



**SO v Republic (Criminal Appeal E006 of 2023)  
[2024] KEHC 16325 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16325 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL APPEAL E006 OF 2023**

**DK KEMEL, J**

**DECEMBER 20, 2024**

**BETWEEN**

**SO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment of the Hon L. N.Sarapai (PM)  
delivered on 27th January 2023 in Ukwalu PMCC (S.O) NO. 31 of 2021)*

**JUDGMENT**

1. The Appellant herein SO was charged with the offence of defilement contrary to section 8(1) as read with 8(3) of the *Sexual offences Act* No. 3 of 2006. The particulars of the offence were that in between the months of June and July 2020 at (particulars withheld) estate, (particulars withheld) Sub County within Nairobi County intentionally caused his penis to penetrate the vagina of V. R. A a child aged 14 years. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* with the particulars being that in between the month of June and July 2020 at(particulars withheld) Estate (particulars withheld) Sub-County within Nairobi County intentionally touched the vagina of V.R.A a child aged 14 years.
2. The Appellant denied the charge and after a full trial he was convicted and sentenced to 15 years imprisonment less two months that he spent in remand custody
3. Dissatisfied by the trial court’s verdict, the Appellant has now filed this appeal against both the conviction and sentence on the following grounds:
  - i. That the trial magistrate and the prosecution erred in both law and fact in failing to establish their case beyond reasonable doubt to sustain a conviction and sentence as by law required



- ii. That the trial magistrate erred in law and in fact by breaching section 36 of the [Sexual Offences Act](#), proved by government analyst under section 77(1) of the [Evidence Act](#) (DNA).
  - iii. That the trial magistrate ERRED in law and in fact in failing to consider his cogent and alibi defence which was adhered to by his assistant chief.
  - iv. That the trial magistrate erred in law and in fact in failing to prove the element of penetration.
4. This being a first appeal, it is the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent findings and conclusions. (See *Okeno vs. Republic* [1972] EA 32). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to make due allowance in that respect as so held in *Ajode V. Republic* [2004] KLR 81.
  5. The Respondent called a total of four witnesses while the Appellant called two witnesses.
  6. PW 1 VRA (minor) gave a sworn statement after the court was satisfied that she understood the duty of telling the truth under oath. She testified that she was 15 years and turning 16 years in July 2022. She identified the birth certificate marked PMFI 1. She testified that she lives at (particulars withheld) church village and that her mother is CA. That she no longer goes to school due to a surgery she underwent in order to deliver a baby. That she could recall what happened before July 2020. That during the time of the incident, they were living in (particulars withheld) estate in Nairobi. They stayed in the same house with her mother and the Appellant as her step- father. She recalled that one night, when her mother had gone to help someone in Alego, she was sleeping on the floor with one NR and that her step- father who is the Appellant raped her that night.

She recalled that he was in a navy blue short. That he took her from where they were sleeping to their bed. That he closed her mouth and that he inserted his penis in her private parts and had sex with her. That the following day she was in pain at her lower abdomen. She informed her Auntie who assured her that the pain was normal for girls having periods. She did not tell her what had happened. That Auntie was their neighbor. That she was afraid because the Appellant who is her step father had threatened her mother with a knife in her presence before.

She went on to state that one day she was unwell and that her mother and step father both took her to the chemist for testing. That she was found pregnant and her mother was very harsh to her but the Appellant insulted her mother. That when she tested positive for pregnancy she was in class 8 in the year 2020. That her mother enquired from her as to who was responsible but she initially hid the truth. That she eventually disclosed that it was SO who had got her pregnant on the day she had gone to Alego to pray for someone. That upon disclosing the news, her mother collapsed on the road. That thereafter, they reported the incident to Ukwala police station and later she was taken to hospital where several tests were done including HIV and scan.

That DNA testing was also done and that they went with the police SO and her mother too. That the DNA test was negative. That when SO took her to the room, it was a single room which had light and had sex with her. That she had never had sex with anybody before. That there is no grudge between them.

On cross examination, she stated that she was with the Appellant and the younger sister. That she has never lived with the Appellant in the absence of the mother. That the Appellant had started insulting her mother that she was barren. That the Appellant, the complainant and her mother were all present when the tests were done at the chemist. That initially she had chest pain.



7. PW2 CA testified that she is the mother to the complainant minor who was born on 31/06/2006, and that she is a preacher at (particulars withheld) Church. She produced her birth certificate as Exhibit 1. That in November 2020 they were living together with SO the Appellant as his wife and that they were at Ugenya. That sometime in July 2020 she left her two children who included the complainant and another one called RN with the Appellant in Nairobi as she went to Alego for work. That upon her return, her daughter the complainant was very sad and upon asking her what the problem was she disclosed that the Appellant had impregnated her. That upon coming to Alego with her children, a friend of hers likewise noticed that the complainant looked pregnant. They reported the issue to the police at Ukwala who referred her with a p3 form to the hospital. That the P3 form was filled and retained by the police. That later the complainant and the Appellant were taken for DNA testing in Kisumu in the company of the mother. That the DNA test was negative. She further testified that the biological father of the children were in Alego and that there was no grudge with the Appellant.

