



**Kariuki v Republic (Criminal Appeal 20 of 2019)  
[2023] KEHC 24531 (KLR) (23 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 24531 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CRIMINAL APPEAL 20 OF 2019  
GL NZIOKA, J  
AUGUST 23, 2023**

**BETWEEN**

**BENARD NJOROGI KARIUKI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the decision of by; Hon. Daffline Nyaboke Sure,  
Senior Resident Magistrate, delivered on, 27th June, 2019, vide Sexual Offence  
No. 38 of 2019, at the Senior Principal Magistrate's Court at Engineer)*

**JUDGMENT**

1. The appellant was arraigned before the Senior Principal Magistrate's Court at Engineer charged vide Criminal Case S/O No. 39 of 2018, with the offence of defilement contrary to section 8 (1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006 (herein "the Act") and an alternative charge of committing an indecent act with a child contrary to section 11 (1) of *the Act*.
2. The particulars of the charge(s) are that, on the 13<sup>th</sup> day of August 2018, at [Particulars Withheld] village within Nyandarua County, intentionally and unlawfully caused his penis to penetrate and/or come into contact with the vagina of V.K.G, a child aged nine (9) years.
3. The appellant pleaded not guilty and the case proceeded to full hearing. The prosecution case was led by the evidence of PW1 V.K.G (herein "the complainant"). She testified that, on a date she could not recall, she went to the shop in the company of her sister called [Particulars Withheld] to buy steel wire when they met the appellant who was staying in the same plot with their parents. That, he offered to buy them soda. He then got bread and soda from his house and gave them. That her sister drank her soda, and finished, while the complainant drunk half. That the appellant sent her sister to get more soda and requested the complainant to give him water. That the complainant got water from their



house and took to the appellant's house, and That while at the doorway, the appellant held her hand and pulled her into his house to the bed.

4. That, the appellant threatened to kill her if she screamed, and removed his belt, covered her mouth and did to her "bad manners". That she bit him on his index finger and he pushed her off and ran away. That the complainant went outside the house and informed a lady who was sitting outside the plot who altered her mother, and who informed the village elder. That, the matter was reported to the Police Station while the complainant was taken to Engineer District Hospital. That with the assistance of the Boda Boda riders, the Police Officers arrested the appellant and he was charged accordingly after the investigation.
5. At the close of the prosecution case, the learned trial magistrate ruled that, the appellant had a case to answer. He testified vide an unsworn statement to the effect that he was called to the Police Station, charged and brought to court. That he did not defile the complainant. That he was not told at the time of his arrest the reason why he was arrested. Further, he requested to be examined but the Police Officers refused and he kept quiet as it was his first arrest.
6. At the conclusion of the case the trial court delivered a judgment dated 27<sup>th</sup> June 2019, and held that the offence of defilement had been proved, found the appellant guilty thereof, and convicted him accordingly. He was sentenced to serve life imprisonment.
7. However, the appellant is aggrieved by both conviction and sentence and appeals against the same on the following stated grounds:
  - a. That, the learned Trial Magistrate erred in law and fact by convicting the appellant in a prosecution case where the age of the appellant was not proved.
  - b. That, the learned Trial magistrate erred in law and fact by holding that penetration of the complainant's genitals (vagina) was penetrated by the appellant while there was no evidence tendered to prove the same.
  - c. That, the learned Trial Magistrate erred in law and fact by convicting the appellant but failed to note that the prosecution case was not proved beyond reasonable doubt to the required standard.
  - d. That, the appellant's defence was not considered accordingly, the evidence tendered was not conclusively considered alongside the appellant's defence.
8. It suffices to note that, at the time of filing the submissions, the appellant filed amended grounds of appeal that states: -
  - a. That the learned trial magistrate erred in law and facts by failing to note that the age of the minor cannot be reasonably nine (9) years yet in standard eight (8) meaning she was in class one (1) while one (1) year old.
  - b. That the learned trial magistrate violated application of section 150 of the *Criminal procedure Code* by not summoning the uncalled witnesses mentioned by PW1 and PW2.
  - c. That the learned trial magistrate erred in law and fact by failing to observe that the medical examination was done and filled by Dr. R. but produced by Dr. N.. The appellant was not asked to agree or object as required by law.
  - d. That the learned trial magistrate erred in law and facts by procuring a harsh sentence of life imprisonment.



