



REPUBLIC OF KENYA



**Melchior v Republic (Criminal Appeal E013 of 2023)
[2024] KEHC 16048 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16048 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E013 OF 2023
DR KAVEDZA, J
DECEMBER 20, 2024**

BETWEEN

BITARICHO MELCHIOR APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered on
12th June 2024 by Hon. Daisy Mutai (PM) at Kibera Chief Magistrate's
Court Sexual Offences Case no. E108 of 2023 Republic vs Bitaricho Melchior)*

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 8th October 2023 in Dagoretti Sub-County within Nairobi county, he intentionally and unlawfully caused his penis to penetrate the vagina of TA a child aged 14 years. He was sentenced to serve twenty (20) years' imprisonment.
2. Being dissatisfied, the appellant filed an appeal challenging the totality of the prosecution's case. Further, he stated that he was denied his right to a fair trial.
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. 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 (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.
- (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
6. The prosecution called on five (5) witnesses in support of their case. PW1, the complainant, TA (name withheld) testified that on 8th October 2023, she met the appellant who had soda and cake in his hand. He told her to get a cup so that he could share the soda with her. When she did so, he dragged her to his house, threw her to his bed, covered her mouth with a blanket, and had sex with her after he had forcefully removed her clothes. He inserted both his finger and penis into her vagina, and she began screaming.
7. Mama Vero, Josephine heard her screams and came to her rescue. He told her not to shower or change clothes. The complainant's mother came later on. The matter was reported to the police station and the complainant was taken to the hospital for examination and treatment. She identified the appellant in court as the perpetrator of the offence.
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'birithia 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. The complainant'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 the complainant was consistent and steadfast in his. In addition, their evidence which was subjected to cross-examination remained consistent throughout.



10. PW3, Josephine Veka King'au, corroborated the complainant's evidence, stating that the complainant narrated the incident to her after it occurred. PW3 informed the complainant's mother, PW2, Mary Goretti Awuor, who rushed home and took the complainant to the hospital.
11. The complainant's mother PW2 testified that the complainant was 14 years old and was born on 8th October 2023. On the material day, she was told by PW3 that something had happened in the house and she should promptly go. On the way she met PW3 told her that the complainant had been defiled. They met the appellant and questioned her. They then reported the matter to the police and took the appellant there. Later they escorted the complainant to the hospital for examination and treatment. PW2 produced the complainant's birth certificate in court. There, the complainant received medication, a GVRC form, and a PRC form.
12. PW4, John Njuguna, a clinician at Nairobi Women's Hospital, presented medical reports on behalf of his colleague. He testified that on 8th October 2023, the complainant reported that the appellant had had intercourse with her. Examination revealed a broken hymen and whitish discharge, though no spermatozoa were found. He adduced the PRC and P3 forms in court. He concluded that there was penetration. In this case, penetration was adequately proven, first from the testimony of the complainant, and further by the complainant's medical records tendered by PW4 the medical officer. The ingredient of penetration was therefore proved beyond reasonable doubt.
13. PW5, Sergeant Gilbert Otieno, narrated that on 8th October 2023, the complainant's mother reported all that had occurred that day at Kasarani Police Station. The complainant was also asked to recount what had happened.
14. When put on his defence, the appellant averred that on the material day, he was in his house when his friend George Munyi came to his house and told him that there was a water shortage. As they were walking, they met the complainant who told him to go back to his house, where he found the complainant's parents waiting for him. They took him to the chief's place and later to the police station. Upon cross-examination, he averred that he had known the complainant for around five months and that the complainant's father was just angry since he had not paid his debt of Kshs. 2000.
15. The trial court considered this defence and found it to be incredible. I have arrived at the same conclusion.
16. On the age of PW1, the trial court considered the copy of her birth certificate that she produced. The birth certificate indicated that the complainant was born on 13th May 2009. She was therefore fourteen (14) years at the time of the offence. There is therefore no doubt that PW1 was a child.
17. On identification of the appellant, PW1, PW2 and PW3 maintained that the appellant was their neighbour, a fact which the appellant did not dispute. Further, he averred that he had known the complainant for five months. This time is sufficient for the complainant and her family to familiarize themselves with the appellant.
18. The upshot of the above analysis is that the prosecution proved their case beyond reasonable doubt. The conviction is hereby affirmed.
19. On sentence, the appellant was sentenced to twenty (20) years imprisonment. During sentencing, the court considered the appellant's mitigation and that he was a first offender before sentencing him. The [Sexual Offences Act](#) provides for a mandatory minimum sentence of twenty years for the offence the appellant is convicted of. 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 vs 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 VIRTUALLY THIS 20TH DAY OF DECEMBER 2024

D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Mburugu for the Respondent

Achode Court Assistant.

