



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ngeno v Republic (Criminal Appeal 298 of 2019)  
[2025] KECA 112 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KECA 112 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 298 OF 2019  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
JANUARY 24, 2025**

**BETWEEN**

**DENNIS KIPNG'ETICH NGENO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at Kisii  
by (D.S. Majanja) dated 30th April 2019 in HCCRA No. 98 of 2018)*

**JUDGMENT**

1. Dennis Kipn'getich Ngeno, the appellant herein, was charged and convicted in the Principal Magistrate's Court at Kilgoris on the offence of defilement contrary to section 8(1) & (3) of the *Sexual Offences Act*. The particulars were that on 21<sup>st</sup> September 2015 at Soit in Transmara West of Narok County, he caused his penis to penetrate the vagina of CC<sup>1</sup> a child aged 14 years. The <sup>1</sup> Initials used to protect identity appellant was tried and convicted of the offence and sentenced to 20 years imprisonment.
2. The appellant, being dissatisfied and aggrieved with both conviction and sentence, appealed to the High Court, which affirmed and upheld the decision of the subordinate court. Dissatisfied with the outcome, he now appeals to this Court.
3. We have carefully considered the record of appeal, submissions by counsel, the authorities cited and the law. This being a second appeal, we are mindful that a second appeal under Section 361(1) of the Criminal Procedure Code, must only be confined to points of law; and this Court will not interfere with concurrent findings of the two courts below unless based on no evidence. The test to be applied on a second appeal is whether there was any evidence on which the trial court could find as it did. See *Karingo & 2 Others vs. Republic* [1982] eKLR.



4. The evidence before the trial court; and which was considered by the High Court was as follows: NC, the complainant, testified as PW1, stating that on 20<sup>th</sup> September at 7.00pm, she was with the appellant at his house, when he declared to her that he wanted to marry her. Apparently, they used to talk and had known each other prior for a month. She testified that she was not allowed by anyone to go to the appellants home, but she nonetheless went there; and that on a Tuesday they had sex. The police then showed up at the appellant's house on the Thursday after, and complainant was taken to hospital. The appellant was not in the house.
5. On 20<sup>th</sup> September 2015, JC, PW2, the complainant's father, received information that his daughter had run away with a certain man. PW2 reported to her teachers and the police and the search for the complainant began. PW2 later on received information that the complainant was at the appellant's home and on reaching there only found the complainant. The appellant was arrested later.
6. Kimutai Kirui John, PW3, the clinical officer, testified that the complainant was examined on 25<sup>th</sup> September 2015. The medic noted that her private parts had no bruises or lacerations but that the hymen was broken. There was a whitish discharge and lab tests showed pus cells and yeast. The medic concluded that there had been penetration on the basis of the broken hymen and the presence of the Urinary Tract Infection (UTI).
7. Sgt. John Mumbo, PW4, the Investigating Officer, recalled that PW2 had reported the complainant missing on 23<sup>rd</sup> September 2015, and that the complainant was later on found at the appellant's house. The appellant was later on arrested on 16<sup>th</sup> October 2016.
8. In his defence the appellant denied the offence and stated that he was arrested as PW2 had a grudge against him.
9. The trial court, having considered both the prosecution and appellant's case, was satisfied that the ingredients of the offence of defilement had been proved by the prosecution, pointing out that PW1 gave a clear testimony describing in graphic detail what the appellant did to her which amounted to penetration; that the fact of penetration was corroborated by PW1, and the medical evidence of PW3, as demonstrate formed by the findings recorded in the P3.
10. On the issue of identification, the trial court was satisfied that the appellant was properly identified. The complainant stated that she had been talking with the appellant for over a month and even stayed at the appellant's house. There is no way that the appellant was mistakenly identified. In his defence, the appellant stated that PW2 had a grudge against him, leading to the question, how does one have a grudge against someone one doesn't know?
11. The trial court noted that on the question of the complainant's age, that the same was a question of fact. The court had no doubt that the complainant was below 18 years as the P3 and treatment notes showed that the complainant was 14 years; and the complainant's father also testified that the complainant was 14 years old.
12. On the appellant's defense that PW2 had a grudge against him, the court noted that the same was raised late in the proceeding and the same was an afterthought; and in any event, there was no evidence produced by the appellant regarding the said grudge.
13. The High Court, from the evidence on record, upheld the conviction by the lower court and affirmed the sentence, as under section 8(3) of the Act the sentence of 20 years was a mandatory minimum sentence, and dismissed the appeal.



