



**Muthee v Republic (Criminal Appeal 46 of 2020)
[2023] KEHC 21572 (KLR) (26 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21572 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL 46 OF 2020
DAS MAJANJA, J
JULY 26, 2023**

BETWEEN

FRANCIS LOKAI MUTHEE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence dated 22nd July 2020 by Hon. L. Mutai, CM in Criminal (SO) Case No.19 of 2019 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](#) and sentenced to 10 years' imprisonment. The particulars were that on an unknown date during the month of January, 2019 in Laikipia East Sub County in Laikipia County, he intentionally and unlawfully caused his male genital organ to penetrate into the vagina of RKK, a girl aged 12 years old.
2. The Appellant now appeals against the conviction and sentence in accordance with his Petition of Appeal dated July 5, 2020. Both parties have filed written submissions in support of their respective positions.
3. This is a first appeal from the Subordinate Court hence the court is called upon to exercise its appellate jurisdiction in line with the principle expounded upon by the Court of Appeal for East Africa in *Okeno v Republic [1972] EA 32*. The duty of the first appellate court 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 but bearing in mind that it never heard or saw the witnesses testify so as to observe their demeanour. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as the trial court. It may rehash those conclusions and there is nothing objectionable in doing so, provided it is



clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision (see *David Njuguna Wairimu v Republic KSM CA CRA No 28 of 2009 [2010]eKLR* and *Pandya v Republic [1957]EA 336*).

4. I now proceed to determine the appeal which is premised on six grounds whose thrust is that the prosecution failed to prove its case. In order to prove the offence of defilement, the prosecution 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.'
5. On the first ground, the appellant contends that the trial magistrate erred by convicting him on evidence that was manifestly insufficient, inconsistent, uncorroborated and had glaring gaps, hence incapable of sustaining a conviction. In his submission counsel for the appellant states that there was contradiction on where and when the offence was committed. Counsel contends that in her testimony RKK stated that she was defiled while on her way from school and on the other hand, the investigating officer, PW 4 informed court that RKK was defiled while fetching firewood. On the second and third grounds., the Appellant's counsel avers that the court did not consider the weight of evidence in reaching its decision in convicting the appellant and that the prosecution failed to prove the charges.
6. After a *voire dire*, RKK gave unsworn testimony that she was a student in class 2. Although she did not recall the specific date in January, 2019, she recalled what took place on the material day thus:

'In January 2019, I left from school at around 5.30pm. On the way home the accused came held my hand and led me to the nearby bushes I wore a trouser then, inner wear and dress school uniform. The accused removed my trouser, pants and then he had bad manners to me. He removed his trouser and laid me on the grass near a bush a bush area. I lay down facing up. He came on me and put his thing for urinating inside mine too.'
7. RKK proceeded to explain that after the ordeal, she went and reported to the area chief and named the Appellant as Baba Abel. Her parents were informed whereupon she was taken to hospital. She told the court that she had known him for a long time as he did not live far from her. When cross-examined she told the court that she had known him for three years. RKK's father, PW 2, recalled that after her ordeal, she refused to go to school and when she inquired why, RKK told her that the Appellant had sexually assaulted her. He reported the incident to the area chief and then took RKK to hospital for examination to the hospital. PW 2 confirmed that the Appellant lived in the neighbourhood.
8. The area chief, PW 3, recalled that on January 30, 2013 at about 6.30pm, she received the complaint from PW 2 accompanied by RKK that the Appellant had defiled RKK. She told the court that RKK identified the Appellant. The Investigating Officer, PW 4, gave an account of the investigation. Upon receiving the complaint on February 2, 2019, he proceeded to issue the P3 form, recorded the witness statement and thereafter arrested the Appellant.
9. When the Clinical Officer, PW 5, examined RKK on February 28, 2019 and prepared the P3 Form and the PRC form, she noted that the vagina did not have any tear or blood discharge, her genitalia was normal save that the hymen was broken and the high vaginal swab (HVS) did not reveal any spermatozoa but there were pus cells and a foul smell. She concluded that there was evidence of defilement from the history and examination. She also recorded that RKK was 12 years old.
10. The Appellant elected to give a sworn statement in his defence. He denied the particulars of the offence and stated that he knew PW 2 and his family as PW 2 had rented his premises. He however denied knowing RKK. He complained that the PW 2 damaged his premises. He gave PW 2 notice to vacate but instead, PW 2 poisoned his chickens which he reported to PW 3.



