

KENYA / JUDGMENT

Mwai v Republic [2026] KEHC 4084 (KLR)

[2026] KEHC 4084 (KLR)**COURT**

High Court

BEFORE

SC Chirchir

CASE / FILE NUMBER

Criminal Appeal E020 of 2025

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Mwai v Republic (Criminal Appeal E020 of 2025) [2026] KEHC 4084 (KLR) (Crim) (19 March 2026)
(Judgment) Neutral citation:

[2026] KEHC 4084 (KLR) Republic of Kenya In the High Court at Isiolo Criminal Criminal Appeal E020 of 2025 SC Chirchir, J March 19, 2026 Between Joseph Mwai Appellant and Republic Respondent (Being an Appeal against the conviction and sentence of Hon. L. Mutai (CM) in Isiolo Chief Magistrates' Court Sexual Offence Case No. E008 of 2023 delivered on 18th January, 2024)

Judgment

1. The Appellant was charged with the offence of defilement of a child contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006. He denied the charge. The particulars of the offence were that during the month of March 2023, at [Particulars Withheld] area in Isiolo Sub-County within Isiolo County, caused his penis to penetrate the vagina of the of GD, a child aged 14 years. 2. He also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. (The Act) The particulars of the offence are that during the month of March 2023, at [Particulars Withheld] area in Isiolo Sub-County within Isiolo County, intentionally touched the vagina of GD a child aged 14 years with his penis. 3. On conclusion of the trial he was found guilty of the first charge and sentenced to a prison term of 20 years. He was discharged of the alternative charge. Petition of Appeal 4. Being aggrieved by both the conviction and sentence, he filed this Appeal, and presented the following grounds in his Amended Supplementary Grounds of Appeal: a. That the learned trial magistrate erred in matters of law and facts by failing to note that the prosecution did not prove their case to the required standard of proof, as evidence of a broken hymen is not proof of defilement. b. That the learned trial magistrate erred by failing to note that there was malice in this case. c. That the learned trial magistrate erred in law by failing to consider that a key witness was not availed before the court to support the testimony of the complainant. d. That the trial magistrate erred by failing to note that the clinical report was questionable. e. That the

learned trial magistrate failed to take into consideration the defense of the appellant. 5. The Appeal proceeded by way of Written Submissions Appellant's Submissions 6. It is the Appellant's submission that the essential elements of the offence were not proved beyond reasonable doubt. He cites for instance, the testimony of PW4, the clinical officer, who examined the complainant nearly a month after the alleged incident. PW4 testified that there were no fresh tears or lacerations and that the breakage of the hymen was old. 7. On the clinical report, the Appellant faults the trial court for failing to take note of the fact that the medical evidence indicated the injuries on the complainant were a month old and that the medical officer relied entirely on the history provided by the complainant to conclude that penetration had occurred. 8. The Appellant states that PW2 testified that her eldest child heard all that happened on that night, yet the said eldest child did not testify. He submits that the failure to call this witness should have led to an adverse inference against the prosecution. 9. The Respondent did not file any submissions.

Analysis and Determination

10. This being a first Appeal, this Court is under the duty to review the evidence, re-evaluate it, and arrive at its own findings. However, due allowance must be made for the fact that the trial Court had the advantage of hearing the witnesses first-hand and observing their demeanor. 11. The following issues arise for determination on this appeal: a. Whether the essential elements of the offence were proved. b. Whether the failure to call vital witnesses was fatal to the prosecution's case. Whether the essential elements of the charge were proved 12. Section 8(1) of the Act defines the offence of defilement as follows: "A person who commits an act which causes penetration with a child is guilty of an offence termed defilement. Thus the elements constituting the offence of defilement are proof of penetration, the age of the minor and the identity of the assailant (See C.W.K v Republic [2015] eKLR). For the prosecution to secure a conviction, all the aforesaid elements must be proved. Age of the victim 13. Proof of the age of a victim of defilement is crucial for the reason that the sentence passed upon conviction is dependent on the age of victim at the time of defilement. 14. In the instant case, the medical examination report (P3 Form) lists the complainant's age as 14 years and the age assessment report dated 6 th November 2023 opines the age of the complainant as about 15 years. I further note that the age of the complainant was not an issue either during trial or on this Appeal. It suffices to state that the Age of the complainant was proved. The identity of the assailant 15. The complainant told the court that the Appellant was her step- father, while the complainant's mother (PW2) told the court that she was living with the Appellant, and that he was like a father to her children. This relationship was not contested by the Appellant at cross- examination. The identity of the perpetrator is also not a ground of Appeal. The court therefore finds that the identity of the perpetrator was duly proved. Penetration 16. Section 2 of the Act defines penetration to mean "the partial or complete insertion of genital organs of a person into the genital organs of another person" 17. The clinical officer stated complainant had an old hymenal scar from which he concluded that she had been defiled. He told the court that he

