



**Mukatiri v Republic (Criminal Appeal 110 of 2023)
[2024] KEHC 16007 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16007 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 110 OF 2023
DR KAVEDZA, J
DECEMBER 19, 2024**

BETWEEN

ERICK AKOSWA MUKATIRI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered on 27th October 2022 by Hon. Lopokoiyit (SRM) at Kibera Chief Magistrate's Court Sexual Offences Case no. E004 of 2022 Republic vs Erick Akoswa Mukatiri)

JUDGMENT

1. The Appellant was charged and after full trial convicted by the Subordinate Court for 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 were that on 3rd January 2022 in Dagoretti Sub-County within Nairobi County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of FK a child aged thirteen (13) years. He was sentenced to serve twenty (20) years' imprisonment.
2. Being dissatisfied, the appellant filed the present appeal where he challenged the totality of the prosecution's evidence against which he was convicted. Further, he stated that he was not properly identified, and that penetration was not proved 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 which was before the trial court and come to its own conclusions on that evidence without overlooking the findings of the trial court but bearing in mind that it never saw the witnesses testify.
4. The appeal was canvassed by way of written submissions with the appellant and respondent filing their respective submissions. The submissions have been duly considered and there is no need to rehash them.



5. 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."
6. Further, section 8(1) and (3) 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.
7. The prosecution called six (6) witnesses to buttress their case. PW1, FK (name withheld), the complainant, testified that on 3rd January 2022, after her mother punished her for talking to boys, she ran away to seek refuge. While walking, she noticed two boys following her and entered an apartment, pretending it was her home. There, she met the appellant, who asked her name, along with a woman who inquired about her parents' phone numbers. When she couldn't remember, the woman called her neighbours and began beating her. The appellant then took her to a vacant house, telling her he would take her to the chief the next morning.
8. While she was asleep, the appellant came into the room, told her to be silent, covered her mouth with a cloth laced with a substance, and proceeded to grope her and lie on top of her. He went to the extent of inserting his finger into her vagina and then had sex with her. She recognized that it was the appellant since there were lights outside. He took her back home the following morning and told her mother that she had been with some boys. Her blouse was stained with blood from her mouth when the appellant bit her lip. Her mother then reported the matter to the police station, after which she took her to the Nairobi Women's Hospital in the company of her father.
9. 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'biritbia 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"



10. 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.
11. To corroborate the complainant's evidence, PW2 MW, the appellant's mother, testified that after the complainant ran away from home, the appellant brought her back the next day. She observed that the complainant had blood stains on her and subsequently reported the matter to the police. She further stated that she took the child to Nairobi Women's Hospital, accompanied by PW3 (EM), the complainant's father.
12. PW3 (EM) corroborated PW2's testimony, confirming that the appellant returned the complainant home. He identified the appellant in court. He stated that the complainant was 13 years old at the time of the incident.
13. PW4 (John Njuguna) presented the complainant's medical records in court on behalf of his colleague, Emma Wamusi, who was unavailable to testify. He stated that the complainant was examined at their medical facility on 3rd January 2022, following an alleged defilement on 2nd January 2022.
14. Upon examination, the complainant exhibited a bite mark on her lower lip, and her blouse was stained with blood. Her genital examination revealed a white discharge and painful lacerations, indicative of forced blunt penetration. PW4 produced the complainant's P3 form and PRC form, both dated 3rd January 2022, and concluded that there was evidence of penetration. It is my finding that the ingredient of penetration was adequately proved.
15. PW5, Dennis Kariuki, stated that on the night of the incident, he and his friends Maish and Ian met a girl who told them that she was going to forty's home. They asked her if they could accompany her and she agreed. The following day, he was arrested by police officers, and when he was asked whether he knew the complainant, he said yes, but denied that he had had sex with her. The complainant affirmed his assertions, after which his statement was recorded and he was released from custody.
16. PW6 (IP Stanley Mwenda) testified that upon receiving the complainant's report, he issued her a P3 form and directed her to Nairobi Women's Hospital. He investigated the scene and identified the appellant as the caretaker of Bwire Flats. When questioned, the appellant denied committing the offence. PW6 subsequently arrested the appellant and produced the complainant's birth certificate in court, confirming her age and identifying the appellant.
17. In his defence, the appellant stated he was a caretaker at Ubillie Flats. On 3rd January 2022, he was informed by a tenant that a girl had been beaten by other tenants. The girl had reportedly been found with two boys, Dennis and Maina, trying to open the gate. Since the girl did not know her parents' contact information, she was locked in a vacant house. The appellant claimed he went back to sleep and, the following morning, released the girl with the help of a man named Zablou. They eventually took her home. He denied any wrongdoing, asserting he only provided her shelter. The appellant was arrested later that evening and taken to Kabete Police Station.
18. 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 16th December 2008. She was therefore thirteen (13) years at the time of the offence. There is therefore no doubt that PW1 was a child.
19. The complainant identified the appellant in the unoccupied house, illuminated by streetlights. Afterward, the appellant escorted her to her house, where PW2 (the complainant's mother) saw him.



The complainant had interacted with the appellant the day before, eliminating mistaken identity. Given her firm identification and the context, I concluded that the appellant was positively identified.

20. The upshot of the above analysis is that the prosecution proved their case beyond reasonable doubt. The conviction is hereby affirmed.
21. On sentence, the appellant was sentenced to serve twenty years imprisonment. During sentencing, the court considered the pre-sentence report and exercised discretion. In the premises, I see no reason to interfere with the sentence.
22. The *Sexual Offences Act* provides for a mandatory minimum sentence of twenty (20) years imprisonment for the offence the appellant is convicted of. The court sentenced the appellant to the minimum sentence provided under the law.
23. As such, I find that the sentence was proper in light of the supreme court decision in Petition E018 of 2023 *Republic v 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 19TH DAY OF DECEMBER 2024

D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Mburugu for the Respondent

Achode Court Assistant

