



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYANDARUA**

**CRIMINAL APPEAL NO. E034 OF 2025**

**JOSEPH MWANGI GITANGA..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in the S.O. Case NO. E013 of 2024 of the Senior Principal Magistrate's Court at Engineer by Hon. E.N. Wanjala-Principal Magistrate)*

**JUDGMENT**

1. Joseph Mwangi Gitanga, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006.
2. The particulars of the offence are that on diverse dates between the month of September 2023 and the 8<sup>th</sup> day of April 2024 at Mutonyora B in Magumu location of South Kinangop Sub-County, within Nyandarua County, he intentionally and unlawfully caused his penis to penetrate the vagina of F.W.M., a child aged thirteen years.
3. The appellant was sentenced to serve twenty years' imprisonment. He was aggrieved and filed this appeal against the conviction and sentence. He raised the following grounds of appeal:
  - a) The learned trial magistrate erred in matters of law and facts by convicting the appellant, whereas all the elements of defilement were not conclusively established.
  - b) The learned trial magistrate erred in matters of law and fact by convicting on inadequate evidence.
  - c) The learned trial magistrate erred in matters of law and facts for failing to prove that the prosecution's case was not proved beyond a reasonable doubt.

- d) The sentence awarded was harsh and did not factor in the sentencing policy guidelines.
4. The state opposed the appeal through M/S Vena Odero, learned prosecution counsel. She argued that the evidence was sufficient to support a conviction and that the sentence was appropriate.
  5. This is the first appellate court. As expected, I have analyzed and evaluated all the evidence adduced before the lower court afresh. I have drawn my conclusions, having neither seen nor heard any witnesses. I will be guided by the celebrated case of **Okeno vs Republic [1972] EA 32.**
  6. For an offence of defilement to be established against an accused person, the prosecution must prove the following ingredients:
    - a) That there was penetration of the complainant's genitalia;
    - b) That the accused was the perpetrator and
    - c) The victim must be below eighteen years old.

This position was echoed in the case of **Fappyton Mutuku Ngui vs Republic [2012] eKLR.**

Ngugi J. (as he was then) said:

*Going by this definition of defilement... the issues which the court needs to determine...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.*

7. I will determine if the prosecution proved these ingredients to the required standards.
8. Joseph Mwangi Gitanga, the appellant, denied involvement in the offence. He argued that he used to assist the complainant's mother when she was unwell. He reported the complainant on several occasions when he found her standing with boys.
9. F.W.M. (PW1), the complainant, said she was 13 years old when she testified on the 23<sup>rd</sup> day of September 2024. She, however, said she did not know when she was born. The doctor who examined her gave her age as 13 years. Her age was therefore proven.
10. The medical evidence presented by Dr Mita Godfrey Ochieng (PW3) was that when he examined the complainant on 11 June 2024, her external genitalia appeared normal except that the hymen was broken with old tags. He therefore concluded that there had been

penetration. However, a broken hymen alone cannot serve as proof of penetration. This was also the view of the Court of Appeal in P. K.W vs Republic [2012] eKLR. The court observed as follows:

***“15. In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the finding that the child’s hymen had been broken. Was this justified” Is hymen only ruptured by sexual intercourse.***

***16. Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina (sic) with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it, like the use of tampons, masturbation injury, and medical examinations can also rupture the hymen when a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be a natural tearing of the hymen. See the Canadian case of The Queen vs Manuel Vincent Quintanila [1999] AB QB 769.”***

11. I will therefore endeavour to determine if there is any other evidence on record that supports the medical findings.
12. F.W.M. (PW1), the complainant, was evasive in her evidence. In her main testimony, she initially stated that on the day she was defiled, she was washing utensils. However, she immediately changed her account, saying she had lit a fire while her mother was at Gitaru. She could not remember the date. The doctor who examined her stated that the first incident occurred in September and the last in May, but did not indicate which year.
13. The complainant informed the court that the third incident was in the appellant’s kitchen, where she had gone for githeri. L.W.M. (PW2) testified that the complainant informed her that the appellant found her in their kitchen while enquiring about her mother, who had been taken to the hospital. This is where he defiled her. During cross-examination, she said that the complainant informed her that the appellant started to defile her when her mother started

to become ill. From her evidence, the complainant's mother became ill in March 2024. She confirmed that the complainant did not inform her that the appellant started to defile her while she was in grade 4.

14. When the complainant changed her version several times, it portrayed her as an untruthful witness. 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.*

15. The proviso to section 124 of the Evidence Act states:

**Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.**

16. The complainant's evidence was not corroborated. Given the numerous discrepancies I highlighted, it was unsafe to rely on it for a conviction. The conviction is quashed, and the sentence is set aside. The appellant is released unless otherwise lawfully detained.

**Delivered and signed at Nyandarua on the 3<sup>rd</sup> day of December 2025**

**KIARIE WAWERU KIARIE  
JUDGE**