- e. That the learned trial magistrate erred in law and fact by failing to consider the appellant's defence in her judgment.
9. The respondent on its apart filed grounds of opposition dated 20<sup>th</sup> September 2022 which states:
- a. That in response to ground 1, the age of the complainant was sufficiently proved.
  - b. That in response to ground 2, penetration was proved.
  - c. That in response to ground 3, the prosecution case was proved to the required standard.
  - d. That in response to ground 4, the appellant's defence was duly considered by the trial court.
  - e. That, the petition is misconceived and devoid of merit and ought to be dismissed forthwith.
10. The appeal was disposed of vide filing of submissions. The appellant filed submissions on 25<sup>th</sup> April 2022 and argued that the age of the complainant was not proved. That, during voire dire examination the complainant claimed to be in class 8 which was not possible for a child aged 9 years' old. Further, the prosecution failed to seek an age assessment and suggested the complainant seemed to be between fifteen (15) and seventeen (17) years old.
11. Furthermore, the prosecution failed to call the woman who was allegedly outside the plot and the village elder, who were crucial witnesses, and therefore there is an inference their evidence was adverse to their case. He relied on the case of *Bukenya & Others v Uganda* 1972 EA 549.
12. The appellant further submitted that, the trial court did not ask if he consented to production of the medical evidence by (PW4), Dr N., on behalf of Dr Rotich, who had filled the P3 Form thus violated the provisions of section 33 and 50 of the *Evidence Act* (Cap 80) Laws of Kenya. He cited the case of *James Muchene Kambo v Republic* Criminal Appeal No. 65 of 2003 where the court allegedly stated that the evidence relied on lacked proper cross-examination for failure to examine the genitalia.
13. That although he admitted that he lived in the same plot with the complainant's family and used to be the caretaker at one time and that they did not have blood bad between them, the complainant framed him since her family had rent arrears when he was the caretaker.
14. Finally the appellant submitted, that he is a first offender and therefore the sentence meted out was harsh. He prayed the court evaluates his case, allow the appeal, quashes the conviction and sentence and set him at liberty.
15. However, the respondent in their submissions dated 20<sup>th</sup> September 2022, reiterated that the age of the complainant was sufficiently proved through the evidence of the complainant's mother (PW2), A., and the production of the immunization card produced as prosecution exhibit (1).
16. Further, it was proved that the complainant was defiled through her testimony detailing what transpired on the day of the offence and corroborated by the medical evidence produced by (PW4) Dr Ndigwa that the defilement was recent.
17. Furthermore, the complainant positively identified the appellant as the perpetrator and knew him as he was her neighbour, which evidence was corroborated by (PW2) A.. That, the trial court considered the appellant's defence but dismissed it as mere denial as it did not shake the prosecution's case.



18. On sentence, it was submitted that the appellant is a dangerous paedophile who should not be allowed back in the society and urged the court to uphold the conviction and sentence.
19. At the conclusion of the hearing of the appeal and in considering the arguments advanced, I note that, the role of the first appellate court is to re-evaluate the evidence afresh and arrive at its own conclusion, bearing in mind that the court did not have the benefit of the demeanour of the witnesses.
20. In that regard, the Court of Appeal in the case of; *Okeno v Republic* (1972) EA 32, thus observed: -

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya V R* 1975) E.A. 336 and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M. Ruwala V. R* [1957] E.A. 570. 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”
21. Be that as it were, the offence the appellant was charged with is provided for under section 8(1) of *the Act*, which states: -

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement”
22. The law is thus settled that, the ingredients of defilement as discussed in the case of; *Agaya Roberts v Uganda*, Criminal no. 18 of 2002, by the Court of Appeal are that, in order to constitute the offence of defilement the following must be proved: (i) sexual intercourse (ii) victims age is below eighteen (18) years (iii) the accused is the culprit.
23. Similarly, in *Bassita Hussein v Uganda* Criminal Appeal No. 35 of 1995, the Supreme Court of Uganda laid down the ingredients of the offence of defilement, which the prosecution must prove beyond reasonable doubt as; (i) the facts of the sexual intercourse (ii) the age of the victim being under eighteen (18) years (iii) participation by the accused in the alleged sexual intercourse.
24. In addressing the aforesaid elements, I find that the charge sheet states that, the complainant was nine (9) years old at the time of the alleged offence. The complainant testified that, she was nine (9) years old and a student in class eight (8). PW2 AGK, the complainant’s mother testified that, she was nine and a half (9 ½) years. That, she was born on 11<sup>th</sup> May 2008 and referred to the immunization card produced as P. exh. 1. Further the P3 form produced indicates that, the age of the complainant as nine (9) years old.
25. In the judgment delivered by the trial court it relied on the immunization card produced as adequate evidence of the age of the appellant as being nine (9) years old. Having considered the evidence adduced I concur with the finding of the trial court and relied on the case of *Francis Omuromi v Uganda*, Court of Appeal Criminal Appeal No.2 of 2000 which held that:-

“...Apart from medical evidence, age may be proved by birth certificate, the victim’s parents or guardian and by observation and common sense....”



