



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njoki v Republic (Criminal Appeal E074 of 2025)  
[2025] KEHC 13518 (KLR) (17 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13518 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKADARA  
CRIMINAL APPEAL E074 OF 2025  
J WAKIAGA, J  
SEPTEMBER 17, 2025**

**BETWEEN**

**ANTHONY KARIUKI NJOKI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against original conviction and sentence in the Chief Magistrates Court case no Sexual Offence No. 14 of 2020 at Makadara)*

**JUDGMENT**

1. The appellant was convicted of the offence of defilement contrary to section 8(1) as read with section 8(3) of The *Sexual Offences Act* no 3 of 2006 and sentenced to 41 years.
2. Being aggrieved by the said conviction and sentence, he filed this appeal initially at the Criminal registry at Milimani as Criminal Appeal no E74 of 2023 and raised the following grounds of appeal:
  - a. The court erred in law and fact when she failed in not realizing that the circumstantial evidence adduced at the trial did not place the accused at the scene of the alleged crime.
  - b. The court erred in law and fact by failing to find that penetration was not proved as required in law.
  - c. The court erred in failing to find that the appellant was not properly identified.
  - d. The court erred in not finding that the complainant was an incredible witness whose evidence could not be used to sustain a conviction.
  - e. That the age of the complainant was not established as required in law.



- f. The court erred in convicting the appellant based on the complainant's single evidence without giving reasons for believing her testimony.

### Submissions

3. Directions were given on the disposal of the appeal by way of written submissions. On behalf of the appellant who was unrepresented, it was submitted that his defence was undermined by denial of legal aid and services as provided for under Article 50(2) of the *Constitution* and as provided for under section 43 of the *Legal Aid Act* and in support of this line of submissions, the following cases were tendered: ZWO versus Republic [2019] eKLR, Karissa Chengo & 2 others versus Republic [2017] eKLR, and Pett versus Greyhound Racing Association [1968] 2 ALLER 545 and Evans Wanjala Siibi versus Republic.
4. It was contended that the appellant was convicted on unsubstantiated evidence of the complainant whose credibility was in question and that in her evidence on record she pretended that she had a headache when she actually was going about hunting for men and that a single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused person was sufficient to set aside the decision of the trial court, in support thereof the case of Josephat Kiprotich Koech v Republic [2025] KECA 419(KLR) was tendered where the court stated that whereas the evidence of the complainant was enough to sustain a conviction, the court must be satisfied for reasons to be recorded that the complainant was a truthful witness,
5. It was submitted that the trial court admitted and relied upon exhibits without any inventory and chain of custody. It was submitted that the appellant was not properly identified and that the same was not taken to a DNA test so as to rule out any other person, in support of which the case of Amos Kinyua Kugi v Republic [2025] eKLR was tendered.
6. On sentence, it was submitted that whereas it is at the discretion of the court, such discretion must be exercised judiciously and not capriciously and that there was a need to relook at the sentencing as was stated in the case of Eliud Waweru Wambui versus Republic where the court stated that in many jurisdictions the laws only criminalize sexual conduct with children below the age of 16 years.
7. It was contended that since the appellant did not enjoy his constitutional right to a fair trial, the matter should be referred back for retrial. In support thereof, reference was made to the case of David Musenge Sande v Republic to the effect that in the case where the court is responsible for a nullity an appeal court can order a retrial, not as a matter of course but where it does not prejudice the appellant.
8. On behalf of the prosecution, it was submitted that the case was proved to the required standard and that the victim's account of what the appellant did to her was corroborated by the evidence of PW2 her mother who confirmed that when she woke up she found her household items and the child who had been sleeping on the sofa missing. The child was found naked near the river bleeding from her vagina. PW 3 and PW4 confirmed penetration and that PW8 confirmed that the samples taken did not generate any result due to their handling.
9. On the identification of the appellant, the victim was able to identify him at the identification parade and that he was her father's friend who had two sons who used to visit their home and that PW6's evidence was that the appellant went to his house at 5.00 am asking for a match box when he was wet and that soon thereafter the father of the victim went to his house and reported a missing child. The age of the victim was proved through the health card and the appellant's defence was considered by the court.



