



**Nyaga v Republic (Criminal Appeal E001 of 2023)  
[2023] KEHC 21044 (KLR) (26 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21044 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL APPEAL E001 OF 2023  
LM NJUGUNA, J  
JULY 26, 2023**

**BETWEEN**

**LAWRENCE GITONGA NYAGA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence by Hon J.W Gichimu (S.P.M.) in Runyenjes Sexual Offences Case No. E008 of 2022 delivered on 02nd November, 2022)*

**JUDGMENT**

1. The appellant herein filed a petition of appeal dated January 08, 2023, seeking orders that the appeal be allowed, the conviction to be quashed and the case be re-tried. The grounds of appeal are:
  - a. That the trial court erred in both fact and law by failing to consider that crucial witnesses were never called to testify thus violating Section 150 of the Criminal Procedure Code;
  - b. That the trial court erred by failing to consider that the medical report after examination of the complainant failed to connect the appellant with the offence;
  - c. That the trial court erred in law in convicting the appellant against the weight of the evidence whereas the prosecution failed to prove their case beyond reasonable doubt;
  - d. That the trial court erred in law when disregarding the appellant's defense without giving cogent reasons; and
  - e. That the trial court erred in law when it imposed harsh and excessive sentence upon the appellant without noting that he was a first offender.
2. The appellant herein faced a charge of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act No 3 of 2006. The particulars of the offence are that on April 10, 2022



at Nyakari sub-location within Embu County, the accused person intentionally caused his penis to penetrate the vagina of DNC a child aged 14 years. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006.

3. PW 1 was the complainant who testified under oath and stated that she met the accused person at [Particulars Withheld] area where she asked him to carry her on his motor cycle. That the accused took a long route and they went to his house together. That they had sexual intercourse and lived together as husband and wife for two weeks. That she did not inform her grandmother who was her guardian but had informed her cousin that she had gotten married. On cross examination PW1 confirmed that she had misled the accused person to believe that she had finished form 4.
4. PW2 who is the grandmother and guardian of the complainant, stated that the complainant left the homestead and did not return thereby causing her to report the matter to the village elder. A search was conducted and she was found in the house of the accused who was a motor cycle rider in the area. PW2 stated that she had seen the accused before but he was not well known to the complainant even though the complainant indicated that she wanted to be married to him.
5. PW3 is a village elder who testified that PW2 went and reported to him that the complainant was missing and that she was in the house of the accused. That he sent her away and investigated the matter. Later on, PW3 in the company of the assistant chief went to the home of the accused and they found the complainant there.
6. PW4 is the assistant chief, Nyakari sublocation, who stated that he received a call from PW3 informing him that the complainant had disappeared and that she was at the home of the accused. That in the company of PW3 they went to the home of the accused and found the complainant in the house of the accused. That PW4 took both the accused and the complainant to Kathanjuri Police Station. On cross examination, PW4 stated that the accused had informed him that he had been living with the complainant for a period of two weeks.
7. PW5 a Clinician at Runyenjes Level 4 Hospital stated that the complainant was referred to the hospital from Kathanjuri Police Station for a medical examination which he conducted. He stated that he had been informed by the complainant that she had been living with the accused as husband and wife for two weeks. That he produced the P3 form marked as PEXH 1 and the Post-Rape Care form marked as PEXH 2.
8. PW6, the investigating officer in the case testified that on the day of the arrest, he was on duty at Kathanjuri Police Station when PW4 brought the complainant who is a minor and the accused person to the station. That he was informed that they had been living together as a husband and wife for two weeks. That he visited the home of the accused in the company of the complainant before taking her to the Runyenjes Level 4 Hospital for medical examination.
9. Upon close of the prosecution's case, the court ruled that a prima facie case had been established to warrant the accused to be placed on his defence.
10. The accused person testified that on April 10, 2022, he was going about his business as a motor cycle rider in the Kathanjuri area when he was approached by PW3 in the company of another man. That PW3 told him that they were searching for a girl who they thought was in his compound, which he shared with his grandmother. He stated that the girl was a stranger in the area and that he did not know her.
11. DW1 was the accused person's grandmother who denied any knowledge of the offence.



12. The trial court considered the evidence presented before it and vide a judgment delivered on November 2, 2022 convicted the appellant and sentenced him to serve 15 years imprisonment. That judgment is the suspect of the appeal herein.
13. The court directed that the appeal be canvassed by way of written submissions.
14. The appellant in his submissions avers that the complainant presented herself to him as an adult. That she requested to be taken to a club to take alcohol but the accused declined. He further avers that the complainant had already agreed to live with him as husband and wife, a position she had taken from the start and the court is aware of the same. That he had no way of knowing the age of the complainant because she acted as an adult. He added that the complainant was in fact taking care of his 3 cousins thus she was already grown up. He also urged the court to set aside the sentence and allow the appeal.
15. In the respondent's submissions, it avers that the law is settled on retrial of criminal cases after conviction as stated in the case of *Fatehali Manji Vs Republic* [1966] EA 343 as cited in the case of *Joseph Anyanga Vs. Republic* (2006) eKLR where it was held that a retrial can only be ordered when the original trial was illegal or defective. It stated that the trial court exercised necessary diligence and considered the evidence and law before it in determining the case. It was its case that the prosecution proved beyond any reasonable doubt that the appellant committed the offence. On the issue of the sentence, the respondent submitted that the sentence was correctly applied albeit departing from the minimum allowable sentence according to the [Sexual Offences Act](#).
16. I considered the grounds of appeal the submissions by the parties and I have also re-evaluated the evidence that was adduced before the trial court and in my view the following are the issues for determination in this appeal:
  - a. Whether or not the offence of defilement was proven beyond reasonable doubt;
  - b. Whether or not the case meets the threshold for retrial; and
  - c. Whether or not the sentence imposed is harsh and/or excessive.
17. The core elements of the offence of defilement are set out under Section 8(1) of the [Sexual Offences Act](#) which provides as follows:

