



**Hussein alias ‘Hassan v Republic (Criminal Appeal 25 of 2024)
[2024] KEHC 13277 (KLR) (30 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13277 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 25 OF 2024
DR KAVEDZA, J
OCTOBER 30, 2024**

BETWEEN

SAID HUSSEIN ALIAS ‘HASSAN APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence delivered on 29th February 2023 by Hon. Kabuya I.M (SPM’S) at Kibera Chief Magistrate’s Court Sexual Offences Case no. E122 of 2023)

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(2) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars were that on the 22nd day of November 2023, at Karanja Area in Kibra Sub-county within Nairobi County, intentionally caused his penis to penetrate the vagina of S.H.H. a child aged four (4) years. The appellant was sentenced to thirty (30) years imprisonment.
2. In the petition of appeal and amended grounds of appeal, he raised the following main grounds for appeal; that the charge of defilement was not proved against him and that his sentence was excessive.
3. This being the first appellate court, we are guided by the decision in *Okeno v. R* [1972] EA 32. In this case, the court opined that a court of first appeal ought to re-examine all the evidence afresh and in an exhaustive manner, so as to come up with its own conclusions without overlooking the conclusions of the trial court, 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. The prosecution called on four witnesses to buttress their case. The complainant testified as PW2. She provided unsworn testimony following voir dire examination. She recounted that on the day that the incident occurred, she came from school at around 1 p.m. and changed her home clothes from her school uniform. A few moments later, the appellant called her into his house, instructed her to remove her stockings, and inserted his penis into her vagina.
7. After the incident, he instructed her not to tell anyone. She got dressed and went back to playing with her friends. That night, she confided in her mother, who took her to the hospital the next day. Both she and her mother received medication. She remained consistent in her testimony during cross-examination.
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 (*Isaac Nyoro Kimita v R* Court of Appeal at Nairobi Criminal Appeal No. 187 of 2009; *Julius Kiunga M'biritbia v R* High Court 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. On additional corroboration evidence, PW1, Asha Said, recalled that on 22nd November 2023, she returned home from work around 9 PM, where her daughter, PW2, asked for two cups of water. Curious, Asha inquired further, prompting PW2 to mention the appellant's name but then fell silent. After threatening to cane her, PW2 disclosed what had happened. Asha consulted her sister Saumu, who advised seeking medical care for PW2. With the help of neighbour Sarah, who works at the



Gender Violence Recovery Centre, they went to the hospital, where PW2 received treatment and documentation for reporting the incident. PW1 identified the appellant as her nephew and submitted PW2's birth certificate, lab results, and P3 form as evidence. During cross-examination, PW1 clarified that she was at a funeral that day and noted that PW2 had whitish stains on her underwear and stockings, indicating partial penetration without bleeding.

11. PW3, John Njuguna, a clinician from Nairobi Women's Hospital, testified on behalf of Faith Mutisya, who was unavailable. The post-rape care form for PW2 noted a bruise inside her vagina, confirming her hymen was intact. PW2 received treatment to prevent HIV and other STDs. Therefore, given the history, it is my finding that partial penetration was sufficiently proved.
12. PW4, Police Constable Esther Kavere, the Investigating Officer, recounted that on 23rd November 2023, PW1 reported the defilement incident. PW1 detailed the events leading to their hospital visit and provided a medical document from Nairobi Women's Hospital. PW4 recorded the complaint in the Occurrence Book, took witness statements, and issued a P3 form to PW1. She visited the incident location, arrested the appellant, and charged him with defilement. During interrogation, the appellant denied the offense, claiming the victim was his relative.
13. In his defence,
14. The court, having found that the prosecution case had been made out sufficiently, required the appellant to be placed on his defence.
15. The appellant stated that he was at home until 2 PM on the day of the incident, after which he attended a football camp with his friend Shaban until 8 PM. The following day, when he answered a knock at his door, he found two police officers alongside PW1, PW2, and PW1's sisters. The officers confirmed his identity and questioned him about the incident. He denied the allegations and was subsequently taken to Kibera Police Station, where he was charged with defilement.
16. DW2, Michael Odhiambo, testified that he was at a funeral with PW1 and her boyfriend Wayne until around 11 PM, claiming that PW1 could not have been home at 9 PM.
17. DW3, Shaban Mohammed, recalled accompanying the appellant to a football game between 4:30 PM and 7 PM. They returned home at 8 PM, and he only learned about the appellant's arrest the next day. He expressed surprise that the appellant was accused of defiling PW2, noting that the appellant frequently picked her up from school and that she visited his home.
18. The court considered his defence and found it to be incredible. Given 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.
19. 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 17th June 2019. She was therefore four (4) years old at the time of the offence. There is therefore no doubt that PW1 was a child.
20. 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.
21. On sentence, the appellant was sentenced to serve thirty (30) 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.



22. 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 OCTOBER 2024

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D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Maroro present for the Respondent

Achode Court Assistant

