



**Mwaura v Republic (Criminal Appeal E096 of 2024)
[2024] KEHC 15999 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15999 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E096 OF 2024
DR KAVEDZA, J
DECEMBER 20, 2024**

BETWEEN

TILAS MWAURA APPELLANT

AND

REPUBLIC RESPONDENT

*((Being an appeal against the original conviction and sentence
delivered on 14th March 2024 at Kibera Chief Magistrate's Court
Sexual Offences Case no. E036 of 2020 Republic vs Tilas Mwaura))*

JUDGMENT

1. The appellant Tilas Mwaura was charged and after a full trial convicted for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*, No. 3 of 2006. He was sentenced to serve life imprisonment. Being aggrieved, he filed an appeal challenging his conviction and sentence.
2. In the petition of appeal and amended grounds of appeal, he raised the following main grounds: The appellant challenged the totality of the prosecution's evidence against which he was convicted; the appellant complained that the minor was not a credible witness and that the prosecution did not prove the ingredients of the offence beyond reasonable doubt.
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 that was before the trial court, and itself 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 (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. Bearing in mind the above provisions, I will now analyse the evidence on record to ascertain whether the essential ingredients of the offence preferred against the appellant were established to the required standard of proof.
7. Regarding proof of age, I wish to state at the outset that the importance of proving the age of a victim, proof of penetration, and positive identification of the assailant in sexual offences were paramount.
8. The complainant (PW1) testified that she was a 12-year-old student at ACK Emmanuel School. She recalled the events of February 2020 when she attended tuition at PCEA Church under the instruction of Teacher Isabella. During lunch at 1 pm, the appellant entered the kitchen and, after lunch, directed her to a specific room.
9. Upon entering the room, she observed four younger girls whom she did not know. One of the girls invited her into the class, where she encountered the appellant. He blindfolded her with a cloth, instructed her to climb onto a table, lifted her as one would a small child, and laid her on her back. She further testified that the appellant restrained her by tying her hands and legs. She said that the appellant then removed her clothes and had sex to her.
10. The complainant demonstrated that the appellant inserted his penis into her genital area, where she urinated. After the incident, she went home, bathed the following morning, and reported the matter to Teacher Irene the following Monday. Teacher Joy subsequently took her to the hospital.
11. Upon cross-examination, the complainant confirmed that she was wearing a skirt during the incident and was not wearing trousers. She explained that she did not scream because she was frightened. She stated that the girl who called her into the room held her hands while the appellant sexually assaulted her. She also testified that she had not previously experienced sexual intercourse. However, she could not recall the specific dates she went to the hospital or the exact date of the incident.
12. Upon re-examination, the complainant reiterated that she was wearing a dress during the incident. She denied fabricating the allegations against the appellant or being coached.
13. 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”
14. 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.
15. The appellant was well known to the complainant whom she recognised as "guka". She could not have possibly pointed fingers at the wrong person for the act. I therefore hold that the appellant was properly identified.
16. To corroborate the complainant’s evidence, her mother, PW2, stated that on several occasions in March 2020, she received urgent calls from a teacher at ACK Academy in Kibera Silanga. When she visited the school, she was informed that the complainant was not walking properly. She then took the minor to Kibra Tumaini Clinic and subsequently reported the matter to the police. During cross-examination, PW2 stated that the minor was not taken to the hospital immediately after the defilement. She also noted that the complainant stopped attending school after the incident on February 1, 2020, which occurred at the PCEA church.
17. PW3, Irene Imbongo, a teacher at ACK Immanuel, recalled that in March 2020, she noticed the complainant could not jump or participate in activities. When questioned, the complainant reported pain in her vagina and revealed that every Saturday, the appellant would "anatumfanyia tabia mbaya" at "kwa mradi" PCEA Silanga. In cross-examination, PW3 confirmed observing this during a Physical Education session.
18. PW4, a social worker at PCEA Silanga, stated that in April 2020, the complainant’s mother informed her that the child had been defiled. They summoned the complainant, who explained that a man at the gate took them to the lab and abused them in turns. The child identified the man as the appellant, their security guard. PW4 also confirmed that attendance records showed the complainant was present until February 1, 2020. During cross-examination, PW4 affirmed that according to the complainant last attended classes on February 1, 2020. She further noted that PW2 reported the incident in April 2020.
19. PW5, a project director at PCEA Silanga, testified that the complainant’s case was reported in April 2020. He indicated that the appellant was employed under the church and there were no prior complaints against the appellant during his tenure.
20. PW6, a nursing officer at Kibera South Health Centre under Amref, testified that on April 28, 2020, the complainant was brought in with allegations of sexual assault. Examination revealed a broken gaping hymen, painful hyperemia at 12 and 6 o’clock regions, lacerations at 6 o’clock, and a whitish discharge. She produced the PRC and P3 forms. During cross-examination, she noted the wounds were five to seven days old. She clarified that she examined the minor on April 28, 2020, and the date "October 17, 2020" was an error. The abuse was recurring, with the last incident occurring on April 28, 2020. She concluded that there was penetration. Therefore, given the history, it is my finding that penetration was sufficiently proven.



21. On the age of the complainant, the trial court considered the birth notification produced by the investigation officer. The notification indicated that the complainant was born on 28th October 2009. She was therefore ten (10) years old at the time of the offence. There is therefore no doubt that the complainant was a child. Age was therefore sufficiently proved.
22. In his defence, the appellant stated that he worked as a security guard at PCEA. On February 4, 2020, the church chair asked him to stay home for investigations related to an earlier incident. He denied defiling the minor and claimed that during the time in question, many activities were happening at the church as schools had closed in March 2020. He also stated he was not at work in February 2020 and did not have keys to the lab, which were only held by the lab teacher and principal. During cross-examination, he mentioned that he did not previously know the minor but could identify her due to the Mradi program.
23. DW2, Isaac Irungu, a preacher and Mradi chair, testified that in April 2020, Joy Wairimu informed him of the defilement incident involving the appellant DW2 stated the appellant was not at work on March 5, 2020, and had been suspended on February 5, 2020.
24. DW3, a chemical forensic physician, noted that the doctor examining the complainant did not comply with proper procedures, as the incident date and sample details were missing. In cross-examination, DW3 explained the 72-hour rule for PRC tests and opined that the minor had been defiled. Upon re-examination, he noted the PRC test occurred three months after the injury, meaning reported pain would have subsided.
25. DW4, a church caretaker, testified that on February 1, 2020, she helped man the gate until 5 p.m., when the appellant left for home.
26. The trial court, after considering the appellant's defense, dismissed it as a mere denial. I make a similar finding that the prosecution proved their case beyond reasonable doubt. The conviction against the appellant on the charge of defilement is affirmed.
27. On sentence, the appellant was sentenced to life 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 life imprisonment for the offence the appellant is convicted of. The court sentenced the appellant to the minimum sentence provided under the law.
28. 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

