



**Ngugi v Republic (Criminal Appeal E044 of 2023)
[2025] KEHC 1147 (KLR) (28 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1147 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL E044 OF 2023
AC MRIMA, J
FEBRUARY 28, 2025**

BETWEEN

JOSEPH NJUGUNA NGUGI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. D. K Mtai (PM) in Kitale Chief Magistrate's Court Criminal Case (S.O.) No. 191 of 2020 delivered on 19th April 2023)

JUDGMENT

Background:

1. Joseph Njuguna Ngugi, the Appellant herein, was charged with the offence of defilement contrary to section 8(1)(2) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the offence were that on diverse dates between 3rd and 13th August 2020 at [Particulars withheld] village in Kiminini sub county, Trans-Nzoia County intentionally caused his penis to penetrate the vagina of MP a child aged 7 years.
2. The Appellant faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of [Sexual Offences Act](#) No. 3 of 2006 whose particulars were that on diverse dates between 3rd and 13th August 2020 at [Particulars withheld] village in Kiminini sub county, Trans-Nzoia County intentionally touched the vagina and or caused contact between the penis and vagina of MP a child aged 7 years.
3. The Appellant denied both counts and he was tried. Four witnesses testified for the prosecution. The complainant was PW1. Her mother, AMW was PW2. Peter Makete, a Clinical Officer at Kitale County Referral Hospital testified as PW3 and No. xxxxxxxx PC Irene Felida, the Investigating Officer was PW4. At the close of the prosecution's case, the Appellant was placed on his defence. He gave a sworn testimony and testified as DW1 whereas his witness one Martha Wamboi Njuguna was DW2.



4. Upon considering the evidence and the law, the Learned Trial Magistrate found the Appellant guilty of the main offence of defilement and he was convicted. He was sentenced to 30 years imprisonment.

The Appeal:

5. The Appellant was dissatisfied with the conviction and sentence. Through Amended Grounds of Appeal, the Appellant urged this Court to quash his conviction and to set aside his sentence on the following grounds: -
 1. That the learned trial magistrate erred in matters of law and fact when he convicted and sentenced the Appellant to 30 years imprisonment yet failed to note that the trial was manifestly unfair.
 2. That the learned trial magistrate erred in law and fact when he convicted the appellant in the case yet failed to note that penetration was not proved against the appellant.
 3. That the learned trial magistrate erred in law and fact when he convicted the appellant by convicting and sentencing the appellant to 30 years imprisonment on false identity.
 4. That the learned trial magistrate erred in law and in fact by convicting and sentencing the Appellant to 30 years imprisonment yet failed to note that the age of the alleged complainant was not proved conclusively.
 5. That the learned trial magistrate erred in both matters of law and fact by convicting and sentencing the appellant in this case to thirty (30) years on uncorroborated evidence.
 6. That the learned trial magistrate erred in fact and in law when he convicted the appellant yet failed to consider his defence.
 7. That the learned trial magistrate erred in law and fact when he convicted and sentenced the appellant in this case to thirty years yet failed to note that the same was excessive and disproportionate sentence.
6. In his written submissions, the Appellant argued that the complainant's father was not called to testify yet he was an important witness. It was his position that recalling of a witness is a right of an accused protected under Article 25(c) of *the Constitution* and section 150 of the *Criminal Procedure Code* (CPC) and as such it was not an excuse that he (the complainant's father) had relocated to Naivasha.
7. In rebutting the incidence of penetration, the Appellant submitted that the Clinical Officer, PW3 was not qualified in discharging his duties since he lacked exactness in his findings. To that end, it was his submission that despite establishing that the complainant's hymen was torn, and had bruises, he could not establish the cause of the same. It was his claim that a hymen broken on 5th August 2020 could not still appear fresh on 13th August 2020. He further submitted that he ought to have given a clear picture of the condition of the genitalia of the victim, the type of Urinary Tract Infection, how she contracted and whether the injuries were as a result of the infection or alleged penetration.
8. The Appellant referred to the decision in Michael Odhiambo -vs- Rep. (2005) eKLR where the Doctor observed that the hymen heals very fast, even within two days and that rupture of hymen per se is not conclusive proof of defilement. It was further his submission that the observation by PW3 that the genitalia was not well kept was the origin of the blisters since the complainant scratched as a result of being itchy. The Appellant submitted that despite PW2 having stated that the complainant did not change clothes and had not taken a shower when she took her to hospital, those clothes were not availed



in court. It was his case that if there were blood stains on the underwear but not in the genitalia, then it was indication that it was artificial.

