



REPUBLIC OF KENYA



**Wangui v Republic (Criminal Appeal 119 of 2023)
[2025] KEHC 4876 (KLR) (Crim) (25 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4876 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
CRIMINAL
CRIMINAL APPEAL 119 OF 2023**

KW KIARIE, J

APRIL 25, 2025

BETWEEN

JOSEPH NJOROGE WANGUI APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in the S.O.A. case NO. E095 of 2022 of the Senior Principal Magistrate's Court at Engineer by Hon. E. Wanjala, Principal Magistrate)

JUDGMENT

1. Joseph Njoroge Wangui, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars of the offence are that on the 11th day of November 2022 in Kinangop, within Nyandarua County, he intentionally and unlawfully caused his penis to penetrate the vagina of L.N.N, a child aged six years.
3. The appellant was sentenced to life imprisonment. He was aggrieved and filed this appeal against the conviction. He was in person and raised the following grounds of appeal:
 - a. The learned trial magistrate erred in law and fact when he convicted the appellant in a prosecution case; her age was not proved.
 - b. The learned trial magistrate erred in law and fact when he convicted the appellant in the prosecution case where penetration was not proved.
 - c. The learned trial magistrate erred in law and fact by applying the wrong standard of proof in the criminal case.



4. The state opposed the appeal through Ms. Odero Vena, learned counsel, who argued that the prosecution had proven its case to the requisite standards and that the sentence was suitable in light of the circumstances of this case.
5. This is the first appellate court. As expected, I have reanalyzed and reevaluated all the evidence presented before the lower court. I have concluded, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of *Okeno vs Republic* [1972] EA 32.
6. An offence of defilement 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. Ngugi J. (as he was then) said:

Going by this definition of defilement... the issues which the court needs to determine...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.
7. I will determine if the prosecution proved these ingredients to the required standards.
8. Although no document was presented in court to establish the age of the complainant, Dr. Maina, who examined her, indicated her age to be about 6 years. In the case of *Edwin Nyambaso Onsongo vs Republic* [2002] eKLR, the Court of Appeal cited the case of *Mwolongo Chichoro Mwanyembe vs Republic*, Mombasa Criminal Appeal No. 24 of 2015 (UR), where the same Court held:

“ ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents, guardian or medical evidence among other forms of proof...

The complainant had testified that her age was 5 years.
9. The appellant should have been charged under section 8 (2) of the *Sexual Offences Act*. The section provides:

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.
10. When Dr. Maina examined the complainant on the 14th day of November 2022, she established that the complainant had sustained a broken hymen at the 7 and 2 o'clock positions. The injury was 4 days old.
11. According to the testimony of L.N.N. (PW1), nobody lay on her. However, the evidence of Steven Thuo Mwangi (PW2) is that he found the appellant in the act. His evidence was that the cries of a child attracted him. When he approached the scene, he saw the appellant with his trousers halfway down, and he was lying on a child who was not visible. On seeing him, the appellant dressed the child. The appellant asked him what he thought he was doing with the child.
12. This witness's evidence was not dented. I find that the appellant was caught defiling the complainant.



13. The Supreme Court addressed itself to the life sentence in *Evans Nyamari Ayako vs Republic* SC Pet. E002 of 2024, as follows:

(47) In view of the foregoing, we find that the Court of Appeal ought not to have proceeded to set a term sentence of thirty (30) years as a substitution for life imprisonment, as the effect would be to create a provision with the force of law while no such jurisdiction is granted to it. The term of thirty years was arrived at arbitrarily without involvement of Parliament and the people. In consequence, we find that the Court of Appeal ventured outside its mandate and powers.

Therefore, the sentence meted out is legal.

14. The upshot of the analysis of the evidence on record is that the appeal on conviction and sentence lacks merit. The same is dismissed.

DELIVERED AND SIGNED AT NYANDARUA ON THIS 25TH DAY OF APRIL 2025

KIARIE WAWERU KIARIE

JUDGE

