



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kipkemboi v Republic (Criminal Appeal 67 of 2021)  
[2023] KEHC 2730 (KLR) (27 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2730 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL APPEAL 67 OF 2021  
RN NYAKUNDI, J  
MARCH 27, 2023**

**BETWEEN**

**ZEPHANIAH KIPKEMBOI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the conviction and sentence of Hon. G. N Sitati in Eldoret Chief Magistrate's Criminal Case No. E074 of 2020 delivered on 28th September 2021)*

**JUDGMENT**

1. The appellant herein was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on the 6<sup>th</sup> day of December 2020 at Soy Sub county within Uasin Gishu county, he unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of EN, a girl aged 8 years.
2. He was charged with an alternative charge of committing an indecent act contrary to section 11(1) *Sexual Offences Act*. The particulars of the offence were that on the 6<sup>th</sup> day of December 2020 at Soy Sub county within Uasin Gishu county, he unlawfully caused his genital organ (penis) to come into contact with the genital organ (vagina) of EN, a girl aged 8 years.
3. The appellant pleaded not guilty and the matter proceeded to full trial. The trial magistrate conducted a voir dire examination on the complainant and was satisfied that the complainant knows the importance of telling the truth. The complainant testified as PW1 and stated that on the material date she was in church and felt hungry. When she went home she found the accused who she knew as he liked staying at their home. She stated that he slapped her, pushed her to the chair and removed her clothes then removed his clothes. She explained that he had put his private part in hers and had done 'tabia mbaya'.



4. PW2, BW testified that on December 6, 2020 he was at home and heard a child screaming. He saw the complainant and when he asked her what had happened she explained that the accused had done 'tabia mbaya' to her. He stated that he saw the accused running from their (complainant) home and pursued him with other members of the public. They then arrested him and returned him to the home whereafter Nyumba Kumi took over.
5. PW3, SKK, a resident of [Particulars Withheld] area testified that on December 6, 2020 he was told someone was about to be killed for defiling a child. He went to the scene and rescued the person and took the child (PW1). He went with the child and her father to the police station.
6. The accused was put on his defence and testified that on December 6, 2020 he was at home doing his own things at 11am when he met the father of the complainant who owed him some money. He stated that he asked him for the money and he was chased with a panga. He was later arrested and it was alleged that he had attempted to defile the daughter. At Moi Teaching and referral hospital it was confirmed that he had not defiled the child. That the investigating officer was bribed and they framed him.
7. Upon considering the testimonies of the witnesses and the evidence adduced in court, the trial magistrate was satisfied that the prosecution had proved its case against the accused person with regards to the alternative charge and convicted him of the same. She then sentenced the accused to 10 years' imprisonment.
8. Being dissatisfied with the conviction and sentence, the appellant instituted the present appeal vide a memorandum of appeal filed on October 12, 2021 premised on the following grounds;
  1. The Learned Magistrate erred in fact and law in basing her findings on irrelevant issues not supported by evidence adduced or the applicable law.
  2. The learned Magistrate erred in law and in fact in failing to appreciate that no positive identification of the Perpetrator was done and or proved.
  3. The learned Magistrate erred in law and in fact by overlooking the fact that no medical doctor testified or adduced any evidence to prove penetration by medical report and/or medical examination.
  4. The learned Magistrate erred in fact and in law in failing to find that the prosecution did not prove to the required standards and or failed to adduce sustainable assessment of the age of the victim.
  5. The learned Magistrate erred in fact and in law in failing to appreciate that crucial evidence of the investigating officer and the arresting officer was never adduced.
  6. The learned Magistrate erred in fact and in law in failing to appreciate that crucial evidence of the father of the victim, who is alleged to have apprehended the perpetrator and the victim in the act was never called or adduced.
  7. The learned Magistrate erred in fact and in law in failing to appreciate that no exhibit was produced by the prosecution to prove their case to the required standards.
  8. The learned Magistrate erred in fact and in law in failing to appreciate that the prosecution evidence was never corroborated.
  9. The sentence imposed to the appellant on the alternative charge was rather too harsh and excessive.



10. The learned Magistrate erred in fact and in law in failing to consider the appellant's defence and or failed to take into consideration the Appellant's evidence.
11. The learned Magistrate's decision is against the weighty evidence adduced in court by the Appellant.

The parties were directed to file written submissions on the appeal.