9. The Appellant submitted further that the evidence of PW1 and PW2 was not corroborative of the evidence of the medical evidence and as such, the prosecution's case was not credible. The Appellant maintained that the evidence on penetration upon which the trial court made a finding that it had occurred was not was safe.
10. Regarding his identity, the Appellant submitted that the person suspected of the alleged offence was Njoroge, he then became Joseph Mwangi Njuguna whereas he was Joseph Njuguna Ngugi. It was his case that three persons could not be the same person.
11. On the aspect of the age of the victim, the Appellant submitted that other than the charge sheet, there was no proof that the complainant was 7 years old. It was his submission that there was no assessment of her age. In buttressing the importance of age, the Appellant relied referred the Court to the decision in Hillary Nyongesa -vs- Rep. (2010) eKLR among other cases where it was observed that age is a critical component in sexual offences that must be conclusively proved through medical evidence.
12. On the claim that the trial Court failed to consider his defence, the Appellant submitted that since the Appellant, during the period of the crime used to work with his daughter, it could not be possible to engage in activities such as the alleged offence. He stated that his daughter confirmed his presence at the workshop in her testimony.
13. In submitting that the sentence was excessive, the Appellant relied on the authority in Criminal Appeal No. 259 of 2012, Abdala Mwanza -vs- R. where it was observed that a sentence that would go beyond life expectancy is manifestly excessive. The Appellant argued that the thirty years imprisonment would go beyond the 64.4 years expectancy of Kenya males yet a life sentence was not imposed. It was his case that a lesser term ought to have been considered since he is 53 years of age.
14. The Respondent did not file any response to the appeal.

Analysis:

15. This being a first appeal, this Court is duty bound to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See Okono vs. Republic [1972] EA 74). While re-assessing the evidence, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses testify before the trial Court as such, it ought to make due allowance in that regard. (See. Ajode v. Republic [2004] KLR 81).
16. For the prosecution to establish the charge of defilement, it must prove beyond reasonable doubt the following critical ingredients: -
 - a. Proof of Penetration;
 - b. Age of the complainant.
 - c. Identity of the perpetrator.
17. I will, therefore, in turn consider the foregoing elements as against the evidence presented at the trial court.

i. Whether penetration was proved:

18. It was the complainant's testimony that on 3rd August 2020 about 1pm, she was at home sweeping when the fundi who does welding arrived. The fundi went to where she was and gave her a biscuit. He