On cross examination, she stated that the child informed her that the Appellant had defiled her and that she cannot tell if the child is lying.

8. PW3 PC Otieno Magdalene testified that she's attached to Ukwala police station doing general duties. That on 14.01.2021 the Complainant V.R.A and her parents reported a case of defilement. That the child was said to be 27 weeks 5 days pregnant. That she issued them with a P3 form which was later duly filled and returned, then she recorded their statements. That after the child had her child, she took them together with the accused to the Government chemist in Kisumu for DNA testing. That the DNA results showed that the Appellant was not the father to the child. That she forwarded the file to the ODPP who directed that the Appellant be charged based on the evidence of the minor.

On cross examination, she stated that the defilement occurred in Nairobi, but that the child was discovered pregnant when the family had relocated to Ugenya so they had to report to the nearest police station. That she took him for DNA which came out negative but ODPP still charged him because there was enough evidence of defilement.

9. PW4 Nicholas Msando testified on oath that he is a clinical officer at Ukwala sub county hospital. He stated that on 15/01/2021 VRA a child aged 14 years from Uranga came alleging that she had been defiled by someone known to her. That upon examination she was 27 weeks and 3 days pregnant. That he filled the P3 form and signed it. P3 form produced as Exhibit 2.

On cross examination, he stated that the pregnancy test was positive, P3 form indicated that the incident had happened between June and July 2020. That he examined the child on 15.01.2021 and that he does not know why the child was not examined immediately after the occurrence. That he could not tell who had defiled her.

10. That marked the close of the prosecution case.
11. The court then ruled that a prima facie case had been established by the prosecution and thus put the Appellant on his defence.
12. DW1 SO gave an unsworn statement. He stated that the lady fabricated the case against him. That on 08/01/2021 the lady went for prayers at 6.00pm. That when she returned at 8.00pm her countenance had changed. That when he asked what was for dinner, she claimed that there was no food. That later that night she woke him up and indicated that she wanted to leave. That she woke up very early and started packing then she left with her household items. That on 12/01/2021 she called him and asked why he had defiled her child. That he was shocked at the allegation. That later on he was arrested and charged. That in the said month of June he was in the village and not in Nairobi where the incident is said to have occurred.



13. DW2 Silvanus James Obala testified that in the month of June 2020 the Appellant was in the village as there was a lockdown due to the Covid pandemic. That the said allegations against the Appellant cannot be true as he was not in Nairobi.
14. That marked the close of the appellant's case.
15. The appeal was canvassed by way of written submissions. It is only the Appellant who complied.
16. The Appellant submitted on appeal that it was interesting how the said defilement occurred once, had never occurred earlier and never occurred again; and was reported late. He submitted further that the fact that several pregnancy tests were negative until 2021 when she tested positive, the same shows that all these were schemes against him.

The Appellant submitted that now that the DNA was done, the biological father of the minor's child was the one to be charge with defilement and not him.

The Appellant relied on the case of JOO vs. Republic (2015)e KLR where Mrima J stated thus: "it is not lost to the court that the offence which the Appellant faced was such a serious one and ought to be denounced in its strongest terms possible. However, it also remains a cardinal duty on the prosecution to ensure that adequate evidence is adduced against a suspect so as to uphold a conviction. The start and of prove in criminal cases is well settled, beyond reasonable doubt, hence this case cannot be an exception. This court holds the view that 'it is better to acquit ten guilty persons than to convict one innocent person'"

On the foregoing, the Appellant prayed that the appeal be allowed, sentence set aside and the conviction quashed.

17. I have considered and evaluated the lower court record plus the submissions and authorities. I find that the issue for determination is whether the prosecution proved its case against the Appellant beyond reasonable doubt.
18. In defilement matters, it is trite that the elements that the prosecution must prove to secure a conviction are inter alia: Age of the victim; penetration and the identity of the perpetrator.
19. On the first issue of age, PW1 testified that she was 14 years at the time of the defilement. Her evidence was corroborated by PW2 who had the complainant's birth certificate indicating that she was born on 31/06/2006. The birth certificate was produced as P. Exhibit 1.
20. The other very crucial issue is the aspect of penetration. PW 1 testified that: "on that night, my mother had gone to help someone in Alego. I went to cut for her a ticket when she left we were sleeping on the floor with Night Robia. She was almost 10 years old at that time. He raped me on that night then he became very harsh." (page 8 lines 17 to 20 of the Record of Appeal)

She continued to state: "On that day I was asleep and he was standing in a navy blue short. He took me from where I was sleeping and put me on their bed. Then that thing happened. He closed my mouth after putting me on that bed.... He used his penis to sleep with me. I mean sex. The penis touched my private parts. He inserted it. The next day I was feeling pain. I went and told my Auntie that I was feeling pain in my lower abdomen. She said it was normal for girls having periods. I did not tell her what had happened. Auntie was our neighbor." (page 9 lines 1 to 11 of the Record of Appeal)

21. It is trite that medical evidence is not the only proof of penetration in defilement cases. The element of penetration can be proved by the testimony of the complainant. This court has severally held that what is most important to prove the allegation of rape or defilement is not medical evidence but the



oral evidence tendered by the victim. In the case of *Kassim Ali vs Republic* [2006] eKLR the Court (Court of Appeal) observed as follows:

“So the absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or circumstantial evidence.”

