



**JO v Republic (Criminal Appeal E004 of 2022)
[2024] KEHC 9587 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9587 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E004 OF 2022
WM MUSYOKA, J
JULY 31, 2024**

BETWEEN

JO APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from conviction and sentence by Hon. PY Kulecho, Senior Resident Magistrate, SRM, in Busia CMCSOC No. E076 of 2021, of 25th January 2022)

JUDGMENT

1. The appellant, JO, had been charged before the primary court, of the offence of defilement, contrary to section 8(1)(2) of the *Sexual Offences Act*, Cap 63A, Laws of Kenya, and an alternative charge of committing an indecent act with a child, contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on 29th April 2021, within Busia County, he unlawfully caused his penis to penetrate the vagina of BKA, a child aged 9 years. The appellant denied the charges, and a trial ensued, where 5 witnesses testified.
2. PW1, who identified herself as BK, was the minor complainant. She identified the appellant as a grandfather. He had asked her to sweep his house, and when she got there, he asked her to lie on his bed, which she did. He asked her to undress, which she did. Whereupon he removed his trousers, took his genital organ, and inserted it into hers. PW2 came in, and found them, and went and reported to the father of PW1, who escalated the matter to the police. PW2, IAE, saw the dress of PW1 on the floor of the house of the appellant, but he did not see either of them, and he reported what he saw to his sister.
3. PW3, DAE, was the father of PW1 and PW2. PW2 reported to him that he had found PW1 and the appellant engaged in sexual activity. He spoke to PW1, who confirmed it, but when he asked the appellant about it, he was furious, and he, PW3, reported to the police. He stated that PW1 was born on 18th December 2011. He described the appellant as a paternal uncle. PW4, David Olunga



Oduori, was the clinical officer who examined PW1. He noted bruises and lacerations on her genital area, the hymen was missing and there was bleeding. Laboratory tests revealed an infection in the urine, bacterial infection and pus cells. PW5, No. 87880, Police Constable Abraham Naro, was the investigating officer.

4. The appellant was put on his defence, vide a ruling that was delivered on 14th October 2021. He made a sworn statement, on 2nd December 2021, and called 1 witness. He denied the charges.
5. In its judgment, delivered on 25th January 2022, the trial court found the appellant guilty, as all the elements of the offence had been positively proved. He was sentenced to life imprisonment, on 8th February 2022.
6. The appellant was aggrieved, and brought the instant appeal, revolving around the medical evidence not linking him to the offence; the trial court not considering that he had physical challenges which could not allow him to commit the offence; the investigations were shoddy; the prosecution witnesses were members of the same family; and his alibi defence was not considered.
7. Directions were given on 9th May 2024, for canvassing of the appeal by way of written submissions. Only the appellant filed written submissions. He submitted around the case not having been proved to the required standard, there being material contradictions and inconsistencies on the age of the complainant, proof of penetration, credibility of the witnesses and sentence. He relies on [*Ndungu Kimanyi v. Republic* \[1976\] KLR \(Madan, Miller & Potter, JJA\)](#) and [*Julius Kitsao Manyeso v. Republic* Malindi CACRA No. 12 of 2021 \(Nyamweya, Lesiit & Odunga, JJA\)](#). He has also cited a number of unreported decisions, copies of which he did not avail, and which I have been unable to trace. Much of what is submitted on does not fall within the grounds of appeal set out in the petition of appeal.
8. I will first consider the issues raised in the petition of appeal. The appellant avers that the medical evidence, which was collected from the complainant, did not link him to the offence. It is true that no deoxyribonucleic acid (DNA) material was collected from the complainant, and tested to connect him with the offence. However, it is trite that a sexual offence need not be based only on DNA evidence. It can be founded on other evidence, including the testimony of the complainant. The complainant knew him prior to the incident, and identified him as the perpetrator, describing in detail what transpired. PW2 was at the scene, and placed the complainant and the appellant together. There was forensic evidence which demonstrated that defilement happened at about the same time as that the complainant alleged. There was ample circumstantial evidence to link the defilement of the complainant to the appellant.
9. On whether the trial court did not consider that the appellant had physical challenges that would have made commission of the offence by him impossible, I note that when he made his sworn statement, he stated that he was incapable of committing the offence. In mitigation, he stated that he was disabled, and he could not walk, and the court noted that he used to crawl to court. Well, it is one thing to be physically disabled, and another to be unable to engage in sexual intercourse. It is not lost on me that the appellant called 1 witness, DW2, who described himself as his son.
10. On the investigations that preceded his being prosecuted being shoddy, it is not immediately clear to me what the basis of this ground is. A court is not concerned with the investigations into a matter, but the material or evidence that is placed before it. Whether the investigations were done shoddily or comprehensively would usually be of little relevance, for the court does not audit the investigations. A shoddy investigation may still provide adequate material upon which a conviction may be founded. Looking at the record, I am persuaded that the material placed on record, at the trial, covered all the aspects of a defilement case, the age of the complainant, penetration and whether that penetration was by the appellant. All those elements of the offence were addressed in the matter that was prosecuted



at the trial court. Whether the investigations, conducted in the matter, were shoddy or otherwise, was not a matter to be determined by the trial court.

