



**Atsewa v Republic (Criminal Appeal 6 of 2024)  
[2024] KEHC 11511 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11511 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL 6 OF 2024  
DR KAVEDZA, J  
SEPTEMBER 30, 2024**

**BETWEEN**

**RODGERS ALIANDA ATSEWA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered on 14th December 2023 by Hon. C. M NJagi (P.M) at Kibera Chief Magistrate's Court Criminal Case no. E075 of 2022 Republic vs Rodgers Alianda Atsewa)*

**JUDGMENT**

1. The appellant Rodgers Alianda Atsewa was charged and after a full trial convicted for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*, No. 3 of 2006. He was sentenced to serve sixty (60) years imprisonment. Being aggrieved, he filed an appeal challenging his conviction and sentence.
2. In the petition of appeal and amended grounds of appeal, he raised the following main grounds: The appellant challenged the totality of the prosecution's evidence against which he was convicted; the appellant complained that voir dire examination was not adequately conducted; he challenged the sentence imposed as being excessive and urged the court to quash his conviction and set aside the sentence.
3. This is the first appellate court and in *Okeno v R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence that was before the trial court, and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.



4. To succeed in a prosecution for defilement, it must be proven that the accused committed an act that caused penetration with a child. "Penetration" under section 2 of the Act means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

5. Further, section 8(1) and (2) of the Sexual Offences Act, No. 3 of 2006 provides thus: -

8. Defilement

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

6. Bearing in mind the above provisions, I will now analyse the evidence on record to ascertain whether the essential ingredients of the offence preferred against the appellant were established to the required standard of proof. Regarding proof of age, I wish to state at the outset that the importance of proving the age of a victim, proof of penetration, and positive identification of the assailant in sexual offences is paramount.

7. The complainant A.K (name withheld) gave unsworn testimony. She told the court that that she lives with her siblings, mother and the appellant whom she calls 'uncle'. That on the material day, the appellant made her bleed in her 'chululu' which she identified as her private parts. On cross-examination, the complainant was steadfast that it was the appellant who made her bleed from her private parts using his 'kalamu ya uchafu'(penis). The victim maintained that she knew the appellant and the identification was by recognition. The appellant was well-known to PW1 with whom she recognised. She could not have possibly pointed fingers at the wrong person for the act. I therefore hold that the appellant was properly identified.

8. As discussed in the Kenya Judiciary Criminal Procedure Bench Book 2018 paragraphs 94-96 no corroboration is necessary for the evidence of a child taken on oath although cross-examination is available for sworn or unsworn evidence of a child in the usual way:

"94. No corroboration is required if the evidence of the child is sworn (*Kibangeny arap Kolil v R* 1959 EA 92). Unsworn evidence of a victim who is a child of tender years must be corroborated by other material evidence implicating the accused person for a conviction to be secured (*Oloo v R* [2009] KLR).

95. However, in cases involving sexual offences, if the victim's evidence is the only evidence available, the court can convict on the basis of that evidence provided that the court is satisfied that the victim is truthful (s. 124, *Evidence Act*). The reasons for the court's satisfaction must be recorded in the proceedings (Court of Appeal at Nairobi Criminal Appeal No. 187 of 2009; Julius Kiunga M'birithia v R High Court *Isaac Nyoro Kimita v R* at Meru Criminal Appeal No. 111 of 2011).

96. The evidence of a child, sworn or unsworn, received under section 19 of the *Oaths and Statutory Declarations Act* is subject to cross-examination pursuant to the right to fair trial, which encompasses the right to adduce and challenge the evidence produced against the accused (art. 50(2)(k), CoK"

9. PW1's testimony did not require corroboration in accordance with the proviso to section 124 of the Evidence Act (Chapter 80 of the Laws of Kenya) if there are reasons to believe that the child was



- telling the truth. In this regard, the trial magistrate noted that PW1 was consistent and steadfast in her testimony. In addition, her evidence which was subjected to cross-examination remained consistent throughout.
10. To corroborate the evidence of the complainant, her mother PW1 testified that the complainant was born on 30<sup>th</sup> March 2020. She told the court that on 25<sup>th</sup> July 2022, the complainant went out to play. After sometime, the appellant came back with her. After sometime, the complainant started complaining of pain, and needed to use the toilet. She noticed blood from her vagina. She confronted the appellant who ignored her and she sought the assistance of a neighbour Sarah Dafala (PW6) and together took the child to Nairobi Women's Hospital for examination and treatment.
  11. The complainant's grandmother (PW3) reiterated the evidence of PW1, that it was the appellant who brought the complainant home on the material day.
  12. John Njuguna, a clinician at Nairobi Women's Hospital (PW5), produced the medical report concerning PW1, which was prepared by his colleague Mike Mutua who was no longer working at the facility. He stated that the minor was taken to the facility on allegations of defilement. The examination revealed that she had laceration and bruises on the clitoris, labia minora and labia majora. The victim also had per vaginal bleeding and the hymen was broken. In his opinion, the injuries were caused by blunt penetrative trauma. Therefore, given the history, it is my finding that penetration was sufficiently proven.
  13. Jamal Abdulnadir (PW4) testified that on the material day, he saw the complainant seated on the appellant's lap. He said greeted them and left. In addition,
  14. In his defence, the appellant denied committing the offence. He testified that on the material day, he was attending a funeral when he saw the complainant and decided to take her home. Upon arrival, he saw PW 1 and PW3 and left the child. He later heard screams and was accused of defiling the minor. He also disputed the evidence of PW4 that the child was sitting on his lap.
  15. The court considered his defence and found it to be uncredible. In view of the foregoing, I find that the appellant's defence did not dislodge the cogent evidence adduced by the prosecution. In my view, the appellant's defence was properly dismissed by the trial court as an afterthought aimed at exonerating himself from the offence.
  16. On the age of PW2, the trial court considered the birth notification produced by the complainant's mother PW1. The notification indicated that the complainant was born on 30<sup>th</sup> March 2020. She was therefore two (2) years old at the time of the offence. There is therefore no doubt that PW2 was a child.
  17. In his submissions, the appellant challenged the *voir dire* examination conducted on the minor as not being sufficient. He argued that although the court indicated that a *voir dire* was conducted, there is no record, how it was conducted and the questions asked. He urged this court not to consider the evidence on the minor.
  18. From the evidence of the prosecution witnesses, which was well corroborated, there is no doubt in my mind that the prosecution proved beyond reasonable doubt the offence charged. The conviction is therefore affirmed.
  19. In the administration of the *voir dire*, the record is clear that all that the learned trial magistrate did was to put questions to the minor which she did not reflect on the record but went ahead to reflect on the record the responses that the minor gave to those questions.



20. The need for the administration of voir dire on minor witnesses before reception of their testimonies especially in criminal trials is entrenched in section 19 of the *Oaths and Statutory Declarations Act* cap 15 Laws of Kenya. This provision does not of itself provide for the format to be applied in the course of such administration. The format used has basically evolved through case law. In *Sula v Uganda* [2001] 2EA 556 the Supreme Court of Uganda approved two formats. The first one is where the trial court can write down the questions put to the witness and the answer of the witness in the first person in the words spoken by the witness in a dialogue form and then make its conclusion after the dialogue. In the second format the court may omit to record the questions put to the witness but record the answers verbatim in the first person and then make his conclusion thereafter.
21. In *Patrick Kathurima v Republic* Nyeri CRA 137 of 2014 the Court of Appeal after reviewing case law on the subject observed thus:-
- “It is best though not mandatory in our context that the questions put and the answers given by the child during voir dire examination be recorded verbatim as opined by the English Court of Appeal in *Regina v Compell (Times)* December 20, 1982 and *Republic v Lalkhan* [1981] 73 CA 190 for the benefit of the appellate court which must satisfy itself on whether that important procedure was properly followed.”
22. There was however no hard rule laid down in the *Kathurima* case (*supra*) that in all cases where voir dire procedure had not been properly administered before reception of a minor’s evidence, the prosecution case stood vitiated. Each case has to depend on its own set of facts and that is why the court observed thus:-
- “It is best though not mandatory in our context that the questions put and the answers given by the child during the voir dire examination be recorded...”
23. In this case, although the complainant gave unsworn evidence she was subjected to cross-examination by the appellant on her unsworn testimony. Her testimony was coherent. The appellant only put one question to her in cross-examination which she answered correctly. It is my finding that the responses given gave during the voir dire examination, the coherent flow of her testimony in chief and the response to the questions put to her in cross-examination by the appellant all demonstrated that she was intelligent enough to understand the nature of the proceedings and the obligation to speak the truth. She therefore gave reliable evidence. The ground of appeal therefore fails.
24. On sentence, the trial court sentenced the appellant to serve sixty years imprisonment. The Sexual Offences provided a minimum sentence of life imprisonment. As such, I find that the sentence was proper in light of the supreme court decision in Petition e018 E018 of 2023 *Republic v Joshua Gichuki Mwangi*.
25. In the end, the appeal is found to be lacking in merit and is dismissed in its entirety.
- Orders accordingly.

**JUDGEMENT DATED AND DELIVERED THIS 30TH DAY OF SEPTEMBER 2024**

.....  
**D. KAVEDZA**

**JUDGE**

In presence of:



Appellant present

Maroro for the Respondent

Achode Court Assistant

