



**Abdallah v Republic (Criminal Appeal 142 of 2019)  
[2023] KEHC 2771 (KLR) (Crim) (30 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 2771 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL APPEAL 142 OF 2019  
JM BWONWONG'A, J  
JANUARY 30, 2023**

**BETWEEN**

**ABDUL AZIZ ABDALLAH ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence delivered by  
Hon. Ombewa P.M on 17th May 2019 in Kibera Chief Magistrate's  
Court sexual offence no. 61 of 2018 Republic vs Abdul Aziz Abdallah)*

**JUDGMENT**

1. The appellant was charged and convicted for the offence of defilement contrary to section 8 (1) as read with 8 (2) of the [Sexual Offences Act](#), No. 3 of 2006. He was sentenced to life imprisonment.
2. Being dissatisfied with the conviction and sentence, he filed a petition of appeal in which he raised six (6) grounds.
3. The main grounds raised are as follows. That the trial magistrate erred in law and fact by affirming the complainant after a voir dire examination, which is contrary to law; in failing to find that the prosecution evidence as a whole was not sufficient to warrant a conviction; by failing to find that there existed a grudge between appellant and the mother of the complainant; failing to give reasons for denying the appellant's alibi defence as required under section 169 (1) of the [Criminal Procedure Code](#) (Cap 75) Laws of Kenya
4. As this is the appellant's first appeal, the role of this court is well settled. It was held in the case of *Okeno v Republic* [1972] EA 32 and further in the Court of Appeal case of [Mark Oiruri Mose v R](#) [2013] e-KLR that this court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate



it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.

5. G.A.N (name withheld) (Pw 1) after a voir dire, testified that he is a pupil at [Particulars Withheld] Primary School and resides in Kibera. He narrated that he knew the appellant, who lured him into a bathroom, while they were playing on the promise of being given Kshs. 50. In the bathroom, the appellant removed his trouser and put his penis in his buttocks. He told the court that the appellant defiled him twice on that day.
6. After the incident, the appellant told him to go and play. He reported the incident to his mother who took him to the hospital for treatment. He was treated and the incident was also reported to the police station. On cross-examination, the complainant stated that he could not remember the exact date when the incident took place.
7. John Njuguna (Pw 2), a clinician at Nairobi Women's Hospital testified that the complainant was brought to the facility on 26<sup>th</sup> June 2018. The complainant was a minor aged 10 years. He was examined by his colleague, Polycarp Koyanda. It is Polycarp Koyanda, who examined the victim. The complainant had allegedly been sexually violated and reported severe tenderness on the anus. He could also not control his stool and was in pain. The anal sphincters were loose. There was puss in the anus. The degree of harm was classified as harm due to perirectal penetration. A P3 form was completed.
8. MAN (Pw 3) told the court that she is the mother of the complainant, who was born on 30<sup>th</sup> July 2008. She testified that on 26<sup>th</sup> July 2018, a neighbour called her asking her whether she had information about the complainant being defiled. When she inquired from the complainant, he denied being defiled. On further inquiry, he admitted that he had been defiled and told her that he was afraid of telling anyone. She took him to Nairobi Women's Hospital for treatment. She also reported the incident at Kilimani Police Station. She produced his immunization card in court which was produced as exhibit 4.No. 201135xxxx APC Kelvin Kasile Khaemba (Pw 4) who was based at the DC's office in Kibera testified that on 28<sup>th</sup> July 2018, the appellant was arrested by members of the public. He was accused of sodomizing the complainant. It was his testimony that they escorted him to Kilimani Police Station.No. 49287 PC Oren Ngelechei (Pw 5), the investigating officer told the court that on 27<sup>th</sup> July 2018 a case of defilement was reported by Pw 3, the complainant's mother. The incident involved the complainant and the appellant. The appellant was arrested by AP officers and escorted to Kilimani Police Station, where he was booked. He gave the complainant a P3 form which was filled by the doctor. He later charged the appellant.
9. After the close of the prosecution's case, the trial court found that the appellant had a case to answer and he was put on his defence. In his defence he gave a sworn testimony and he did not call any witnesses. In his defence, he testified that he knows the complainant very well but denied ever defiling him. He told the court that crucial witnesses such as the complainant's father should have testified if indeed, he committed the offence. In addition, crucial witnesses were never called to testify.

### **Analysis and Determination**

10. In ground 1 of the appeal, the appellant challenged the voir dire examination which was conducted in respect of the complainant. He argued that the same was conducted contrary to law. No submissions were made by the parties on this ground of appeal.
11. That notwithstanding, in the case of *Gabriel Maholi vs R* [1960] EA the former Court of Appeal said that even in the absence of express statutory provisions, it is always the duty of the court to ascertain the competence of a child to give evidence; and that it is not sufficient to ascertain that the child is



intelligent to justify the reception of the evidence, but also that the child understands the difference between the truth and falsehood.

