



**Luchebeli v Republic (Criminal Appeal 171 of 2023)  
[2024] KEHC 11357 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11357 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL 171 OF 2023  
DR KAVEDZA, J  
SEPTEMBER 30, 2024**

**BETWEEN**

**OBED LUCHEBELI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered on 30th August 2023 by Hon. E. Riany (SRM) at Kibera Chief Magistrate's Court Sexual Offences Case no. E105 of 2022 Republic vs Obed Luchebeleli.)*

**JUDGMENT**

1. The Appellant was charged and after full trial convicted by the Subordinate Court of the offence of defilement contrary to section 8(1) as read with 8(4) of the *Sexual Offences Act*. The particulars were that on 21<sup>st</sup> October 2022 in Kangemi Westlands Sub County within Nairobi county, he intentionally and unlawfully caused his penis to penetrate the vagina of NM a child aged 16 years. He was sentenced to serve fifteen (15) years' imprisonment.
2. Being dissatisfied, the appellant filed an appeal against the conviction and sentence in line with his petition of appeal. He submitted written submissions, which I have considered, and there is no need to rehash them here.
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 which was before the trial court and 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. With the above, I now proceed to determine the substance of the appeal. In his grounds and submissions, the appellant has raised nine grounds of appeal which have been coalized as follows. He challenged the totality of the prosecution's evidence against which he was convicted. He argued that



- the prosecution's evidence was marred with contradictions and that the prosecution failed to prove its case beyond reasonable doubt. He urged the court to quash his conviction and set aside his sentence.
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. The complainant (PW1) provided a sworn testimony after voir dire examination stating that she was 16 years old. On 21<sup>st</sup> October 2022, while selling vegetables at her cousin's shop, a man approached the complainant asking for a phone, which she didn't have. He offered to get her one if she accompanied him. Once they reached the road, he told the other children with her to go back. They arrived at a flat about three minutes away, where she refused to enter. However, he pulled her inside and locked the door.
  7. Inside, the room was divided by a curtain and had a bed. He carried her and threw her onto the bed. He threatened to kill her if she screamed. He undressed her and inserted his penis into her vagina. He then locked the door and left her inside. Later on, he came back and had sex with her again. Her cousin called out for her, but the complainant remained silent due to fear. The cousin then peered through the door and spotted her shoes. Realizing something was wrong, she opened the door and left with the complainant. Afterward, the complainant shared what had happened with her cousin. She was taken to the hospital, and the incident was reported to the police. She identified the appellant as her assailant in court.
  8. In her testimony, PW1 gave clear and graphic testimony of how the appellant, who lured her to a house defiled her. Despite being subjected to cross-examination, PW1 remained steadfast that it was the appellant, who committed this act against her. She could not have possibly pointed fingers at the wrong person for the act. I therefore hold that the appellant was properly identified.
  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 were recorded reasons why she believed the child was telling the truth. In her judgement, the trial magistrate recorded that his observation of the demeanour of the minor as she testified was satisfactory and that she was truthful and credible. In addition, she had no reason to point an accusing finger at the appellant if indeed he did not defile her. I have also thoroughly gone through the testimony of PW1 and noted that she was consistent all through, and her evidence was unshaken on cross-examination by the appellant.
  10. Regarding additional corroborating evidence, the prosecution called Caroline Musanga (PW2), the complainant's cousin. She testified in court that on the day the complainant went missing, she had left her and her children at her vegetable vending shop. When she returned at 6 PM, she realized the complainant was gone. Her children informed her that the complainant had left with Obed, a neighbour. Accompanied by one of her children, she went to the premises where the complainant and Obed had been seen entering. Neighbours helped identify the house. Peeking through the door, she spotted the complainant's shoes. After opening the door, she found the complainant on the bed without her underwear. The complainant recounted her ordeal, and the witness took her to the hospital and reported the incident to the police.
  11. Tiya Afisa Abdullahi (PW3) a clinical officer examined the complainant on 22<sup>nd</sup> October 2022. Upon examination, there were no physical injuries, her vagina had a fresh laceration on the hymen at 12 o'clock. The vagina had mild inflammation on the labia minora and labia majora with whitish discharge. She concluded that the cause of the injuries was penile penetration. This medical evidence corroborates the complainant's testimony regarding penetration and produced the PRC and P3 reports.



12. In his defence, the appellant denied committing the offense, claiming that he was framed by PW2, who he stated was his lover. He maintained his innocence throughout his testimony.
13. On the age of the complainant, it was her testimony that she was 16 years old. The investigating officer produced her birth certificate which indicated that she was born on 8<sup>th</sup> July 2005. She was therefore 17 years old and a child within the meaning of the law.
14. The trial court considered this defence and found it to be baseless. I have already found above that her testimony was truthful and consistent all through. When weighed against the prosecution case, the appellant's defence did not raise any doubts thereof and it was rightly dismissed by the trial court. I therefore find that penetration was proved to the required legal standard.
15. Having analysed the totality of the prosecution's case, I find that the prosecution proved their case beyond reasonable doubt. The conviction on the charge of defilement is thus affirmed.
16. On the sentence, section 8(4) provides that 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. The prosecution proved that the child was 17 years old; hence, the trial court, imposed the sentence of 15 years' imprisonment. I therefore see no reason to interfere.
17. The upshot of the above analysis is that the appellant's appeal is dismissed in its entirety for lack of merit.

Orders accordingly.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2024**

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**D. KAVEDZA**

**JUDGE**

In the presence of:

Appellant absent

Maroro present for the Respondent

Achode Court Assistant

