



REPUBLIC OF KENYA



KENYA LAW
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**NGM v Republic (Criminal Appeal E028 of 2022)
[2025] KEHC 6156 (KLR) (13 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6156 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL E028 OF 2022**

JM NANG'EA, J

MAY 13, 2025

BETWEEN

NGM APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the Chief Magistrate's
Court at Molo (Hon. A. Mukenga - SRM) delivered on 24/03/2022)*

JUDGMENT

1. The Appellant is dissatisfied with the said judgement of the above stated lower court before which he was charged with a main offence of Defilement contrary to section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* No. 3 of 2006. In the alternative the Appellant was charged with committing an Indecent Act with a child contrary to Section 11(1) of the same Act.
2. The particulars of the main charge are that on 24/06/2020 at North in Narok County (sic), he intentionally caused his penis to penetrate the vagina of N.G.A, a child aged 8 (eight) years. It is alleged in relation to the alternative charge that on the same date and at the same place the appellant intentionally and unlawfully touched the child's vagina using his penis.
3. The appellant refuted the charges.
4. After a full hearing, the trial court convicted the appellant of the main charge of defilement pursuant to Section 215 of the *Criminal Procedure Code* and sentenced him to life imprisonment. In light of the finding on the main charge, the trial court put the alternative charge "in abeyance".
5. The grounds of appeal as per Grounds of Appeal filed on 27/05/2024 may be condensed as follows:
 - a. That the learned trial magistrate erred in law and fact by failing to find that the ingredients of the offences charged including penetration were not established.



- b. That the learned trial Magistrate erred in law and fact by convicting the Appellant on the basis of contradictory prosecution evidence.
 - c. That the learned trial magistrate generally erred in law and fact by convicting the Appellant against the weight of the evidence.
- and
- d. That the learned trial magistrate erred in law and fact by failing to consider the defence evidence and/or rejecting it without giving reasons.
6. It is trite law that a first appellate court has the duty of re-assessing or re-evaluating the evidence presented before the trial court and arrive at its own conclusions on both matters of fact and law while being mindful of the fact that unlike the lower court it did not have the advantage of watching the demeanour of witnesses {(see the case of Okeno vs Republic (1972) EA 32}.
 7. N.G.A. was allowed to make an unsworn statement following voire dire examination conducted by the lower court.
 8. The prosecution evidence is that on a date N. G.A did not state her mother left her at home with other children named C, K and another whose name was not given. The Appellant who the alleged victim called "Pastor" was also present. The children didn't return until the following day. According to N.G.A, they spent that night in the same house with the Appellant.
 9. The complainant further told the court that while she was sleeping on the couch at around 9 p.m., the Appellant came and removed her clothes in her sleep. She attempted to scream but the Appellant covered her mouth and lay on her. The other children were sound asleep didn't hear the commotion. N.G.A complained that the Appellant did "bad things" to her using his penis while pointing at her vagina. She felt pain as a result. The Appellant went back to his bed after the act. The room in which N.G.A slept was lit with "D- Light", according to her. The Appellant is also said to have lit a candle during the incident.
 10. The following morning N.G.A related the incident to her brother called E and her mother (PW 2) when she returned home. Their neighbour called Mama Grace who was also a police officer arrested the Appellant at their home upon PW2' s report. The child denied under cross-examination by the Appellant that she and her siblings spent the material night at the home of one Mercy.
 11. PW2 confirmed N.G.A's statement. Saying that the Appellant was her husband with whom she had lived for two years, she stated that she had left him with the children when she left on a business trip. When she came back home on a date that is not clear on the evidence, N.G.A reported that the Appellant had defiled her. She had noticed that the child was walking with difficulty. She took the child to Olenguruoni Hospital and also lodged the complaint with the police.
 12. PW2 further told the court that the alleged victim was 8 (eight) years old but couldn't recall her date of birth. She had forgotten to bring her Birth Certificate with her to court.
 13. PW2 continued to testify under cross-examination by the Appellant that she never had prior differences with him. She denied that the Appellant had accused her of adultery before.
 14. The complainant was taken for medical examination at Olenguruoni Sub County Hospital when she returned home. PW3 (Dr. Joel Mokamba) told the court that he examined the child on 27/06/2020 at the Hospital for reported defilement on 24/06/2020. Small lacerations were noted on the labia majora but no abnormality was observed on the labia minora. The injuries were consistent with having been caused by a blunt object. Examination of High Vaginal swab taken revealed presence of pus cells, an



indication of infection. The patient's hymen was torn. The witness concluded that there was evidence of penetration.

