



**JKC v Republic Of Kenya (Criminal Appeal E028 of 2022)
[2024] KEHC 14959 (KLR) (28 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14959 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CRIMINAL APPEAL E028 OF 2022
JR KARANJA, J
NOVEMBER 28, 2024**

BETWEEN

JKC APPELLANT

AND

REPUBLIC OF KENYA RESPONDENT

JUDGMENT

1. This appeal is against the decision and judgement of the Resident Magistrate at Kericho in Criminal Case (S/O) No. E024 OF 2021 in which the Appellate, JKC was convicted and sentenced to seven (7) years imprisonment for the alternative count of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offence Act.
2. The main charge was that of defilement, contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. It was alleged that the Appellant defiled a girl child aged seven (7) years between the night of 1st and 2nd March, 2021 within Kericho County. Alternatively, the Appellant committed an indecent act with the child.
3. After trial, the Appellant was found guilty of the alternative count and convicted accordingly, but being dissatisfied with the conviction and sentence he preferred the present appeal on the basis of the grounds set out in the petition of appeal dated 22nd September, 2022.
4. The appeal was canvassed by written submissions which were duly filed by the Appellant through H & K Law Advocates and by the state/Respondent through the Office of the Director of Public Prosecution (ODPP). Having given due consideration to the appeal and the rival submissions, the duty of this court was to revisit the evidence and draw its own conclusions bearing in mind that the Trial Court had the benefit of seeing and hearing the witness (see, Okeno Vs Republic (1972)EA 32).
5. In that regard, the evidence led by the four (4) prosecution witnesses inclusive of the child complainant (PW1) and her mother, MCS (PW2), was considered along with that of the Appellant and his witness



Francis Maritim (DW2). The Trial Court considered the same evidence and concluded that the prosecution had failed to prove beyond reasonable doubt that the Appellant (accused) committed the offence of defilement, but had sufficiently proved that the Appellant committed an indecent act with the child.

6. In this court's opinion, the prosecution evidence and in particular that of the child complainant (PW1) and the clinical officer Nancy Wendo (PW3) was sufficient and credible enough in establishing the element of penetration thereby proving that the complainant was actually sexually offended. The same evidence coupled with that of the child's mother (PW2) also established the element of age and proved that the child complainant was seven (7) years old at the material time of the offence. The age assessment report (P.exhibit 4) confirmed as much.
7. In any event, there was no substantial dispute from the defence that the child complainant was actually defiled. It was therefore ironic that the Trial Court concluded that the offence of defilement had not been proved beyond reasonable doubt. Proof of the child complainant age and the fact that there was penetration of her genital organ in any manner was sufficient enough to prove defilement.
8. What presented itself for determination by the Trial Court was the question of identification of the offender. It was thus incumbent upon the prosecution to provide sufficient and credible evidence of identification against the Appellant to prove that he was the person who actually offended the child complainant who was his own daughter.
9. In his defence, the Appellant denied having been responsible for the offence and implied that he was implicated by his wife (the complainant's mother) after they disagreed on the sale of land. He admitted having slept on the same bed with the complainant and another child of his on the material night of the 1st/2nd March, 2021 but did not notice or hear anything happening to his children. He said that on the following day in the morning to midday hours he allowed his children including the complainant to go and join their mother at Kapcheptoror where she had gone after the disagreement.
10. Francis Maritim (DW2) confirmed that he visited the Appellant at his home on that following day and found him in company of his children including the complainant. He helped the Appellant to walk the children on the way to join their mother and noted that they all seemed okay.
11. Other than that the complainants evidence, there was no other evidence of identification against the Appellant. In that regard and being very much alive to the Provisions of Section 124 of the Evidence Act, the Trial Court found that the Appellant was positively identified by his daughter as being the person who sexually offended her.
12. Section 124 Evidence Act, provides that; -

“ notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act (Cap 15) where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him;

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 shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reason to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth”



13. In arriving at its conclusion that the Appellant was the offender the Trial Court rendered itself as follows: -

“On whether the accused person committed indecent act with the alleged victim, I have relooked at the prosecution evidence particularly the testimonies by the alleged victim, her mother and PW3 the clinical officer. From the alleged victim’s testimony, she testified

on how the accused did bad manners to her by touching her vagina using his hands, how he even touched inside her vagina using his “thing” how he wore a condom to his “thing” located on his groin and inserted it into her vagina making her to feel a lot of pain, used it to do bad manners to her, it is clear that the accused person caused his body parts namely his hands, and his “thing” located on his groin being his penis to come into contact with the genital organ being the virgina of the alleged victim. Nothing that the accused person was very well known to the alleged victim, the place was well lit with electric light and that the court had nothing to doubt the credibility of the alleged victim as to the identity of the perpetrator having seen her testify and the clarity of her mind in giving her narration being guided by the provision to section 124 of the Evidence Act and further the decision in *Abdi Ismail Mouldid vs Republic (2019]eKLR*, I find that the prosecution have proved the alternative offence of committing indecent act as against the accused person”.

14. This court agrees with the aforementioned findings of the Trial Court with regard to the identification of the Appellant as the offender save for the finding that the offence which was proved was the alternative count of committing an indecent act against the child complainant. The finding on the alternative count was clearly in error as it went against the weight of the evidence which proved beyond reasonable doubt that the child complainant was actually defiled and indecently assaulted.
15. It would therefore be the finding of this court that there was sufficient evidence of identification against the Appellant based on the credibility of the child complainant (PW1) which proved that the Appellant was the actual offender.
16. . The Trial Court was in a better position to make findings on the credibility of a witness compared to this court which did not have the opportunity of seeing and hearing the witness. And for good reason, the Trial Court believed the child complainant. This court cannot interfere with that finding and must also find that the Appellant was positively identified as the person who offended the child complainant, his own daughter.
17. The manner in which the offence was executed coupled with the timing was a clear indication that the Appellant transferred the anger he had for his wife (the child’s mother) to his daughter of tender years, all because of a sale of land. This court therefore finds the Appellant guilty of the main count of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offence Act and convicts him accordingly.
18. The Trial Court’s conviction of the Appellant on the alternative count of committing an indecent act contrary to Section 11 (1) of the Sexual Offence Act is hereby quashed.

For all the reasons foregoing, grounds one (1) to seven (7) of the petition of appeal are unsustainable and are hereby dismissed. The error on the year of the commission of the offence in the charge sheet alluded to by the Trial Court was insignificant and curable by dint of Section 382 of the Criminal Procedure Code. In any event, the evidence clearly indicated that the offence occurred on the night of 1st/2nd March, 2021.



19. On sentence, it was imposed on the basis of the conviction on the alternative count and must now be set aside for this court to impose a sentence on the main count of defilement. Section 8(2) of the Sexual Offence Act provides for a mandatory sentence of life imprisonment for a person who commits the offence of defilement with a child aged eleven (11) years and below.

However, on the basis of the submissions on sentence made herein by the state/Respondent and the fact that grounds eight (8) of the petition of appeal alludes to the sentence imposed by the Trial Court being harsh and excessive, this court deems it fit to call for a pre-sentence report from the probation officer before it imposes sentence.

20. . In that regard, a date shall be given for submission of the pre-sentence report and sentence.

Otherwise, the appeal is dismissed for want of merit.

21. Ordered accordingly.

HON. J.R. KARANJAH

JUDGE.

DATED AND DELIVERED THIS 28TH DAY OF NOVEMBER, 2024.

In presence of;-

Mr. Karanja;- State Counsel

Simon;- Court Assistant

No appearance for the Appellant