### **Appellant's case**

9. Learned counsel for the appellant filed submissions on November 17, 2022. Learned counsel submitted that the essential ingredients of the alternative charge of defilement was never proved by the prosecution to the required legal standard. Further, that the appellant was convicted solely on the evidence of the complainant since no evidence of the doctor was produced by the prosecution to corroborate with that of the victim. It was counsel's case that as a matter of practice, corroboration is necessary in sexual offences. He cited the cases of *Igbine v The state* [1997] 9 NWLR (Pt 519) 101(a), 108, *Makungu v Republic* [2002] 2 EA 482 the Court of appeal citing *Mutonyi vs Republic* (1982) KLR 2003 and *Moses Mutahi Mugo v Republic* (2022) eKLR in support of his submission on corroboration.
10. Learned counsel urged that there was no material corroborating the complainant's evidence and the evidence of PW2 and PW3 relied by the trial court to sustain the conviction of the appellant on the alternative charge, since neither PW2 nor PW3 witnessed the commission of the alleged offence therefore their evidence was mere hearsay. He stated that section 124 of the *Evidence Act* gives guidance to the court where it opts to solely rely on the evidence of a victim, devoid of other evidence placed before it.
11. Regarding voir dire, he submitted that in both the proceedings and the judgment, the trial magistrate did not explain the reasons why she believed the victim and opted to convict the Appellant on the sole evidence of the minor victim. Counsel urged that the prosecution failed to prove the ingredients of the offence of indecent act beyond reasonable doubt and he invited the court to find that the trial court was in error to convict the appellant on the alternative charge since the evidence given did not corroborate. He prayed that the court acquit the appellant on the charge.

### **Respondent's case**

12. There were no submissions on record for the respondent.

### **Analysis & Determination**

13. This being a first appeal, the court has a duty as was stated in *Okeno v. Republic* [1972] EA 32 where the court stated as follows:

“The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala -V- R. (1975) EA 57). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”



## Issues for determination

14. The following issues arise for determination;
1. Whether the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* was proved to the required standard.

### **Whether the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* was proved to the required standard.**

15. Section 11 (1) of the *Sexual Offences Act* states that:-
- “Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term not less than ten years.”
16. Section 2 (1) of the said *Act* defines an ‘indecent act’ as follows:-
- “Indecent act means an unlawful intentional act which causes:-
- Any contact between any part of the body of a person with the genital organ, breast or buttocks of another, but does not include an act that causes penetration;
- Exposure or display of any pornographic material to any person against his or her will.”
17. There was no medical evidence adduced with regards to the main charge of defilement. The trial court concluded that prosecution had proved the alternative charge beyond reasonable doubt and proceeded to convict the accused. The learned magistrate concluded that an indecent act was committed based on her assessment of the testimony of the complainant. Section 124 of the *Evidence Act* provides guidance on convictions based on single witness evidence as follows;
- “Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration 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.”(Emphasis mine)
18. It is now firmly established that an Appellant case on Appeal must be tested within the scope of the phrase beyond reasonable doubt. In the first instance learned author Granville Williams in his book *Criminal Law* 2<sup>nd</sup> edition explained the concept of reasonable doubt in this context”
- “It is business of the prosecution to bring home the guilt of the accused to the satisfaction of the mind of the Jury: but the doubt to the benefit of which the accused is entitled to must be such as rational thinking, sensible man fairly and reasonably entertain, not the doubt of a vacillating mind that has not the moral courage to decide but shelters itself in a vain and idle scepticism. There must be doubt which a man may honestly and conscientiously entertain.”



19. I have considered the reasoning of the trial magistrate and given that she was able to use the demeanour of the complainant to gauge whether she was telling the truth therefore the same was in accordance with the law. The appellants' identification as by recognition and therefore the same was proved to the required standard. As for the age of the complainant I am bound by the Court of Appeal decision in *Evans Wamalwa Simiyu v Republic* (2016) eKLR where it held that the fact that the court felt it necessary to conduct a voir dire is a clear indication that the trial court had formed the impression that the child was a child of tender years. In the premises, it is indisputable that the complainant was a child.
20. I therefore agree with the findings of the trial magistrate and there is no reason to interfere with the sentence and the conviction. The appeal is dismissed.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 27<sup>TH</sup> DAY OF MARCH 2023**

**R.NYAKUNDI**

**JUDGE**

**In the Presence of:**

Appellant Present

Mr. Mugun for the State

