



**DN v Republic (Criminal Appeal E069 of 2021)
[2023] KEHC 19574 (KLR) (Crim) (30 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19574 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E069 OF 2021
DR KAVEDZA, J
JUNE 30, 2023**

BETWEEN

DN APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence delivered by Hon. M. Juma (RM) on 17th December 2020 in Milimani Chief Magistrate's Court sexual offences case no. 67 of 2016 Republic vs Derrick Naulikha Nabiswa)

JUDGMENT

1. The appellant was charged and after a full trial convicted for the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act*, No 3 of 2006. He was sentenced to serve fifteen years imprisonment. Being dissatisfied, the appellant filed the present appeal challenging his conviction and sentence.
2. In his appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted. The appellant complained that the trial court failed to give due regard to his defence. That the sentence imposed was harsh and excessive.
3. As this is the appellant's first appeal, the role of this appellate court of first instance is well settled. It was held in the case of *Okeno vs Republic* [1972] EA 32 and further in the Court of Appeal case of *Mark Oruri Mose vs R* [2013] eKLR 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.



4. The prosecution called five (5) witnesses in support of their case. BA (name withheld) after *voir dire* examination told the court that she is 17 years old. Her parents are deceased she was living in the care of her relatives. She moved to Nairobi in search of opportunities and got a job in Kawangware. However, her employer required her to submit her national identity card. In March 2013, she went to the DC's office to make an application where she met the appellant. Since she did not have a birth certificate or any documentation, she gave a man who offered to help her Kshs 500 to enable her to get an identity card.
5. She narrated that the appellant was one of the attendants there and he assisted her in filling out the forms and also took her phone number. He called her after two weeks and informed her that her ID was ready and asked her to meet him on Sunday morning. He went to meet in the proceeding Sunday to collect the card. The appellant asked her to accompany him to his residence. There, he offered her tea. She declined but he insisted. She obliged and after a few sips, she felt dizzy and passed out.
6. She told the court that she regained consciousness at around 4 pm. She was half naked and was lying on a mattress on the floor. The appellant was fully dressed. An old man was also present. After getting dressed, the appellant told her that her identity card was not ready and he will get in touch with her. She went home and took painkillers.
7. The complainant testified that in June 2013, she got sick and developed a skin rash. She sought medical attention and was found to be pregnant and HIV positive. She told the appellant but he denied the pregnancy chasing her away. She reported the matter to the police who did not help at first. She was later assisted by FIDA. The appellant tried to encourage her to procure an abortion but she refused. He also tried to marry her offer but she also refused. The appellant was eventually arrested and charged.
8. Daniel Nguku (PW 2) of Nairobi Women's Hospital testified that the complainant was examined at their facility on June 26, 2013 after a case of alleged sexual assault. Upon examination, the conclusions made were that she was pregnant and her immunity was suppressed.
9. Dr Kizzie Shako (PW 3) testified that she examined the complainant on November 18, 2013. At the time she was pregnant and she did not conduct an age assessment test. He produced the P3 form that was filled.
10. Ann Nderitu (PW 4) a government analyst testified that she conducted DNA tests on the complainant's child after her birth and the appellant. The test confirmed that the appellant was the child's biological father. The report was produced in court.
11. PC Barnabas Kibet Too (PW 5) the investigating officer told the court that he was assigned to investigate the case in June 2013. He referred the complainant to Nairobi Women's Hospital and the Police doctor (PW 3). After the results of the medical examination, DNA tests, and investigations, he charged the appellant. The complainant also identified the appellant as the perpetrator of the offence.
12. After the close of the prosecution's case, the appellant was found to have a case to answer and was put on his defence. In his defence he gave sworn testimony and called one witness. In his defence, he testified that he met the complainant in March 2013 and they began a sexual relationship. During this period the complainant was her lover with whom they spent many nights together. However, the complainant framed him for the offence alleged because he decided to end their relationship. He denied drugging her. He told the court that he was willing to provide child support for their child together.
13. Rueben Lumali Kado (DW 2) testified that he was a neighbour of the appellant. He told the court that he saw the complainant in the company of the appellant about twice or thrice.



Analysis and Determination.

14. In his appeal, the appellant challenged the totality of the prosecution evidence against which he was convicted. He submitted that by the complainant's conduct, she behaved like an adult. That the appellant had no reason to doubt that she was an adult and was even contemplating marrying her. In addition, she went to register a national identity card. In addition, none of the prosecution witnesses gave evidence to prove that the complainant was a minor at the time of the alleged offence.
15. He further submitted that there are grave inconsistencies in the complainant's testimony. That she failed to give the exact dates of the alleged incident. Further, that there was an old man who was present when she regained consciousness. The said man was never called as a witness to corroborate her evidence. Further, she failed to report the alleged incident to the police immediately which raised doubts as to the truthfulness of her claims. He cited the case of *John Mutua Munyoki vs Republic* [2017]eKLR and *Paul Kanja Gitari vs Republic* [2016]eKLR in support of his position.
16. In rebuttal, the respondent submitted that the minor's age was conclusively proven by an age assessment that was done in 2015. This evidence was conclusive proof that the complainant was a child under the law. Secondly, the appellant was positively identified and penetration was proved beyond reasonable doubt. It was argued that the prosecution proved the elements of the offence charged.
17. I will now analyse the evidence on record to ascertain whether the essential ingredients of the offence preferred against the appellant were established to the required standard of proof. Regarding proof of age, I wish to state at the outset that the importance of proving the age of a victim, proof of penetration, and positive identification of the assailant in sexual offences is paramount.
18. The first element is age. The Court of Appeal in *Edwin Nyambogo Onsongo vs Republic* (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

“... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.”
19. There is no dispute that the prosecution did not produce the birth certificate of the complainant. The complainant stated that she was seventeen (17) years old. During the trial, the court ordered an age assessment to be conducted. The report from Kenyatta National Hospital dated January 29, 2015 showed that the complainant was eighteen years old. This is 2 years after the alleged incident. The complainant was therefore 16 years at the time of the alleged incident in 2013.
20. From the record, the age of the complainant was therefore adequately proved within the provisions of the law. The ground of appeal therefore fails.
21. The second ingredient is whether the element of penetration was proved beyond reasonable doubt. Penetration is proved through the evidence of the victim. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred. Where the medical examination may not be available or conclusive, the court ought to weigh with thorough scrutiny and utmost caution, the evidence of the child, in order to determine whether there was penetration.



22. PW 1 after a *voire dire* examination gave an unsworn statement in which she narrated how the appellant lured her to a house, drugged her, and defiled her. She told the court that the appellant sexually assaulted her while she was unconscious. When she regained consciousness, she was undressed from the waist down. There was another individual who was never identified in the room.
23. The medical evidence produced confirmed that the complainant was pregnant and had contracted HIV. The DNA analysis performed confirmed that the appellant was the father of the complainant's child. Although the appellant denied luring and defiling the complainant, the complainant was very clear in her testimony which was not shaken on cross-examination that it is the appellant who defiled her. She narrated to the court her ordeal in the hands of the appellant before, during, and after the incident.
24. Regarding the identity of the perpetrator, the complainant was very categorical about who her assailant was. She identified the appellant as the perpetrator, a person she knew prior to the material date. The identification was therefore by recognition. From the evidence, the complainant was very clear on the events that took place and the identity of the perpetrator. That being the case, the prosecution proved their case beyond reasonable doubt to warrant a conviction by the trial court.
25. The appellant also complained that the trial court failed to consider his defence. In his defence, the appellant denied defiling the complainant insisting that they were lovers. His witness DW 2 told the court that he had seen the complainant in the company of the appellant twice or thrice. The trial court considered this defence and found it to be unbelievable. This was the justification for the rejection of the defence evidence. I, therefore, reject the appellant's ground in that regard.
26. This Court finds that after weighing the evidence adduced by the prosecution and the Defence as a whole, the charge of defilement against the appellant contrary to Section 8 (1) as read with Section 8 (3) of the [Sexual Offences Act](#) was proved beyond reasonable doubt. I, therefore, uphold the appellant's conviction.
27. On the sentence, the appellant was sentenced to serve 15 years imprisonment. The appellant argued that the trial court meted a harsh and excessive sentence. During the sentencing proceedings, the appellant was sentenced in his absence having absconded. The court noted that the appellant was a first offender but was not present to give his mitigation. The provisions of section 8 (4) of the [Sexual Offences Act](#), No 3 of 2006 provide that:

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.
28. The sentence imposed was therefore the minimum sentence prescribed under the law. However, in light of the various judicial decisions the mandatory minimum sentence can be vacated in appropriate cases. (See [Dismas Wafula Kilawake vs Republic](#) [2019] eKLR and [Joshua Gichuki Mwangi v Republic](#) Criminal Appeal No 84 of 2015). Further pursuant to the provisions of section 216 and 329 of the [Criminal Procedure Code](#) (Cap 75) Laws of Kenya, mitigation is part of the process under section 329 which provides that the court may before passing sentence, receive such evidence as it thinks fit to inform itself as to the proper sentence to be passed.
29. Thus, in my view, section 329 of the [Criminal Procedure Code](#) gives judges and magistrates the discretion, in appropriate cases, to consider mitigation and mete out a sentence that fits the offence committed, despite another sentence being prescribed under the Act. However, the appellant lost his chance to mitigate before trial court when he absconded.



30. Nevertheless, I have considered the appellant's submissions, and I am not persuaded that the sentence meted against him is excessive, for the following reasons; firstly, the appellant defiled the complainant while she was unconscious. Secondly, he violated her right to dignity under Article 28 of the *Constitution* by defiling her in the presence of another person. Thirdly, the complainant got pregnant as a result of the defilement. The complainant will not only live with the scars inflicted on her physically, psychologically but will always have the stigma of having a child born out of defilement. For these reasons, I find the sentence imposed to be appropriate and affirm the said sentence.
31. In the end result, the appeal is dismissed in its entirety.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 30TH DAY OF JUNE 2023.

D. KAVEDZA

JUDGE

In the presence of:

Ms. Odhiambo for the State

Mr. Wanyama h/b Mr Walubengo for the Appellant

Joy C/A

