



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Ng'ang'a v Republic (Criminal Appeal 112 of 2023)
[2025] KEHC 3289 (KLR) (Crim) (19 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3289 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
CRIMINAL
CRIMINAL APPEAL 112 OF 2023
KW KIARIE, J
MARCH 19, 2025**

BETWEEN

STEPHEN KIMANI NG'ANG'A APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S. O. Case No. E052 of 2021 of Senior Principal Magistrate's Court at Engineer by Hon. D.N. Sure– Senior Resident Magistrate)

JUDGMENT

1. Stephen Kimani Ng'ang'a, the appellant herein, was convicted of the offence of defilement of a girl contrary to section 8 (2) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of the offence were that on diverse dates between 1st January 2019 and the 6th day of July 2021, at [Particulars Withheld] within Nyandarua County, intentionally caused his penis to penetrate the vagina of C.R.A, a child aged ten years.
3. The appellant was sentenced to life imprisonment. He has appealed against both conviction and sentence. He was represented by David K. Gichuki & Company Advocates. He raised the following grounds of appeal:
 - a. That the learned trial magistrate erred in holding that evidence of the victim's age was conclusive.
 - b. That the learned trial magistrate erred in law and facts in convicting and sentencing the appellant on the evidence that there was penetration when the evidence available is not firm or conclusive.



- c. That the learned trial magistrate erred in law and facts in shifting the burden of proof to the appellant, which is against the rules of Criminal Procedure.
 - d. The learned trial magistrate erred in law and fact in coming up with her own opinions, which were not based on the evidence on record, and used the opinions to convict the appellant.
 - e. The learned trial magistrate erred in law and fact in entering into the fray of the trial case, becoming a witness, a judge, and a prosecutor simultaneously, and the appellant was seriously prejudiced.
 - f. That the learned trial magistrate erred in law and facts in failing to find that the prosecution was unable to call the evidence of the mother to the complainant even though she had recorded her statement to the police, and the presumption is that her evidence would have been favourable to the appellant's case.
 - g. That the learned trial magistrate erred in law and fact in failing to call the evidence of the mother to the complainant, whose evidence was the only evidence that would have corroborated the evidence of the teacher or would have given credence to the evidence of the teacher in respect of the manner that the complainant was purported to have been walking.
 - h. That the learned trial magistrate erred in law and facts in failing to find that the doctor's medical evidence materially contradicted the complainant's evidence.
 - i. That the learned trial magistrate erred in law and facts in exhibiting extreme bias in her opinion and findings and eventually convicting the appellant on these biased and unfair findings.
 - j. That the learned trial magistrate erred in law and facts in going to an extreme extent to downplay the appellant's defence and to seek insufficient reasons not supported by the evidence in the record to dismiss the appellant's case.
 - k. That the learned trial magistrate erred in law and facts in failing to find that the complainant's evidence, being the evidence of a single prosecution witness regarding the alleged defilement, required to be considered with a lot of care and caution in the circumstances of this case.
 - l. That the learned trial magistrate erred in law and facts in finding that the complainant would give a sworn when it was clear that the complainant did not understand the nature of the oath or the consequences of telling lies while on oath.
 - m. That the learned trial magistrate erred in law and did not find that the complainant was coached on what to say by persons who were not even called in court to give evidence in this case.
 - n. That the learned trial magistrate erred in law and facts in not finding the evidence of the doctor pw 3 was hearsay for failure of the doctor (PW3) to give evidence of the qualifications of the doctor who filled the P3 Form, or the qualifications of the clinical officer who filled the PRC Form and the Clinical officer who wrote the Treatment notes produced in court as Exhibit 3.
 - o. That the learned trial magistrate erred in law and facts in sentencing the appellant to life imprisonment when she had the discretion to consider the appellant for a lesser sentence.
4. The state opposed the appeal through Judy Rukunga, prosecution counsel. Five grounds of appeal were filed as follows:
- a. The complainant's age was sufficiently proved as provided for under the [Sexual Offences Act](#).



