



**Ngova v Republic (Criminal Appeal E059 of 2022)
[2024] KEHC 30 (KLR) (11 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 30 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E059 OF 2022
KW KIARIE, J
JANUARY 11, 2024**

BETWEEN

EVANS KITSAO NGOVA APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O case NO.72 of 2020 of the Chief Magistrate's Court at Mombasa by Hon. R.M. Amwayi–Senior Resident Magistrate)

JUDGMENT

1. Evans Kitsao Ngova, 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 diverse dates between March 2020 and 5th July 2020, in [Particulars Withheld] area, Mombasa sub-County within Mombasa County, intentionally and unlawfully caused his penis to penetrate the vagina of MM, a child aged 16 years.
3. The appellant was sentenced to fifteen years' imprisonment. He was aggrieved and filed this appeal against both conviction and sentence. He raised grounds of appeal as follows:
 - a. That the learned trial magistrate erred in law and fact by finding the conviction and sentencing without considering that the expert's report did not prove the case of defilement beyond reasonable doubt.
 - b. That the learned trial magistrate erred in law and fact by finding the conviction and sentence without considering that the prosecution case was rife with contradictions and discrepancies.
 - c. That the learned trial magistrate erred in law and fact by failing to comply with section 329 of the [CPC](#) as mitigation is part of the trial process.



- d. That the learned trial magistrate erred in law and fact by finding the conviction and sentence without considering the defence evidence.
 - e. That the learned trial magistrate erred in law and fact by finding the conviction and sentence without considering the sentence meted on the appellant was harsh, excessive, unjust, unconstitutional inhumane, and degrading.
4. The appeal was opposed by the state through M/s. Maureen Anyumba learned counsel. She contended that the prosecution proved all the ingredients of the offence to the required standards.
 5. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court. I have drawn my conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno v Republic* [1972] EA 32.
 6. To sustain a conviction for the offense of defilement, the prosecution has to prove the following ingredients:
 - a. Whether there was penetration;
 - b. Evidence must show that the accused is the perpetrator; and
 - c. The age of the victim must be below eighteen years.

In the case of *Fappyton Mutuku Ngui v Republic* [2012] eKLR Joel Ngugi J. said:

Going by this definition of defilement, I agree with Mr. Mwenda on the issues which the court needs to determine. The 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.

These are the ingredients I will endeavour to find if they are proven.

7. MM, ((PW1) testified that she had been a girlfriend of the appellant since March 2020. They started engaging in sexual intercourse. At one time, she returned home late at night and found their door locked and had to knock. Her mother enquired where she was from and she informed her that she had visited the appellant.
8. The evidence of her mother ((PW2) after three days the complainant escaped from home and when she reported, the appellant was arrested.
9. Jacob Leli Dingo ((PW3) testified that on July 24th, 2020, the area chief summoned him at about 10 p.m. They proceeded to the house of the appellant. They found the complainant's mother at the door which was locked with a padlock from outside. When she opened the door, they found the appellant and the complainant seated on a mattress.
10. When the complainant was examined by Dr. Nafisa on July 30th, 2020, whose report was produced by Dr. Mohamed Ali Mohamed ((PW4), healed vaginal abrasions and a broken hymen were detected. It was concluded that there was penetration.
11. The appellant in his defence the appellant contended that the complainant's mother had a grudge against him over some rent. This defence was an afterthought. He never confronted her with these facts during cross-examination. The learned trial magistrate was therefore justified to dismiss it.



12. A copy of the birth certificate of F.A. was produced as an exhibit. It indicates that she was born on the 26th day of February 2004. At the time of the offence, she was sixteen years old. Section 8 (4) of the *Sexual Offences Act* provides:

A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

The prosecution therefore proved the age of the complainant.

13. Though the appellant complained that the sentence was harsh, excessive, unjust, unconstitutional inhumane, and degrading, this is the prescribed sentence for the offence. This court will not interfere with it.

14. Section 333 (2) of the *Criminal Procedure Code* provides:

Subject to the provisions of section 38 of the *Penal Code* (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this *Code*.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

The learned trial magistrate ought to have ordered the sentence to run on July 25th, 2020, when he was arrested, but did not. I make an order that the sentence meted out by the learned trial magistrate to run from July 25th, 2020.

15. Except when the sentence ought to run, the appeal is dismissed.

DELIVERED AND SIGNED AT MOMBASA THIS 11TH DAY OF JANUARY, 2024

KIARIE WAWERU KIARIE

JUDGE

