



REPUBLIC OF KENYA



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**Ngemo v Republic (Criminal Appeal 52 of 2019)
[2025] KECA 1079 (KLR) (20 June 2025) (Judgment)**

Neutral citation: [2025] KECA 1079 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 52 OF 2019
JM MATIVO, PM GACHOKA & WK KORIR, JJA
JUNE 20, 2025**

BETWEEN

JAPHET KIPLANGAT NGENO APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal against the judgment of the High Court at Kericho (Mumbi Ngugi, J.) dated 27th February 2019 in HCCRA No. 39 of 2017)

JUDGMENT

1. The appellant, Japhet Kiplangat Ngemo, is currently serving a sentence of 20 years imprisonment after he was convicted for the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. The particulars of the charge were that on diverse dates between 11th and 12th of March 2016 at [Particulars withheld] Trading Centre within Kericho County, the appellant unlawfully caused his penis to penetrate the vagina of J.C., a girl aged 14 years. He denied the charge but was found guilty and convicted after a full trial. His appeal to the High Court was dismissed on 27th February 2019 by Mumbi Ngugi, J. (as she then was) and he is now before us on a second appeal.
2. Before us, the appellant is raising three grounds of appeal, to wit, that the sentence is excessive, that the evidence of PW1 was taken without voir dire examination, and that the ingredients of the offence of defilement were not proved.
3. In establishing the case against the appellant, the prosecution relied on the evidence of four witnesses. J.C. who testified as PW1, stated that she was born on 17th January 2002. Her evidence was that on 10th March 2016, after arriving home from school, she went to [Particulars withheld] market to buy past examination papers. At the market, she met the appellant, whom she knew as an employee of their neighbour. They took a motorbike to a rental house where they spent the night, but did not have sex. The next morning, the appellant locked her in the room and went to work, returning with food in



- the evening. They spent another night together, during which they had sex for the first time, and she bled. She stated that the appellant cleaned her with a towel and later washed the towel. The following day, the appellant once again locked her in the house and left for the market. The appellant returned with food and told her that her father was looking for her. The appellant then escorted her to the main road, where she met W., who called her father (PW2) before taking her home. When questioned by her father, she told him that she had been with the appellant. She was taken to [Particulars withheld] Police Station, and the next day, she was examined at Kericho District Hospital and a P3 form filled for her.
4. A.B. (PW2), the father of PW1, stated that the complainant was born on 17th January 2002. On 10th March 2002, he arrived home at around 7.00 pm only to find the complainant was not home. He went to look for her in her grandmother's house, which was nearby, to no avail. The next day, the headteacher of the complainant's school informed him that the complainant had skipped school. He reported the matter to the area chief and at the [Particulars withheld] Police Station. On Sunday, he made an announcement in church that his child was missing. At about 7.00 pm on the same day, he received a call from W. informing him that he had found the complainant. The complainant was escorted home by W., after which they proceeded to [Particulars withheld] Police Station together with the appellant. The following day, he escorted the complainant to [Particulars withheld] Health Centre, from where she was referred to Kericho District Hospital, where her P3 form was filled.
 5. Philip Rotich (PW3) examined the complainant at Kericho District Hospital on 14th March 2016. He noticed bruises on the labia minora and a broken hymen while the vagina had a whitish discharge. Laboratory examination revealed that the child was pregnant. Due to the presence of pus cells in the urine, he concluded that the minor had a sexually transmitted infection after penetration.
 6. When the case was reported at [Particulars withheld] Police Station, Police Constable Agnes Nyaboke (PW4) was tasked to investigate the case. She recorded statements and issued a P3 form to the complainant. She visited the appellant's house, which was locked at the time. Upon the arrest of the appellant, she preferred the charge of defilement against him. She also produced the complainant's birth certificate showing that she was born on 17th January 2002.
 7. In his defence, the appellant gave unsworn evidence stating that he had seen the complainant in the company of W. on numerous occasions. He further stated that W. was the caretaker of the rental house where it is alleged that he hid the complainant. He also testified that it was PW2 who forced the complainant to say that she had been with him.
 8. When the appeal came up for hearing on 18th March 2025, the appellant was virtually present from Kericho Prison while Senior Assistant Director of Public Prosecutions (SADPP) Mr. Omutelema appeared for the respondent. The parties sought to rely on their written submissions, which we highlight hereunder.
 9. In the submissions dated 8th July 2024, the appellant addressed three issues. First, it was his submission that the first appellate court erred in upholding the mandatory minimum sentence of 20 years' imprisonment. The appellant argued that the learned Judge failed to note that he was young and a first offender, and ought to have been awarded a lighter sentence pursuant to the provisions of sections 216 and 329 of the *Criminal Procedure Code* and Article 50 (1) & (2) (p) of *the Constitution* as well as the sentencing policy guidelines of 2016. He also argued that the sentence was wrong as it was issued in its mandatory nature, thus denying the court a chance to exercise its discretion.
 10. Secondly, the appellant submitted that the learned Judge erred in upholding his conviction and sentence based on the evidence of the complainant, which was received without voir dire examination to ascertain whether she understood the meaning of an oath. The appellant underscored the



importance of voir dire examination before receiving the evidence of a child of tender years and urged that the omission was not only prejudicial to him but also fatal to the prosecution's case.

