



**Ngala v Republic (Criminal Appeal E128 of 2023)  
[2025] KEHC 17695 (KLR) (28 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 17695 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL APPEAL E128 OF 2023  
M THANDE, J  
NOVEMBER 28, 2025**

**BETWEEN**

**YUSUF KAZUNGU NGALA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Appellant herein, was convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* (SOA) in Kaloleni Sexual Offences Case No. E017 of 2023 and sentenced to 10 years imprisonment. The particulars of the offence are that on diverse dates between 13.3.22 and 29.5.23 at Gogoraruhe village, Kayafungo, Kaloleni sub-county within Kilifi county, intentionally and unlawfully caused his penis to penetrate the vagina of J. M. K., a child aged 17 years.
2. Being aggrieved by the decision of the trial Magistrate, the Appellant has appealed to this Court against both the conviction and sentence. In his amended grounds of appeal, he faulted the trial magistrate for failing to consider that the defence under Section 8(5) of the SOA was available to him in the circumstances of the case. Further that the trial magistrate imposed upon him a harsh sentence.
3. As a first appellate Court, I have subjected the evidence adduced before the trial Magistrate to a fresh analysis and evaluation while giving due allowance for the fact that unlike the trial court, I neither saw nor heard the witnesses. See *Okeno v. Republic* [1972] EA 32.
4. The Respondent filed submissions dated 20.2.24 and submitted that against the provisions of the law, the trial court imposed a lesser sentence than that provided by law. The Respondent contended that the Appeal lacks merit.
5. Section 8(5) of the SOA provides:



- (5) It is a defence to a charge under this section if—
- a. it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
  - b. the accused reasonably believed that the child was over the age of eighteen years.
- (6) The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.
6. For this defence to be available to an accused person, it must be raised at trial to enable the prosecution respond and the trial court pronounce itself on the same. Such accused person must demonstrate that at the time of the alleged commission of the offence, he was deceived into believing that the child was over 18 years old. The trial court then determines the matter taking into account all circumstances including any steps the accused person took to ascertain the age of the complainant.
7. I have looked at the record. The Appellant did not raise this defence at the trial. Indeed, in his defence, he denied knowledge of the Complainant.
8. It is trite law that no appeal can lie on an issue in respect of which a decision has not been made by the lower court. This was the holding in *Kipkorir v Republic (Criminal Appeal E056 of 2022) [2024] KECA 745 (KLR) (21 June 2024) (Judgment)* where the Court of Appeal stated:
- We are of the considered opinion that this court sitting as a second appellate court can only entertain matters that were considered by the court being appealed from. An appeal can only lie where there has been a decision made by a lower court. If an issue was not brought up before the lower court, and therefore not determined, then any decision made by the appellate court would not be considered a judgment on an appeal.
9. Flowing from the cited decision, it is clear that this Court can only entertain a matter that was considered and decided by the court below. The defence in Section 8(5) of the SOA, having not been raised in the trial court and therefore not determined, cannot be considered by this Court on appeal. Accordingly, the ground is rejected.
10. As regards sentence, Section 8(4) of the SOA provides that a person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years. Having convicted the Appellant of the offence with which he was charged, the trial Magistrate ought to have sentenced the Appellant to 15 years imprisonment. It is not clear why the trial Magistrate chose to impose a sentence of 10 years which is against the express provisions of the law. However, given the that Respondent did not ask for an enhanced sentence, I shall leave the matter there.
11. In the end, for the reasons stated, the Appeal lacks merit and is dismissed. The conviction and sentence are upheld save that the sentence shall commence from 29.5.23, when the Appellant was arrested.

**DATED, SIGNED AND DELIVERED IN MALINDI THIS 28<sup>TH</sup> DAY OF NOVEMBER 2025**

.....

M. THANDE

**JUDGE**