- b. That penetration was proved under the *Sexual Offences Act* through the evidence of the doctor examining the complainant and producing the P3 form and PRC form.
 - c. That the trial court found that the prosecution case was proved beyond reasonable doubt and subsequently convicted him in line with section 215 of the *Criminal Procedure Code*.
 - d. That the sentence imposed by the trial court was proper and in line with the *sexual offences Act*. Further, the court considered the mitigation and circumstances of the offence and used discretion in sentencing the appellant.
 - e. The petition is misconceived and lacks merit, so it should be dismissed and the conviction and sentence upheld.
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 C.R.A. was born on November 8, 2009. As of January 1, 2019, she was 9 years and one month old. The victim's age was proved to the required standards.
8. In January 2019, the complainant was 9 years and one month old. The court needs to interrogate her evidence on how an adult allegedly defiled her. At the time she testified, she said she was in class four. She alleged that the appellant started to defile her while she was in class two. Since she did not repeat class, she was about nine years old. This is how she described the defilement incident, though she did not indicate which instance it was:

I was going to the flour – mill at a place called ‘Passenga’. It is not a town area. While walking, I met Baba Michael. He was at the flour mill. He lifted me up. He, undressed me and removed his “kasusu”. He removed my skirt; he pushed my trousers to the high area (by pointing). Counsel repeats the question). I was wearing a sweater, trousers and a skirt. Baba Michael removed my trousers and the skirt. He removed his kasusu and put it in my



kasusu. He kept asking if I was feeling pain. I was feeling pain. We were in a standing position. (demonstrates). The accused lifted and undressed me. He then put me down. When he was through, he started licking my lips. He then gave me sweets and told me to go home.

This thing has been done to me since I was in class in two (2). I have not repeated any class. Previously, I did not tell anyone because he told me not to tell anyone and would give me sweets. This is still Baba Michael. I can't be specific on the times it was done to me, but it is when Mum would send me to mill the flour. Baba Michael would mill my flour – the last-when he would defile me. the mill is single-roomed. He would close the door and do the act. Sometimes, I would find another person in the mill, and Baba Michael would be annoyed. I was sent to the mill at 3.00 p.m. I started seeing Baba Michael when I started going to the mill. In his house, he lives with his wife. I used to go to his house. Baba Michael is the one who would invite me. We took a long time to get to his house. I never told anyone what was happening to me.

9. Some serious issues of how the alleged defilement was done arise.
 - a. How practicable was it for her to be undressed by her defiler while lifting her?
 - b. How could her defiler proceed to defile her while in a standing position? This is only possible for two consenting adults; the female must be the active partner. Sexologists call it a stand-and-carry position. It has been described as tiring; performing it for more than 2-3 minutes is exhausting for both partners.
 - c. Though she testified of several defilements, did it always happen similarly?
 - d.) The investigating officer confirmed the appellant's account regarding the location of the house in relation to the flour mills. In her testimony, the complainant stated they took considerable time to reach the appellant's house. This raises the question of whether she was able to perceive distances accurately.
10. The complainant's evidence was that the appellant milled her maize last and closed the mill's door before defiling her. This is another baffling piece of evidence. Her testimony was that the appellant's shop was next to the mill. The appellant's wife was the one running the shop. This is what the appellant testified to. One is left wondering how a child of nine years could be defiled in a posho mill which was next to the shop without any detection.
11. PC Kaitumo Rurie (PW4) testified that when the complainant's teachers discovered that all was not well with her, they summoned her mother, who failed to respond. This ought to have been a red flag. Did she know more about the case that she was not willing to divulge? At the time of the case hearing, the complainant said she was not there and had not testified at all. Without any explanation by the prosecution of her whereabouts, someone may be forgiven for assuming that she was concealing some facts. The mother should have been the first to detect the anomaly in her walking gait for a child of this age.
12. The complainant had undoubtedly been defiled. The evidence provided by her teacher, Mercy Njeri Mburu (PW2), who first observed her abnormal gait, along with that of Dr. Winnie Ndegwa (PW3), leaves no doubt that she was defiled. PW3 testified that the complainant was taken to the hospital by her mother on the 6th of July, 2021. Her evidence was that no date of defilement was indicated. The only positive finding was the broken hymen, which had healed. The complainant had vaginal discharge and painful urination. This was a result of a sexually transmitted infection.



