



**Ndungu v Republic (Criminal Appeal E026 of 2025)
[2025] KEHC 16349 (KLR) (Crim) (13 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16349 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
CRIMINAL
CRIMINAL APPEAL E026 OF 2025
KW KIARIE, J
NOVEMBER 13, 2025**

BETWEEN

JOHN NGERE NDUNGU APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O. Case No. E047 of 2023 of the Senior Principal Magistrate's Court at Ol' Kalou by Hon. J.N Nthuku – Principal Magistrate)

JUDGMENT

1. John Ngere Ndungu, the appellant herein, was convicted of the offence of gang defilement contrary to section 10 of the *Sexual Offences Act* No.3 of 2006.
2. The particulars of the offence were that on the 17th day of December, 2022, at Gichagi village, in Mirangine Sub-County, within Nyandarua County, in association with others not before the court, he intentionally and unlawfully caused his penis to penetrate the vagina of M.N.T., a child aged 16 years.
3. The appellant was sentenced to 15 years' imprisonment. He has appealed against both conviction and sentence.
4. The appellant was represented by V.W. Mburu & Company Advocates and stated the grounds of appeal as follows:
 - a. The learned magistrate erred in law and in fact to convict the appellant on a sentence [sic] that was not proved beyond a reasonable doubt, as required by law.
 - b. The learned magistrate erred in law and in fact in convicting the appellant even though he had raised an appeal regarding the DNA results that were adduced as evidence by the prosecution.



The magistrate went ahead and pronounced judgment despite the appeal still being pending determination.

- c. The learned magistrate erred in fact and in law in sentencing the appellant and meting an excessive sentence in the circumstances.
5. The state opposed the appeal through M/S Vena Odero, learned counsel, who argued that the offence of gang defilement was proved to the required standards.
6. This is a first appellate court. As expected, I have re-analysed and re-evaluated all the evidence adduced 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 Republic* [1972] EA 32.
7. Section 10 of the *Sexual Offences Act* defines defilement in the following terms:

Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.

8. The ingredients of gang defilement were outlined in the case of *Elly Otieno Alose v Republic* [2019] eKLR as comprising the following:

Under Section 10 of the Act, the key ingredients of the offence of Gang Rape include:

- a) Proof of rape or defilement;
 - b) Proof that the assailant was in association with another or other persons in committing the offence of rape or defilement, or that the assailant did not per se commit the offence of rape or defilement, but with common intent, was in the company of another or others who committed the offence.
9. I will therefore endeavour to find out if these ingredients were proven to the required standards.
 10. M.N.T. (PW1) testified that on her way to the shop, she encountered the appellant, who stated he would have sex with her regardless of her consent. This was someone she knew. After leaving the shop, the accused and two others seized her, dragging her to the slaughterhouse. One person restrained her legs, another her hands. The appellant sexually assaulted her.
 11. The defilement resulted in her being pregnant, and she gave birth to a baby.
 12. John Ngere Ndungu, the appellant, contended that he was framed due to a debt he owed by the complainant's family.
 13. When DNA testing was carried out with the complainant, the appellant, and the baby providing samples, the analyst's report concluded that the appellant fathered the complainant's child.
 14. The defence of the appellant was not only an afterthought, but the DNA results displaced it. The appellant attempted to discredit these results, but without a basis.
 15. I find that the conviction was based on sound evidence.
 16. When the learned trial magistrate delivered her judgment, there was no order prohibiting her. She cannot be faulted for performing her duty.



17. The appellant contended that the sentence was excessive. An appellate court would interfere with the trial court's sentence only where there exists, to a sufficient extent, circumstances entitling it to vary the trial court's order. These circumstances were well illustrated in the case of *Nillson vs 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 Vs. 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 vs SHERSHEWSITY* (1912) C.CA 28 T.LR 364.

18. In the instant case, the learned trial magistrate meted out the minimum prescribed sentence. It cannot be described as excessive.
19. I therefore find that the appeal lacks merit and is dismissed.

DELIVERED AND SIGNED AT NYANDARUA, THIS 13TH DAY OF NOVEMBER 2025

KIARIE WAWERU KIARIE

JUDGE

