



**Bii v Republic (Criminal Appeal E012 of 2023)  
[2024] KEHC 15016 (KLR) (28 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15016 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
CRIMINAL APPEAL E012 OF 2023  
JR KARANJA, J  
NOVEMBER 28, 2024**

**BETWEEN**

**SHADRACK KIPROTICH BII ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. Shadrack Kiprotich Bii (Appellant), appeared before the Senior Resident Magistrate at Kericho charged with defilement, contrary to Section 8(1) as read with Section 8(2) of the Sexual Offence Act in that on diverse dates between 11<sup>th</sup> – 14<sup>th</sup> August, 2021 at [Particulars Withheld] within Kericho contrary, be defiled MC a girl aged six (6) years. In the alternative, the Appellant was charged with committing an indecent act with the same girl contrary to Section 11(1) of the Sexual Offence Act.
2. After trial, the Appellant was convicted on the main count and sentenced to serve sixty (60) years imprisonment. Being dissatisfied with the conviction and sentence, the Appellant preferred the seven (7) grounds of appeal set out in the petition or memorandum of appeal filed herein on 4<sup>th</sup> March, 2023.
3. At the hearing of the appeal the Appellant represented himself and relied on his written submissions with brief oral response to the Respondent/state’s written submissions in opposition to the appeal.  
  
The appeal was canvassed by way of written submissions and the state/respondent was represented by the learned prosecution counsel, Mr. Karanja.
4. Upon due consideration of the appeal on the basis of the supporting grounds and the riral submissions, the duty of this court was to reconsider the evidence and draw its own conclusion bearing in mind that the Trial Court had the advantage of seeing and hearing the witness (see, Okeno Vs Republic (1972)EA32).



5. Accordingly, the prosecution evidence through its six (6) witnesses inclusive of the child complainant (PW1) was considered against that of the Appellant in defence. In this court, opinion, what emerged as the basic issue for determination was whether the complainant's child was indeed defiled and if so, whether the Appellant was responsible for the offence.

6. The material ingredients of the offence of defilement are essentially the act of penetration, the age of the child victim and the identification of the offender.

Under the Sexual Offence Act, an act contemplated under the Act is what is known as penetration and such act includes the partial or complete insertion of the genital organs of a person into the genital organs of another person (see, Section 2 of the Act).

7. The evidence by the child complainant (PW1) indicated that her genital organ was penetrated by the genital organ of a male person. She referred to her genital organ as her "rose" and the male genital organ as a "snake". Amother or so after the incident the complainant revealed the fact to CC (PW2) and her mother, RC (PW6). This was on the 12<sup>th</sup> September, 2021 as they were having lunch.

8. The complainant's mother reported the incident to the police after which the child complainant was taken to Sigowe Health Centre where she was medically examined by a clinical officer, Chepngetich Faith Caroline (PW4) who compiled and signed the medical examination report (P3 form) (p-exhibit 1) confirming the act of penetration against the complainant, child, thereby confirming and corroborating the child's evidence in that regard and the fact that she was indeed defiled.

9. It may therefore be safely stated that the element of penetration was duly established by the complainant's evidence coupled with that of the clinical officer (PW4). As to the age of the child, the evidence by the complainant's mother (PW6) together with that of the Clinical officer (PW4) and the investigation officer, PC Ruto Ndiema (PW5) was sufficient enough in proving the age of the child complainant as confirmed by the birth certificate (P.Exhibit 2) which indicated that she was born on 12<sup>th</sup> March, 2015, thereby placing her age at approximately six (6) years as at the material time of the offence.

10. With proof of penetration and the age of the child complainant, the prosecution did establish beyond reasonable doubt the occurrence of the offence of defilement against the child complainant. In any event, the Appellant did not substantially dispute the fact. At most, the crucial issue which presented itself for determination was the identity of the offender. The accused denied that he was such offender and implied that he was implicated without good cause.

11. However, the prosecution evidence through the complainant (PW1) indicated that the Appellant was the actual offender. It is notable that the child complainant was very familiar to the Appellant. He worked at her family's home together with FC (PW3), who was a house help in the home and who indicated that around the material time of the offence on 11<sup>th</sup> August, 2021, she spotted the child complainant and going to the Appellant's compound at about 10.00am. she then went to get her (complainant) out of the compound where she found her sitting on a chair while the Appellant was on a bed.

12. Faith (PW3), did not at the time notice anything unusual with the child complainant. Save the child complainant, none of the other prosecution witnesses could provide direct evidence of identification against the Appellant. They apparently relied on what they were told by the child complainant and had high suspicion that the Appellant was responsible for the offence.

13. The child complainant was thus the sole witness of identification against the Appellant. Her evidence in that regard was uncorroborated by any other evidence from the rest of the prosecution witnesses, but



was accepted and treated as credible evidence of identification by the Trial Court which then relied on it to find that the Appellant was positively and reliably identified as the person who sexually offended the child complainant by defiling her.

14. The proviso to Section 124 of the *Evidence Act* provides that;-

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court should receive the evidence of the alleged victim and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth”

15. The Trial Court in finding that the complainant child’s evidence was credibly cogent was in fact satisfied that the child was telling the truth when she identified him as the person who actually offended her. For all the foregoing reasons, this court is satisfied that the conviction of the Appellant by the Trial Court was sound and proper and is hereby upheld.

16. With regard to the sentence, the punishment for a person who defiles a girl aged eleven (11) years and below is imprisonment for life (see Section 8(2) of the Sexual Offence Act). Herein, the Appellant was given sixty (60) years imprisonment which was rather harsh and excessive considering that the Appellant was a remorseful first offender and a college student in the making. Consequently, this court deems it fit to temper justice with mercy or sympathy and reduce the sentence downwards or in any other lawful manner subject to a favourable pre-sentence report by a probation officer.

17. The matter shall therefore be mentioned at a later stage for submission of the pre-sentence report and sentence.

18 Ordered accordingly.

**HON. J.R KARANJAH**

**JUDGE.**

**DATED AND DELIVERED THIS 28<sup>TH</sup> DAY OF NOVEMBER, 2024.**

In presence of;-

Appellant;- Present in person

Mr. Karanja;- State counsel

Mr. Simon Magwa;- Court Assistant.

