 20. The court of appeal, in *Kiilu & Another V Republic* [2005]1 KLR 174, stated thus; “ An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. 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 findings and conclusions; 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.” 21. The Appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the Sexual Offences Act . The specific ingredients of the offence of defilement arising from section 8 (1) of the Sexual Offences Act which the prosecution must prove beyond reasonable doubt are proof of penetration; age of the complainant and positive identification of the assailant. See *Charles Wamukoya Karani vs Republic*, Criminal Appeal No. 72 of 2013. 22. Having considered the grounds of appeal, the evidence adduced in the lower court, the trial court’s judgement, the record of proceedings and the rival submissions of parties, I find the main issues for determination to be; i. Whether there was proof of age of the complainant ii. Whether there was proof of penetration iii. Whether there was proof of positive identification of the perpetrator iv. Whether there were material contradictions in the prosecution’s case

- i. Whether there was Proof of Age of the Complainant 23. Age of the victim is a critical ingredient of the offence and must be proved. For the offence of defilement under Section 8 (1) of the Act to crystalize, it must be proved that the victim was a child, that is, below the age of 18 years. Proof of age is importance since by dint of 43 (4) (f) of the Sexual Offence Act, a child is incapable of consenting. Thus in a case involving a minor, such as this one, it is immaterial that she may have willingly agreed to the sexual act since such a person is incapable of giving consent. 24. The High Court in *Kamau vs Republic* (Criminal Appeal E003 of 2024) [2025] KEHC 42 (KLR) held; “ Proof of age is important in a sexual offense. In *Kaingu Kasomo vs. Republic*, Criminal Appeal No. 504 of 2010 (UR), the Court of Appeal stated that: “Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.” 25. Age can be established by medical evidence, birth certificate, the victim’s parents or guardian and by observation and common sense. See *Thomas Mwambu Wenyi vs Republic* Criminal Appeal No. 21 of 2015 [2017]. 26. In this case, PW2 and PW4, the complainant mother and father respectively, testified that the complainant was 17 years old. PW4 produced the complainant’s birth certificate as Exhibit 2. The birth certificate shows that was born on 8 th August 2008 meaning that she was 16 years at the time the offence was

committed. The authenticity of the exhibit was not challenged and provided conclusive proof on the matter. ii. Whether there was Proof of Penetration 27. On the issue of penetration, the appellant submitted there was no evidence of penetration and that the medical officer PW6 did not at any time point or ascertain any sign of penetration. He further took issue with the fact that DNA was not conducted arguing that this would have conclusively addressed the matter. He submitted that without DNA, all other evidence amounts to hearsay and points out to shoddy and inconclusive investigations that cannot form the basis for a conviction. He urged the court to find in his favour and acquit him. 28. Section 2 (1) of the Sexual Offences Act defines penetration to mean the partial or complete insertion of the genital organs of a person into the genital organs of another person. “Genital organs” are defined by the said Act to include the whole or part of male or female genital organs and for purposes of this Act includes the anus. 29. To prove penetration, it must be established that the appellant inserted his penis into the vagina of the complainant either partially or completely. Being a minor, the complainant was incapable of consenting hence it is immaterial that she may have agreed to the act. 30. Penetration can be proved through the complainant’s testimony and though desirable, corroboration by medical evidence is not mandatory. See *Bassita Vs Uganda S.C Criminal Appeal No. 35 of 1995*. 31. The court of appeal in *Kassim Ali vs Republic Criminal Appeal No. 84 of 2005 (Mombasa)* held: - “The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim or circumstantial evidence”. See also *Kosgei alias Weldon & another v Republic (Criminal Appeal E016 & E022 of 2021 (Consolidated))* [2026] KEHC 4800 (KLR). 32. The complainant, PW1 testified how the appellant led her to the bush, removed her clothes as well as his clothes, inserted his penis inside her vagina and had intercourse with her on 25 April 2024. Her testimony was corroborated by PW2 who found the appellant together with the complainant at the scene. She described seeing the appellant wearing his trouser and that the complainant had no trouser. She immediately reported to PW3, the complainant’s mother which led to the arrest of the appellant. This evidence was further corroborated by PW6 who testified that medical examinations established that complainant had difficulty in walking, was bleeding in her private parts, her hymen was broken and had lacerations in the vagina, leading to a conclusion that there was penetration. She produced the P3 form (exhibit 1) and Post Rape Care form (exhibit 3) as evidence thereof. 33. Contrary to the submissions by the appellant, there is overwhelming evidence that proved penetration. PW6 did indeed provide medical evidence that proved penetration leaving no doubt that this ingredient was proved beyond reasonable doubt. 34. As regards the DNA test, Section 36 of the Sexual Offences Act provides as follows; “ 36. (1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence”. 35. As set out in *Kassim Ali vs Republic (supra)* medical evidence is not mandatory on a sexual offence and that a

conviction can be founded on the basis of the victim's evidence under Section 124 of the Evidence Act . Section 36 (1) of the Sexual Offences Act does not make DNA mandatory and the absence of DNA does not disprove a case of defilement. See *Williamson Sowa Mbwanga Vs Republic* (2016) eKLR. iii. Whether there was Proof of Positive Identification of the Perpetrator 36. On the issue of positive identification of the assailant, identification can be establish in various ways including through recognition. Recognition is generally stronger than identification of a stranger. In *Anjononi & Others vs Republic* [1980] KLR 59, the Court of Appeal stated: " Recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger." 37. PW1 testified that she identified the appellant as the assailant. He was a neighbour, well known to her and they had interacted just before the incident. PW2 testified that she found the appellant at the scene together with the complainant and engaged him before he left. This corroborated PW1's evidence. Further, PW3 and PW4 testified that the appellant was a neighbour and well known to PW1. 38. Identification in this case is founded upon recognition and having evaluated the evidence adduced wholesomely, the court is satisfied that the appellant was properly identified as the assailant. iv . Whether there were Material Contradictions in the Prosecution's Case 39. The appellant submitted that there were material contradictions in the prosecution's case, pointing out that whereas PW2 testified that PW1 went back home at 8pm, yet PW5's evidence was that the report was made at 7.30pm. He argued that this was a serious contradiction as to the time the offence occurred. He relied on the case on *Mbogo vs Republic* (2025) KECA 374 (KLR) to support his case. The Respondent denied that there were material contradictions arguing that any inconsistency noted was peripheral to the substance of the case and was not material. 40. It is expected that contradictions may occur in any particular case since witnesses ordinarily perceive similar matters differently. However, for such contradictions to be fatal, they must go to the root of the case. In other words, not all contradictions would affect the outcome of a particular case. In the case of *MTG vs Republic* (2022) KEHC 189 (KLR), the court held, inter alia, that contradictions in evidence would be fatal if they relate to material facts and are substantial. 41. Turning to this case, the contradictions pointed out relate to the time the offence was reported, with PW2 stating that they reported at 8pm while PW5 stating that it was reported at 7.30pm. This, to the court mind, is not substantial but a slight discrepancy on the time the incident was reported to the police that did not go to the root of the case. 42. Having considered the totality of the case, the court finds all ingredients constituting the offence of defilement as charged were proved beyond reasonable doubt and that the conviction was safe. Final Orders 43. In view of the above, the court makes the following orders; i. The appeal against conviction and sentence is unmerited and is accordingly dismissed. ii. The sentence of 15 years imprisonment imposed by the trial court is upheld. DELIVERED AND SIGNED AT NAIROBI ON THIS 17 TH DAY OF SEPTEMBER 2026 JOSEPH KIPKOECH BIOMDO JUDGE

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