15. PW4 was the case Investigating Officer and she confirmed lodgement of the complaint. She met with the complainant and checked her genitalia, finding presence of some mucus-like substance and blood. The officer told the court that NGA was subjected to medical age assessment and tendered the report dated 30/11/2020 opining the child's apparent age to have been between 5-10 years old.
16. The Appellant gave an unsworn defence upon being put on his defence following close of the prosecution case. While confirming that he slept at home in the material night, he reiterates his denial of the charges. He laments that the charges are malicious saying that on 26/06/2020 he had returned home in the evening to find one Joseph with his wife. He protested to his wife about the man's frequent visits to their home and demanded refund of funds he had given her for business. PW 2 got annoyed and left home, only to return with a police officer who arrested him.
17. Both parties filed written submissions which I have perused against the record. I will consider all the grounds of appeal together. It is indisputable based on the complainant's Age Assessment Report produced in evidence and PW 2's oral evidence that NGA was 8 (eight) or thereabouts at the material time. A Birth Certificate would have been more reliable proof of age but it was not tendered despite indication that it was available. Notwithstanding, It is noteworthy that the Appellant has not specifically disputed the Complainant's age as per the prosecution evidence in his Memorandum of Appeal.
18. In convicting the Appellant, the learned trial magistrate believed N.G.A's oral evidence as well as the medical report showing injury to the child's vagina as proving penetration. Section 2 of the [Sexual Offences Act](#) defines penetration as;

“partial or complete insertion of the genital organs of a person into the genital organs of another person”.

Genital organs include the whole part of male and female genital organs.
19. The trial court therefore found that penetration was proven. As the Appellant was a person well known to the child and gave consistent and credible evidence, the lower court was further convinced that the latter was recognized as the perpetrator.
20. It is common ground that the appellant and the complainant live in the same homestead as close relatives. Besides, the Complainant alluded to some form of lighting in the house at the time.
21. The proviso to section 124 of the [Evidence Act](#) dispenses with the requirement for corroboration of the evidence of a child in sexual offences cases where the child is a victim, if the court is satisfied that the child has spoke the truth implicating the accused person. The case of JWA vs Republic (2014) eKLR among many other judicial determinations has reiterated this position.
22. Section 143 of the [Evidence Act](#) further provides;

“no particular number of witnesses are required to prove any given fact”.
23. Indeed evidence is not counted but rather it is weighed. Even the evidence of one witness may be sufficient to prove a fact if the evidence is credible (see case law in Benjamin Mbugua Gitau vs Republic (2011) eKLR.



24. Like the trial court, this court is satisfied that the complainant rightly implicated the Appellant. The Appellant's defence that the charges were actuated by malice because of purported differences between him and PW2 appears to be an afterthought given that the couple had previously been living together presumably peacefully for two years as per the evidence. Whereas there appears to be inconsistency in the evidence of PW 2 with respect to the date of her return home from a trip and the date of medical examination of the child, vis-a-viz the date of commission the offence, this is not material to the case so long as the charge was instituted within any period prescribed by the law (see section 214 (2) of the [Criminal Procedure Code.](#))
25. Contrary to the Appellant's contention that the trial court did not consider his defence, the defence statement was in fact considered and rightly disbelieved with reasons.
26. All the grounds of appeal therefore fail.
27. The upshot is that the appeal is dismissed.

J. M. NANG'EA, JUDGE.

**JUDGEMENT DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT
NAKURU THIS 13TH DAY OF MAY, 2025**

in the presence of:

The Prosecution Counsel, Ms Sang

The Appellant, present in person

The Court Assistant (Jeniffer)

J. M. NANG'EA, JUDGE.

