



REPUBLIC OF KENYA



KENYA LAW
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**Ngene v Republic (Criminal Appeal E079 of 2024)
[2025] KEHC 14736 (KLR) (21 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14736 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E079 OF 2024
KW KIARIE, J
OCTOBER 21, 2025**

BETWEEN

BENJAMIN MUMO NGENE APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O. Case No. E039 of 2020 of the Senior Principal Magistrate's Court at Tawa by Hon. L.K. Mwendwa–Principal Magistrate)

JUDGMENT

1. Benjamin Mumo Ngene, the appellant herein, was convicted of the offence of defilement of a girl contrary to section 8 (3) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars of the offence were that on the 15th day of September 2020, at Mbooni East District, within Makueni County, he intentionally caused his penis to penetrate the vagina of M.N., a child aged twelve years.
3. The appellant was sentenced to serve 25 years' imprisonment in person. He was aggrieved and filed this appeal. He raised the following grounds of appeal:
 - a. The prosecution failed to prove the key ingredients of the offence of defilement as required by law.
 - b. The learned trial magistrate erred both in law and in fact by relying on hearsay evidence in convicting the appellant, making his conviction unjustified and unsafe.
 - c. The learned trial magistrate erred both in law and in fact by failing to accord the appellant a fair trial as required in law as a matter of right.



- d. The sentence to serve twenty-five years' imprisonment meted out on the appellant was harsh and excessive and against the spirit of rehabilitation and reintegration, considering current development in jurisprudence as regards sentencing.
4. The state opposed the appeal through Mr. Victor. Kazungu, learned counsel. He contended that the prosecution proved the case to the required standards and that the sentence that was imposed was appropriate.
5. This is a first appellate court. As expected, I have analyzed and reevaluated all the evidence presented before the lower court, and I have drawn my own conclusions, 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. Section 8(1) of the *Sexual Offences Act* defines defilement in the following terms:
- A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- An offence of defilement, therefore, is established against an accused person when the prosecution has proved the following ingredients:
- a. That there was penetration of the complainant's genitalia;
- b. That the accused was the perpetrator; and
- c. The age of the complainant was below eighteen years.
- These ingredients were restated in *Fappyton Mutuku Ngui v Republic* [2012] eKLR as follows:
- 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 that the prosecution must prove against an accused person.
7. M.N. (PW1), the complainant in this case, stated her age at the time of the alleged offence was 12 years. Her clinic card indicates that she was born on the 4th day of February 2008. As of the 15th day of September 2020, she was 12 years and 7 months old. Her age was therefore proved to the required standards.
8. When Jenifer Ndunge Muendi (PW5), a clinical officer at Tawa sub-county Hospital, examined the complainant, she found her hymen was breached and she had a foul discharge from the vagina. She concluded that she had been defiled.
9. M.N. (PW1) testified that when she was returning home from the shop, she found the appellant, who offered her Kshs. 50/= in exchange for sex. They had sexual intercourse in a bush. She returned home late but did not divulge what had delayed her until the following morning. She said the appellant had threatened her with dire consequences if she revealed what had transpired.
10. Benjamin Mumo Ngene, the appellant, contended that he was falsely implicated due to a land dispute with the complainant's father. The learned trial magistrate dismissed this defence and rightly so; it is an afterthought. The conviction was founded on the evidence on record.



11. An appellate court would interfere only where there exists, to a sufficient extent, circumstances entitling it to do so. *Nillson v Republic* [1970] E.A. 599 as follows:

“The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in *James v Rex* (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor! To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. *R v Shershewsity* (1912) C.CA 28 T.LR 364.”

12. Section 8(3) of the *Sexual Offences Act* provides:

“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.”

13. The sentence cannot be described as harsh. I have no reason to interfere with the discretion of the learned trial magistrate.

14. The appeal is dismissed in its entirety.

DELIVERED AND SIGNED AT MAKUENI, THIS 21ST DAY OF OCTOBER 2025

KIARIE WAWERU KIARIE

JUDGE

