



REPUBLIC OF KENYA



KENYA LAW
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**Lomilio v Republic (Criminal Appeal E094 of 2022)
[2023] KEHC 21405 (KLR) (10 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21405 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E094 OF 2022
MS SHARIFF, J
AUGUST 10, 2023**

BETWEEN

PETRO LOMILIO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence of Hon Lucy. K. Mutai S.R.M
in original Isiolo Law Court S.O Cause No. 25 of 2019 delivered on 8/7/2022)*

JUDGMENT

A. Case background

1. The appellant Petro Lomilio was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars were that on 12/10/2019 in Isiolo County within Eastern region intentionally and unlawfully caused his penis to penetrate the vagina of CA child aged 13 years.
3. The appellant faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) No 3 of 2006, the particulars being that on the above stated particulars, he intentionally touched the vagina of CA a child aged 13 years.
4. The appellant denied the charges and the suit thus proceeded to trial.

B. Evidence

B.1 Respondent's evidence

5. PW1 the victim was subjected to a voire dire examination CA, the minor testified that she knows the appellant as he was their neighbour. It was her testimony that on 12/10/2019 at around 9.pm she



had gone to visit a friend called mama while in the company of Carolyine. They found Mama with one Kulaha. The friends then suggested that they should go to church and conduct choir rehearsals. Given that it was a Saturday night, Kulaha requested the appellant to escort the girls to church and the appellant complied. Mama and Kulaha remained behind while the victim and Carolyine went to church for the choir practice. Upon reaching the church they found that no one else was present and they decided to go back home. There was moonlight. On their way back Petro held PW1 by her neck and Carolyine ran away. The appellant then ordered PW1 to lie down on the ground on a bushy area. PW1 declined whereat the appellant forcefully put her on the ground. He then undressed PW1 of her biker and pants and inserted a finger in her anus. The victim screamed but no one was near to come to her rescue. The appellant then untied his wrapper (shuka), lowered down his pants, covered the victim's mouth with his hand and inserted his penis in the victim's vagina. The victim experienced excruciating pain and started bleeding. The appellant threatened to kill the victim in the event she that she leaks the incident to anyone. The appellant was at all material times carrying a spear and a knife that was sheathed. After defiling PW1 the appellant gave her Ksh 500 which the former declined to take. PW1 then dressed up and ran home while crying. At her home she found her mother one Rosemary Ngilimo and she narrated the incident to her. The victim's mother then examined her private parts and confirmed that PW1 was bleeding and then took the victim to where PW1's father was herding their goats. The father decided that they should take her to hospital but it started raining and thus reported the matter to the police and went to hospital the next day.

6. PW2 RN the victim's mother testified that on the material night PW1 had told her that she was going with a friend to church to fellowship. The mother of Mama one Kaluha then requested the appellant to escort the girls to church. PW2 slept but at 10p.m she was woken up by a neighbour by the name of Alube who informed her that her daughter CA had been defiled.
7. PW2 and Alube commenced a search and went to the scene that was near a river but they could not trace the victim. On their way back home they heard the victim calling PW2 and they eventually found her. PW1 then narrated how the appellant had defiled her. PW2 then examined her daughter's vagina by illuminating it with a torch and she indeed confirmed that her daughter was bleeding from her vagina. This witness identified the blood stained pair of pants and biker that her daughter had worn at the material time. It was her testimony that she then informed her husband and the next day they reported the matter at Isiolo Police Station and they were advised to take the victim to hospital which they did. A P3 form was then filled in at the hospital.
8. PW3 one Daudi Dabaso a clinical Officer from Isiolo Sub County hospital produced the victim's treatment sheet, Pp3 form and laboratory request form on behalf of his colleague Karai Jillo who had examined the victim. It was his evidence that the victim was aged 13 years. She had visible nails mark on her neck that was indicative of strangulation. There were lacerations on her labia majora and her hymen was freshly broken and was still bleeding. She was not pregnant but urinalysis confirmed that her urine was blood stained. This witness concluded that there was evidence of penetrative sexual intercourse.
9. PW4 Petro Ekitera a police reservist from Alamach camp in Nasuulu Conservancy stated that an elder identified as John had reported the defilement incident at the camp o 12/10/2019 and the next morning at 6.a.m the elder led the reservist and others to the appellant's residence whereat he arrested the appellant and handed him over to Isiolo Police officers who then rearrested the appellant.
10. PW5 Police Constable Hamere Kichana of Isiolo Police Station who took over the investigation from another officer who was on transfer, gave a narration of the events leading to the arrest of the appellant and produced the knife and spear as PEX1 and 2 respectively. She also produced the victim's blood stained underwear and purple biker as PEX4 and 5 respectively.



11. Upon conclusion of the prosecution's case the trial court ruled that a *prima facie* case had been established against the appellant wherefore he was put on his defence.

B.2. Appellant's evidence

12. The appellant gave sworn testimony. He stated that he is a herdsman. He admitted that the victim was his neighbour but he denied that he had defiled her. He stated that 3 suspects were arrested yet he was the only one who was charged while the other suspects were released. He stated that Rosemary was a stranger to him. He asked the court to release him.
13. Upon considering the rival evidence of the prosecution and the defence, the trial court found the appellant guilty and sentenced him to serve 20 years imprisonment term.