Being dissatisfied and aggrieved with the sentence, the appellant has now filed this appeal with the following amended ground of appeal:

- i. The trial judge erred in law and fact by holding that the absence or missing hymen was a proof of penetration.
  - ii. The trial judge erred in law and fact by failing to put into consideration the mitigation factors raised by the appellant during sentencing.
14. In his written submissions, the appellant points out that on cross-examination, the clinical officer said: "There was an infection but I cannot tell who infected her. I cannot tell who broke the hymen. I cannot tell who defiled the minor", He argued that the medical evidence given by PW3 did not have corroborative value at all and never linked the appellant to the offence; that in any case, the appellant was not taken for medical examination to ascertain whether he also had the urinary infection hence it was wrong for the trial judge to come to a conclusion that he was the culprit; that where the medical examination is not conclusive such as in this matter, the court ought to have weighed with thorough scrutiny and utmost caution the evidence of the child in order to determine whether there was penetration; and that it was not logical for the clinical officer to come to a conclusion that a sign of urinary tract infection and the absence of the hymen was proof of penetration hence defilement.
15. To solidify his argument in what he terms as an erroneous presumption about the absent hymen, the appellant submits that although most female infants are born with the membrane that covers the vagina, commonly known as hymen, scientific and medical evidence have proved that some girls are born without a hymen, and the membrane to the vagina is capable of tearing through factors other than sexual intercourse, which include insertion of objects like the use of tampons, masturbation, injury, medical examinations, which can rupture and naturally tear the hymen.
16. At the hearing, the appellant withdrew his appeal against conviction; and chose to address this Court on sentence only. The appellant contends that his mitigation was not considered when passing sentence, pointing out that in mitigation, he asked for forgiveness and prayed for leniency. The respondent was not averse to this Court interfering with the sentence given the circumstances of the case; and the fact that the appellant was remorseful and had prayed for leniency,
17. With regard to the severity of sentence. The appellant is therefore not just questioning the severity of the sentence imposed upon him, but has raised issues of law regarding the place of mitigation when a court metes out a mandatory sentence, that calls for determination by this Court.
18. We acknowledge that in regard to the discretion in sentencing, as stated by this Court of Appeal in *Bernard Kimani Gacheru - vs. Republic (2002) eKLR*:
- “It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”
19. We are aware that prior to July 2024, there was a growing jurisprudence drawn from the Supreme Court decision in the case of *Francis Karioko Muruatetu and Anor, vs. R [2017] eKLR* that mandatory sentences were unconstitutional, and there followed a wave of mandatory sentences being set aside and



substituted with term sentences which the courts perceived to be appropriate. However, this position has shifted following the Supreme Court in *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR)*:

“Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue leaving it open to the discretion of the court to impose a harsher sentence.”

20. The upshot is that to the extent that mandatory sentences are clearly provided for in the *Sexual Offences Act*, the trial court has no option, but to impose it. The sentence imposed on the appellant of 20 years was the mandatory minimum sentence as provided in section 8(3) of the *Sexual Offences Act*. The discretion of the two courts below to mete out a sentence to the appellant that was commensurate with the circumstances of the case and in accordance with the provisions of the Statute.

21. The upshot of the foregoing is that the appellant's appeal on sentence fails and is dismissed.

**DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF JANUARY, 2025.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