“

“8.

  - (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
  - (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
  - (3) 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.
  - (4) 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.

- (5) It is a defence to a charge under this section if -
  - a. it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
  - b. the accused reasonably believed that the child was over the age of eighteen years.
- (6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.
- (7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the *Borstal Institutions Act* and the Children's Act.
- (8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees."

The elements were also discussed in the case of *EMN Vs Republic* (Criminal Appeal E043 of 2022) [2022] KEHC 16687 (KLR) where the court stated:

"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

18. On the first parameter of the age of the complainant, the trial court was satisfied that the complainant was a minor through the testimonies by the prosecution's witnesses and by production of PEXH 3 being a copy of the complainant's birth certificate which clarified the date of birth. It is well proven that the complainant was 15 years old at the time of the incident, therefore a child according to the definition provided in the *Children Act* No. 8 of 2001 which defines a child as ".....any human being under the age of eighteen years." The courts have also shared this position as in the case of *Philemon Koech Vs Republic* [2021] eKLR where the court cited with authority, the case of *Edwin Nyambogo Onsongo Vs Republic* (2016) eKLR where the court of Appeal stated that: -

"... 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. On the second parameter of proof of penetration, the trial court relied on the evidence produced by PW5 who examined the complainant and wrote reports namely P3 form and Post-Rape Care form produced as PEXH 1 and PEXH 2 respectively. These reports clearly stated the findings of the PW5 as an expert and as such they are admissible evidence. In his testimony, the clinician stated that the complainant's vagina was inflamed (reddish) confirming recent penetration. Section 2 of the *Sexual Offences Act* states: "'penetration" means the partial or complete insertion of the genital organs of a



person into the genital organs of another person.” For emphasis, in the case of EMN Vs Republic (Criminal Appeal E043 of 2022) [2022] KEHC 16687 (KLR) the court cited the Court of Appeal decision in the case of *Sabali Omar Vs Republic* [2017] eKLR, noted that:

“.....penetration whether by use of fingers, penis or any other gadget is still penetration as provided for under the *Sexual Offences Act*.”

I therefore find that the prosecution proved beyond any doubt that there was actual penetration within the meaning and the intention of the *Sexual Offences Act*.

20. On the issue of identification, I have also noted the testimony of complainant who is also PW1 stating that she and the accused person were living together as husband and wife for a period of 2 weeks. The same sentiment appears across the board in terms of testimonies and evidence adduced by the prosecution. I note that the appellant in his testimony stated that the complainant was not known to him and that she was a stranger in the area but in his submissions, he confirms that him and the complainant agreed to live together as husband and wife and start a family. In my view the complainant positively identified the appellant.
21. As to whether or not the case should be retried, I am guided by precedence that shed light on this issue. In the case of *JK Vs Republic* [2021] eKLR the court cited with approval, the case of Fatehali Manji Vs Republic [1966] EA 343 where the Court of Appeal when dealing with the same issue, gave the following guideline: -

“In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for a retrial should only be made where the interests of justice require it.” (See Philip Kipnetich Terer –Vs- Republic [2015] eKLR)

In *Muiruri Vs R* [2003] KLR 552, the Court held that: -

“It [retrial] will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial. (See Zedekiah Ojuondo Manyala Vs Republic (Criminal Appeal No. 57 of 1980); the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution’s making or the court’s.”

In the case of *Mwangi –Versus- Republic* [1983] KLR 522, the Court of Appeal held at page 538 that: -

“We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant.”

22. On the issue of sentencing, I have noted that the trial court factored in the time when the appellant was in custody and his mitigation. To this end, the court sentenced him to 15 years imprisonment which was below the recommended sentence of a minimum of 20 years imprisonment.



- 23. In the case herein, the appellant has not argued his case on the grounds of retrial. Rather that listing as a ground of appeal he has not told the court why the case should be remitted back to the trial court for retrial.
- 24. However, considering the circumstances under which the offence was committed I am of the considered view that even the 15 years meted out to the appellant is excessive.
- 25. In the end, I uphold the conviction but set aside the sentence of 15 years and in its place I impose a sentence of 8 years.
- 26. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 26<sup>TH</sup> DAY OF JULY, 2023.**

**L. NJUGUNA**

**JUDGE**

..... for the Appellant

..... for the State

