Ndotyo v Republic (Criminal Appeal E055 of 2024)
[2025] KEHC 14855 (KLR) (23 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14855 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E055 OF 2024

KW KIARIE, J

OCTOBER 23, 2025

BETWEEN

GEDION MUENDO NDOTYO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence in S.O. Case No. E011 of 2023 of the Senior Principal Magistrate's Court at Tawa by Hon. Stephen Jalang'o–Senior Principal Magistrate)

JUDGMENT

1. Gedion Muendo Ndotyo, 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 10th day of September 2023 at [Particulars withheld] village, Mbooni East sub-county, within Makueni County, he intentionally caused his penis to penetrate the vagina of RNM, a child around fourteen years.

3. The appellant was sentenced to serve 15 years' imprisonment in person. He was aggrieved and filed this appeal. He raised the following grounds of appeal:

    a. The learned magistrate erred in law and fact in failing to take cognizance of the fact that the age of the minor as an ingredient and evidence required of defilement were not proven by the prosecution beyond a reasonable doubt as the law required.

    b. The learned magistrate erred in law and fact by holding that the prosecution had proved its case beyond a reasonable doubt, contrary to the light-weight evidence adduced at the trial, and thereby occasioning a miscarriage of justice.

    c. The learned magistrate erred in law and fact by convicting the appellant on insufficient evidence, but working on an assumption without physical evidence.

d. The learned magistrate erred in law and fact by convicting the appellant on circumstantial evidence.

e. The learned magistrate erred in law and fact by disregarding the convincing evidence adduced by the appellant in his defence.

1. The state challenged the appeal through Mr Victor Kazungu, the learned counsel. He argued that the prosecution provided sufficient evidence and that the sentence given was appropriate.

2. 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 vs the Republic [1972] EA 32.

3. 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 vs 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. The prosecution gave four different ages for the complainant. The charge sheet stated she was 14 years old. When she testified, the complainant (PW1) claimed to be 16 years old and born in 2009. Her mother, in her main evidence, said she was 17, but during cross-examination, she stated she was 18. The evidence of the two witnesses was on 14th May 2024. If there was to be any discrepancy, it should have been about one year from the 10th day of September 2023, the date of the alleged offence. Although an age assessment report was produced, I find that the prosecution was groping in the dark on the issue of her age. In Alfayo Gombe Okello v. Republic, Cr. App. No. 203 of 2009 (Kisumu), the Court of Appeal stated as follows:

> In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)

8. The complainant said she stayed with the appellant in his house for a week from the 10th day of September 2023. This was confirmed by her mother (PW2). This is what she said:

> On 10th September 2023, I went to the shop. I returned and found my child missing. I looked for the complainant but failed to find her.
>
> The following day, I also looked for the complainant. I did not find her. I continued looking for the complainant.
>
> After a week, I saw the clothes at the home of the accused. I made a report to the police that night. The police accompanied me to the home of the accused at 2.00 a.m. We found my daughter/complaint at the home of the accused. They were both arrested and taken to the Kithungo police post.

9. Francis Kilonzi (PW4), a clinical officer, testified that he examined the complainant and filled her P3 form on the 11th of September 2023. The question that arises is how this was possible. The Court of appeal in the case of The Court of Appeal in the case of Ndungu Kimanyi vs Republic [1979] KLR 283 (Madan, Miller and Potter JJA) held:

> The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, raise suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

10. Gedion Muendo Ndotyo, the appellant, denied involvement in the offence.

11. In view of the contradictions I have pointed out in the prosecution's case, the conviction was unsafe. The same is quashed and the sentence set aside. The appellant is set at liberty unless otherwise lawfully held.

DELIVERED AND SIGNED AT MAKUENI, THIS 23RD DAY OF OCTOBER 2025

KIARIE WAWERU KIARIE

JUDGE