



REPUBLIC OF KENYA



KENYA LAW
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**Wainaina v Republic (Criminal Appeal E069 of 2022)
[2023] KEHC 21966 (KLR) (16 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21966 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E069 OF 2022
GL NZIOKA, J
AUGUST 16, 2023**

BETWEEN

SAMUEL MWANGI WAINAINA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal arising from the decision by, Hon. E. Wanjala, Principal Magistrate, dated, 23rd November, 2022, vide Criminal Sexual Offence Case No. E049 of 2022, in the Senior Principal Magistrate’s Court at Engineer)

JUDGMENT

1. The appellant Samuel Mwangi Wainaina was charged at the Senior Principal Magistrate’s Court at Engineer *vide* criminal case No E049 of 2022 with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*, in the main count and an alternative count of committing an indecent act with a child. The particulars of each count are as per the charge sheet.
2. The appellant pleaded not guilty to the charges and the case proceeded to full hearing. The prosecution case was led by the evidence of (PW1) SNK (herein “the complainant”) who testified that, she left school at [Particulars withheld] primary school where she was studying in class 8 and sat at a dam along the road. Apparently, she did not want to go home as she had disagreed with her mother.
3. That the appellant and another Dennis approached her and inquired into what she was doing and requested her to accompany them to Kambi centre to charge a battery and look for her friend one Sammy. That they went and eventually they ended up at the appellant’s house where they stayed between 8.00 to 9.00 pm and moved to the house for Dennis. That the three of them namely: the appellant, the complainant and Dennis slept on the same bed. The complainant slept between the two men.



4. That the appellant defiled her despite her warning both of them not to touch her. That the appellant asked Dennis whether he had any condom and Dennis said he had none and the appellant proceeded to have sex with her without protection gear. The following day at 6.00am, the complainant went home and showered and went to school.
5. However, there was a school teacher Mrs Pale who interviewed her and referred her to the Police Station at Murungaru. She disclosed what had happened and was referred to the hospital for examination. The appellant was later arrested and charged.
6. At the close of the prosecution case, the trial court ruled the accused had a case to answer. He was put on his defence. He testified that, he and his friend Dennis found the complainant who told them that she was looking for one Martin, who was Dennis neighbour.
7. That the three went to look for Martin but missed him at the video place and offered to take the complainant home but she declined and requested Dennis to allow her wait for Martin at his place. That they got food from the appellant's house and went to Dennis' house, where they slept three of them. The following morning the girl was escorted by Dennis to her place.
8. At the conclusion of the case, the trial court found the appellant guilty as charged on the main count and convicted him accordingly. He was then sentenced to serve twenty (20) years imprisonment.
9. However, the appellant is aggrieved and has appealed against both conviction and sentence on the following grounds as reproduced:
 - a. That, the learned trial magistrate erred in both law and facts when he convicted the appellant in this case on a defective charge sheet.
 - b. That, the learned trial magistrate erred in both law and facts when he convicted the appellant in a prosecution case where age was not proved.
 - c. That, the learned trial magistrate erred in both law and facts when he convicted the appellant in a prosecution case where penetration was not proved.
 - d. That, learned magistrate erred in law and fact by applying the wrong standards of proof in criminal case which was a standard of probability instead of reasonable doubt.
10. The respondent in response to the appeal filed grounds of opposition dated April 23, 2023, in which it argued that:
 - a. That the learned magistrate properly convicted the appellant on the count of defilement contrary to section 8 (1) as read with section 8 (3) of the [Sexual Offence Act](#) after carefully analysing the evidence on record.
 - b. That the prosecution proved its case against the appellant to the required standard of beyond reasonable doubt.
 - c. That the sentence that was meted out by the trial court was legal.
 - d. That the appellant's appeal lacks merit and should accordingly be dismissed.
11. The appeal was canvassed through filing of submissions. The appellant in his submissions dated April 12, 2023, argued that the age of the complainant was not proved to the required standard as no document was produced in court to prove her age. He relied on the decision in; [Eliud Waweru Wambu v Republic](#) [2019] eKLR and [ES & OSJ v Republic](#) [2020] eKLR where it was stated that of the age of