10. On sentence it was submitted that the appellant should have been liable to life imprisonment whereas the court considered his mitigation and pre-sentencing report in giving him 45 years and therefore the appeal should be dismissed.

### **Proceedings**

11. This being a first appeal, the appellant is entitled to a re-evaluation of the evidence tendered before the trial court while giving an allowance that unlike the trial court, it did not have the benefit of seeing and hearing witnesses as was stated in the case of *Okeno v r*.
12. PW1 a child who was found not to understand the concept of oath gave an un-sworn statement and stated that on the material day a thief tied both her hands with a rope and “put his stick into me” while she was lying on the ground and left her there. PW2 her mother stated that she was born on 28<sup>th</sup> November 2013 and that on the material day she woke up and found the child missing from her sleeping sofa, she started looking for the child in the neighbourhood and found the appellant whom she knew as Karis together with one Kevo in his house within the plot and when she asked them if they had seen the child they answered in the negative.
13. She was then informed by Mama village that the child had been found at the river and at that point the appellant escaped leading people to suspect him. The child was found bleeding from her private part with her mouth tied with a cloth, she was taken to the hospital and upon interrogation she stated that the person who defiled her used to come to their house with a young child, and she was able to identify him as the appellant. The appellant disappeared for a month before being arrested by the victim’s father who was his friend.
14. PW3 Doris Kerubo a Clinical Officer, produced the medical report on the victim who had blood stains on her vulva area and thighs, her hymen had visible tears with minor bleedings. She also produced the P3 form and that she was later referred to Nairobi Women Hospital from where PW4 John Njuguna produced a discharge summary confirming that the victim was admitted at the facility on 1/12/ 2019 with a history of sexual assault and discharged on 6<sup>th</sup> December 2019.
15. PW5 IP Benson Mbeya conducted an identification parade where the appellant was positively identified by the victim and that the appellant signed the ID parade forms. In cross examination he stated that the victim had been kept behind the station and had no chance of seeing the appellant before the parade and that she pointed him without any hesitation, the appellant having opted not to call a third party.
16. PW 6 Kelvin Kinyua Mwangi stated that the appellant went to his house at 5.00 am very wet as it had been raining and borrowed a matchbox from him and at that time a neighbour told them that his child together with his household items had been stolen when they received the news that she had been found at Nairobi River naked and could not talk. At that time the appellant disappeared and later heard that he was living in the village and that when he was arrested he was taken to the chief who re-arrested him.
17. PW7 JMN the father of the victim stated that she was six years old and that on the material day his wife woke him up and told him that they had been robbed and that the child was stolen as well. He went to PW6 who was his friend and found him with the appellant. They proceeded to search for the child whom they found near the river with her hands tied with a rope at the back and on a towel, which had been taken from their house. She could not talk as she seemed to have been strangled. The police from Shauri Moyo police Station came and took the child to Nairobi Women Hospital and that the child told him that the person that defiled her was his friend who used to come to their house and was his close friend with whom they worked together.



