



**Kamau v Republic (Criminal Appeal 126 of 2023)
[2026] KEHC 253 (KLR) (Crim) (22 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 253 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
CRIMINAL
CRIMINAL APPEAL 126 OF 2023
KW KIARIE, J
JANUARY 22, 2026**

BETWEEN

DAVID MBURU KAMAU APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O. Case No. E005 of 2023 of the Principal Magistrate's Court at Engineer by Hon. E. Wanjala, Principal Magistrate)

JUDGMENT

1. David Mburu Kamau, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the *Sexual Offences Act* No.3 of 2006.
2. The particulars of the offence were that on diverse dates between the 17th and the 20th day of February 2023, at [Particulars Withheld], Njabini location, in South Kinangop Sub-County within Nyandarua County, intentionally and unlawfully caused his penis to penetrate the vagina of M.W.M., a child aged seventeen years.
3. The appellant was sentenced to fifteen years' imprisonment and has appealed against both his conviction and sentence. He raised the following grounds of appeal:
 - a. The learned trial magistrate erred in law and fact by convicting the appellant, and yet the age of the complainant was not conclusively proved.
 - b. The learned trial magistrate erred in law and fact by convicting the appellant, and yet penetration was not proved.



- c. The learned trial magistrate erred in law by convicting the appellant and yet the identification of the appellant was not positively proved by recognition.
4. The state did not file any grounds of opposition.
5. This is the first appellate court. As expected, I have analyzed and evaluated all the evidence adduced before the lower court. I have concluded, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of Okeno vs the Republic [1972] EA 32.
6. To establish an offence of defilement against an accused person, the prosecution has to prove the following ingredients:
 - a. That there was penetration of the complainant's genitalia;
 - b. That the accused was the perpetrator and
 - c. The victim must be below eighteen years old.

This principle was reflected in the case of Fappyton Mutuku Ngugi v Republic [2012] eKLR. Ngugi J. (as he then was) stated:

Going by this definition of defilement... the issues the court needs to determine...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.

Therefore, I will endeavour to establish whether the prosecution met the required standards.

7. M.W.M (PW1) testified that she was seventeen at the time of the alleged offence. A copy of her birth certificate states that she was born on 21 May 2006. As of 17 February 2023, she was 16 years and nine months old.
8. The complainant testified as follows:

I am M. W. M. I live at College Njabini. I am 17 years. I was born on 31/5/2006. I went to school at [Particulars Withheld] Secondary School. On 17/2/2023, I left school at 6 p.m. I went home. I stayed up to 7.30 p.m. Uncle Benson Karanja came from Njabini Shopping Centre. My uncle quarrelled with me because I left for the trading Centre where I was late. The explanation I am giving is what happened on 14/2/2023. When he quarrelled, I escaped from home and went to Njabini Trading Centre. I went with David Mburu, the accused person, who was positively identified by a witness. This was still on 14/2/2023. The accused person asked me where I was going. I told him that I was just at the Shopping Centre. He asked me to go to his place. I met his wife, child, and the brother of his wife. I stayed with them. The accused person, his wife, child and brother's wife. I knew the accused person he was working with my uncle.

On 14/2/2023, I slept on a mattress on the floor; the rest slept on the bed. I stayed with them to date, 18/2/2023. On 19/2/2023, I went to check the farm. On 20/2/2023, we were arrested. I have never slept with the accused person. The accused person used to be my boyfriend before he married, and I never slept with him; he was a colleague of my uncle. I was sleeping with the brother of the wife of the accused person. At the time, I was at the accused's place. I did not have a boyfriend. In my statement, I indicated that from 14th to 17th February, I had unprotected sex with the accused person willingly. He did not force me. He did not use any protection. I started a relationship with the accused person in 2021 when I was in class '8'. The only time I had sexual intercourse with him was on 17th to 20th



February, 2023. I suspected we were arrested by police officers and put in custody at Njabini police station. First period I stayed with him, we only had sex once on 17/2/2023, later we were arrested and locked in cells. At the police station, I was taken to the Engineer hospital. The Doctor filled the treatment card- it indicates that I escaped from home, and I willingly had unprotected sex with the suspect. Treatment booklet PMF11(a). Later, I came to the Engineer hospital. I was examined, and the P3 form was filled out (marked PMF1 (b). PRC form was filled marked (PMF11(c).

During cross-examination, she said:

Yes, we were in love. Yes, you slept with me, but you did not break my virginity- I attempted to have sex with her, but I found she was a virgin, so I stopped. I did not break her virginity.

In re-examination, she said:

We had sex only once.

9. I extracted the entire evidence of the complainant, for it is incoherent. Her narration portrays her as unreliable in telling the truth. The Court of Appeal in the case of *Ndungu Kimanyi vs Republic* [1979] KLR 283 (Madan, Miller and Potter JJA) held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

10. Dr Patrick Maina Wakahiu (PW4) presented the medical evidence. He testified that Dr Agnes examined the complainant. At the time of examination on 21st February 2023, the hymen was broken, and epithelial cells were present, indicating penetration. There was, however, no discharge or blood observed.

11. At the time of the arrest of the appellant and the accused, PC Chesoni Simon (PW6) testified that the wife of the appellant was not present, but there was another person. This other person was not identified or called to testify. Could this be the brother of the appellant's wife, the complainant referred to in her evidence? In her evidence, she said this was the man she slept with. The Court of Appeal in the case of *Bukenya vs Uganda* [1972] EA 549 (Lutta Ag. Vice President) held:

The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

12. This was a material witness due to the contradictory evidence of the complainant. The only logical inference is that if he had been called, his evidence probably would not have supported the prosecution's case.

13. The complainant's evidence required corroboration. It was unsafe to depend on her testimony to establish penetration by the appellant. 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.

14. David Mburu Kamau, the appellant, chose to exercise his constitutional right under Article 50 (2) (i) of *the Constitution* of Kenya. It states:
 - (2) Every accused person has the right to a fair trial, which includes the right—
 - (i) to remain silent, and not to testify during the proceedings;
15. The appellant was not required to prove his innocence; the prosecution bore the responsibility to establish its case beyond a reasonable doubt.
16. The conclusion from the preceding analysis of the evidence on record is that the conviction was unsafe. It is quashed, and the sentence is set aside. The appellant is at liberty unless lawfully detained.

DELIVERED AND SIGNED AT NYANDARUA, THIS 22ND DAY OF JANUARY 2026

KIARIE WAWERU KIARIE

JUDGE