11. I have considered the evidence and I find as follows. On the issue of identification of the Appellant as the perpetrator, I hold that the identity of the Appellant was no in doubt. First, the ordeal took place at 5:00pm which was in broad daylight. Second, although the Appellant denied that he knew RKK, the evidence dispels this contention as both the Appellant and RKK lived in the same area for at least three years. PW 2 had even rented the Appellant's premises. Moreover, the RKK named the Appellant as the person who had committed an act of penetration to all the persons she informed.
12. In her testimony, RKK gave a vivid account of what had transpired on the material day. This evidence, according to the proviso to section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya), is sufficient to support a conviction if the trial magistrate, for reasons to be recorded, believed the child was telling the truth. Thus the medical evidence produced by PW 5 was merely corroborative. Though the evidence confirmed that RKK has been subjected to penetration before, it was insufficient to point specifically to the Appellant. The trial magistrate however concluded that RKK was, 'not only a candid witness but a witness whose evidence was trustworthy.' The court pointed out the evidence remained unshaken in cross-examination. In light of sole testimony of RKK, the fact that she identified that the Appellant to those she reported, I find the element of penetration proved.
13. The Appellant complains that the prosecution case was replete with contradictory evidence. In *Erick Onyango Ondeng' v Republic NRB CA Crim. Appeal No 5 of 2013 [2014] eKLR* the Court of Appeal cited with approval the decision of the Uganda Court of Appeal, *Twebangane Alfred v Uganda [2003] UGCA 6* where it held that not very contradiction that warrants rejection of evidence. As the court put it:

'With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.'

From the totality of the evidence, the contradictions pointed out by the Appellant are not material. For example, it is not inconsistent in a rural setting for a child to be coming from school and collecting firewood. What is clear is that the Appellant is the one who took RKK to the bush and committed the felonious act.

14. The Appellant complained that the trial magistrate did not take into account his defence but this is not correct as it was considered and discounted. The Appellant raise the issue of a grudge between him and PW 2. When cross-examined by the Appellant, RKK admitted that there was bad blood between the Appellant and PW 2, she however insisted that the defiled by the Appellant. PW 3 also confirmed that the issue but testified that RKK had made the complaint of defilement.
15. The final issue concerns that age of RKK. In cases of defilement, the age of a child is important on two levels. First, as an element of the offence it must be proved that the victim is below the age of 18 years. Second, the age determines the level of sentence to be imposed on the accused upon conviction. Proof of age is a question of fact (see *Mwalongo Chichoro Mwajembe v Republic MSA Cr App No 24 of 2015 (UR)*). In this case there is no doubt that RKK was child. PW 3 produced the P3 medical report and confirmed in her testimony the RKK was 12 years old. PW 4 also produced an age assessment report dated April 7, 2019 showing that RKK was aged 12 years. I accordingly find that the age of the child was proved.
16. The final ground raised by the Appellant is that the sentence was harsh in the circumstances. 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'. Since the prosecution proved that the child was aged 12 years, the sentence imposed was within the law as prescribed.

17. For the reasons I have set out above, I affirm the conviction and sentence imposed on the Appellant. The appeal is dismissed.

SIGNED AT NAIROBI

D.S. MAJANJA

JUDGE

DATED AND DELIVERED AT NANYUKI THIS 26TH DAY OF JULY 2023.

A.K. NDUNG'U

JUDGE

