



**Ndaka v Republic (Criminal Appeal E079 of 2023)  
[2025] KEHC 2802 (KLR) (Crim) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2802 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL**

**CRIMINAL APPEAL E079 OF 2023**

**AB MWAMUYE, J**

**FEBRUARY 13, 2025**

**BETWEEN**

**JOHN MULINGE NDAKA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal against the Judgment, Conviction and Sentence of the Hon. L.K. Gathuru (SRM) delivered on 15th November, 2022 in S.O Case No. 185 of 2021)*

**JUDGMENT**

1. The Appellant, John Mulinge Ndaka, was charged with the offence of Defilement Contrary to section 8(1), as read with Section 8(3) of the [Sexual Offences Act](#), 2006. The particulars of the offence as stated on the Charge Sheet were that on diverse dates between the 16<sup>th</sup> day of July 2021 and 24<sup>th</sup> July, 2021 in Embakasi East District within Nairobi County the appellant caused his penis to penetrate into the female genital organs namely vagina and anus of EN, a child aged 9 years. The appellant was also charged, with the offence of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#), No. 3 of 2006. The particulars of the alternative count was that on the diverse dates between the 16<sup>th</sup> July, 2021 and 24<sup>th</sup> July 2021 at 13<sup>th</sup> day of January, 2018 in Embakasi East District within Nairobi County, the Appellant intentionally and unlawfully committed an indecent act with EN a child aged 9 years by touching her private parts namely vagina with his penis.
2. The Appellant pleaded not guilty. The prosecution called 6 witnesses; the Appellant was put to his defence. The Appellant was subsequently convicted and sentenced to serve 23 years, 6 months imprisonment for the offence of defilement.
3. Having set out the background to the matter, this Court's duty is to evaluate and scrutinize the evidence and proceedings on record and reach its own independent conclusion. I have considered the



Trial Court's proceedings, the undated Petition and Amended Grounds of Appeal, the Appellant's undated submissions and the Respondent's grounds of opposition dated 21<sup>st</sup> June, 2023 and Submissions dated 27<sup>th</sup> January, 2024.

4. In as much as the appellant's Petition indicates that he is only appealing against the sentencing only; in his amended grounds of appeal and submissions, it is evident that he intends to appeal against both his conviction and sentencing.
5. It is clear from all the filings in this appeal that the issues for determination are whether the prosecution proved its case to the desired threshold and whether the sentence meted upon the Appellant was lawful.

#### **Whether the prosecution proved its case to the desired threshold**

6. The Appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* which provides:
  - 8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement
  - 8(2) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”
7. The ingredients that ought to be established in an offence of defilement are: the age of the complainant, proof of penetration and the positive identification of the assailant as set out in the case of Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013.

#### **i. Age of the Complainant**

8. In a charge of defilement, the age of the victim is important for two reasons:
  - a. defilement is a sexual offence against a child; and
  - b. Age of the child has also been used as an aggravating factor for purposes of determining the sentence to be imposed; the younger the child the more severe the sentence. On this element, the prosecution produced the complainant's birth certificate which is conclusive proof that the complainant herein was 9 years old.

#### **ii. Penetration**

9. Section 2(1) of the *Sexual Offences Act* defines penetration as:

“The partial or complete insertion of the genital organs of a person into the genital organ of another person.”
10. On the element of penetration, PW1 testified that on a certain date she could not recall, she was playing with her friends on the road when the appellant came by. The appellant called her and they went to his house where the appellant locked the door and removed her trousers as well as his. The appellant put her on the bed then put his thing used for short call into her private part. The minor further added that it was not the first time the appellant had done that to her adding that he would call her from the road, give her Kes. 10/- and put his thing into her groin area.
11. Further the medical reports corroborated this. PW2, Dr. Farah Mohammed of Mama Lucy Hospital produced the p3 form, medical summary and PRC form which showed that on genital examination, the minor had reddening labia minora and some laceration. The reddening showed that there was



penetration and the laceration showed that the penetration was rough. The minor also had a whitish discharge and an old tear on the hymen at 3:00 o'clock. He added that a high vaginal swab was done and spermatozoa were seen.

12. Consequently, it is my finding that the second element of penetration was proved beyond reasonable doubt.

### **iii. Identification of the perpetrator**

13. Regarding the identification of the perpetrator, the complainant testified that the appellant was a neighbour, a fact confirmed by PW5, who was the minor's elder sister. PW6, The investigating officer also testified that on visiting the scene, she found the complainant's family lives opposite the appellant's plot, only separated by a road. There is therefore no doubt that the Appellant was properly identified as the perpetrator of the offence of defilement.
14. All the elements of the offence of defilement were proved beyond all reasonable doubt and the evidence tendered was sufficient to sustain a conviction.

### **Whether the sentence was harsh and excessive under the circumstances**

15. The appellant contended that the sentence was excessive given the circumstances of the case herein. Section 8 (2) of the *Sexual Offences Act* No. 3 of 2006 provides as follows:

“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.

16. It is trite law that superior courts will not interfere with sentence unless it can be shown that the sentence was excessively harsh or excessive or that the court overlooked some material factors or took into account some wrong material or acted on the wrong principle of law. This was laid down in the Court of Appeal decision of Ogolla s/o Owuor Vs. Republic, [1954] EACA 270, as cited in Republic V. Stephen Mweizela Mutuku & 2 others [2020] eKLR.
17. I am satisfied that the sentencing of the Appellant to 23 years, 6 months' imprisonment was not harsh or excessive.
18. From the foregoing analysis, I am satisfied that the Appellant was convicted on strong evidence and the prosecution discharged the burden of proof beyond reasonable doubt. I therefore find no merit in the appeal on both conviction and sentence. In the result, I affirm the judgement of the court below and dismiss the appeal in its entirety.

**DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 13<sup>TH</sup> DAY OF FEBRUARY, 2025.**

.....

**BAHATI MWAMUYE**

**JUDGE**

