



**Ngatia v Republic (Criminal Appeal E003 of 2024)
[2025] KEHC 8174 (KLR) (9 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8174 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL APPEAL E003 OF 2024
LN MUTENDE, J
JUNE 9, 2025**

BETWEEN

CORNELIUS GITHINJI NGATIA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Cornelius Githinji Ngatia, the Appellant, was indicted for having contravened Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* by committing the offence of defilement. The particulars of the charge were that on the 20th August, 2020, in Subukia Sub-County within Nakuru County he intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (anus) of SMK a boy child aged 16 years and mentally challenged (dumb).
2. In the alternative, he faced the charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. Particulars being that on the 20th August, 2020, in Subukia Sub-County within Nakuru County he intentionally and unlawfully caused his genital organ (penis) to come into contact with the genital organ (anus) of SMK a boy aged 16 years and mentally challenged (dumb).
3. He was taken through full trial, found guilty, convicted and sentenced to serve 15 years imprisonment for the offence of defilement.
4. Aggrieved, he appeals against both conviction and sentence on grounds that;
 - a. That the learned trial Magistrate erred in both law and facts by finding conviction against the Appellant against the weight of evidence on record which was manifestly insufficient, inconsistent and had glaring gaps hence incapable of sustaining a conviction.



- b. That the learned trial Magistrate erred both in law and in fact by failing to appreciate that the main ingredient of the offence charged had not been proven to the required degree by the prosecution.
 - c. That the learned trial Magistrate erred in both law and fact by failing to find that the evidence by the prosecution did not support the charge against the Appellant.
 - d. That the learned trial Magistrate erred in law and in fact in failing to find the Complainant's evidence was not corroborated in any material way by direct evidence of the other prosecution witnesses.
 - e. That the learned trial Magistrate erred in law in failing to give due and/or adequate consideration to the Appellant's defence.
 - f. That the learned trial Magistrate erred in law and in fact by receiving the evidence of the Complainant without making a specific finding that he was possessed of sufficient intelligence to justify the reception of such evidence. The same caused a serious miscarriage of justice.
 - g. That the learned trial Magistrate erred both in law and fact by receiving the evidence of the complainant without fully complying with the provisions of Section 19 of the Oaths and Statutory Declaration Act Cap 15 Laws of Kenya.
 - h. That the learned trial Magistrate erred in both law and fact by passing a sentence which was manifestly harsh and excessive in the circumstances in any event.
5. Briefly, facts of the case were that on 20th August, 2020, PW2 SM, the Complainant was sent to buy some meat and maize by his mother PW1 MN. While enroute he encountered an individual who took him to a shop then a house where he undressed him and molested him. He attempted to shout but couldn't be heard. After the act he dressed up and went home leaving the assailant inside the house. He reported the incident to his mother who took him to hospital as his uncle went to report the incident to the police. The assailant was traced and arrested hence the case.
 6. Upon being placed on his defence, the Appellant testified that on the 20th August, 2020, he was in his house when he heard a neighbour calling him. He went outside only to find the Complainant, his mother and uncle who were in company of two (2) police officers. He was informed that he was under arrest for sodomizing the Complainant. He willingly entered the police vehicle and was taken to the police station.
 7. That on the 21st August, 2020, he was taken to hospital where his urine sample was taken to the laboratory but he was not told anything. He denied having known the Complainant or his uncle prior to the material date but stated that he knew his brother N who used to go to the field where he worked as a commentator and would threaten him asking whether he had a home. That is when he learnt that the particular area/ 'territory' belonged to some people with rights over it. That the Complainant was used by his brother to frame him.
 8. The trial court considered evidence adduced and concluded that it was a case of recognition; that medical evidence revealed that there was physical interaction with somebody and the person was identified as the Appellant, hence the conviction.
 9. Following directions given by the court as proposed by the parties, the appeal was to be canvassed through written submissions. However, only the Appellant filed submissions; and I have duly considered the record of appeal filed and submissions by the Appellant.



10. This being a first appellate court, it is duty bound to reassess the entire evidence presented before the trial court, re-evaluate it so as to draw its own independent conclusions bearing in mind that it neither saw nor heard witnesses who testified so as to observe their demeanor. This duty was set out in *Okeno v Republic* [1972] EA 32 where the Court stated 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 (*Pandya v Republic* [1957] EA 336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala v R* [1957] EA 570). 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 finding 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, see *Peters v Sunday Post* [1958]EA 424.” This was also set out in the case of *Kiilu & Another v Republic* [2005] KLR 174.”