12. From the record, the trial magistrate took the child through a voir dire examination. He asked a series of questions to determine whether the minor was competent to be sworn and whether the child knew the difference between the truth and lies. The court was satisfied that the child appreciated giving evidence on oath. The ground of appeal therefore fails and is hereby dismissed for lacking in merit.
13. In respect of ground 2 the appellant argued that the trial magistrate failed to find that the prosecution's evidence as a whole was not sufficient to warrant a conviction. Further, the court did not consider that the evidence that there existed a grudge between the appellant and the mother of the complainant.
14. In his submissions, the appellant argued that on diverse dates when the alleged offence was committed created doubts about the existence of the offence. He argued that the information on the charge sheet was not sufficient without indicating the diverse dates to warrant a conviction. The appellant further submitted that the evidence of penetration was not proven beyond reasonable doubt.
15. Conversely, the respondent submitted that there was sufficient evidence that proved the elements of defilement.
16. From the record, the complainant narrated to the court how the appellant lured him and defiled him in a bathroom within their neighbourhood. He told his mother of his ordeal and he was taken to the hospital where he was examined. The clinical officer concluded that from the degree of injuries sustained, the case was classified as harm due to perirectal penetration. This confirmed that indeed there was penetration. In addition, the age of the complainant was proved having been born on 30<sup>th</sup> July 2008 and was therefore a child at the time of the incident. He also positively identified the appellant as the perpetrator of the offence. I find that the elements of the offence of defilement were proved beyond reasonable doubt.
17. The appellant urged the court not to ignore the inconsistencies which were raised as to the dates, when the offence was committed. Section 124 of the Evidence Act stipulates thus: -
18. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim 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 evidence in support thereof implicating him.
19. 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.
20. From the record, in reaching a determination to convict the appellant, the trial magistrate noted that the child was clear and consistent in his evidence and believed the child's testimony. The court was therefore satisfied with the child's truthfulness and his testimony was not shaken in cross-examination.
21. However, I find that the medical evidence of the clinician Polycarp Koyanda, was admitted contrary to the law; since the prosecution did lay the foundation for the reception of his evidence as required by section 33 (b) of the Evidence Act (Cap 80) Laws of Kenya. The provisions of that section provide as follows:
  33. Statement by deceased person, etc., when Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead,



or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—

- (a) not applicable.
- (b) made in the course of business when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;”

22. It is clear that the prosecution did produce evidence as to the reasons why the clinician Polycarp Koyanda, did not come to court to give evidence. It therefore follows that the medical evidence is inadmissible and is hereby excluded.
23. I further find the evidence of the victim was credible and the lack of the medical evidence does not vitiate the conviction.
24. In ground 3 the appellant challenged the trial court decision on the premise that it failed to give reasons for denying the appellant’s alibi defence as required under section 169 (1) of the *Criminal Procedure Code*. In his defence, the appellant that denied defiling the complainant. His defence was considered by the trial court and found to be unbelievable. The reason why the evidence of the appellant was rejected is because it was incredible, which I find satisfies the provisions of section 169 of the *Criminal Procedure Act*. The ground therefore fails and is hereby dismissed for lacking in merit.
25. After re-assessing the entire evidence, I find that the offence was proved beyond reasonable doubt. The appellant appeal against conviction fails and is hereby dismissed.
26. On sentence, the appellant was sentenced to life imprisonment. During sentencing, the trial magistrate stated that he had considered the mitigation and the provisions of the *Sexual Offences Act*, which provided for a mandatory minimum sentence of life imprisonment. He then proceeded to sentence the appellant to a life sentence. It is trite that although sentencing is at the discretion of the trial court, that discretion must be exercised judiciously in accordance with the law taking into account the facts and circumstances of each case.
27. The punishment prescribed by the law for the offence of defilement for a child of less than 11 years is life imprisonment. Although sentences are intended, inter alia, to punish an offender for his wrongdoing, they also aim to rehabilitate offenders to renounce their criminal tendencies and become law-abiding citizens. I have no doubt that the sentence imposed by the trial court in this case was lawful but considering that the appellant was a first offender, I am satisfied that the sentence was harsh and manifestly excessive.
28. For the above reason, I hereby set aside the sentence imposed by the trial court.
29. In considering the appropriate sentence to be imposed, I have taken into account the period spent in pre-trial custody by the appellant. I have also taken into account that the appellant is a first offender.



30. In the premises, I hereby substitute it with a sentence of thirty (30) years imprisonment.

31. The sentence shall run from the date of the appellant's conviction.

**JUDGEMENT SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 30<sup>TH</sup> DAY OF JANUARY 2023.**

**J M BWONWONG'A**

**JUDGE**

In the presence of-

Mr. Kinyua: Court Assistant

The appellant in person

Ms. Akunja for the Respondent

