

**IN THE COURT OF APPEAL  
AT NAIROBI**

**(CORAM: KIAGE, MUCHELULE, & KORIR,**

**JJ.A.) CRIMINAL APPEAL NO. 109 OF 2017**

**BETWEEN**

**MICHAEL MUNE NJENGA ALIAS KARATI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against the judgment and decree of the High Court at Nairobi  
(L. Achode, J.) dated 15<sup>th</sup> October  
2014 in*

***HCCRA No. 329 of 2021)***

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**JUDGMENT OF THE COURT**

1. The appellant, Michael Mune Njenga alias Karati, was charged with, and convicted of, defilement contrary to **section 8(1)** as read with **section 8(2)** of the **Sexual Offences Act, 2006** in Count 1 in the Senior Resident Magistrate's Court at Gatundu. He was sentenced to life imprisonment. The complainant (D.W.W.) was found to have been born on 13<sup>th</sup> May 1999 at the time of the offence, thereby being 10 years, one month and 22 days.
2. The appellant faced Count 2 of defilement under **sections 8(1)** and **8(3)** of the **Act**, but, although it was found that he had sexually assaulted the complainant therein (D.N.) in the same

incident, the age of the complainant had not been proved. This led to the appellant's acquittal on the charge.

3. The appellant was aggrieved by the conviction and sentence in Court I and appealed to the High Court at Nairobi. The High Court (L.A. Achode, J.) (as she then was) heard the appeal which it dismissed in its entirety.
4. The appellant is now before us on second appeal. Our duty is strictly limited to matters of law, not fact. We will not re-evaluate the evidence unless the lower courts failed to consider relevant material, considered irrelevant material, or were plainly wrong, thereby making their findings of fact perverse (See ***Sichei -vs- Republic, Criminal Appeal No. 8 of [2025] KEC 152 (KLR)***).
5. The evidence upon which the appellant was convicted was that on 4<sup>th</sup> July 2009, D.W.W. and D.N. went to his house and remained there throughout the night. The appellant slept with D.W.W. and then with D.N. This happened on the appellant's bed. The appellant came from the same village as the complainants and they knew him well.
6. D.W.W.'s evidence was that the appellant, after removing her clothes and his, he put his penis between her legs and penetrated her. She felt pain and bled. She had not had any sexual interaction before. She reported to her mother (M.W.K.) and the incident got to the police who had her examined at Igegania Dispensary where the P.R.C. Form was completed, and subsequently the P3 as completed by Dr. Rose Chemwei

(PW 3),

of Gatundu District Hospital, who found that the child's outer genitalia was normal but the hymen was perforated.

7. The appellant's unsworn statement in defence was that he had been framed by D.W.N. (the mother of D.N.) who had given him casual work but had failed to pay him; instead promising to frame him. He denied sleeping with the two complainants.
8. This is the evidence that the trial court considered and, on it, convicted the appellant in respect of D.W.W.
9. On first appeal, the grounds were that the prosecution's case was not proved to the required standard; there was no evidence to show that the appellant had absconded following the incident; and that the medical evidence was not conclusive and did not support the act of penetration. The appellate court reviewed the evidence, dismissed each ground and found that the appellant had been properly convicted and sentenced.
10. Before this Court, the appellant's grounds were that the High Court erred by sustaining his conviction when the elements of defilement were not conclusively proved; when PW 1 and PW 2 were not truthful witnesses; when the *voir dire* was badly conducted in contravention of **section 124** of the **Evidence Act** as read with **section 19** of the **Oaths and Statutory Declarations Act**; when he was convicted on a defective charge sheet contrary to **section 214** of the **Criminal Procedure Code**; when he was denied the right to recall

witnesses; and when his constitutional rights were violated.

11. We hasten to point out that the grounds that the appellant's constitutional rights were violated because the charge sheet was improperly amended and he was not allowed to recall witnesses; that there was improper conduct of *voir dire*; that PW 1 and PW 2 were not truthful witnesses; and that the charge sheet was defective, were not raised during the first appeal. On the basis of **Republic -vs- Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) Petition No. E018 of 2023 [2024] KESC 34 (KLR)**, we cannot assume jurisdiction to determine grounds that were not raised before the first appellate court and a decision made thereon.
12. On whether appellant was convicted on sufficient evidence on a charge of defilement, we consider that the two courts below accepted that D.W.W. was 10 years old when she was sexually assaulted by the appellant; that she was sexually penetrated by the appellant as testified to by her and D.N., and as confirmed by her perforated hymen as shown by PW 3; and that, it was common ground that the appellant was a fellow villager, a neighbour, who was known to the complainant. We have no reason to depart from those concurrent factual findings that clearly and compellingly proved the charge. We are mindful of the observations by this Court in **Mwaura -vs- Republic, Criminal Appeal No. 54 of 2019 [2025 KECA 1487 (KLR)** that

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***“In a charge of defilement, the prosecution***

***is required to prove that the victim was a child, was***

***penetrated and the accused person was the penetrator.”***

13. Once it was proved that D.W.W. was 10 years, under **section 8(2)** of the **Sexual Offences Act** the lawful sentence was life imprisonment.
14. In conclusion, we find no merit in the appeal which we dismiss in its entirety.

**Dated and delivered at Nairobi this 30<sup>th</sup> day of April 2026.**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**A.O. MUCHELULE**

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**JUDGE OF APPEAL**

**W. KORIR**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

***Signed***

**DEPUTY**

**REGISTRAR.**