11. Emphasis to analyze the entire evidence of the trial court was stated in *Kiilu & Another v Republic* [2005] 1KLR 174 as follows;

“Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error.”

12. In *Ngui v Republic* [1984] 729 the court did accentuate that a miscarriage of justice can result where there is failure to re-appraise the evidence.

13. In justifying grounds of appeal submitted, it is urged that the conviction was against the weight of evidence on record that was insufficient to sustain the conviction.

14. Section 8(1) of the *Sexual Offences Act* (SOA) provides thus;

A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

15. Elements of defilement were stated in *Charles Wamukoya Karani v Republic* Criminal Appeal No. 72 of 2013 where the court delivered itself that;

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

16. To prove age of a minor a birth certificate issued by government recording the fact of birth is ideal as proof, this is hence primary evidence. In the instant case, a birth certificate was adduced which is not in dispute. According to the official document the Complainant was born on 22nd August, 2004. Therefore, at the time he was 16 years old.



17. The crux of the matter is that penetration was not proved and purported identification was not questioned. Penetration is defined by Section 2 of the *Sexual Offences Act* as;

“Penetration” means the partial insertion of the genital organs of a person into the genital organs of another person.
18. In his testimony the Complainant stated that the Assailant had carnal knowledge of him through the anus and he was in pain. Carnal knowledge is legal euphemism for sexual intercourse. Sexual intercourse also includes insertion of a penile shaft into the anus.
19. The Complainant was examined on 21st August, 2020. At the time he complained of pain on the anus and was having frequent defecation which was attributed to bladder loosening. PW3 Milka Chesop Kosgei, the Clinical Officer who examined him did not find any injuries/bruises in the anal region.
20. Bladder loosening may be caused by a variety of factors including chronic constipation and even some medical condition, hence that fact per se cannot be caused by penetrative anal sex.
21. The medical evidence being as it is, the Court of Appeal in *Kassim Ali v Republic* [2006] eKLR stated that;

“The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.”
22. In *AML v Republic* [2012] the Court of Appeal held that;

“The fact of rape or defilement is not proved by way of a DNA test but by way of evidence.”
23. The proviso to Section 124 of the *Evidence Act* Provides;

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.
24. It is urged that the Complainant’s evidence was not corroborated by direct evidence or other prosecution witness. In *Mutonyi v Republic* [1982] KLR 203 the Court of Appeal defined corroboration as;

“.....an important element in the definition of corroboration, which is that it “affects the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it”. See *Republic v Manilal Ishwerlal Purohit* (1942) 9 EACA 58, 61.”
25. However, the law is clear, evidence of the victim is receivable and based on such evidence alone the court can convict as long as it believes the witness was truthful and it must record reasons for such belief.
26. On the question of identification, the Complainant told court that the Appellant was the Assailant. This was dock identification. He went on to state that he had known him before. On cross – examination he said they met at a place where he was buying maize. He said he knew the Appellant’s place where he took him on the material date.



27. PW1 the mother of the victim stated thus;

“I went and reported to the station and with officers we went to the house of the accused where he was arrested. They were both taken to hospital.

28. This evidence confirms the explanation by the Appellant that he was subjected to medical examination. The question lingering is what the results were and why they were not adduced in evidence. The prosecution is constitutionally obligated to disclose exculpatory evidence that may help the court reach a just decision. The unanswered question would be why the Appellant was subjected to medical evidence but the results were not introduced in evidence. The inference drawn in that the evidence may have either exonerated the Appellant or weakened the prosecution case.

29. Back to the question of the finding of the Magistrate, as expounded in the proviso to Section 124 of the *Sexual Offences Act*, the rights of the victim are protected by the law. The credibility of the victim’s testimony must be assessed, carefully considered and the trial Magistrate must record reasons for believing the victim.

30. In the instant case there was an omission. The learned trial Magistrate failed to record reasons for his belief. This was mandatory considering that the victim was deaf and dumb whose evidence was presented through an alternative, the sign language. There was absolutely no comment of the circumstances that surrounded it.

31. The upshot of the above is that the appeal is meritorious. For that reason, I quash the conviction and set aside the sentence imposed. The Appellant shall be released forthwith unless otherwise lawfully held.

32. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9TH DAY OF JUNE, 2025.

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L.N. MUTENDE

JUDGE

