



**Ndaru v Republic (Criminal Appeal 37 of 2019)  
[2025] KECA 961 (KLR) (23 May 2025) (Judgment)**

Neutral citation: [2025] KECA 961 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CRIMINAL APPEAL 37 OF 2019  
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA  
MAY 23, 2025**

**BETWEEN**

**HASSAN MUCHIRI NDARU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the decree and judgment of the High Court at  
Kerugoya (L.W.Gitari, J.) dated 7th February 2019 in HCCRA No. 12 of 2017)*

**JUDGMENT**

1. This is a second appeal against conviction and sentence by the Gichugu Principal Magistrate's Court where the appellant was charged with defilement contrary to section 8(1) as read with section 4 of the *Sexual Offences Act*. In the alternative he was charged with committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The girl at the time of the offence was said to be 16 years old. The appellant pleaded not guilty to the offence and the matter proceeded to hearing. In support of its case the prosecution called seven witnesses while the appellant made an unsworn statement of defence.
2. The complainant (A.W.N.) had been sent by her mother to take milk to the market and to also buy medicine. She said that on her way back she met with one of her classmates and they started chatting. At some point, they met the appellant, who she said started pulling her whereby she lost consciousness and she did not know what transpired. She said that she came to at 4.00 a.m. and found herself in bed beside the appellant. She did not go back home and her parents started looking for her.
3. The following morning the Assistant Chief called to inform them that their daughter had been found at the appellant's house. The appellant and the complainant were both escorted to the police post and later to the Kianyaga Police Station where a case of defilement Was reported.



4. JNG (PW3), the complainant's father, testified that he knew the appellant as a butcher man at Mbiri Market. When he was informed about their missing child, he called the elder in- charge of the area who advised him to report the matter to the Police Station. He then received information that the complainant had been found at the appellant's house. The appellant and the girl were both arrested and escorted to the Kianyaga Police Post.
5. Beatrice Wanjiru Kubai (PW7), a medical officer at Kianyaga Sub- County Hospital examined the complainant and found the hymen was broken, the vagina was inflamed at the opening, there was no spermatozoa and the conclusion was, that she had been defiled because of the excessive trauma at the opening of the vagina. The appellant was subsequently charged with the offences mentioned above.
6. In his defence, the appellant confirmed that he was a butcher man at Mbiri Market, he did not recall the date of arrest but that he was at his place of work in the morning when police officers went to his butchery and arrested him without telling him the reason for his arrest. The police had gone to his shop with the complainant whom he said he did not know before.
7. The trial magistrate found the charge proved, and found the appellant guilty as charged for the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* and convicted him under section 215 of the *Criminal Procedure Code* and sentenced him to 15 years' imprisonment.
8. He was dissatisfied with the decision and appealed to the High Court. Unfortunately for him, the appeal was not successful, and the learned Judge confirmed both conviction and sentence on 7<sup>th</sup> February 2019.
9. He was dissatisfied with the decision of the learned Judge and he filed this appeal citing grounds that the learned Judge erred in supporting the trial magistrate's decision which was erroneous; failed to consider that penetration was not proven to the required standard; failed to consider that the identity of the perpetrator was not proved; failed to consider that the investigations conducted were shoddy and unfounded; failed to consider that the appellant was not medically examined to prove the commission of the offence; that the learned Judge shifted the burden of proof to the defence and failed to give his defence and mitigation enough consideration.
10. When the appeal came up for hearing before for us, the appellant was present in person while the respondent was represented by learned State Counsel Mr. Naulikha. The appellant told the Court that all he wanted was the Court to relook into his sentence and that he had abandoned his appeal against conviction. He said that he was unwell and urged the Court to reduce his sentence.
11. On his part, Mr. Naulikha told the Court that he was relying on his written submissions. He said that the sentence was lawful and it was within the law and urged the Court not to interfere with it and to dismiss the appeal in its entirety.
12. The appeal before us is on the sentence of the 15 years' imprisonment imposed on the appellant by the trial court and confirmed by the High Court on 1<sup>st</sup> appeal. This being a second appeal by dint of section 361(1) of the *Criminal Procedure Code*, our remit is restricted to consideration of matters of law only. Severity of the sentence pursuant to section 361(2) of the *Criminal Procedure Code* is a question of fact. We cannot, therefore, interfere with the sentence.
13. In the circumstances the appeal is dismissed in its entirety, but pursuant to section 333(2) of the *Criminal Procedure Code* the appellant is entitled to be given the benefit of the time he spent in remand pending the hearing and determination of his case before the trial court and that time should be deducted from the 15 years which he has been serving. The prisons authorities are, therefore, ordered to recompute the appellant's sentence only to that extent. It is so ordered.



DATED AND DELIVERED AT NYERI THIS 23<sup>RD</sup> DAY OF MAY 2025.

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**JAMILA MOHAMMED**

.....

**JUDGE OF APPEAL**

**A.O. MUCHELULE**

.....

**JUDGE OF APPEAL**

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

Signed

Deputy Registrar