- then took her to the maize farm. She stated that the fundi went to fetch water and she left the biscuit at the shamba. It was her evidence that that the following day, the fundi came when she was washing utensils. He told her she was a good girl and that she will be a princess. He then started to touch her legs. That day, her mother had left home to go to work. She stated that she was going to play with other children and fundi told her to go and hide and to go where he was. He removed her panty and then removed his underwear and then slept on top of her and did bad manners.
19. It was her further evidence that he used to put his thing which he inserted at the place she uses to urinate. She described that he did bad manners to her every time he called her and that he did it for three days. The complainant stated that the fundi told her that if he reported the matter, God will be annoyed at them and that they will not board a plane and that the Police would arrest them. She stated that the fundi's name was Joseph Njuguna who used to come home when it was only her and her sister aged five years. The complainant then stated that she eventually got fed up with the fundi and reported him to her mother.
 20. On cross-examination, it was her evidence that Joseph Njuguna is the name of the assailant and that other than her mother, the only other person who removed her clothes is Joseph Njuguna. She reiterated that her mother was away when it happened and that he did the act for a total of 3 times in three days.
 21. PW3 testified he was a Clinical Officer attached to the Kitale County Hospital. On 15th August 2020, he received two parents from Waitaluk who accompanied their daughter with the complaint that on different days from 3rd August 2020 a person lured her into a maize plantation and defiled her. He examined the girl's genitalia and made the observation that she had no pubic hair, was not properly kept and had blisters and bruises on her labia majora. Her vestibules red inflamed and had blood clots. He further made the observation that the hymen was freshly torn, not more than three weeks old, and that the structure connecting her labia and anus was bruised. It was his evidence that he whereas HIV and syphilis tests turned out negative, urine test showed traces of white cells and that there was pus therein. He stated that the complainant had been treated at Maili Saba dispensary. He produced P3 form and treatment notes as exhibits. Further to the foregoing, PW3 stated that presence of white cells in the urine indicated that complainant had Urinary Tract Infection and presence of pus indicates infection in the urine.
 22. On cross-examination, PW3 stated that the injuries the complainant sustained were less than 2 weeks old. He conceded that he did not specifically state that it was a penis that caused the injuries. It was his case that when he examined the girl, she had not taken a bath nor changed clothes.
 23. In order to establish whether the evidence presented before the trial court conclusively proved the occurrence of penetration, it is necessary to interrogate how the law defines it and what courts have said about the offence.
 24. Section 2 of the *Sexual Offences Act* defines penetration as follows;

“penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;
 25. The conduct and extent that qualify an act to be termed as ‘penetration’ was discussed by the Court of Appeal in the case of Mark Oiruri Mose -vs- R (2013) eKLR where the Learned Judges observed as hereunder: -

.... Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa



be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.... (emphasis added).

26. In *Erick Onyango Ondeng -vs- Republic* (2014) eKLR the Court of Appeal spoke further to the act of penetration by stating as follows:

In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.

27. Coming back to the evidence, the complainant's narration of the sequence of events speaks to a clear motive by the Appellant to manipulate the young girl. He would tell her she is a princess, was a good girl and that they would board a plane. He then would win over her trust but was keen to coerce her into silence by telling her that God would be unhappy with them if she ever spoke out. This used to happen when the complainant's parents were away.
28. The Appellant would then lure her into the maize plantation with a biscuit and then sexually assault her. In her evidence, the complainant categorically stated that he removed her panty, then removed his, and did 'bad manners' to her. She elucidated her encounter by stating that the Appellant would insert the thing he uses to urinate inside the place she uses to urinate.
29. Even without probing the evidence of the Clinical Officer, the complainant's testimony was enough proof, considering the definition of penetration that it indeed occurred. However, for completeness of the record, the Clinical Officer's evidence is crucial. He shed more light on the incidence of penetration. He examined the complainant and saw that she had blisters and bruises on her labia majora and that her hymen was torn. The test on her urine revealed presence of white cells and pus.
30. This Court has taken a keen look at the P3 form. It was filled on 15th August 2020, three days after the last day in respect of period between 3rd August 2020 and 13th August 2020. PW3 observed that the complainant had neither changed clothes nor taken a shower.
31. The remarks he made on the physical state of the genitalia were as follows;
- Poorly kempt genitalia (normal for age) blisters in labia majora, bruised labia minora, vestibule inflamed, blood clots – hymen torn fresh, fourchette torn – fresh.
32. In the assessment of this Court, there is no doubt the complainant was defiled. Her evidence was corroborated explicitly by the results of PW3's examination.
33. There was a claim by Appellant that the complainant had not taken a shower for a period of two weeks before examination hence the state of her genitalia would not reveal any penetration. To me, that argument is far-fetched and presumptive and is not made on any basis whatsoever. The period in question is 3rd August 2020 and 13th August 2020. The complainant was examined on 15th August 2020. The evidence of the complainant shows that the Appellant's advances were subtle and gradual. The sexual assault did not happen at the very first approach. It, therefore, cannot be the case, as claimed by the Appellant that the injuries were as a result of the 3 weeks old unkempt state of the complainant's genitalia. As regards the unkempt state of the genitalia, it was PW3's evidence that it was common for girls that age.
34. In the premises, the trial Court's finding on penetration was safe. It was established to the required standard.