18. In the meantime, the appellant went into hiding until the 19<sup>th</sup> January when he arrested him and took him to the chief. The child identified the appellant as baba Taris. In cross examination he stated that the appellant did not take any action when he told him that the child was missing and that he even stayed with the appellants children when he went to the village and that at the time when he met him with PW6 he did not suspect that he was the defiler until the child pointed him out.
19. PW9 CPL Roseline Lobeki the investigating officer visited the house of the victim and at the scene found that there was a struggle and lots of mud and the child was in much pain and that the child told her that the person who had defiled her was her fathers' friend and that he had taken her to the river, removed her clothes and defiled. When he was arrested, she conducted an identification parade where the victim picked him up and that the appellant blamed the victim's father for framing him up over an alleged sale of a public plot .
20. In cross examination she stated that the victim knew the appellant's house and that he told her that he had escaped to Muranga and that he was arrested on 19<sup>th</sup> January .
21. When put on his defence, the appellant stated that he was living at Kiambiu with his two children and that on 19<sup>th</sup> October 2019 he got home drunk and had a disagreement with his wife who went to her sister in Huruma. The next day he decided to take his children to the village in Nyahururu and after two months his wife called him after she had cooled down and when he came back the father of the victim whom he had previously fought with over the site for the Sacco met him and they fought before they were taken to the chief's camp where he brought the defilement allegation. He confirmed that the child identified him at the identification parade.

### **Determination**

22. From the submissions herein and the proceedings, the appellants main contention is that he was not accorded legal representation and therefore his right to free and fair trial under Article 50 of the *Constitution* was violated. Since the same has raised a constitutional issue I will start with this determination first before proceeding with the issue as to whether the prosecution case against the appellant was proved to the required degree .
23. The right to legal representation has been settle in the Court of Appeal case of Manyeso versus Republic [2023] KECA thus:

“Secondly, the appellant claims that his right to legal representation was also violated. Article 50(2)(g) and (h) of the *Constitution* in this respect provides that the right to a fair trial includes the right:g.to choose, and be represented by, an advocate, and to be informed of this right promptly;h.to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

This court (Kairu, Mbogholi-Msagha and Nyamweya JJA) held in William Oongo Arunda (Hitherto referred to as Patrick Oduor Ochieng) versus Republic (Criminal Appeal 49 of 2020) [2022] KECA 23 (KLR) that the operative circumstance that triggers the necessity of legal representation in criminal proceedings is where substantial injustice would occur arising from the complexity and seriousness of the charge against the accused person, or the incapacity and inability of the accused person to participate in the trial. The court also noted that it should be standard practice in every criminal trial for the accused person to be informed, at the onset, of his right to legal representation since the *Constitution* demands it. However, in the present appeal, the appellant did not raise the issue of legal representation



either in the trial court and the High Court, and the record of the trial court shows that the appellant participated in the trial and cross-examined the witnesses, and it is not evident that he suffered any or any substantial injustice. For these reasons, we do not find any merit in the appellants arguments that their rights to a fair trial on under articles 50(2)(g) and 50(2) (h) of the Constitution were violated.”

24. From the proceeding herein, whereas there is nothing on record to show that the trial court informed the appellant of his right to legal representation it is clear that the appellant understood the charge he was facing and was able to cross examine all the prosecution witnesses and to offer a reasonable defence. I therefore find and hold that lack of legal representation did not prejudice the appellant and therefore the trial cannot be vitiated by reason of lack of legal representation. I therefore decline to buy the appellants submission that the matter ought to be referred for retrial.
25. It is high time that the ruling for legal representation to be developed as not all the cases where an accused person is charged with an offence qualifies for legal representation. The said rules and directions will help in reducing cases where the appellants , as in this case will raises lack of legal representation as a ground, whereas the issue, was not raised in the first instance before the trial court.
26. On the proof of the prosecution case, the age of the victim was proved through the evidence of her mother and the child health card produced by pw11 thereby conforming with the principles set out in the case of Francis Omuroni v Uganda. On penetration she stated that the appellant inserted stick into her groin and in convicting the appellant the trial court had this to say “ 41. Turning to the testimony of the complainant, she claimed that she was penetrated by a stick. She was only six years and with her young mind , the court can have the liberty to interpret this as reference to a penis. In Lawrence Kamau Nganga v Republic [2017] eKLR the court of Appeal case of Muganga Chilejo Sahu versus Republic [2017] eKLR was quoted ....”
27. I therefore find no fault with the trial court finding on the proof of penetration and dismiss this ground of appeal.
28. On the identification of the appellant, I note that the same was identified through recognition ass he was known to both the compliant and her parents as a friend of the complainant’s father who used to come to their house and was a father of Kevo. The compliant as positively picked the same at an identification pared which was properly conducted. Lack of DNA examination on the appellant was therefore not fatal to the prosecution case. The court from the record warned herself from convicting the appellant on the circumstantial evidence.
29. I therefore find and hold that the appellants conviction was safe and free from error and consequently dismiss the appellants appeal on conviction and affirm the trial courts finding thereon.
30. On sentence, the same remains at the sole discretion of the court and will only be interfered with if the following conditions are met; the court acted on wrong principles or overlooked some material factors or that the sentence imposed is manifestly excessive in view of the circumstances of the case, see Bernard Kimani Gacheru v R [2002] eKLR
31. In sentencing the appellant, the court had this to say  