13. Whenever a victim of defilement or rape contracts a sexually transmitted disease, the best practice is to subject the alleged perpetrator to a medical examination. Should the finding be positive, it strengthens the prosecution's case and corroborates the complainant's identification of the culprit. The prosecution failed to subject the appellant to a medical examination, and no evidence was provided to explain this failure. This was a critical omission.
14. The appellant explained that the mill, his wife's shop, and his house were situated on the same plot and near one another. The investigating officer (PW4) confirmed this arrangement. He further informed the court that since 2017, he has had diabetes. He stated that he was impotent. His wife (DW2) supported this assertion. She added that initially, she suspected he had an illicit affair, but the doctor who treated him confirmed that the cause of his sexual dysfunction was diabetes. During cross-examination, Dr. Winnie Ndegwa (PW3) confirmed that the appellant was treated on the 10th of October 2019 for acute type 2 diabetes. She also stated that it was possible for a person who has type 2 diabetes to experience erectile dysfunction.
15. Those in the medical field have written as follows:

Diabetes type 2 may cause erectile dysfunction. Erection problems, also called erectile dysfunction or ED, are common in men with diabetes, especially those with type 2 diabetes. High blood sugar over a long period of time can damage the nerves and blood vessels. This damage causes problems with getting or keeping an erection firm enough for sex. [Mayo Clinic]

Having high sugar levels for some time can damage your blood vessels and nerves, including the ones that supply your penis. This can restrict the amount of blood flowing to your sexual organs, so you can lose some sensation. This could mean you have difficulty getting aroused, both physically and in how you feel. [British Diabetic Association Operating as Diabetic UK]

Almost a similar scenario was presented in the case of the People of the Philippines vs Jesus Paragas Cruz G.R. No. 186129, August 4, 2009. The appellant was charged with using force and intimidation, willfully, unlawfully, and feloniously having carnal knowledge of one [AAA], a minor aged 9 years, against her will. As part of his defence, he maintained that he couldn't commit rape, as he had been sexually impotent since 1995. Cruz's wife, Melinda, corroborated his account by stating that they seldom had sexual intercourse after 1995 due to his impotence. Dr. Darius Mariano, meanwhile, diagnosed Cruz in 2001 as suffering from erectile dysfunction. Regarding the defence of impotence, the Supreme Court in Manila stated that:

As a defense, impotence is both a physical and medical question that should be satisfactorily established with the aid of an expert and competent testimony. Impotency as a defense in rape cases must likewise be proved with certainty to overcome the presumption in favor of potency. While Cruz was indeed diagnosed as suffering from erectile dysfunction, this does not preclude the possibility of his having sexual intercourse with AAA. As the CA observed accurately, AAA was raped in 1998, while the medical examination of Cruz was conducted in 2001. A good three years had already lapsed since AAA had been sexually abused. The diagnosis on Cruz in 2001 is, therefore, useless to disprove his sexual potency at the time of the rape incident. It merely corroborates his assertion that he is currently sexually impotent, and not that he has been so since 1995. Cruz was not able to adduce hard evidence to demonstrate his impotency prior to or on June 6, 1998 when the crime of rape was committed. Moreover, assuming *arguendo* that he was indeed impotent since 1995, it does not discount the possibility that his erection was cured by drugs like Viagra or Cialis. There was simply no proof of his alleged impotency on June 6, 1998, when the beastly act of rape was committed against AAA.

The current case can be distinguished from the decision in the Jesus Paragas Cruz case. The appellant's condition existed at the time of the alleged offence.



16. Upon analysing the evidence on record, I conclude that the requirements of the proviso to section 124 of the Evidence Act were not met for the trial court to convict without corroboration. The proviso 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.

17. I find that the conviction was unsafe. The conviction is quashed, and the sentence is set aside. The appellant is granted liberty unless otherwise lawfully detained.

DELIVERED AND SIGNED AT NYANDARUA THIS 19TH DAY OF MARCH 2025

KIARIE WAWERU KIARIE

JUDGE

