



**Kariuki v Republic (Criminal Appeal 66 of 2023)
[2025] KEHC 3025 (KLR) (Crim) (17 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3025 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
CRIMINAL
CRIMINAL APPEAL 66 OF 2023
KW KIARIE, J
MARCH 17, 2025**

BETWEEN

JAMES MAINA KARIUKI APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S. O. Case No. E008 of 2023 of Chief Magistrate's Court at Nyabururu by Hon. S.N. Mwangi– Senior Resident Magistrate)

JUDGMENT

1. James Maina Kariuki, the appellant herein, was convicted of the offence of defilement of a girl contrary to 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 18th day of April 2021 and the 23rd of April 2021, within Nyandarua County, intentionally caused his penis to penetrate the vagina of N.W.M., a child aged sixteen years.
3. The appellant was sentenced to fifteen years imprisonment. He has appealed against both conviction and sentence. He was in person and raised the following grounds of appeal:
 - a. The complainant left nothing in the appellant's house that proved she was in the house.
 - b. The complainant implicated Mama Peter, who used to give her alcohol with the motive of trading her for money.
 - c. The evidence of the complainant was not corroborated.
4. The state did not file any opposition or submissions.



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. The copy of the birth certificate produced as an exhibit indicates that N.W.M. was born on the 17th day of September 2005. As of the 23rd of April 2021, she was 15 years and seven months old. Section 8 (4) of the *Sexual Offences Act* provides:

A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

The correct section ought to have been 8 (3). Since this will disadvantage the appellant, the charge will remain as it is. The complainant's age was proved.

8. N.W.M. (PW3) testified that when she disagreed with her mother (PW2), she left their home at night with the intention of going to her girlfriend's home. At their gate, she met with the appellant, who offered to accommodate her. This was on the 18th day of April 2021 at about 10 p.m.

9. While in the house of the appellant, the latter had sexual intercourse with her after threatening to kill her. He had sex with them on the other nights she was in his house. He used to lock her in the house with a padlock and would return at about 9 p.m. She never used to leave the house so that people could not see her.

10. On the 23rd of April 2021, the appellant forgot to use the padlock. This is how she managed to escape.

11. The evidence of the complainant's mother (PW2) was that she disagreed with the complainant on learning that there were some men who were calling her (the complainant) through the home phone. Nico was one of the men. She described him as an old man.

12. Richard Mose (PW4) was the investigating officer. He attributed a letter written in charcoal to the complainant. If we were to assume she was the author, it would mean that when she testified that the appellant held her in his house against her wish, it was not true. The complainant did not talk about the



letter. During cross-examination she said she did not leave anything in the appellant's house to show she was there. This raises doubts in the prosecution case.

13. Part of the complainant's evidence in cross-examination is damning. She testified that Mama Peter used to give her alcohol. She wanted to use her so that she could have money. When this evidence is read together with her mother's (PW2) on the reasons they disagreed, it was unsafe to rely on her uncorroborated evidence. 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. The medical evidence could have, in the circumstances of this case, provided such corroboration. However, it did not do so. According to the complainant, the appellant had sexual intercourse with her every night they were together. She was taken to hospital on the 24th of April 2021. There was insufficient time for the hymen to heal. The testimony of Purity Wanja Mwanu (PW1) indicated that the complainant informed her they had sex multiple times while in the perpetrator's residence. The complainant's genitalia appeared normal and showed no lacerations. The hymen was broken but had healed. 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.

15. It was unsafe to depend on the complainant's evidence to establish penetration. I find that the prosecution failed to demonstrate that the appellant penetrated the complainant's genitalia.
16. The conviction of the appellant is hereby quashed, and the sentence set aside. The appellant is at liberty unless otherwise lawfully held.

DELIVERED AND SIGNED AT NYANDARUA THIS 17TH DAY OF MARCH 2025

KIARIE WAWERU KIARIE

JUDGE