“ The circumstances of the case depict a heartless offender. The child was tied up with rope despite her tender age. One wonders what it is she would have done with her feeble body. She was left for the dead and by a lucky streak she was found in time. The offence is not only gender based but penetration was gross necessitating a reconstruction surgery. There is no record of how she is doing now but it can’t be ruled out that she will have a permanent scar



in her life. For the convict, he is a first offender on record, a single father and his children are on the verge of destitution. He had a troubled past which the probation depicts as a contribution to his predicament.

All factors considered, but with a deep consideration of the gravity of the offence and the inhuman torture the child victim underwent, the convict is sentenced to 45 years (540 months) imprisonment. Since he has been in custody for 3 years 7 months i.e. 43 months, in line with section 333(2) of the Criminal Procedure Code, Chapter 75 laws of Kenya, he shall now serve 41 years and 5 months (i.e. 497 months) from the date of this sentence”.

32. The question for the court to determine is if the said sentence was unlawful, excessive or erroneous so as to be interfered with by this court on appeal noting that the statute provides for imprisonment for life and in view of the current jurisprudence from the Supreme Court?
33. Having stated that sentencing is the discretion of the trial court and noting that the appellant relied on the decisions of the Court of Appeal which have since been overturned by the Supreme Court and noting that the Prosecution did not address the court on the issue of enhancement of the sentence and neither was the appellant warned, and whereas the sentence given by the trial court was unlawful I shall not interfere with the sentence herein.
34. The Court of Appeal in *Manyeso* (Supra) had this to say on sentence:”

“The last issue raised by the appellant is that of his sentence. In this regard, sentencing is at the discretion of the trial court, and as a second appellate court we cannot interfere with this exercise of discretion unless it is shown that the court passed an illegal sentence. During the hearing of the appeal, the appellant also stated that he was young, and did not know how to express himself, and that the court considers that the time he has spent in prison since his arrest in 2013. The appellant in this regard indicated that he had nothing to say after the Prosecution indicated that he was a first offender. The trial court in sentencing him to life imprisonment considered that the offence was committed on a girl aged 4 years who had been traumatized for life, and was of the view that a deterrent sentence was called for.

We note that the decisions of this court relied on by the appellant, namely *Evans Wanjala Wanyonyi versus Republic* [2019] Eklr and *Jared Koita Injiri v Republic Kisumu Crim App No 93 of 2014* were decided before the Supreme Court clarified the application of its decision in *Francis Karioko Muruatetu & another v Republic* [2021] eKLR and limited its finding of unconstitutionality of mandatory sentences to mandatory death sentences imposed on murder convicts pursuant to section 204 of the Penal Code.

35. Final analysis I find no merit on the appeal herein both on conviction and sentence with I hereby dismiss and affirm the trial court determination thereon. The appellant is entitled to right of appeal.

**DATED, SIGNED AND DELIVERED AT MAKADARA THIS 17<sup>th</sup> DAY OF SEPTEMBER 2025**

**J. WAKIAGA**

**JUDGE**

In the presence of

Court Assistant - Irene

The appellant in person

Ms Kariuki for the state.

