



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Ndungu v Republic (Criminal Appeal E048 of 2021)  
[2023] KEHC 3261 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3261 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CRIMINAL APPEAL E048 OF 2021**

**M MUYA, J  
APRIL 20, 2023**

**BETWEEN**

**PASCAL WANJOHI NDUNGU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

**Background**

1. Pascal Wanjohi Ndungu hereinafter referred to as the appellant was convicted and sentenced to 25 years imprisonment for 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 being that on the or about the December 13, 2019 at [Particulars Withheld] area, Kieni West sub county, he unlawfully and intentionally caused his penis to penetrate the vagina of CNN a child aged seventeen years.
3. The appellant pleaded not guilty to the charge and the case proceeded to full hearing and determination. The prosecution called 6 witnesses. The appellant gave a sworn testimony and opted not to call witnesses on his behalf.
4. Being dissatisfied with both the conviction and sentence the appellant lodged this appeal on the following grounds
  - (a) That the learned trial magistrate erred in both law and fact in failure to appreciate that the prosecution did not call all the relevant witnesses.
  - (b) That the learned trial magistrate erred in both law and fact by failure to conduct proper *voire dire* examination of the complainant.



- (c) That the learned trial magistrate in convicting him placed reliance on inconsistent and contradictory evidence.
- (d) The learned trial magistrate erred in both law and fact in convicting the appellant against the weight of the evidence adduced by the prosecution.

### **Duty Of The First Appellate Court**

5. It is the duty of the first appellate court to re-evaluate and reconsider a fresh the evidence on record so as to arrive at its own conclusion while bearing in mind that it did not have the opportunity to observe the demeanor, of the witnesses Guiding principles are found in the cases of *Okeno v R* [1972] EA 32 *Njorege v R* [1987] eKLR 19, *Kiilu & another v R* 2005 1 KLR 174

### **Brief Facts**

6. The uncontested facts are that the appellant was a lover of the mother of the complainant and knew all her children including the victim and he used to pay school fees for them. During cross-examination he did note that the offence was said to have been committed on December 13, 2019.
7. The birth certificate did indicate that she was born on June 26, 2002. That on December 2019 she was aged 17 years and 6 months but he still insists that to his mind she was over 18 years and therefore an adult at the time. As regards paternity of the child he testified that he was not certain that he was the father.
8. The complainant/victim testified as PW3 in the lower court and stated that on the December 13, 2019 she was at home while in the company of her younger siblings. Her mother had travelled to Nakuru to visit a relative.

At about 10.00 pm the appellant visited them. He was not a stranger as he used to pay them visits during the weekends as he was a lover to complainant's mother. She served him dinner and left him at the sitting room.

Upon finishing eating he put off the lights. He went and picked her from her bed and took her to her mother's bed. He undressed her and proceeded to have sex with her till morning. He had threatened her not to scream as he would kill her. In the morning he left. She did not mention the incident to anybody. She testified that she was born on June 26, 2002 whereas the act was on December 13, 2019. The birth certificate was issued on February 10, 2016.

She further testified that she got pregnant from the act and gave birth on August 16, 2020 to a bouncing baby. Later a DNA test was conducted and the appellant was found to be the father.

### **Issues For Determination**

9. The ingredients for the offence of defilement are -:
- (a) The age of the victim
  - (b) The act of penetration
  - (c) Identification

### **Age Of The Victim**

10. This case presents itself as a borderline one.



The evidence adduced in court by the victim is that the incident took place on December 13, 2019. It was not reported to police till the month of September, 2020. Her birth certificate and the evidence of her mother shows that the victim was born on June 26, 2002. By September 2020 which was the time the matter was reported to police she was already over 18 years.

However, the incident itself took place on December 13, 2019. By calculation and deduction, She was aged 17½ years at the time and had not yet attained the age of 18 years.

### **Penetration**

11. The complainant did testify that the appellant who was known to her visited them at the night of December 13, 2019 and after serving him with food he proceeded to have sex with her till morning.

On August 11, 2020 the complainant was examined by a medical doctor and was found to be eight months pregnant. PW4 produced a p3 form and PRC form to that effect. A DNA test confirmed paternity of the child to be of the appellant.

### **Identification**

12. There is ample evidence from PW1, PW2 and PW3 that the appellant was known to them as he was PW2's lover and used to visit them frequently. The appellant was clearly seen by the complainant when she opened for him and when she was serving him with food.

There cannot be the possibility of mistaken identity.

### **Voire Dire Examination**

13. In the case of *Johnson Muiruri v Republic* [1983] KLR 445 it was held:- “ Where in any proceedings before any court, a child of tender years is called as a witness the court is required to form an opinion, on a voire dire examination, the nature of an oath in which even his sworn evidence may be received, if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the later event, an accused person shall not be liable to be convicted on such evidence, unless it is corroborated by material evidence in support thereof implicating him.”

14. Section 2 of the *Children Act* defines a child of tender years to mean “a child under the age of ten years.”

At the time of the defilement the victim was aged 17½ years. She was not by any stretch of imagination a child of tender years.

### **Inconsistencies And Contradictions**

15. The contradictions and or inconsistencies are very minor and do not go to the root of the case nor are they capable of creating doubts in the mind of the court.

### **Conclusion**

16. The upshot is that the appellant knew the victim as a student in form three. He admits that he was the one paying her school fees. He did not or was not able to explain to the court how the victim deceived him that she was over 18 years and what steps if any he undertook to ascertain her age. He cannot therefore benefit from the defence available under section 8 (5) of the *Sexual Offence Act*. The conviction was lawful and it is upheld.

17. On Sentence



It is noted that the appellant was sentenced to 25 years imprisonment. Section 8 (4) of the *Sexual Offences Act* provides for a sentence of not less than fifteen years imprisonment.

It is noted that the appellant was treated as a first offender. No probation report or that of the victim was called for. The sentence of 25 years in the circumstances of this case I find was harsh. It is reduced to ten years imprisonment from the time of conviction and sentence.

The appellant to serve ten years imprisonment.

This appeal succeeds to that extend only.

**JUDGMENT DELIVERED READ AND SIGNED AT NYERI IN OPEN COURT THIS 20<sup>TH</sup> DAY OF APRIL 2023.**

**HON. JUSTICE MARTIN M. MUYA**

**JUDGE**

**In the presence of:**

In person: Appellant

Mrs. Mutiso: Respondent

**Court Assistant: Kinyua**

**30 days R/A.**