26. As regards penetration, section 2 of the Act defines it as the partial or complete insertion of the genital organs of a person into the genital organs of another person.
27. As regards this matter, the complainant (PW1) testified that, it was the appellant who defiled her. She described how he removed her clothes; skirt, stockings, top and a jacket and then removed his belt and trouser and lay on her, defiling her. She stated that, he used his thing (where urine comes out) and inserted in her organ where she urinates from. She thus stated “he put his thing in my vagina and was moving up and down” and demonstrated the same.
28. The other evidence relating to defilement was led by (PW4), Dr. N. who produced the P3 form filled by Dr. R. in relation to the complainant. That, upon examining the complainant, it was noted that the under garment had brownish stains. That the vaginal opening was reddened and the hymen was broken with a tear at 6 O'clock. That, the brownish discharge was at the vulva. The doctor also produced a PRC form which had similar findings as indicated in the P3 form. The doctor further stated that, the defilement was a recent event, and took place on 13<sup>th</sup> August 2018, the date indicated in the PRC form, and the probable type of weapon causing injury was “penile vaginal”.
29. In delivering the judgment, the trial court held that, the P3 form and the PRC were adequate evidence of defilement. I do note that, the complainant stated that she was taken to hospital the same day. That, she was examined at Engineer District Hospital. The PRC form was filled at that hospital. Furthermore, 9PW30 PC Wilson Nzioka stated he referred her to Njabini Hospital for examination. The PRC form shows she was examined on 14<sup>th</sup> August 2018, and the offence was on 13<sup>th</sup> August 2018, therefore the reddened vagina speaks to a recent incident. I therefore find there is sufficient evidence of penetration and concur with the findings of the trial court.
30. The last issue to be established is whether, it is the appellant who committed the offence. The complainant stated in evidence that the appellant stays in the same plot with her. That, he removed soda and bread from his house and gave her and her sister. That she took to him water at his house. The whole incident took place during the day-time. She continuously referred to the appellant as “Bernard” which is the appellant’s real name as acknowledged in his defence.
31. In cross-examination, the questions put to the complainant clearly proved the appellant was known to the complainant. He asked the complainant whether she was the one who went to buy soda and not her sister [Particulars Withheld]; basically corroborating the complainant’s evidence that the appellant sent her sister for soda. He even asked her whether there was anyone else in the plot when the alleged offence occurred. At no time did the appellant put it to the witness that, he was not the culprit or that, she was lying by her testimony that he defiled her.
32. In the same vein, all the medical documents; that is, the P3 form and PRC form clearly speak to a history of defilement by a person best known to the complainant and how she was lured to the appellant’s house.
33. PW2 AG testified that when she arrived home, she found the complainant crying and upon inquiry, she reported that Bernard undressed and defiled her. That, he had sent I to the shop. That, the appellant lived in the same plot with her. Again in cross-examination of the witness, the appellant did not allude to or denied the offence.
34. Finally, when the investigating officer (PW3) PC W.N. testified, the appellant cross-examined him. The appellant did not put to him any question to suggest that, he was not involved in the offence save to allege that he was bribed to fix him. His concern as regards cross-examination of the doctor is that, he was not given a chance to cross examine him.



35. In his defence the appellant narrated how he was arrested and generally denied the offence. He did not attempt to rebut the evidence of the complainant. He did not comment on the P3 and the PRC form and did not pursue his theory that the investigating officer framed him. Therefore he had no plausible defence. It is a mere denial.

36. In convicting him, the learned trial Magistrate relied on the provisions of section 124 of the *Evidence Act* (Cap 80) Laws of Kenya, which states: -

Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations 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.

37. The trial court stated that, it could not “discern any ill will on the part of the complainant and (PW2) Ann. They had no acrimony with the appellant. Further the incident happened during the day time and the complainant convinced the court the appellant was the person who defile her”. That, though (PW3) PC Nzioka did not avail the Boda Boda riders or the woman who heard the complainant scream, it did not negate the complainant’s evidence because defilement was done in a clandestine manner and away from witnesses.

38. I note the trial court had the benefit of the complainant’s demeanour. The court warned itself of relying on the complainant’s evidence in finding the appellant culpable. Even without more consideration, the appellant did not explain why the complainant would lie against him. I therefore find that, there is adequate evidence that, the appellant committed the offence and I decline to interfere with the finding on conviction.

39. As regards sentence, the provisions of section 8 (3) of the Acts states:

(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.

40. Pursuant to the aforesaid, the appellant was sentenced to serve a lawful sentence and I decline to set it aside. Thus the appeal fails in its entirety. Right of appeal in 14 days.

41. It is so ordered.

**DATED, DELIVERED AND SIGNED ON THIS 23<sup>RD</sup> DAY OF AUGUST 2023.**

**GRACE. L. NZIOKA**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed



**DEPUTY REGISTRAR**

