



REPUBLIC OF KENYA



KENYA LAW
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**Mwai v Republic (Criminal Appeal 61 of 2023)
[2025] KEHC 2989 (KLR) (Crim) (17 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2989 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
CRIMINAL
CRIMINAL APPEAL 61 OF 2023
KW KIARIE, J
MARCH 17, 2025**

BETWEEN

RICHARD MWAI APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S. O. Case No. 58 of 2020 of Chief Magistrate's Court at Nyabururu by Hon. S.N. Mwangi– Senior Resident Magistrate)

JUDGMENT

1. Richard Mwai, 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 the 8th day of May 2020, at Nyandarua County, he intentionally caused his penis to penetrate the vagina of A.M., a child aged fifteen years.
3. He was also convicted in count two of the offence of defilement of a girl contrary to section 8 (4) of the [Sexual Offences Act](#) No. 3 of 2006.
4. The particulars of the offence in the second count were that on the 8th day of May 2020, at Nyandarua County, he intentionally caused his penis to penetrate the vagina of E.W., a child aged fourteen years.
5. The appellant was sentenced to twenty years imprisonment on each count. The sentences were ordered to run consecutively. He has appealed against both conviction and sentence. He was in person and raised the following grounds of appeal:
 - a. The trial magistrate erred in law and fact by failing to find that the medical evidence proved penetration but did not ascertain the real perpetrator.



- b. The trial magistrate erred in law and fact by relying only on identification, considering that the complainants are young children, and anyone with sinister motives can give direction to make false accusations.
 - c. The investigating officer did not produce the rope before the court that is alleged to have been used to tie the complainant's hands.
 - d. The PRC form was filled out twice. I was given it, and then the investigating officer requested it. I found that it had other information added that was not initially included.
 - e. That the trial magistrate erred in law and fact by finding that the prosecution had not proved the charge of defilement beyond reasonable doubt since the alleged stick found on the private part of the second complainant was not brought before the court.
 - f. That the trial magistrate erred in law and fact in finding a conviction that was against the weight of evidence.
 - g. The trial magistrate erred in law and fact by passing a sentence without considering that all the components to prove a case of defilement were not met; hence, the sentence lacks merit.
 - h. That the sentence is too harsh and ought to be quashed and set aside.
6. The state did not file any grounds of opposition or submissions.
 7. 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.
 8. 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.

9. The copy of the birth certificate presented as an exhibit indicates that A.M. was born on the 15th day of January 2006. As of the 8th day of May 2020, she was 14 years and five months old. The copy of



the birth certificate presented concerning E.W. indicates that she was born on the 8th day of November 2006. When the complained offence occurred, she was 13 years and six months old.

10. 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.

11. The appellant ought to have been charged under section 8 (3), which provides:

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.

12. The ages of both complainants were proved.

13. As is customary in rural Kenya, the two complainants were instructed to collect firewood from a forest. They stated they encountered the appellant, whom they recognised, in the woods.

14. E.W. (PW1) testified that they decided to fetch firewood in different locations. From where she was, she heard her cousin A.M. screaming. She rushed there and found the appellant on top of her, and both were naked. She attempted to run away, but he threatened to cut her with a machete he had if she did so. She stopped. He went and held and defiled her. At the time, A.M. was lying on the grass unconscious. She had been tied with a rope on the hands and the legs. The appellant proceeded to undress her, tied her with a rope on the hands and legs and defiled her. After the defilement, the appellant left.

15. When A.M. gained consciousness, she managed to untie herself and used a machete to cut the rope tying her (E.W.). They went home and reported the ordeal.

16. The evidence of A.M. (PW6) was to the same effect.

17. MB (PW2) testified that A.M. and E.W., who had gone to fetch some firewood, returned home crying and accused the appellant of defiling them. They were taken to hospital.

18. Joseph Ndungu Gathecha (PW6) examined E.W. and found her with swollen genitalia. The hymen was broken, and from the genitalia, he removed some sticks and grass. He also examined A.M. She had a swollen vagina, and the hymen was broken.

19. Penetration was proved to the required standards.

20. Richard Mwai Githinji, the appellant, argued that he was falsely implicated due to his disagreements with JW. This situation arose after he had refused to provide her daughter with money that was allegedly meant for procuring an abortion. She (JW) warned him of severe consequences. JW (PW3) denied this allegation. Although the appellant cross-examined her on the matter, it was evident that it was merely an allegation. The prosecution established beyond reasonable doubt that the appellant defiled both complainants.

21. An appellate court would only interfere with the trial court's sentence where sufficient circumstances exist that entitle it to vary the court's order. These circumstances were well illustrated in the case of *Nilsson vs Republic* [1970] E.A. 599, as follows:

The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a



somewhat different sentence, and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in Jamesvs Rex(1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. (R vs Shershewcity(1912) C.CA 28 T.LR 364).

In the instant case, the circumstances militate against any interference with the sentence.

22. The upshot of the foregoing analysis of the evidence on record is that the appeal lacks merit. The same is dismissed.

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

KIARIE WAWERU KIARIE

JUDGE