ii. Identity of the Perpetrator:

35. This was a hotly contested issue. It was the Appellant contention that he was not identified as the perpetrator since he was described by the complainant and PW2 as fundi and by the name Njoroge, yet he is Joseph Njuguna Ngugi. However, the evidence of the complainant was satisfactory. Despite having started off by describing the Appellant as fundi, on further examination, she expressly stated that fundi's name is Joseph Njuguna. On cross-examination, the complainant confirmed the identity of the Appellant by stating that the only other person, other than her mother, who removed her clothes was Joseph Njuguna.
36. PW4, the Investigating Officer, offered clarity to the issue when he discovered, upon probing the case that, the Appellant's nickname was 'Njoroge' but his name as per his identification card is Joseph Njuguna Ngugi. Therefore, the Appellant was properly identified as the perpetrator.

iii. Age of the victim:

37. In the Grounds of Appeal, the Appellant argued that the complainant's age was not proved conclusively. The importance of ascertaining age was underscored by Court of Appeal in Criminal Appeal No. 504 of 2010, Elias Kaingu Kasomo -vs- Republic, when the Learned Judges observed as follows;
- ... Age of the victim of the sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved in the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed upon conviction will be dependent on the age of the victim....
38. In Nahayo Syprian -vs- Republic [2017] eKLR the tools at the Court's disposal for purposes of ascertaining age was described as hereunder;
- ... The age of the victim in sexual offences can be proved by documentary evidence such as birth certificate, notification of birth, or baptismal cards. It can also be proved by medical age assessment; direct evidence of parents or guardian or by observation by the court.
39. Apart from the evidence by PW2, the complainant's mother, that her daughter was 7 years old, there is on record the complainant's Certificate of Birth which was produced by the Investigating Officer, PW4, as Exhibit 2. The certificate indicated that the complainant was born on 20th July 2013. A computation of the complainant's age as from the period beginning 3rd August 2020, the date suspected of first occurrence of the offence, confirms that she was 7 years and 1 month old.
40. The Appellant's contention that it did not come out clearly as to when the complainant was born for purposes of knowing her age is put to rest by the Certificate of Birth, an exhibit not challenged by the Appellant.
41. Finally, on the claim by the Appellant's that the complainant's father, was an important witness and ought to have been availed before the trial Court, this Court is reminded that the discretion to decide the number of witnesses is one solely within the prosecution. In Julius Kalewa Mutunga -vs- Republic [2006] eKLR, the Court of Appeal held that: -

...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of



that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive....

42. As regards the sentence the Appellant was handed down, this Court's attention was drawn to the Supreme Court decision in Petition No. E018 of 2023 Republic -vs- Joshua Gichuki Mwangi where the Learned Judges remarked that sentences provided for in the *Sexual Offences Act* must be rendered as is until when an amendment of the law took place or a properly filed petition was allowed.
43. The Appellant herein was sentenced to 30 years imprisonment instead of life imprisonment provided for in section 8(2) of the *Sexual Offences Act*. However, since there was neither cross-appeal nor an application to enhance the sentence, this Court shall not interfere with the sentence.
44. The foregoing exposition renders the appeal without merit and has to fail.
45. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 and later elected to the Judicial Service Commission thereby mostly being away from the station. Apologies galore.
46. In the end the following final orders hereby issue: -
 - a. The appeal is hereby dismissed.
 - b. For avoidance of doubt, trial Court's conviction and sentence are hereby upheld.
47. It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2025.

A. C. MRIMA

JUDGE

Judgment delivered virtually in the presence of:

Joseph Njuguna Ngugi, the Appellant.

Mr. Mugun, Learned Prosecutor instructed by the Director of Public Prosecutions for the Respondent/State.

Chemosop/Duke – Court Assistants.