C. Appeal

14. The appellant was aggrieved by the said judgment and subsequently lodged this appeal which he premises on the following grounds:
 - a. That, the learned trial magistrate erred in law and fact by failing to note that KEY witness was not called.
 - b. That, the learned trial magistrate erred in law and fact by failing to find that the light used to identify the appellant was not fully analyzed.
 - c. That, the learned trial magistrate erred in law and fact by failing to find that the whole case against the appellant was based on suspicion which the same cannot form a basis for conviction.
 - d. That, the learned trial magistrate erred in law and fact by failing to take into account the period spent in custody under section 333 (2) of the *Criminal Procedure Code*.
 - e. That, the learned trial magistrate erred in law and fact by dismissing the appellant defense without giving cogent reasons of dismissing it.

D. Submissions

15. Parties were directed to canvass the appeal by way of written submissions. Both parties complied. This court has duly considered the rival submissions.

E. Analysis and determination

16. Given that this is the first appellate court, I am duty bound to re-analyze, re-evaluate and scrutinize the evidence presented before the trial court afresh, an exercise akin to a re trial, and the draw my own conclusions while taking into account the fact that unlike the trial court, I did not have the advantage of seeing and hearing the witnesses testify, and I cannot therefore form any assessment of the witnesses' demeanor. See the case of *Okero v Republic* (1972) EA, *Peters v Sunday Post* (1978) EA and *Pandya v Republic* (1957) EA 336.
17. In the case of *David Njuguna Wairimu v Republic* (2010) eKLR the court held;

.....the duty of a 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. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think



there is anything 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.

14. The offence facing the appellant is that of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* and the ingredients that the respondent ought to have proved are; age of the minor, the act of penetration and the positive identification of the perpetrator. (See *John Mutua Munyoki v Republic* (2017) eKLR.)
15. On the issue of age, PW-1 stated that she was 13 years old and a class 5 student at Aramat Primary school. The P3 form produced as PEX 6 also placed PW1 age at 13 years. I note that no certificate of birth was produce in this regard. I however do find that PW1 was truthful and gave a consistent and chronological narration of the events leading to the defilement wherefore I do believe her evidence that she was at all material times aged 13.
16. The courts have interpreted the issue of age as being proved by production of medical evidence. This was stated in *Joseph Kieti Seet v Republic* (2014) eKLR where it was held as follows:

It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of *Francis Omuroni v Uganda*, Court of Appeal Criminal Appeal No. 2 of 2000. It was held thus:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim’s parents or guardian and by observation and common sense
17. In the instant case, whereas no age assessment report was produced, the trial court that had the advantage of seeing the victim was from her evidence, P3 form and observation and common sense persuaded that the victim was 13 years old. I have no reasons to doubt that and I proceed to find that the age was proved satisfactorily.
18. On the element of penetration, the record shows that PW-1 stated that the appellant forcefully undressed her, threatened her with a knife and a spear, covered her mouth to muffle her screams and defiled her. PW1’s vagina bled. PW2 confirmed that PW1 was bleeding from her vagina and the medical evidence of PW3 Daudi Dabaso who produced PW1’s P3 form as PEX6 corroborated the evidence of the victim thus:

“She said a person known to her defiled her. ...She had nail marks on her neck which indicated strangulation. There were lacerations on the labia majora and hymen was broken and bleeding.....urinalysis confirmed the urine was blood stained. There was external penetration going by the lacerations and broken hymen.”
19. It is noteworthy that the appellant did not challenge the medical evidence as he opted not to cross examine the PW3.
20. Penetration was thus proved.



21. It is trite law that in cases of sexual offences the victim's evidence should be corroborated under the provisions of section 124 of the *Evidence Act*, however the proviso thereto provides;

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.

22. I have already found that from my own re-evaluation of the record the victim was truthful in her testimony.

23. It is also trite law that the prosecution is under no obligation to call any specific number of witnesses in support of its case provided the witnesses so called sufficiently prove the ingredients of the offence. I do find that the failure to call the victim's friends and Kaluha cannot attract an adverse inference on the part of the respondent's case for reason that PW1 reported the defilement to her mother immediately after the incidence and she disclosed that it was the appellant who had defiled her.

24. On the issue of identification, the appellant has maintained that given that the incident is said to have occurred during the night, the circumstances were not favourable for positive identification. The appellant was the victim's neighbour and he is said to have escorted the victim and Carolyne to church when he turned on the victim while Carolyne ran away. The appellant was positively identified by way of recognition.

25. On the balance I find that the offence of defilement was proved to the required standards. I therefore proceed to make the following orders:

- a. The appellant's appeal herein is dismissed for want of merit.
- b. The appellant's conviction is upheld and his sentence is confirmed.
- c. The appellant's sentence to be computed from the date of his arrest.

26. It is hereby so ordered.

DELIVERED, SIGNED AND DATED AT MERU THIS 10TH DAY OF AUGUST 2023

MWANAISHA S SHARIFF

JUDGE

In the presence of:

