



**Keya v Republic (Criminal Appeal 96 of 2024)
[2024] KEHC 11355 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11355 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 96 OF 2024
DR KAVEDZA, J
SEPTEMBER 30, 2024**

BETWEEN

BENARD NYABUTO KEYA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered on 16th March 2022 by Hon. R. Kitagwa (S.R.M) at Kibera Chief Magistrate's Court Sexual Offences Case no. 82 of 2020 Republic vs Benard Nyabuto Keya)

JUDGMENT

1. The appellant Benard Nyabuto Keya was charged and after a full trial convicted for the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act*, No. 3 of 2006. He was sentenced to serve fifteen (15) 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; he challenged the sentence imposed as being excessive and urged the court to quash his conviction and set aside the sentence.
3. In response, the respondent filed grounds of opposition dated 29th November 2023. The grounds raised were that the appeal was an abuse of the court process. The prosecution discharged their burden of proof beyond reasonable doubt. The appeal lacks merit and should be dismissed.
4. 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.



5. 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."
6. Further, section 8(1) and (4) 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.
 - (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.
7. 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.
 8. PW1, LKM (name withheld) told the court that she was born on 3rd July 2003, and in Form One. She stated that in April 2020, while living at Olympic, she became acquainted with the appellant, a security guard near their home. The appellant allegedly began writing letters and proposing a relationship, which she eventually accepted under the condition of secrecy.
 9. On 26th May 2020, she encountered the appellant on her way to buy vegetables, and he lured her to his house, where he locked the door. He proceeded to remove her clothes and they had sex on his bed without protection. LKM later discovered she was pregnant and informed the appellant, who pressured her into an abortion. He provided her with medication from a chemist, which induced bleeding, alarming her mother, who subsequently took her to a hospital for treatment.
 10. Under cross-examination, the complainant confirmed her prior knowledge of the Accused, her pregnancy, and the events surrounding the abortion.
 11. 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. The appellant was well-known to PW1 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.
 12. To corroborate the evidence of the complainant, her mother PW3 testified that PW1 is her daughter. On 24th July 2020, she noticed PW1 was experiencing excessive bleeding, frequently soiling her clothes and leaving blood clots in the toilet. Upon questioning her, PW1 broke down and revealed the events leading to her condition. PW3's testimony aligned with PW1's account of the incident. She further stated that while she recognised the appellant physically, she did not know his name. PW3 confirmed that PW1 was born on 3rd July 2003 and produced PW1's birth certificate.
 13. In addition, PW4, Dr. Naomi Ratemo, a medical officer at Kibera South Health Center, testified that PW1 visited their facility on 27/7/2020, alleging defilement. Upon examination, PW1 had excessive bleeding, lower abdominal pain, a broken and painful hymen, and an open cervix. She co-



examined PW1 together with PW2 who testified of similar findings. The conclusion was that PW1 had undergone an abortion. It is my finding that the ingredient of penetration was adequately proved.

14. In his defence, the appellant denied committing the offence. DW1, the Accused, testified under oath, stating he was a security guard at S.D.A Kibera and 20 years old. He knew PW1's family as neighbours but denied defiling or having any sexual relations with her, including giving her medicine for pregnancy termination. He suggested PW1 falsely accused him under duress, and no DNA test was conducted. During cross-examination, DW1 confirmed his arrest at S.D.A near Olympic and denied taking PW1 to another house.
15. DW2, Ezekiel Ombaso Otete, the Accused's uncle, testified that the appellant lived with him, his wife, and children, making it impossible for any sexual activity to occur. He later met PW1's parents post-arrest but could not confirm if the defilement occurred.
16. The court considered his defence and found it to be incredible. 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.
17. On the age of PW1, the trial court considered the birth certificate produced by the complainant's mother PW2. The birth certificate indicated that the complainant was born on 3rd July 2003. She was therefore seventeen (17) years at the time of the offence. There is therefore no doubt that PW1 was a child.
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. On sentence, the appellant was sentenced to serve fifteen (15) years imprisonment. During sentencing, the court considered the pre-sentence report, the appellant's mitigation, and that he was the first offender. The court sentenced the appellant to the minimum sentence provided under the law.
20. As such, I find that the sentence was proper in light of the supreme court decision in Petition E018 of 2023 *Republic v Joshua Gichuki Mwangi*. 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 the presence of:

Appellant present

Maroro present for the Respondent

Achode Court Assistant

