



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYANDARUA
CRIMINAL APPEAL NO. E019 OF 2024

JOSEPH MUCHIRI WAIRIMU..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O. Case No. E002 of 2024 of the Senior Principal Magistrate’s Court at Engineer by Hon. E. Wanjala– Principal Magistrate)

JUDGMENT

1. Joseph Muchiri Wairimu, the appellant herein, was convicted of the offence of defilement of a girl contrary to section 8 (2) of the Sexual Offences Act No. 3 of 2006.
2. The particulars of the offence were that, on unknown dates in 2023, at Gathara village in North Kinangop sub-county within Nyandarua County, he intentionally caused his penis to penetrate the vagina of E.L.W., a child aged four years.
3. The appellant was sentenced to life imprisonment. He has appealed against both the conviction and the sentence. He appeared in person and raised the following grounds of appeal:
 - a) The learned trial magistrate erred in law and fact by convicting the appellant, but failed to note that the age of the complainant was not conclusively proved.
 - b) The learned trial magistrate erred in law and fact by convicting the appellant, but failed to note that either identification or recognition did not prove the identification of the assailant.
 - c) The learned trial magistrate erred in law and fact by convicting the appellant, but failed to note that the penetration was not proved.
4. The state opposed the appeal through Odera Vena, learned counsel, because:
 - a) There was sufficient evidence that proved the charge to the required standards.
 - b) The sentence was appropriate.
5. This court is an appellate court. As expected, I have carefully reviewed and assessed all the evidence presented to the lower court, bearing in mind that I did not witness any of the

witnesses testify. Therefore, I will follow the well-known case of **Okeno vs Republic [1972] E. A 32** to guide my decision-making process.

6. 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 victim must be below eighteen years old.

This position was echoed in the case of **Fappyton Mutuku Ngui vs Republic [2012] eKLR** when Joel Nguigi J. said:

Going by this definition of defilement, I agree with Mr. Mwenda on the issues 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. Joseph Muchiri Wairimu, the appellant, denied that he defiled the minor.
8. Dr Karanja Newton (PW3), who examined the complainant, stated that she was about four years old. Eliud Ndirangu Waititu (DW2), in whose home the complainant was staying at the time, testified that she was four years old. His wife (DW3) testified that they started living with the complainant in 2022, when she was three years old. The complainant's age was proven to the required standards.
9. E.L.W. (PW1) testified that the appellant lied to her that there was a baby on his bed. When she went to check, she did not find a baby. The appellant instead made her lie on the bed with her face up. According to her evidence, this is what transpired:

He lay me on his bed. He took me to his house. I went outside. I found my grandmother asking for me, calling for Vanesa and Shiko. When I lay on Muchiri, my grandfather was looking for Vanesa and Shiko. When I lay on Muchiri's bed, I closed my eyes. I was driving a vehicle. I felt bad. When he lay me on his bed, he touched my susu, he poked my eyes. I touched his stomach he spoke to me badly. I got shocked. He said to me Shiko. He beat me. I told my grandmother. My grandmother washed me first, and my mum came for me. Nothing happened. Muchiri inserted a kadudu in my private parts. The minor points between her legs. I bled. Muchiri wanted me to bleed. I called the police to come arrest him when Muchiri put his kadudu in my kasusu. I did

not have clothes. He also removed all his clothes. When Muchiri lay me on his bed, there was another small baby, very small, on his bed. I told Shosho about how Muchiri put his Kadudu to my kasusu. Shosho said Let him be. Mum called the police officers.

10. The evidence of this minor was incoherent. She mentioned driving a vehicle, but there was no attempt to clarify from her what she meant. Her evidence required corroboration due to incoherence.
11. Logically, one is unable to reconcile her age with what she said the appellant did to her. In the case of **Ben Maina Mwangi v Republic [2006] eKLR Lesiit, J.** (as she then was) observed:

Bearing in mind she was a child of tender years being only 4 years at the time, for the offence to be proved there should have been evidence adduced to show that the Appellant used some force on her or something tending to show an assault or infliction of pain. At least some evidence needed to be adduced from which it could be construed that defilement took place. Considering the Complainant's age as compared to the Appellant, if any attempt were made to penetrate the Complainant's private parts it would be expected that the Complainant must have felt pain, if not excruciating pain. There is no way the Complainant would forget the experience or that detail in her evidence.

12. When the complainant testified that she reported to her grandmother what the appellant did to her, and she told her to let him be, her evidence becomes perplexing. Since she was the one who washed her, she should have noticed that all was not well with her. This was a material witness whom the prosecution failed to call. According to the investigating officer, PC Tabitha Watina (PW4), the girl's grandmother was harsh and refused to cooperate. This is a compellable witness, and this explanation raises questions about the veracity of the prosecution's case. The Court of Appeal in the case of **Bukenya vs Uganda [1972] EA 549** (Lutta Ag. Vice President) held:

The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

13. Mary Muthoni King'ori (DW3) is the complainant's grandmother who was staying with her. She gave a history of how she came to be in the complainant's custody. The maternal grandmother requested her to stay with the child since July 2021 and not to release the child to its mother. She informed the court that the complainant's mother had told her she was

going to pick up the girl to take her to an academy in Nairobi, which she did on 18 December 2023. She instead took the child to Nyeri.

14. Her evidence was that she was the one who used to wash the child and saw her on the day her mother went to pick her up. If she had been defiled, she would have been unable to fail to notice. She further testified that when the lady officer visited her home, the officer asked her only for a toy car and did not request her to record a statement.
15. Eliud Ndirangu Waititu (DW2) testified that the child was going to church with her grandmother and nothing abnormal had been noted.
16. The upshot of the preceding analysis of the evidence is that the conviction was unsafe. I quash the conviction, set aside the sentence, and set the appellant at liberty unless lawfully held.

Delivered and signed at Nyandarua, this 3rd day of December 2025

KIARIE WAWERU KIARIE

JUDGE