



REPUBLIC OF KENYA



**Nzilu v Republic (Criminal Appeal E058 of 2025)
[2025] KEHC 14604 (KLR) (15 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14604 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKADARA
CRIMINAL APPEAL E058 OF 2025
J WAKIAGA, J
OCTOBER 15, 2025**

BETWEEN

JOHN MWANZIA NZILU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence in
Criminal Case SO NO 270 of 2018 of the Chief Magistrates Court at
Makadara of Hon H. Onkwani SPM delivered on 30th June, 2023)*

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1)(2) of the [sexual offences Act](#) and an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Act, the particulars of which were that on the 18th day of November 2018 at [Particulars withheld] Slams in industrial Area within Nairobi county, intentionally caused his genital organ namely penis to penetrate the genital organs namely vagina of LN a child aged seven (7) years.
2. He was tried, convicted and sentenced to serve 50 years for the of the offence of defilement contrary to section.
3. Being aggrieved by the said sentence and conviction, the appellant filed this appeal initially at the Criminal Registry at Milimani as Criminal Appeal No E 278 of 2023 having been granted leave to file an appeal out of time in Misc. Case no E 347 of 2023 by a ruling thereon dated 9th September 2023.
4. On 13th march 2025, the said appeal was transferred to the criminal registry at Makadara with directions that the appeal be heard by way of written submission which were filed by the appellant .



Submissions

5. The appellant submitted that the respondents evidence were inconsistent with the law on attempted defilement as understood under section 9 (1)(2) and that contrary to what the trial court suggested that from the mistake by the I O on drafting the charge against the appellant and that the evidence on record is that the appellant tried to assert his penis into the complainants vagina but he could not gain entry and that this was supported by the evidence of PW3.
6. On sentence it was submitted that the trial court erred in sentencing the appellant to fifty years while the lawful sentence was for a term not less than ten years and therefore the sentence was excessive .
7. The prosecution did not file any submission but at the hearing hereof Ms Kariuki submitted that the sentence should have been not less than ten years

Determination

8. From the judgement of the court dated 30th June 2023 I note that the court referred to the appellant having been charged with the offence and convicted of attempted defilement contrary to section 9(1) (2) of the *sexual offences Act*, whereas there is no evidence that the charge sheet herein was ever amended and the evidence lead was in respect of defilement and there is no evidence that the court found that a lesser offence of attempted defilement was proved yet in her judgement she stated that all the ingredients of the offence of defilement were proved except the aspect of penetration .
9. The court went further to state that on the issue of penetration , the child told the court that when the accused tried to insert his penis into her vagina she felt pain ,the Doctor who examined the child noted that the outer genitalia of the victim was bruised which in the opinion proves the offence of attempted defilement .
10. Based upon this judgement the appellant submitted on the basis that he was charged with the offence of attempted defilement on the basis that the evidence adduced shows that there was no penetration.
11. The issue for the courts consideration is whether the appellant was prejudiced having been unrepresented? being a lay man and un-represented, the court was under a duty to safe guard the appellants right to fair hearing and that whereas the court could have rightly found that a lesser offence rather than the one charged was proved under the provisions of section 179 of the CPC , I have noted that the court referred to a charge which was not before her in the judgement and proceeded to analyse the same contrary to evidence that was tendered before the court.
12. It therefore follows that the said judgment was erroneous and cannot stand for being contrary to the known principles of what constitute a judgement and is therefore set aside.
13. On the sentence it is noted that the appellant was sentenced to fifty years while as submitted by the appellant and conceded to by the prosecution, the sentence provided for is for a term not less than ten years. The trial court erroneously stated that the offence carries mandatory life sentence , while the offence under which he convicted the appellant carries a minimum sentence of not less than ten years unlike the original charge which carries a life imprisonment .
14. It therefore follows that the sentence of 50 years was not supported by any reason whatsoever and was unlawful and irregular as not being provided for in law. It is therefore quashed.
15. Having set aside the said judgement, the next issue is what order should the court make herein? this to my mind is a matter which should have been set down for retrial but I note that the prosecution opposed the same on the ground that the matter was registered in the year 2018 and that the child



would be re-traumatized, which the court agreed with, while declining to grant the appellant an order for fresh trial under the provisions of section 200(3) of the CPC .

16. It will therefore not be in the best interest of justice should the court now order a retrial. The appellant shall therefore enjoy the benefit of the error on the part of the court and is therefore set free forth with unless otherwise lawfully held .
17. However the appellant is warned that there was enough and adequate evidence to sustain a conviction, the child who was aged seven stated that the appellant who was her neighbour called her into his compound which was opposite their house and told her to lie on bed which she refused, he thereafter put her on bed, removed her clothes and his and lay on her, she felt pain as he inserted his urinating thing into her urinating thing.
18. It was her evidence that she reported to her mother and was taken to hospital. She was able to identify the appellant and when put on his defence the appellant opted to remain silent , having been identified by the victim by name which she gave to her mother PW2 who noticed that she had problems walking and when she opened her leg she saw some discharge on her private part.
19. The appellant should have been referred for retrial as stated herein, save that as they say an accused person is always the darling and an apple and the most favoured child , in the eye of the law and the trial courts more so in criminal matters despite the heavy work load , must go an extra mile to safe guard the rights, interest and procedural safeguards of the accused persons who as in this case are unrepresented .
20. And it is ordered .

DATED SIGNED AND DELIVERED AT MAKADARA THIS 15th DAY OF OCTOBER 2025

J. WAKIAGA

JUDGE

In the presence of

Court Assistant - Irene

Ms Kariuki for the Prosecution

The appellant in person