11. Finally, the appellant submitted that the ingredients of the charge of defilement were not proved to the required standard. The appellant specifically asserted that the victim's age and penetration were not proved. He referred to *Alfayo Gombe Okello vs. Republic* [2001] eKLR to underscore the importance of proving the age of the complainant in a defilement case, while the case of *Mark Oiruri vs. Republic* [2013] eKLR was cited to stress the necessity of proving penetration. According to the appellant, the evidence in regard to the complainant's age was marred with inconsistencies, while the evidence proving penetration was inconclusive and not credible.
12. The respondent opposed the appeal through the submissions dated 11th March 2025. Mr. Omutelema rehashed the evidence on record and submitted that all the elements of the offence of defilement were proved against the appellant. Counsel cited *Julius Kalewa Mutunga vs. Republic* [2006] eKLR and *Bukenya & others vs. Uganda* [1972] E.A. 549 to assert that the prosecution properly exercised its discretion and that the failure to call W. as a witness did not vitiate the prosecution's case. Counsel, therefore, urged us to dismiss the appeal.
13. We have reviewed the record of appeal, the submissions and the authorities referred to by the parties and the applicable law. This being a second appeal, section 361(1) of the [Criminal Procedure Code](#) provides our jurisdiction. The provision was summarized by the Supreme Court in *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* [2024] KESC 34 (KLR) as follows:

“ 48. Before further delving into the question of constitutionality or otherwise of the sentence, we must take cognizance of provisions of section 361(1) of the [Criminal Procedure Code](#) which, in cases of appeals from subordinate courts, explicitly bars the Court of Appeal from hearing issues relating to matters of fact. This section also elaborates that the severity of sentence is a matter of fact and not of law and the Court of Appeal is barred from determining questions relating to sentences meted out, except where such sentence has been enhanced by the High Court...

49. Thus, the Court of Appeal's jurisdiction on second appeals is limited to only matters of law and it could not interfere with the decision of the High Court on facts unless it was shown that the trial court and the first appellate court considered matters they ought not to have considered, failed to consider matters they should have considered, or were plainly wrong in their decision when considering the evidence as a whole. In such a case, such omissions or commissions would be treated as matters of law. Consequently, the respondent's appeal on the grounds that his sentence was harsh and excessive was not one that the Court of Appeal could lawfully determine as it fell outside the purview of the Court of Appeal's jurisdiction.”

14. Alive to the scope of our mandate, we note that the question of the alleged failure to subject the complainant to voir dire examination and the constitutionality of the sentence are being raised for the first time in this Court. As per the holding of the Supreme Court in *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae)* (supra), as echoed in *Republic vs. Ayako* [2025] KESC 20 (KLR) and *Republic vs. Manyeso* [2025] KESC 16 (KLR), we are barred from determining these issues on the basis that they have not been subjected to the constitutional and legal framework of the appellate system. Their determination risks eroding this Court's power as an



appellate Court while, in the same vein, usurping the High Court's power as a first appellate court. Having established as such, it follows that the only issues falling for our determination are whether the offence of defilement was proved and whether the failure to call W. as a witness was fatal to the prosecution's case.

15. The key ingredients that must exist to found a conviction in an offence of defilement are firstly, that the complainant is a child, secondly, that there was penetration, and thirdly, that the person charged was positively identified as the person who committed the offence.

16. With regard to the element of age, the appellant's contention is that:

“the first appellate court relied on the evidence of PW1 and held that the complainant was aged 14 years but failed to note that there [were] inconsistencies [on] age as recorded on the charge sheet, P3 form, hospital appointment card, and no independent medical age assessment card.”

17. Indeed, both the client appointment card and the P3 form indicated the complainant's age as 16 years. The charge, as drafted, referred to the complainant as 14 years. The birth certificate indicated that the complainant was born on 17th January 2002, meaning that as of 12th March 2016, she was approximately 14 years and 2 months. In *Mwalango Chichoro Mwanjembe vs. Republic* [2016] KECA 183 (KLR), the Court held that:

“The question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof.”

18. In our view, the best evidence for proving a complainant's age is a birth certificate, birth notification, an immunization card or in some instances a baptismal card issued shortly after the birth of the child. That does not rule out the fact that the age of a victim can be proved by other evidence. The Court in *Mwalango Chichoro Mwanjembe vs. Republic* (supra) lends credence to this view. Similarly, in *Hadson Ali Mwachongo vs. Republic* [2016] KECA 521 (KLR), when faced with a scenario similar to the one before us, the Court held that:

“... The evidence of DC's mother and the certificate of birth confirmed DC's specific date of birth, which means when the offence was committed, she was 15 years, 6 months and 13 days old. The age assessment report gave 16 years as the estimated age of DC. In light of the evidence of DC's mother and her certificate of birth which were very specific, we are satisfied that DC's age was appropriately proved and there is no room for reasonable doubt in that regard.”