22. Further, on the need for corroboration, Section 124 of the *Evidence Act* provides thus:

“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 reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

23. The effect of the proviso to Section 124 was considered by the Court of Appeal in the case of *Robert Kabwere Kiti v Republic* [2012] eKLR, where the Court observed as follows:

“Turning to corroboration as a requirement for the minor’s evidence as complained by the appellant, in the *Mohamed versus Republic* case (2005 2 KLR 138) this Court made the following observations:

‘By legal notice No.5 of 2005 which introduced the proviso to Section 124 of the *Evidence Act*, Parliament drastically qualified Section 124 of the *Evidence Act* to enable a court in a sexual offence case to convict on the sole evidence of a child of tender years if satisfied that the child was telling the truth so that corroboration was no longer required as a matter of law making it now settled that the courts shall no longer be hamstrung by requirements of corroboration where the witness of a sexual offence is a child of tender years if it is satisfied that the child is truthful’.”

24. From the evidence on record, and specifically the defense testimony, the Appellant did not come out clearly to contravert the testimony of the complainant. The Appellant begins his testimony by narrating what transpired between him and the mother of the victim from 08/01/2021 until his arrest. There is nothing in his testimony explaining where he was at the specified dates and time of the alleged offence. All he said was that in June, he was not in Nairobi. What about the specified day when the wife is said to have travelled to Alego leaving him with the complainant and another child under his care?

25. In my view, I find that the testimony of PW1 believable as against the mere denials and sympathy seeking sentiments of the Appellant. Further, in response to the Appellants sentiments that the defilement happened only once, it had never happened before and it never happened after that day; the fact that the defilement happened once does not make it lawful or excusable, it is still very unlawful. Even though the Appellant has contended that the DNA results had turned negative and thus there is nothing to link him to the crime. However, the same did not absolve him of involvement since it is trite law that the offences such as defilement and rape cannot be proved through DNA but by oral evidence. I find that it is highly unlikely that the complainant could have been used as a victim of defilement so as to fix the Appellant yet there had been no problems between the Appellant and the complainant’s mother. It is clear that the complainant was speaking the truth since upon the arrival of



the complainant's mother from upcountry and being briefed about the incident, the Appellant became very agitated and hostile to the family and suppressed any attempts at pursuing the crime. The evidence of the complainant and the medical evidence confirmed that she had been defiled and that it matters not that somebody else is the biological father of the complainant's infant as long as the Appellant had an opportunity to engage in sexual activity with the complainant. I am satisfied that the evidence of the complainant was credible and believable as she had no reason whatsoever to lodge a complaint against her own step-father. I am satisfied by the evidence by the Respondent which was quite overwhelming against the Appellant and that the Appellant's defence evidence did not shake that of the Respondent. The finding on conviction by the trial magistrate was quite sound and that the same must be upheld. I am convinced that indeed, penetration was sufficiently proved.

26. As regards the issue of the identity of the perpetrator, the evidence availed is quite clear that it was the Appellant who defiled the complainant on the material date. PW1 testified that she was defiled by a person well known to her, her step farther. She stated in her testimony that:

“SO did it he was standing upwards I was lying down. When he took me to the bed, the light was on and I saw his face. It was a single room and the light was on.” (page 11 lines 3 to 5 of the Record of Appeal). The complainant's evidence is quite clear that it was none other than her step- father who had stolen her innocence on the material when her mother had travelled up country. There was no reason at all for the complainant to blame her own step-father in such an offence unless of course it took place. I am satisfied that the Appellant was the perpetrator of this crime and that his alibi defence was not convincing at all and did not dislodge the watertight evidence which placed him squarely at the scene of crime.

27. Finally, as regards the sentence imposed, it is noted that the trial court sentenced the Appellant to serve 15 years imprisonment. Under section 8(3) of the *Sexual Offences Act*, a person found guilty is liable to be sentenced to serve twenty years imprisonment where the victim is aged between 12-15 years old. The evidence tendered confirmed that the minor was aged 14 years at the time of the offence and hence the same fell within the bracket to justify a sentence of twenty years imprisonment. However, the Respondent did not seek to serve a notice of enhancement of sentence. It is trite that a sentence imposed must take into account all the circumstances regarding the moral blameworthiness of the offender. It is noted from the pre-sentence report presented to the trial court revealed that the victim's life has been turned upside down and that she has been traumatized by the incident. She had to undergo a caesarian delivery and that her education has been ruined. The Appellant instead of being a protector turned out to be a predator to the young complainant. I find the sentence imposed is neither harsh nor excessive. The trial court exercised its discretion and that I see no reason to interfere with it.

28. In the result, it is my finding that the appeal has no merit. The same is hereby dismissed.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 20<sup>TH</sup> DAY OF DECEMBER, 2024**

**D. KEMEI**

**JUDGE**

In the presence of:

SO .....Appellant

Mocha.....for Respondent

Ogendo.....Court Assistant

