REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYANDARUA

CRIMINAL APPEAL NO. E020 OF 2025

DAVID KIMANI NJUGUNA……...……. APPELLANT

VERSUS

REPUBLIC ……. RESPONDENT

(From the original conviction and sentence in S.O. Case No. E014 of 2024 of Senior Principal Magistrate's Court at Engineer by Hon. E. Wanjala–Principal Magistrate)

JUDGMENT

1. David Kimani Njuguna, the appellant, was convicted in two counts of grievous harm contrary to section 234 of the Penal Code. The particulars of the offence in count one were that on the 27th day of May 2024, at Matura area, Magumu location, South Kinangop sub-county, within Nyandarua County, unlawfully did grievous harm to M.W.
2. In count two, the particulars were that on the same day at the same place, he did grievous harm to F.N.
3. He was also convicted of the offence of defilement of a girl contrary to section 8 (3) of the Sexual Offences Act No. 3 of 2006.
4. The particulars of the offence were that on the same day and place, he intentionally caused his penis to penetrate the vagina of F.N., a child aged fifteen years.
5. The appellant was sentenced to serve 40 years' imprisonment in count one and life imprisonment in counts two and three. The sentences in counts 1 and 3 were ordered to be held in abeyance. He has appealed against both conviction and sentence. He raised the following grounds of appeal:
    a) The learned trial magistrate erred in matters of law by convicting on inadequate evidence.
    b) The learned trial magistrate erred in matters of law and facts in finding that the prosecution's case was not proved beyond a reasonable doubt.

c) The learned trial magistrate erred in matters of law and facts by convicting me, whereas failing to have the convictions run concurrently

a) That by merits of the case and other emerging jurisprudence, a 20-year imprisonment term is harsh and inappropriate under the circumstances of the case.

6. The state opposed the appeal on the grounds that:

   a) There was sufficient evidence on both counts.

   b) The sentences were commensurate with the offences.

7. This court is an appellate court. As expected, I have carefully reviewed and assessed all the evidence presented to the lower court, keeping 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.

8. 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 Ngugi 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.

9. F N. (PW5) testified that she was born on the 6th day of June 2008. A copy of her birth certificate confirmed the same. As of the 27th day of May 2024, she was 10 days shy of her 16th birthday. Her age was therefore proven.

10. The complainant was examined at the Engineer County Hospital. Dr Patrick Wakahiu (PW7) produced the medical report on behalf of Dr Karanja, who examined her and completed a P3 form dated June 7, 2024. She sustained multiple cut wounds on the side and

back of the head. She sustained a fracture of the right hand. Her hymen was freshly broken, and she was wearing blood-stained clothes.

11. In her evidence, F N. (PW5) stated that she was left at home to do domestic chores and to mind her siblings. When she was going to tether a cow, she found the appellant squatting near their farm. He had a knife inside his jacket. He pointed the knife at her, grabbed her and took her to a house he had newly constructed in the forest. He did this despite her screams. Her younger siblings cried and followed her. He declared that he was going to kill them. He injured her in several places on her body. He then proceeded to defile her as the other children watched. He announced that he was going to kill them at 5 p.m. He smoked something and then fell asleep. Luckily, they were rescued by their parents.
12. Nicholas Kamware Wanjiku (PW1) testified that when they were searching for the children, they found them in the house of the appellant, which was full of blood. He gained entry after struggling with the appellant, who attempted to hit him with a metal bar. He found F N. (PW5) naked on the lower part of her body. M.A. was injured. B., a boy aged 2 years and 7 months, unfortunately, was dead. PW2, PW3 and PW4 replicated this evidence.
13. When M.W. was examined, she was found to have a fracture on the left parietal and right frontal bones of her skull. The conclusion was that she sustained grievous harm.
14. David Kimani Njuguna, the appellant, denied any involvement in the offences. However, the evidence against him was overwhelming. He was convicted on irrefutable evidence.
15. 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.

16. The appellant committed very grave offences. He has not provided any reasons to demonstrate that the learned trial magistrate acted upon some incorrect principle or overlooked some material factor.
17. The upshot of the foregoing analysis of evidence is that I find the appeal has no merit. The same is dismissed.

Delivered and signed at Nyandarua, this 15th day of December 2025

KIARIE WAWERU KIARIE

JUDGE