19. Where a birth certificate is produced as an exhibit, the Court needs not look further to ascertain the age of the complainant. In this case, birth certificate number 4...82 was produced indicating the complainant's date of birth as 17th January 2002. This was corroborated by the evidence of J.C. (PW1) and A.B. (PW2). We therefore find no error on the part of the learned Judge in holding that the complainant was 14 years old at the time of the commission of the offence.

20. Turning to the issue of penetration, the appellant contends that the evidence of Philip Rotich (PW3) was inconclusive. What we heard the appellant to be saying was that the existence of a pregnancy showed that the complainant had engaged in sex prior to the material date and that ought to have prompted further investigations to establish when the hymen was broken.



21. The argument advanced by the appellant is not novel because it has been raised previously in other appeals. In *Williamson Sowa Mbwanga vs. Republic* [2016] KECA 147 (KLR), the Court addressed a similar issue and held as follows:

“As regards the first ground of appeal, it is patently clear to us that whilst paternity of PM’s child may prove that the father of the child had defiled PM, that is not the only evidence by which defilement of PM can be proved. The fact, as happens in many cases, that a pregnancy does not result from conduct that would otherwise constitute a sexual offence does not mean that the sexual offence has not been committed. In this case, there does not have to be a pregnancy to prove defilement. A DNA test of the appellant would at most determine whether he was the father of PM’s child, which is a different question from whether the appellant had defiled PM. As the Court of Appeal of Uganda rightly stated, in the sexual offence of defilement, the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and that it is not necessary that the hymen be ruptured.”

22. We associate ourselves with the above reasoning. We further wish to reiterate that the proviso to section 124 of the *Evidence Act* permits a trial court to convict an accused person of a sexual offence solely on the evidence of the victim, if for reasons to be recorded, the court is satisfied that the victim is telling the truth. This provision is not ousted by section 36 (1) of the *Sexual Offences Act* which allows a court to order medical tests that would ascertain the father of the complainant’s child. As rightly held in *Williamson Sowa Mbwanga vs. Republic* (supra), in some instances, the act of penetration must not be complete but, the slightest attempt is sufficient to prove penetration. In any event, whether the appellant was the father of the child that the complainant was carrying was not the issue before the trial court. The question was whether the appellant had penetrated the complainant.

23. In this case, the complainant narrated how she spent two nights with the appellant. She was clear that even though they did not have sex the first night, the second night was different as she was penetrated and she bled. Her father, A.B. (PW2), confirmed that his daughter went missing on 10th March 2016 and was found two days later on 12th March 2016. Upon examining the complainant, PW3 confirmed that penetration had occurred. This evidence undoubtedly establishes penetration of the complainant. Based on the foregoing, we cannot fault the learned Judge for concluding that the complainant was penetrated.

24. The third ingredient is the identity of the perpetrator. The evidence of PW1 was that she knew the appellant as an employee of their neighbour. PW2 also testified that he knew the appellant. The complainant testified that she spent two nights with the appellant in his house where she would be locked in during the day as the appellant went about his errands. Furthermore, the two had met in the evening and boarded a motorcycle to the appellant’s house. The appellant in his defence distanced himself from ever hosting the complainant in his abode and alluded to one W. as the person who had a relationship with the complainant. This proposition was however denied by the complainant during her cross-examination. The appellant in his defence also claimed that the complainant was coerced by her father to mention his name. However, this issue was never raised during the cross-examination of any of the prosecution witnesses. In our view, the issue of alleged coercion was raised as an afterthought. In the circumstances, we find that the appellant was properly identified as the person who defiled the complainant.

25. The question that remains unanswered is whether, as submitted by the appellant, the failure to call W. as a witness vitiated the prosecution’s case. We have reviewed the impugned judgment, and we are satisfied that the learned Judge correctly appreciated the legal principles surrounding this issue and properly applied them. On our part, we reiterate that the prosecution is only obligated to call witnesses



sufficient to prove their case. In this case, as we have already held, the evidence on record proved the case against the appellant. The failure to call W. as a witness was therefore not fatal to the prosecution's case.

26. Regarding sentence, we only wish to inform the appellant that the Supreme Court recently in *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (supra); Republic v Ayako (supra)* and *Republic vs. Manyeso (supra)* reiterated the legality of the sentences under the *Sexual Offences Act*, 2006. This Court is therefore bound to implement the sentences as prescribed by the Act. It therefore follows that the sentence of 20 years imprisonment was legal, and we affirm it.

27. In the end, we find the appeal lacking in merit and dismiss it in its entirety. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 20TH DAY OF JUNE 2025.

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCI Arb.

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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

DEPUTY REGISTRAR