further relied on the history of the patient to conclude that penetration had occurred. 18. In the case of Daniel Mwingirwa vs Republic (2017) eKLR, the Court of Appeal observed: “we think it was an error for the learned judge to form a firm conclusion of defilement from the fact alone of the broken hymen”. Further in P.K.W v Republic (2012) eKLR, the court observed that a hymen can be broken by factors other than sexual intercourse, such as strenuous physical activity or injury. 19. Given that the clinical officer found no fresh injuries and categorized the breakage of the hymen as an old case, the medical evidence failed to provide the necessary corroboration for penetration. 20. However, it is trite law that the testimony of the complainant can be sufficient proof in cases of rape or defilement. In this regard the complainant’s (PW1) went as follows:” In march 2025, I recall my mother cooking food. We ate and slept. While sleeping I felt pain in my private part. I cried and my mother came, only to find the accused with me.... The accused came and undressed me” 21. The relevant part of PW 2’s testimony went as follows: At night the accused told me he was going to answer nature’s call... The Accused took a while to return. I shortly heard the complainant crying. I got up and went to where the girls slept... I found the accused sleeping next to the complainant ... she complained of pain in her private parts.. I suspected that the accused had defiled her because although she had her short on, it was pulled up and her pants were also out. I asked the accused what he had done and he asked me to forgive him...” 22. I have carefully considered the testimony of the two witnesses. The complainant herein was a teenager, of 14 years old at the time of the incident. I find it odd that all she could say by way of penetration was that she felt pain in her private parts. The pertinent question is; what caused the pain. Was she touched? was she penetrated? what exactly happened? The complainant was generally old enough to understand that she was being violated or at the minimum, to give a better description of the act(s) that took place. Considering her age, it would even have been satisfactory if she used the word defilement. 23. She also contradicted herself. At the initial part of her Evidence -in- chief she stated that “ while sleeping I felt pain in my private part”, then towards the end of the same testimony she stated: “ The accused came and undressed me”. It raises the question; did she see the accused right from the start of the “Act” or she simply woke up to the pain in her private parts? This contradiction puts into question the credibility of the complainant as a witness. I find her testimony implausible. 24. According to PW2 she found the Appellant lying next to the complainant, after being alerted by her cries. She was not a witness to the act of penetration if any. She went ahead and told the court that apart from hearing the complainant crying, and seeing the Appellant lying next to her, she did not know anything else. She simply suspected that the Appellant had defiled her because the complainant’s pants were pulled up. 25. PW2’s testimony did not prove penetration. Thus neither the medical evidence nor the complainant’s testimony and her witness proved penetration. There was no sufficient evidence therefore to prove penetration as an element of the crime. Whether the failure to call vital witnesses was fatal to the prosecution's case. 26. The Appellant also took issue with the fact that the prosecution did not call PW2’s eldest child. He has urged the Court to draw an adverse inference from that failure. In *Bukenya & Others vs Uganda* (1972) E.A 549, the court held that while the prosecution is not required to call a superfluity of witnesses, if they

call evidence which is barely adequate and other available witnesses are not called, the Court may infer that their evidence would have been adverse to the Prosecution's case. 27. In this case, the complainant told the court that "Mum slept on the bed and I slept on the floor with my sister" This position was affirmed by the mother (PW2) when she told the court: "I got up and went to where the girls slept" Indeed at cross- examination, PW2 stated that the eldest child heard all that happened. It follows that apart from the complainant, the sister of complainant was a critical witness on what took place that night. She was the one closest to the complainant and the Accused at the time. Failure to call the complainant's sister, without explanation, not only left a gap in the prosecution's case but the court is bound to draw inference that her testimony would not have been favourable to the prosecution. 28. Further, 'the house was small', according to both witnesses, and further according to PW2, it is apparent that the sleeping positions was partitioned with nothing but a curtain. It is not plausible that whatever was going on was missed by, even by PW2 herself. 29. This ground of Appeal is valid. 30. The court has observed another unexplained anomaly in this case. According to the clinical officer, medical examination of the complainant was done a month after the incident. The Appellant was also arrested the same time as the medical examination, as per the evidence of the chief (PW3) and investigations officer (PW5). No explanation was given for the delay, both in examination and arrest. The lack of explanation puts into question the motive of the charge. 31. The Appellant opted for the right to silence. However the legal burden of proof never shifts. This burden places an obligation on the prosecution to prove its case, even in the face of such silence. 32. The Appellant's conviction was erroneous. It is hereby quashed and sentence set aside. He shall be set free forthwith, unless otherwise lawfully held. DATED, SIGNED AND DELIVERED AT ISIOLO, THIS 19 TH MARCH 2026 S. CHIRCHIR JUDGE. In the presence of : Ismail Adow- court Assistant Mr. Majale – For the state The Appellant- appearing in person.

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