



REPUBLIC OF KENYA



**Ngundo v Republic (Criminal Appeal E268 of 2023)
[2025] KEHC 8215 (KLR) (Crim) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 8215 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL APPEAL E268 OF 2023**

CJ KENDAGOR, J

MAY 15, 2025

BETWEEN

LUCAS KIMEU NGUNDO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence of 20 years for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act 2006 meted on 10th September 2021 by Hon. E. Suter, P.M, at Chief Magistrate Court at Makadara in Sexual Offence Case No. 189 of 2020)

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act*. The particulars of the offence are that on 4th July 2020 at [Particulars Withheld], Nairobi County, he intentionally and unlawfully caused his penis, to penetrate the vagina of R.S., a child aged thirteen (13) years.
2. The Appellant faced an alternative count of committing an indecent act with a child contrary to Section 11 of the *Sexual Offences Act*, the particulars being that on the aforesaid date, at [particulars withheld] Nairobi County, he intentionally touched the vagina of R.S., a child aged thirteen (13) years.
3. He pleaded not guilty and the matter proceeded to trial. By Judgement delivered on 10th September, 2021 he was convicted of the offence in the main charge and was sentenced to 20 years of imprisonment from 13th July, 2020. The alternative charge was held in abeyance.
4. Being dissatisfied with both the Conviction and Sentence, he has appealed vide a Petition of Appeal filed on 19th September, 2023 in which he raised five grounds of Appeal;



- i) That the Hon. trial magistrate erred in matters of law and fact by failing to find that the ingredients of age and penetration by the accused person were not conclusively established against him thereby leaving his conviction unsafe.
 - ii) That the Hon. trial magistrate erred in matters of law and fact by failing to find that the whole of the prosecution's case was marred by explicit inconsistencies and contradiction which vitiated on the overall burden of prove.
 - iii) That the Hon. trial magistrate erred in matters of law and fact by failing to find that the essential witnesses were not procured to corroborate the prosecution's case thereby leaving a waging gap which ought to have been resolved in favor of the appellant.
 - iv) That the Hon. trial magistrate erred in matters of law and fact by rejecting in totality the accused person's defense case which exonerated him from the offences charged with.
 - v) That the sentence meted on the appellant is harsh as the learned Hon. Magistrate did not exercise the discretion but rather relied on the mandatory nature of the *Sexual Offences Act* 2006.
5. The appeal was canvassed by way of written submissions.
 6. The Appellant filed written submissions on 5th July, 2024. Regarding the age of the victim, he acknowledges that the birth certificate shows the minor was born on 17th July, 2007, and that she was 13 years old, thus qualifying as a minor under the law.
 7. Regarding identification and recognition, he contends that it is undisputed that the minor was in his (Appellant's) house on the relevant night; however, the dispute concerns the events at that house. He further asserts that he did not commit the alleged offence; rather, that it was a setup to have him arrested and implicated in the charges herein.
 8. He submits that PW1 did not implicate the Appellant herein out of her own volition. However, she was beaten up to do so and even after she was beaten was still unwilling to narrate where she was and what she was doing until she was subsequently threatened with consequences of further beatings. He submitted that if it were voluntary, then she would not have had any trouble narrating this to PW2 or anyone else to have the culprit arrested.
 9. He cited the case of Paul Kanja Gitari v Republic [2016] ECLR and the case of John Mutua Munyoki v Republic [2017] ECLR. He submitted that the complainant was not so young that she could not speak for herself, and that it was only after being coerced and threatened with beatings that she claimed to have been defiled by the Appellant while in his house. He thus urges the Court to determine that credible doubts exist regarding the Appellant's positive identification, given the significant revelations, as there are considerable uncertainties surrounding the veracity of the Complainant's evidence.
 10. He submitted that there was lack of corroborative evidence to support the prosecution's case and cited the cases of Stephen Mungai Maina v Republic [2020], Stephen Mungai Maina (supra), John Cardon Wagner v Republic & 2 others (2011) eCLR and the case of John Mutua Munyoki (supra).
 11. On penetration, he submitted that as per the medical findings, there were positive findings of external contact by a blunt object on the minor's genital organ, but his question is whether the same was occasioned by the Appellant.
 12. He further submitted that the burden of proof was not discharged and urged the court to quash the conviction and set aside the sentence.



13. The Prosecution did not file any submissions despite being granted an extension of time to do so.

Analysis and Determination

14. As a first appellate Court, I must reconsider and evaluate the evidence in the Court below to arrive at an independent conclusion while bearing in mind that I did not hear or see the witness. In *Kiilu & Another V Republic*, [2005] 1 KLR 174, the Court of Appeal set out the duties of a first appellate court as follows:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

15. Guided by the above principle, I have carefully considered the grounds of appeal, the evidence presented before the trial Court, and the written submissions filed by the parties. I have also read the judgment of the trial court. Having done so, I find that the issues for determination is whether the prosecution established the charges brought against the Appellant to the required standard of proof beyond any reasonable doubt, whether the conviction was safe, and whether the sentence was appropriate or excessive.
16. The Complainant gave sworn evidence. The record shows that the trial Court conducted a *voire dire* examination and recorded it in terms. I am satisfied that the trial Court employed the correct procedure in ascertaining the child’s competence to give evidence.
17. The main charge was on the offence of defilement; the ingredients that need to be proved in the offence are;
- i. Age of the victim
 - ii. Penetration
 - iii. Positive identification of the perpetrator

Age

18. As acknowledged by the Appellant in his submissions, the age of the victim was proved via several means, the age as stated, the immunization card and the birth certificate. I am satisfied that this ingredient has been sufficiently proven. She was 12 years and 253 days old and a child within the definition.