- victim is a critical component and must be proved by credible evidence beyond reasonable doubt as the sentenced imposed on conviction will depend on it.
12. Further, reliance was placed on the case of; *Francis Omuroni v Uganda* criminal appeal No 2 of 2000 where the court stated that in determining the age of a victim medical evidence was paramount in absence of which it may be proved by the birth certificate, the victim's parents and observation and common sense.
 13. That the appellant was not aware of the age of the complainant as she presented herself as an adult with the capacity to get married. He cited the case of; *Eliud Waweru Wambui v Republic* [2019] eKLR where the Court of Appeal considered the defence provided for under section 8 (5) and (6) of the *Sexual Offences Act* and stated that, where a child is closer to the age of eighteen (18) years it is more likely for a person to believe that the minor is over 18 years. Further, knowledge that a person is dealing with a minor is an important element of defilement and that in the instant case the complainant was seventeen (17) years old.
 14. However, the respondent in its submissions dated March 23, 2023 argued that, the charge sheet was proper and that the appellant has not indicated in what way it is defective.
 15. Further, the case was proved beyond reasonable doubt. That, the age of the complainant was proved by production of an age assessment which indicated the age of the victim to be 15 years, and which evidence was not rebutted by the appellant.
 16. Furthermore, penetration was proved by the evidence of the complainant which was corroborated by the medical evidence adduced by PW3 that detailed the injuries to her genitalia. The trial court found the complainant evidence was forthright and not shaken in cross-examination.
 17. The respondent submitted that the learned trial magistrate clearly analysed and considered the evidence of the appellant and found his defence to be a denial. That, the appellant admitted to sleeping with the victim twice on the night of the offence. Consequently, the trial magistrate arrived at the correct decision in holding that the prosecution had proved its case beyond reasonable doubt.
 18. Finally, the respondent argued that the crime against the appellant was grave and deserved an even greater punishment of life imprisonment and urged the court to uphold both conviction and sentence.
 19. Having considered the application I find that the only issue that arises is whether the prosecution established the existence of all ingredients of the offence of defilement. I also note that the role of 1st appellate court well-articulated in the case of *Okeno v Republic* (1972) EA 32, to re-evaluate the evidence afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses.
 20. In that matter the court stated as follows: -

“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) EA 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] EA 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 elements of defilement are settled, in the case of; *Agaya Roberts v Uganda*, Criminal No 18 of 2002, and *Bassita Hussein v Uganda* criminal appeal No 35 of 1995, the Supreme Court of Uganda where court stated that, in order to constitute the offence of defilement the following must be proved: (i) the facts of the sexual intercourse (ii) the age of the victim being under 18 years (iii) participation by the accused in the alleged sexual intercourse.
22. To revert back to the matter herein, the ingredient of age of the complainant was proved *vide* the birth certificate produced as prosecution exhibit (1) which indicated that, the complainant was born on October 20, 2006 whereas the offence is stated to have occurred on May 15, 2022, therefore she was fifteen (15) years old, as stated in the charge sheet.
23. Penetration was proved by the evidence of PW1 that the appellant had sex with her on the material date in the house of Dennis. Her evidence was supported by the evidence of PW4 Dennis who testified that, the appellant asked him for a condom and when he told him he had none he asked the complainant to face him and he heard them have intercourse two (2) times.
24. Furthermore, the medical evidence as led by (PW3) Dr Patrick Maina Wakaba revealed that, the complainant had abrasions of external genitalia with freshly broken hymen and fresh blood. The examination was done on May 17, 2022, following allegation of defilement on May 15, 2022. That the injuries were two (2) days old and caused by penal vaginal penetration. The doctor further produced the PRC form filed by Julius Ngugi a clinical officer on May 16, 2022, which had similar medical finding as the P3 form. In view of the aforesaid, I find that the element of penetration was proved.
25. As regards the perpetrator, the complainant pointed at the appellant and her evidence was corroborated by (PW4) Dennis. The appellant defence concreted that evidence as he testified that he found the complainant at a dam, went around with her and ended up in the same bed. That they were only two (2) men in the same bed with the complainant. It is noteworthy that the complainant did not point at Dennis (PW4) as the perpetrator. Indeed, when Dennis testified that it the appellant who had sex with the complainant, the appellant did not rebut it in the cross-examination of the witness or evidence in chief.
26. In fact, in his own cross-examination by the prosecutor, the appellant “yielded” and admitted that, in his initial statement, he indicated that he had slept or had sex with the complainant twice.
27. In the light of all this evidence, it is the finding of the court that, the appellant was involved in the offence and the trial court’s finding cannot be faulted. I therefore find that, all grounds of appeal hold no water and I accordingly dismiss the appeal in its entirety.
28. It is so ordered. Right of appeal 14 days explained

DATED, DELIVERED AND SIGNED THIS 16TH DAY OF AUGUST 2023

GRACE L NZIOKA

JUDGE

In the presence of:

The appellant present, virtually

Mr. Atika for the respondent

Ms. Ogutu: Court assistant

