



REPUBLIC OF KENYA



KENYA LAW
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**Rutto v Republic (Criminal Appeal E020 of 2021)
[2023] KEHC 2668 (KLR) (30 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2668 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL APPEAL E020 OF 2021
HK CHEMITEI, J
MARCH 30, 2023**

BETWEEN

BONIFACE RUTTO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgement of Hon P.C Biwott (SPM)
Dated 7th June 2021 in Kabarnet Criminal Case No. 32 of 2020)*

JUDGMENT

1. The appellant was charged with the offence of Defilement contrary to Section 8(1), (3) of the [Sexual Offences Act](#) no 3 of 2006. The particulars of the offence were that on the 22nd October 2020 at around 1930 hours in Baringo central sub county within Baringo county willingly and unlawfully caused his penis to penetrate into the vagina of NJK a girl aged 14 years in contravention to the said act.
2. The Alternative charge was Indecent act with a girl contrary to Section 11 of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the charge were that on the 22nd day of October 2020 at around 1930 hours in Baringo central sub county within Baringo county willingly and unlawfully caused his penis to touch the vagina of NJK a girl aged 14 years in contravention to the said act.
3. The appellant after a full trial was convicted and sentence to ten years' imprisonment hence this appeal.
4. When the matter came up for directions the court directed the same to be determined by way of written submissions which the parties have complied.
5. The appellant essentially grounded his submissions on the grounds of appeal. He argued that the age of the complainant was not proved beyond a shadow of doubt. He submitted that the court disregarded the certificate of birth presented contrary to the provisions of Section 143 (1) of the [Children's Act](#).



6. The learned state counsel on his part supported the findings of the trial court. He submitted that contrary to the allegations by the appellant, the charge sheet was not defective and the proceedings were regular. That the appellant was granted a proper trial as he was allowed to cross examine the witnesses as well as seek the services of a counsel.
7. On the voir dire examination the state submitted that the same was proper and the court relied on the provisions of Section 124 of the *Evidence Act*. That the evidence of the minor was well corroborated in this case.

Analysis and determination.

8. The court is expected in this appeal process to re-evaluate the evidence afresh and come up with an independent finding. See *Okeno v. Republic* (1972) E A 32.)
9. The three ingredients of the offence of defilement which are now notorious are the age of the victim, the identity of the complainant and the evidence of penetration.
10. In the case at hand the age of the complainant was clearly proved through the production of the certificate of birth which showed that she was born on 7th March 2006 and thus for purpose of the offence against the appellant a minor.
11. On the question of the identity of the perpetrator, the complainant testified that the incident occurred at around 7 pm as she came out of the toilet. The appellant took her to his house where he proceeded to defile her forcefully for about 45 minutes.
12. Clearly the time was still generally daytime and the period she spend with him was sufficient enough to have her recognise the assailant. In any case this did not feature much during trial as well as in the appellant's submissions.
13. Was the complainant sexually assaulted.? From her evidence there is no doubt that she was. Although she did not scream, it is her evidence that the appellant defiled her in his house. It is the same house where he was arrested later that night.
14. The medical evidence produced namely the treatment notes and the p3 form by pw3 showed that there was absent hymen, some whitish discharge which he concluded to have been spermatozoa. He concluded that there was penetration.
15. The basic defence by the appellant and which has greatly emphasized is his age. The court has perused the proceedings and the exhibits produced. There were two sets of birth certificates produced relating to the appellant which were brought to the attention of the court after the conviction and due for sentencing.
16. The first one indicated that he was born on 15th August 2004 and the other indicated that he was born on 15th April 2001. Because of this discrepancy the court ordered that the appellant be taken for a proper medical age assessment. The age assessment report indicated that he was 19 years.
17. The trial court as a result placed his age at 18 by the time the incident occurred. He was then sentence to serve 10 years' imprisonment.
18. The court agrees with the steps taken by the trial court. With the two conflicting certificates of birth, the only way out was getting the medical age assessment which indeed gave the court some directions. It was incumbent for the appellant to have raised the same during or before trial and not to wait till the stage the matter had reached.



19. Needless to state that the ingredients of the offence were established and the appellant as shown in his submissions did not have much to rebut. At any rate I do not find his defence weighty enough to have disturbed the respondent's case. The minor was graphic enough in her evidence.
20. In the premises, this court does not find merit in the appeal and the same is hereby dismissed.
21. On sentencing however, I note that the court exercised its discretion. Nevertheless, the appellant from the probation report dated 31st May 2021 seemed to be a young man of good character and a first offender.
22. The primary purpose of sentencing is to bring punishment and rehabilitation at the same time. Considering the circumstances of the matter, the age of the appellant, the period he has been in custody I order that he be released unless lawfully held and shall serve a three (3) years' probation period from the date herein under the relevant probation office.
23. Orders accordingly.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 30TH DAY OF MARCH 2023.

H. K. CHEMITEI.

JUDGE

