



**Njoki v Republic (Criminal Appeal 116 of 2023)
[2025] KEHC 4893 (KLR) (Crim) (25 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4893 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
CRIMINAL
CRIMINAL APPEAL 116 OF 2023**

KW KIARIE, J

APRIL 25, 2025

BETWEEN

JOHN GICHUKI NJOKI APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in the S.O.A. case NO. E091 of 2021 of the Principal Magistrate's Court at Engineer by Hon. H.O. Barasa -Senior Principal Magistrate)

JUDGMENT

1. John Gichuki Njoki, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of the offence are that on unknown dates in June and July 2021 within Nyandarua County, he intentionally and unlawfully caused his penis to penetrate the vagina of FNN, a child aged thirteen years.
3. The appellant was sentenced to serve twenty years' imprisonment. He was aggrieved and filed this appeal against the conviction. He was in person and raised the following grounds of appeal:
 - a. The learned trial magistrate erred in law and fact when he convicted the appellant in a prosecution case; her age was not proved.
 - b. The learned trial magistrate erred in law and fact when he convicted the appellant in the prosecution case where penetration was not proved.
 - c. The learned trial magistrate erred in law and fact by applying the wrong standard of proof in the criminal case, which was a standard of probability instead of the reasonable doubt standard.



- d. The learned trial magistrate erred in law and fact by convicting the appellant, but did not consider the appellant's defence.
4. The state opposed the appeal through Ms. Odero Vena, learned counsel, who argued that the prosecution had proven its case to the requisite standards and that the sentence was suitable in light of the circumstances of this case.
5. This is the first appellate court. As expected, I have reanalyzed and reevaluated all the evidence presented before the lower court. I have concluded, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of *Okeno v Republic* [1972] EA 32.
6. An offence of defilement is established against an accused person when the prosecution has proved the following ingredients:
 - a. That there was penetration of the complainant's genitalia;
 - b. That the accused was the perpetrator and
 - c. The victim must be below eighteen years old.

This position was echoed in the case of *Fappyton Mutuku Ngui v Republic* [2012] eKLR. Ngugi J. (as he was then) said:

Going by this definition of defilement... the issues which the court needs to determine...first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child, and finally, whether the penetration was by the Appellant.

7. I will determine if the prosecution proved these ingredients to the required standards.
8. FNN (PW1), the complainant, said she was 13 years old. A copy of her Certificate of Birth, which was produced, indicates that she was born on February 4, 2008. At the time the offence was allegedly committed, she was 13 years and 4 months old. I am satisfied that her age was proven.
9. In this case, the appellant was charged with two counts of defiling minors. He was acquitted of the offence in count two; however, it would be beneficial for me to review all the evidence on record.
10. According to the testimony of FNN (PW1), the first time the appellant had sexual intercourse with her was in the kitchen. He found her cooking. He showed her some pornography before inviting her to have sexual intercourse with him. These were of men and women engaging in sexual intercourse. She declined, but he compelled her by removing her pair of trousers and had sex with her on a stone that was in the kitchen. She only screamed a little. Her aunt, the appellant's wife, was in the sitting room about 10 meters away.
11. It was essential to establish whether the incident occurred as described by this witness. Although she talked of screaming a little bit, a child of this age having sex for the first time with an adult did not speak of pain or bleeding, and her aunt could not detect any distress on her. Her evidence was that he subsequently engaged in sexual intercourse with her whenever an opportunity arose. I would understand the subsequent episodes, but not the first one.
12. The prosecution ought to have elicited how the appellant was able to have sex with a minor for the first time on a stone in the kitchen.
13. The evidence of EN (PW2) ought to have raised a red flag in the mind of the trial court. She narrated her encounter with the appellant in the same manner as PW1. He first showed her pornographic materials while she was in the kitchen. He then defiled her on top of some potatoes. PW2 said she was ten. After



the defilement, she went to the sitting room and shared her experience with PW1. However, she told PC George Kuria (PW4) that the appellant had attempted to defile her but had not penetrated her. This witness informed the doctor who examined her that “Baba alinifanyia tabia mbaya tukiwa tumesimama kunigusisha kitu yake” The totality of evidence regarding this child, along with the evidence on record, raises reasonable doubts.

14. Article 50 (2) (i) of the *Constitution* of Kenya provides:

Every accused person has the right to a fair trial, which includes the right—

i. to remain silent, and not to testify during the proceedings;

15. At the close of the prosecution's case, the appellant opted to exercise this right.

16. Due to the inconclusive evidence presented in the narration of the first episode by FNN (PW1), the learned trial magistrate should have exercised caution. This caution was necessary given that the two minors appeared unable to understand that even consensual sexual intercourse between consenting adults can be a painful experience for the female if she is not adequately prepared.

17. The finding of a broken hymen may have influenced the decision of the learned trial magistrate. A broken hymen alone cannot be used as proof of penetration. This was also the view of the Court of Appeal in the case of *P. K.W. v Republic* [2012] eKLR. The court observed as follows:

“ 15. In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified” Is hymen only ruptured by sexual intercourse.

16. Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina (sic) with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. For those who are, there are times when the hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons, masturbation injury, and medical examinations can also rupture the hymen when a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be a natural tearing of the hymen. See the Canadian case of *The Queen v Manuel Vincent Quintanila* [1999] AB QB 769.”

18. There was, therefore, no sufficient evidence to prove that the appellant defiled the complainant.

19. The conviction of the appellant was unsafe. The same is quashed, and the sentence is set aside. He is set free unless otherwise lawfully held.

DELIVERED AND SIGNED AT NYANDARUA ON THIS 25TH DAY OF APRIL 2025

KIARIE WAWERU KIARIE

JUDGE

