



**Thigiru v Republic (Criminal Appeal E105 of 2023)
[2025] KEHC 2160 (KLR) (Crim) (11 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2160 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
CRIMINAL
CRIMINAL APPEAL E105 OF 2023
KW KIARIE, J
FEBRUARY 11, 2025**

BETWEEN

FRANCIS CHEGE THIGIRU APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S. O. Case No. E081 of 2022 of Senior Principal Magistrate's Court at Engineer by Hon. E. Wanjala(miss)– Principal Magistrate)

JUDGMENT

1. Francis Chege Thigiru, the appellant herein, was convicted of the offence of defilement of a girl contrary to section 8 (1) as read with section 8 (2) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of the offence were that on the 25th day of August 2022, at Engineer in Kinangop within Nyandarua County intentionally caused his penis to penetrate the vagina of L.T.N., a child aged twelve years.
3. The appellant was sentenced to twenty years imprisonment. He has appealed against both conviction and sentence. Ngugi Gathu & Company advocates represented the appellant. He raised the following grounds of appeal:
 - a. The learned trial Magistrate erred in law and facts by basing his conviction on the appellant's retracted statement recorded by an officer below the rank of inspector.
 - b. The learned trial magistrate erred in law and fact by relying on the prosecution's inconsistent and contradictory evidence.



- c. The learned trial magistrate erred in law and fact by convicting and sentencing the appellant when the elements of the offence under sections 8 (1) and (2) of the [Sexual Offences Act](#) had not been proved by the prosecution beyond reasonable doubt.
 - d. The learned trial magistrate erred in law and fact by convicting and sentencing the appellant without considering the facts of the case and the legal provisions.
 - e. The learned trial magistrate erred in law and fact by failing to consider that the victim was a truant child who had already run away from the family and was, hence, unreliable.
 - f. The learned trial magistrate's judgment does not conform to the relevant laws.
4. The state opposed the appeal through Odero Vena, prosecution counsel. It was contended that the prosecution proved its case to the required standards and that the appeal lacked merit.
 5. This court is an appellate court. As expected, I have carefully reviewed and assessed all the evidence presented to the lower court, keeping in mind that I did not witness any of the witnesses give their testimonies. Therefore, I will follow the well-known case of Okeno vs Republic [1972] E. A 32 to guide my decision-making process.
 6. Section 8(1) of the [Sexual Offences Act](#) defines defilement in the following terms:

A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

An offence of defilement, therefore, is established against an accused person when the prosecution has proved 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 position was echoed in the case of Fappyton Mutuku Ngui vs Republic [2012] eKLR when Joel Ngugi J. said:

Going by this definition of defilement, I agree with Mr. Mwenda on the issues the court needs to determine. The 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.

These are the ingredients that the prosecution must prove against an accused person.

7. Though it was contended that the copy of the birth certificate produced was not authentic, the explanation tendered during the hearing as to why the serial numbers on the two copies did not agree is reasonable.
8. A confession is defined under section 25 of the [Evidence Act](#) in the following terms:

A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.

Section 25A (1) of the [Evidence Act](#) has limited persons who can take a confession from a suspect in the following terms:



A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.

9. The purported confession allegedly recorded by Corporal Wairimu is inadmissible evidence and should not have been allowed to be adduced by PC Tabitha Gatune (PW3). She was not qualified to record a confession. Therefore, I expunge it from the record.
10. In her account, L.T.N (PW1) told the court they were sent home to get money for a home science project. Since it was about 4 p.m., she did not go home but went to her grandmother's home. She, however, introduced incoherence in her evidence. This is what she told the trial court:

I went to school, picked up my bags, and left for home. I changed to home clothes. I passed the school road, towards the engineer, and it was 7 p.m. when I was coming to the engineer. I went behind a supermarket. I stayed until the time police pass that place when I saw police pass by the name 'Kanini' – shop. There are vehicles parked at that place for "wisdom" vehicles called 'wisdom.'

I opened the door of the vehicle and entered the vehicle. I slept in that vehicle. The following day, I left for Miharati, and I climbed some sort of a quarry. I slept in the quarry. A Kenya Power officer passed by and asked why I was sleeping at the quarry. I told them I was tired and resting. In the evening, it was about to rain. I came back to the Engineer's side. There was a kiosk I entered when it stopped raining at about 5 p.m. I went behind the supermarket again and stayed there till 9 p.m. I left the supermarket area and followed a road. I did not know. I went to a nearby shop. I bought a soda and a cake for Kshs. 10/= . Since it was night, I went back to 'Wisdom Vehicle' I slept there again, and the soldier/guard came and asked what I was doing there. I told him my mother left. The following day, 3rd day, I went towards the road to Nyayo. I reached Nyayo and followed another road.

My cousin lives there, but I did not enter their house. I passed by and stayed on the road. I came back to the road to Uwanja at Engineer. I did not know where I was going. When it reached the evening, I came back to Engineer. I went back to behind the supermarket, and another girl came and took me to her place. I declined. I went to the "vehicle wisdom" and slept there. At about 4.00 a.m., 'Chege' the accused person (pointed at by the victim [sic] in the dock). He asked me why I looked like I was crying. I told him that I was not crying.

11. This evidence raises many questions rather than supplying answers. For instance, did she go to her home or her grandmother's? Was she playing truant, or what was the motive of sleeping in a quarry or a parked vehicle? Ordinarily, vehicles are locked, but unfortunately, she did not inform the court how she gained entry.
12. The complainant's evidence portrays her as a witness who cannot be trusted to tell 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.

13. 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. This evidence required corroboration before a court could convict. I find the conviction unsafe. The conviction is quashed, and the sentence is set aside. The appellant is set at liberty unless otherwise lawfully held.

DELIVERED AND SIGNED AT NYANDARUA THIS 11TH DAY OF FEBRUARY 2025.

KIARIE WAWERU KIARIE

JUDGE

