



**Gacheru v Republic (Criminal Appeal 48 of 2020)  
[2023] KEHC 3005 (KLR) (30 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 3005 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL APPEAL 48 OF 2020  
RB NGETICH, J  
MARCH 30, 2023**

**BETWEEN**

**SAMUEL KINUTHIA GACHERU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

**BACKGROUND**

1. The appeal arises from the judgment of the Honourable Senior Principle Magistrate in Limuru Criminal Case No 263 of 2015 delivered on September 30, 2020. The appellant herein was charged with the offence of Defilement Contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No 3 of 2006. The particulars were that on March 28, 2015, at Karambane Location within Kiambu County caused his penis to penetrate into the vagina of AWM a child aged 16 years.
2. In the alternative charge, the appellant was charged with the offence of Committing an Indecent Act with a child Contrary to 11(1) of the *Sexual Offences Act* No 3 of 2006. The particulars were that on March 28, 2015 at Karambane location within Kiambu County, the Appellant unlawfully and intentionally touched the breast and vagina of AWM against her will.
3. The charges were read over and explained to the accused on April 1, 2015. He pleaded not guilty to both counts and a plea of not guilty was entered on both counts. The matter proceeded to trial with the prosecution calling a total of three (3) witnesses. At the end of the trial, the court rendered its judgment.
4. The trial court convicted the appellant for the offence of Defilement Contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* and sentenced the accused to fifteen (15) years imprisonment.



5. The appellant, aggrieved by the trial court's judgment on both conviction and sentence filed the instant appeal citing twenty two (22) grounds.
6. At the hearing of the Appeal, the advocates agreed to canvass the appeal through written submissions.

### **Appellant's Submissions**

7. Counsel for the Appellant filed written submissions on June 20, 2022 and submitted that the ingredients of defilement were not proved by the prosecution in the trial court; that the age of the victim was not properly proved as there was no birth certificate adduced in court to prove the age of the victim. That the evidence of Pw1 and Pw2 was contradictory; that Pw2 solicited a bribe in an attempt to withdraw the allegations.
8. On the issue of penetration, counsel submitted that pregnancy is not an obvious way to prove defilement and submitted that penetration was not proved.
9. Counsel further submitted that the trial court failed to consider the appellant's defence while rendering its judgment and the prosecution failed to link the appellant to the offence of defilement.
10. In conclusion counsel submitted that the sentence of fifteen (15) years was excessive and urged the court to quash the conviction and the sentence.

### **Respondent's Submissions**

11. The state counsel filed written submissions on February 7, 2023 submitting that the ingredients of defilement were properly proved at the trial court. That the age, penetration and identification of the appellant was properly proved and urged the court to uphold the conviction and sentence of the trial court.
12. Counsel further submitted that the defence of Alibi was not credible and Pw1 could have been pregnant any time on or before October/ November 2014.
13. Counsel urged the court to find that the conviction was proper and uphold the same.

### **Analysis And Determination**

14. This court being the first appellate court, I am obligated to reevaluate evidence adduced before the trial court and arrive at my own determination as guided by principles laid down in the case of *Okeno vs Republic (1972) EA 32* where the Court of Appeal for Eastern Africa stated as follows: -  

' An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) EA 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.'
15. In view of the above, I have perused the trial court's record and find the following as issues for determination:
  - a. Whether the offence of defilement was proven to the required standard.
  - b. Whether the sentence imposed was harsh and excessive.
16. The ingredients for the offence of defilement are identification or recognition of the offender, penetration and the age of the victim.



17. On the issue of age, the complainant testified that she was 17 years old. Her father when testifying showed court a copy of the Birth Certificate which confirmed Pw1 was born on May 7, 1998. However, the birth certificate was not produced in court as the investigating officer did not testify. I however note from the record that the appellant did not challenge the age of Pw1 in the trial. In my view, the fact that the birth certificate was not produced because the investigating officer was not called to testify is not a fatal omission on prosecution's case as during the hearing, the court was made aware of the date of birth being May 7, 1998 as per birth certificate shown to court.
18. On the issue of whether the accused was properly identified, Pw1 testified that she was in a romantic relationship with the accused after the accused severally lured and coerced her to have sex with him. Pw1 testified that her and the accused had been intimate severally before the incident of March 28, 2015. Pw1 testified that the accused was well known to her as he was a neighbour and brother to the landlord.
19. The appellant also testified that the victim lived with the father and her other siblings as tenants in his brother's rental house. Identification of the Appellant/Accused was therefore not in doubt.
20. The last issue is whether the ingredient of penetration was properly proven. Section 2 of the Sexual Offence Act defines Penetration as the partial or complete insertion of the genital organs of a person into the genital organs of another person.
21. In the case of *Bassita Vs Uganda SC Criminal Appeal No 35 of 1995*, the Supreme Court held as follows: -

' The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, sexual intercourse is proved by the victim's own evidence and corroborated by medical evidence or other evidence. Though desirable, it is not a hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt.'
22. The victim who testified as Pw1 in her evidence told the trial court she and the appellant engaged in sexual escapades severally before the incident of March 28, 2015 when she decided to end the love affair and reported the matter to her father.
23. Pw2 took Pw1 to the hospital and he was informed Pw1 was pregnant. The doctor in his examination found the following:-

' The abdomen had pelvic mass and external genitalia was normal. The hymen was broken and there were some old hymenal tags. A vaginal swab revealed no spermatozoa. His conclusion was pregnancy in the first trimester secondary to defilement'.
24. This is sufficient proof of penetration. In her testimony, the complainant informed court as captured above that it is the appellant that she had sexual intercourse with severally. The Appellant did not sufficiently challenge her evidence. From the foregoing, the prosecution proved the three ingredients of defilement against the appellant beyond reasonable doubt.
25. The appellant contends that his defence of alibi was not considered by the trial court. The appellant alleged that he was not in the country at the time of the commission of the offence on March 28, 2015. He stated that he was in Dubai; that he left the country in November 2013 and returned in June 2014.



I however note from the passport that despite having an exist and entry stamp, it does not indicate the destination of the Appellant contrary to the norm; a clear indication that the same may have been forged to suit the appellant's claim.

26. From the foregoing, the appellant failed to prove his defence of alibi and the assertion that the offence is a frame up by complainant's father and allegations of soliciting a bribe for Kshs 1 million or in the alternative an acre of land was not proved.
27. From the foregoing I find that the offence of defilement was sufficiently proved.
  - (ii) Whether the sentence was harsh and excessive
28. Sentence for the offence herein is provided under section 8 (4) of the *Sexual Offences Act* which provides as follows: -

' A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.'
29. Sentencing is the discretion of the trial court and the same should not be interfered with unless it is proved the trial court acted on wrong principles or overlooked some material facts.
30. For defilement of a child aged between sixteen (16) and eighteen (18) years is jail term of not less than 15 years. The victim herein was aged 17 years. The appellant was sentenced to 15 years' imprisonment which is the minimum sentence provided by statute. In view of the Supreme Court's direction on application of the decision in respect to minimum sentence to the effect that it applies to Murder cases only, I will not interfere with the sentence. From the foregoing, I see no merit in the appeal.
31. Final Orders: -

The appeal on both conviction and sentence is hereby dismissed.

**JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET**

**THIS 30<sup>TH</sup> DAY OF MARCH, 2023**

.....

**RACHEL NGETICH**

**JUDGE**

**In the presence of**

**Martin – Court Assistant**

Mr. Gachera for the state

Ms Wandugi holding brief for Mr. Wandugi for the Appellant

