



**Ndung'u v Republic (Criminal Appeal 107 of 2014)
[2025] KEHC 10672 (KLR) (15 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10672 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL 107 OF 2014**

**JM NANG'EA, J
JULY 15, 2025**

BETWEEN

DAVID KARANJA NDUNG'U APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from conviction and sentence of Hon J.M Nthuku (SRM)
delivered in Nakuru Sexual Offence Case No.242 of 2010 on 14th May, 2014)*

JUDGMENT

1. The Appellant herein was charged before the lower court with two counts of offences to wit; Attempted defilement contrary to Section 9 (1) (2) of the [Sexual Offences Act](#) No. 3 of 2006 (Count I) and Defilement contrary to Section 8 (1) (3) of the same [Act](#). Under each of the charges, the Appellant was in the alternative charged with committing an indecent act with a child contrary to section 11(1) of the same [Statute](#).
2. The particulars of the first Count are that on the 5th of October 2010 at about 5 pm at [particulars withheld], Nakuru District, within the Rift Valley Province the Appellant intentionally attempted to cause his penis to penetrate the vagina of FW, a girl aged 11 years.
3. In relation to the alternative charge it is alleged that on the same date and at the same place, the Appellant intentionally touched FW's vagina using his penis.
4. As regards the second Count, it is alleged that on the same date at [particulars withheld] in Nakuru District, of the Rift Valley Province, the Appellant intentionally caused his penis to penetrate the vagina of EW, a child aged 13 years.
5. The particulars of the alternative charge thereunder are that on the same date and at the same place, he intentionally touched E.W's vagina with his penis.



6. The Appellant pleaded not guilty to the main and alternative charges and the matter proceeded to full hearing. The prosecution called five (5) witnesses, and the Appellant gave sworn testimony in his defence after close of the prosecution evidence. The trial court returned a guilty verdict in respect of the main charges and sentenced the Appellant to thirty (30) years imprisonment on each of the Counts, which sentences were directed to run consecutively. The judgement is, however, silent on the alternative charges.
7. Aggrieved by the trial court's decision, the Appellant lodged this Appeal against the conviction and sentence on 26th May 2014 vide an undated Petition of Appeal based on six grounds that may be condensed into two broad grounds as follows;
 1. That the learned trial magistrate erred in law and fact by convicting the Appellant against the weight of evidence.
And;
 2. That the learned trial magistrate erred in law and fact by failing to consider or evaluate the Appellant's sworn defence.

Summary of the Evidence Before the Lower Court.

8. Following voire dire examination, the learned trial Magistrate allowed both FW and EW to adduce sworn evidence. FW told the court that at the material time she was 11 years old and a Form 2 student at [particulars withheld] School. On 5th October 2010 at around 10.30 pm she was on her home from school accompanied by one JN. A man appeared from behind them and went ahead before take a turn to use a different path. Then the man reappeared and grabbed JN by the shoulder. The latter managed to disengage and fled. The stranger turned to FW, forcing her to seek refuge in a nearby house where there were some little children. The attacker allegedly followed her into the house amidst heavy raining. In distress, FW further testified that she sent the children to seek help as the attacker locked the house and forcibly undressed her. After tearing her short, the man pushed her to the floor and got on top of her and ordered her to shut up. Just then the children returned with a "grandmother" owner of the house and forced open the door. They pulled the man away from her and took off his jeans jacket, but he managed to escape. The alleged victim stated that she didn't know her assailant before the incident.
9. F. W was taken to Lare Health Centre for medical attention and the matter was reported to the police.
10. On her part EW testified that she as a class 7 Primary School student at [particulars withheld]. On 8th October 2010 at around 5 pm she was going home from school when she met with a man who got hold of her and carried her on his shoulder upto a tree near a road. Pointing at her genitalia, she stated that the man inserted "her thing" into her "thing" she uses to pass urine. Another man she knew as Wagikuyu found the stranger doing the act. The attacker attempted to flee but members of the public arrested him.
11. PW3 seems to be the witness who allegedly found EW being molested. He told the court that as he was walking on a road to the shops that day, he heard groans and then saw some feet extending to the road from grass on the left side of the road. Then he saw a man lying on a girl. The man rose and ran away on seeing him while holding his trousers. The witness raised alarm and one Omariba and others arrested the man. He was handed over to the police to whom he gave his name as David Karanja. The said Omariba testified as PW8 and confirmed PW4's testimony.
12. The woman who allegedly went to the rescue of FW testified as PW4. Her grandchildren had reported to her that one Karanja was attacking FW in her house. She rushed to the house, and together with



others forced open the order. Karanja was allegedly found raping FW. He managed to escape leaving his coat behind.

13. PW4 and the others went to report the matter to the police and then took FW to Lare Health Centre for medication. On their way back from the health facility they heard of another “rape” incident and returned to the Police Station to find out more. The said Karanja was brought to the police station for defiling another girl.
14. PW5 (Clinical Officer) testified to examining FW and EW at Lare Health Centre. No abnormalities were observed in FW’s genitalia. EW’s hymen was, however, perforated and some “soil” particulars were in her urine.
15. PW9 (Investigating Officer) confirmed lodgment of the complaints and subsequent arrest and prosecution of the Appellant.
16. When the Appellant was put on his defence to the charges he decided to remain silent as is his right.
17. Upon reviewing the evidence the trial court accepted the evidence of the two child victim’s as corroborated by PW3 and PW4. The Appellant was accordingly convicted on both main charges.
18. The Court of Appeal in setting out the duties of the Court of first appeal in the case of *Okeno vs. Republic* [1972] EA 32 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 vs. 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 vs. 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 conclusion; it must make its own findings and draw its own 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 vs. Sunday Post* [1958] EA 424.”

19. From the prosecution evidence, the evidence of FW and EW was corroborated by eye witnesses who found the Appellant molesting them. There is further evidence proving that the two were minors of the ages stated in the charge sheet.
20. Contrary to the defence submissions, the accused did not offer a defence that was not considered by the trial court. He had chosen to remain silent.
21. As regards the defence complaint of severity of the sentences imposed, I find the sentences to be legal. Section 8 of the *Sexual Offences Act* provides as follows:-

- “(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- (2) 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.
- (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.”



22. For attempted defilement of a minor contrary to section 9(1)(2) of the *Act*, the sentence on conviction is not 10 years in prison.
23. FW and EW were found to be of the ages stated in the charge sheet at the time of commission of the offences charged and so the sentences are within the legal limits. The trial court also rightly directed them to be served consecutively since the victims were different and the offences were committed at different places.
24. I find in the circumstances, that the conviction on both counts was safe. The sentence imposed in respect of the first count is, however, excessive. The trial court could not reasonably impose the same custodial sentence for defilement and attempted defilement in the absence of clear aggravating circumstances. I would mete out a sentence of 15 years on the first count of attempted defilement instead.
25. The upshot is that the appeal partly succeeds. The appeal is allowed only to the extent that the sentence of 30 (thirty) years imprisonment imposed on the first Count of attempted defilement is substituted for 15 (fifteen) years imprisonment.
26. Judgement accordingly.

JUDGEMENT DELIVERED THIS 15TH DAY OF JULY, 2025 IN THE PRESENCE OF:

J. M. NANG'EA, JUDGE.

Mr. Wakasyaka for the DPP

Appellant, Present

Ms Morande Advocate, Present

Court Assistant (Jeniffer)

