



REPUBLIC OF KENYA



**KENYA LAW**  
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**Lopungo v Republic (Criminal Appeal 15 of 2020)  
[2023] KEHC 21173 (KLR) (26 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21173 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
CRIMINAL APPEAL 15 OF 2020  
DAS MAJANJA, J  
JULY 26, 2023**

**BETWEEN**

**JOSEPH LOPUNGO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence dated 26th February 2019 by Hon. N. Thuku, PM in Criminal (SO) Case No. 40 of 2017 at the Magistrate's Court at Nanyuki)*

**JUDGMENT**

1. Before the Subordinate Court, the appellant was charged and convicted of the offence of defilement contrary to section 8(1) and (3) of the *Sexual Offences Act*, 2006. The particulars were that on August 9, 2017 in Laikipia County, he intentionally and unlawfully caused his male genital organ to penetrate into the vagina of WWM, a child aged 14 years old.
2. Upon conviction, the trial court sentenced the appellant to 20 years' imprisonment thus precipitating this appeal. The appellant has appealed has filed a Petition of Appeal filed on June 25, 2019. The appeal had been heard by Waweru J., who took oral submissions and reserved judgment but has since retired. I am now called upon to deliver the judgment.
3. This is a first appeal. In *Okeno v R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court and at all times bearing in mind that it never saw or heard the witnesses testify. In order to proceed with this task, it is necessary to outline the evidence as it emerged before the trial court.
4. On the evening of August 9, 2012, PW 1, a student at a local school quarreled with her mother and left home. She went to see the complainant, PW 2, and they left for a local centre in [Particulars Withheld] area where they met the appellant and another man. After the appellant had given the food, he took



- them to his house where they slept a mattress on the floor. PW 2 testified that the while they were asleep, the appellant removed his trousers and tried to remove her trouser whereupon she pulled it up to her waist. She explained that after he remover her trouser, he put his penis in her vagina.
5. Earlier that evening, PW 2's mother, PW 3 recalled that PW 2 had disappeared with another girl. She was informed by another woman that PW 2 had been seen in the area. She reported to the police that PW 2 was missing. In the morning, she heard that PW 2 had been spotted by the river but she ran away. The appellant was later arrested and charged.
  6. In his sworn defence, the appellant denied the charged against him. He told the court that he was not in the area on the material day as he had been asked by his friend to go and help him harvest cabbages. That while they were harvesting, he was arrested and taken to a house by forced where he found PW 2 and PW 3. He admitted that PW 2 wanted him to be in a romantic relationship with her but he was married so he rejected her advances.
  7. Based on the material before the court, the appellant has challenged the conviction and sentence on procedural and substantive grounds. The first ground raised by the appellant is that the charges preferred against him were defective. I have looked at the record, the initial charge was less detailed in respect of the particulars. On August 23, 2018, before the close of the prosecution case, the court permitted the prosecution to amend the charge by detailing particulars. Section 214 of the [Criminal Procedure Code](#) (chapter 75 of the Laws of Kenya) permits the court to alter, amend, substitute or add any new charge at any stage of proceedings but before the close of the prosecution case. In addition, the court read to the appellant the amended charges and gave him the opportunity to recall any witness who had already testified as provided under subsection (i) of the proviso to section 214 of the [Criminal Procedure Code](#). The appellant indicated that he did not wish to recall any witness. Having reviewed the record, I am satisfied that the trial magistrate complied with procedure for admitting amendment of charges hence I do not find any error in the proceedings upto this stage.
  8. The other grounds of appeal deal with whether the prosecution proved its case beyond reasonable doubt. In order to succeed in a prosecution for defilement, it must prove that the accused committed an act that caused penetration with a child. "Penetration" under section 2 of the Act means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person."
  9. As to whether the prosecution proved penetration, PW 2 gave a vivid description of what transpired on the night when the Appellant lured her and her friend, PW 1 to his house. PW 1 corroborated the testimony of PW 2 who was with then in the same bed and who recalled that she felt the two on top of each other. The prosecution called PW 5, a clinical officer, who produced the P3 medical form and the Post Rape Case form filled by the officer who examined PW 2 on August 12, 2023. Although nothing remarkable emerged from the examination since she had bathed at the time of the examination, PW 5 stated that PW 2's vagina had a foul smelling discharge which was indicative that PW 2 was sexually active. I hold that from the totality of the evidence, the fact of penetration was proved.
  10. Although the incident took place at night, the identity of the appellant was proved beyond reasonable doubt. The appellant, PW 1 and PW 2 interacted for sufficient at the bar before they went to the appellant's house and slept together. The appellant, in his own defence, admitted that he knew PW 2.
  11. The appellant attempted to put forth an alibi. It must be recalled that when an accused raises an alibi defence, it is the duty of prosecution to disprove it beyond reasonable doubt. In this case though, the defence amounted to a mere denial because the appellant stated that on the material day, the lorry that was to pick him did not come and he went to work on the next day. Since the incident took place at night, the evidence was right termed as a sham. The appellant also raised the issue of a grudge between



him and PW 2 arising from unwanted advances. This defence is an afterthought as nothing of the sort was put to the PW 2 in cross-examination.

12. Proof of age of the victim is a question of fact. In this regard, the Investigating Officer, PW 7, produced the birth certificate showing the PW 2 was born on August 8, 2003 and was therefore a child and 14 years old at the time the offensive act took place. In sum, I am in agreement with the trial court that the prosecution proved all the ingredients necessary to satisfy a charge of defilement.
13. As regard the sentence, section 8(3) of the *Sexual Offences Act* provides that a person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years. The trial court therefore meted out the sentence provided in law and there is no reason for the court to interfere with it.
14. The conviction and sentence are affirmed. The appeal is dismissed.

**SIGNED AT NAIROBI**

**D.S. MAJANJA**

**JUDGE**

**DATED and DELIVERED at NANYUKI this 26<sup>th</sup> day of JULY 2023.**

**A.K. NDUNG’U**

**JUDGE**