11. On the key witnesses being all members of the same family, I note that the key witnesses on what transpired were family members, 3 of them, and only 2 were technical witnesses. The 3 were a father and his 2 children. That of itself did not rob the prosecution of credibility. They were the witnesses privy to the happenings in question, and there was no mention of any outsider. Defilement typically happens within the sanctuary of the family, and it would not be strange to find that all the witnesses are family members. In any case, the appellant himself was a member of the same family with the said witnesses. He was identified by PW1 and PW2 as a grandfather, and by PW3 as an uncle. The appellant himself identified PW1 as his granddaughter. What mattered was not the blood relationship between the witnesses, but the credibility of the evidence that they presented.
12. On his alibi defence not being considered, I have looked at his defence statement, and I do not see anything that comes close to an alibi defence. He merely said that he was alone at his house, and that PW1 was not at that house at the material time. The prosecution case was that the defilement happened at that house. PW1 testified that the appellant invited her there, to sweep the house. PW2 said that he saw the dress of PW1 on the floor in that house. As between the appellant, PW1 and PW2, the trial court, which had the opportunity of seeing all 3 testify, believed PW1 and PW2, and not the appellant. I see no reason why I should find otherwise.
13. I will advert to the matters raised in his written submissions. The first relates to the case not being proved to the required standard. I believe that I have addressed this above, in paragraphs 8 and 10 of this judgment, with relation to the material that was presented in court being sufficient to establish that PW1 was a minor, her genitals were penetrated, and that penetration was by the appellant. He has raised issue with the penetration not being proved, but there was testimony from PW1 herself, attesting that the appellant inserted his penis into her vagina. The medical records presented by PW4, that is to say the treatment notes, the P3 form and the PRC form, provided adequate evidence to support defilement. The court file notes on the testimony of PW4 could have been recorded in a better fashion, but that of itself did not take away from the documents presented by that witness in evidence. On contradictions and inconsistencies in the evidence, it is trite that no prosecution is devoid of such, and the mere incidence of contradiction or inconsistencies would not matter, unless they go to the heart or core of the matter. I have gone through the testimonies of PW1, PW2 and PW3, and noted some inconsistencies in their narratives. However, I am satisfied that those inconsistencies are not critical or material, as to vitiate the conviction.
14. On the age of PW1, the complainant, the charge indicates that she was 9 years at the material time of the commission of the offence. Her father, PW3, said that she was born on 18th December 2011. The offence was allegedly committed on 29th April 2021. That meant that, as at 29th April 2021, PW1 was 9 years, 4 months and 16 days old. The courts have repeatedly said that there could be no better evidence on the date of birth of a child than that given by the parent of the child. In any case, a copy of a certificate of birth, for PW1, serial number [particulars withheld], dated 31st July 2019, was produced by PW3, which confirmed that date.
15. On the sentence, I note that the appellant was sentenced to life imprisonment. That is what is prescribed for defilement of a minor of tender years, by section 8(2) of the *Sexual Offences Act*. The age of the complainant was 9. That made her a child of tender years. Section 8(2) makes that sentence mandatory, which would leave the trial court with no discretion, and mean that the trial court imposed sentence in accordance with the relevant statute.



16. However, there have been developments in that area of the law, with respect to mandatory sentences and life imprisonment in particular. Mandatory and minimum sentences, for sexual offences, were declared unconstitutional, in *Mainigi & 5 others v. Director of Public Prosecutions & another* [2022] KEHC 13118 (KLR) (Odunga, J) and *Edwin Wachira & 9 others v. Republic* Mombasa HC Petition No. 97 of 2021 (Mativo, J). In *Julius Kitsao Manyeso v. Republic Malindi* CACRA No. 12 of 2021 (Nyamweya, Lesiit & Odunga, JJA), the sentence of life imprisonment itself was declared unconstitutional, with the court holding that no one should face an indefinite sentence; while in *Evans Nyamari Ayako v. Republic* Kisumu CACRA No. 22 of 2018 (Okwengu, Omondi & J. Ngugi, JJA) (unreported), it was held that a sentence of life imprisonment should translate to a maximum of 30 years imprisonment.
17. In view of the above, I find no merit in the appeal herein, save on the sentence. The appeal on conviction is dismissed, the conviction is upheld and affirmed. On sentence, PW1 was 9 years at the time the offence was committed. She was of tender years. Guided by the *Evans Nyamari Ayako v. Republic case*, I do hereby set aside the sentence of life imprisonment, imposed on the appellant, on 8th February 2022, in Busia CMCSOC No. E076 of 2021, and substitute it with a sentence of 30 years imprisonment, to run from the date when the appellant was convicted. It is so ordered.

JUDGMENT IS DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 31ST DAY OF JULY 2024

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. JO, the appellant, in person.

Advocates

Ms. Chepkonga and Mr. Onanda, instructed by the Director of Public Prosecutions, for the respondent.