Proof of penetration and identity of the assailant

19. The complainant told the Court that on the material date, she encountered a neighbour on the stairs while coming from the bathroom. She told the Court that he forcefully held her hand and took her into his house, where he defiled her in his bed. She stated that she was prevented from screaming as the assailant covered her mouth and also threatened to harm her after putting a knife on the table.



20. According to PW2's evidence, the complainant left the house at 9.30 p.m. to take a bath and did not return until midnight. She stated that she had checked on her in the bathroom, and when she didn't find her, she proceeded to look in the surroundings. According to PW2, the Complainant indicated that she had been in the Appellant's house and relayed what had occurred after they threatened to discipline her. PW2 stated further that after this, they proceeded to the Appellant's house, where the Appellant acknowledged that the Complainant had been at his house but denied that she had been defiled.
21. From the prosecution's evidence and the defence, it is acknowledged that the parties were familiar with each other, and it is not denied that the Complainant was at the appellant's house on the material night.
22. So, what happened on that night? The Appellant in this case has claimed that the Complainant's testimony was obtained through coercion, alleging that she was threatened and beaten. However, during cross-examination, this claim was scrutinized. The Complainant provided a detailed account of the events in the Appellant's home and the subsequent actions involving her father, who knocked at the Appellant's door before he finally came out. She also mentioned the neighbours who threatened to lynch the Appellant, and how her father saved him.
23. PW2 recounted the inquiry she and the Complainant's father conducted upon arriving at the scene. I find no reason to doubt the testimony simply because the parents questioned the Complainant about her whereabouts or because there were threats of discipline. The parents' actions that night indicate that there was no malice involved and that they were acting based on the information provided by their child.
24. The Complainant was escorted to hospital the following day and the medical findings as indicated by PW3 showed that there was a fresh laceration on the posterior fourchette of the vagina, blood discharge and hymen had a fresh tear. "Penetration" is defined in Section 2 of the *Sexual Offences Act* as "partial or complete insertion of the genital organs of a person into the genital organs of another person." The Complainant stated clearly that the Appellant inserted his penis into her vagina. The medical findings support the Complainant's testimony on how the incident happened. The findings in this case revealed that there was penetration.
25. The Appellant argued that the prosecution failed to call several necessary witnesses. The investigating officer stated that there were no independent witnesses as it was at night. I have assessed the evidence presented in its entirety, and I do not identify any shortcomings in the prosecution's case. It was not essential to call numerous witnesses. Section 143 of the *Evidence Act* provides that no specific number of witnesses is required to prove a fact. The victims' own evidence proved the sexual penetration.
26. I agree with the trial Court's findings that the defence did not cast doubt on the prosecution's case. The ingredients of the offence of defilement were proved beyond reasonable doubt. The appeal against conviction is accordingly dismissed.
27. I will now address the sentence. The Court of Appeal of East Africa stated in *Wanjema v Republic* [1971] EA 494 that:

"An appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, too into account some immaterial factors, acted on the wrong principle or the sentence is manifestly excessive in the circumstances of the case"
28. The Complainant was established to be 12 years and 253 days old at the time the offence occurred. For the crime to be classified as defilement, the victim must be considered a child. The Appellant was



not adversely affected by the fact that Section 8 (2) was referenced in the charge. It was never raised, and from the cross-examination of the witnesses, the Appellant understood the charge he was facing; he was also primarily aware of the Complainant's age, even during the cross-examination. It is curable under Section 382 of the *Criminal Procedure Code*. The issue of age in sexual offences is particularly important when determining the appropriate sentence that should be meted out once it has been established that the victim is a child and that the offence classified as defilement under Section 8 (1) has been proven.

29. Under the *Sexual Offences Act*, Section 8 (3), 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. The Appellant was given the minimum sentence. The trial Court indicated that it considered his mitigation, and it took into consideration the period that the Appellant was in custody as required under Section 333(2) of the *Criminal Procedure Code*.
30. The Supreme Court has now provided guidance on minimum sentences under the *Sexual Offences Act* in Republic V Joshua Gichuki Mwangi Petition No. E018 of 2023. The Supreme Court held that where a sentence is set in statute, the legislature has already determined the course unless declared unconstitutional.
31. The Appellant was afforded a fair trial, the conviction was safe, and the trial Court meted out a lawful sentence. The Appeal lacks merit and is dismissed.
32. It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 15TH DAY OF MAY, 2025.

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Appellant present

Mr Chebii, ODPP for Respondent

