



**Gathigia v Republic (Criminal Appeal 11 of 2019)
[2023] KEHC 23469 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23469 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL 11 OF 2019
DAS MAJANJA, J
SEPTEMBER 29, 2023**

BETWEEN

GRAHAM NJOMO GATHIGIA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the Original Conviction and Sentence of Hon. N. Thuku, PM dated 26th March 2019 in Criminal (SO) Case No. 14 of 2018 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 (2) of the *Sexual Offences Act*, 2006. The particulars were that on February 16, 2019 at an unknown place and time at Burguret in Kieni East Sub-county within Nyeri County, he intentionally and unlawfully penetrated into the vagina of CWM, a child aged 6 years old., with his penis.
2. Upon conviction, the trial court sentenced the Appellant to life imprisonment thus precipitating this appeal. The Appellant has appealed and has filed a Petition of Appeal filed on September 23, 2021.
3. The appeal had been heard by Waweru J., who took written and oral submissions and reserved judgment but has since retired. This court is now called upon to render the judgment.
4. This is a first appeal. In *Okeno v R* [1972] EA 32, the Court of Appeal for East Africa laid down the duty of the first appellate court which 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 and at all times bearing in mind that it never saw or heard the witnesses testify. In order to proceed with this task, it is necessary to outline the evidence as it emerged before the trial court. (Also see *David Njuguna Wairimu v Republic* KSM CA CRA No. 28 of 2009 [2010] eKLR)



5. After a *voire dire*, the complainant (PW 1) testified on oath. She stated that she was in Class 1. She stated that she knew the Appellant as he was staying in the compound they lived. She recalled that on February 16, 2018, the Appellant called her to his room. He was sitting on his bed. He removed her trousers and panty and after lowering his trouser, touched her vagina and then proceed to insert his penis into her vagina. After the incident she did not tell anyone what transpired. She later told her teacher what transpired after the teacher saw her dirty dress.
6. PW 1's father, PW 2, confirmed that he lived in the same compound as the Appellant who would assist him from time to time selling timber. He was informed what happened to PW 1 on 20.02.2019 by the school teacher who noticed PW 1 was wearing the same dress she had on the previous day. The teacher informed PW 2 what PW 1 had told her. PW 1's mother, PW 3, also testified and confirmed that PW 1 told her what transpired after PW 2 had been told by the teacher what happened to PW 1.
7. PW 1's teacher, PW 4, testified that on 16.02.2018, she noticed PW 1's dress had a brownish stain. When she inquired from PW 1 what had happened, she narrated how the Appellant had sexually assaulted her. She informed the school management and PW 2. The clinical officer, PW 6, testified that he examined PW 1 on 21.02.2018. According to him PW 1 had bruises on her private parts and her hymen was broken. He concluded that an act of penetration had taken place. He produced the P3 medical form and the Post Rape Care (PRC) Form together with treatment notes.
8. When put on his defence, the Appellant gave sworn testimony. He denied that he had committed the offence. Although he states he was at home with the complainant and other children, he affirmed that nothing happened on that day.
9. The thrust of the Appellant's appeal is that the prosecution failed to prove the case against him beyond reasonable doubt. The Appellant also complains the prosecution failed to prove the elements of the offence of the defilement. In order to succeed in a prosecution for defilement, it must be proved 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."
10. The appellant attacks his conviction on the ground that the trial magistrate erred in failing to adhere to the provision of section 19 of the [Oaths and Statutory Declaration Act](#) (Chapter 15 of the Laws of Kenya) which provides as follows:

19(1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the [Criminal Procedure Code](#) (Cap. 75), shall be deemed to be a deposition within the meaning of that section.
11. The procedural requirements before reception of evidence of child of tender years under section 19 of the [Act](#) has been considered by the Court of Appeal in several cases among them [Johnson Muiruri v Republic](#) [1983] KLR 445 and [Kinyua v Republic](#) [2002] 1 KLR 256. The authorities show that if, after the *voire dire* examination, the trial court is satisfied that the child understands the nature of the oath, the court proceeds to swear the child and receives the evidence on oath. But if the court is not so



satisfied, the unsworn evidence of the child may be received if, in the opinion of the court, the child possessed of sufficient intelligence and understands the duty of speaking the truth.

12. In *Jobson Muiruri v Republic* (*supra*), the Court of Appeal held that the trial court should record the questions put to the child and the answers so that the appellate court can determine whether the test in section 19 of the Act has been met. In this case the record shows as follows:

2. 5.18

Minor of approximate 4 – 6 years examined by the court and she replies as follows:

I am CW. I am a pupil at SP Primary school. I am 6 years old. I attend Sunday School. We are told to always tell the truth in church. If you tell lies you will go to the devil.

Court:

I am contented that the minor owing to her religious background understands and the duty of telling the truth. She will thus give evidence on oath.

13. While it is not necessary to set out the questions and answers in *voire dire* verbatim, it must be clear from the substance of proceedings that the essential elements of section 19 of the Act have been complied. The elements being examination on the competence and the nature of the oath. From the examination conducted by the trial magistrate and which I have set out above, given the age of the child, her competence to testify is not in doubt and as regards the oath she at least understood that failure to tell the truth attracted certain consequences.

14. Even if the *voire dire* was defective, the Court of Appeal in *Patrick Kathurima v Republic* CA NYR CR App. No. 131 of 2014 [2015] eKLR, observed that;

The trial magistrates' failure to reflect on the record the questions put to H.W. during the *voire dire* examination was not therefore per se fatal to the prosecution case. The sustainability or otherwise of the prosecutions' case solely depended on whether the evidence on which it was anchored met the threshold of proof beyond reasonable doubt.

15. Turning to the substance of the evidence, the Appellant was not a stranger to PW 1. Both PW 1 and PW 2 confirmed that the Appellant lived with them in the same compound. Likewise, his sworn defence, the Appellant did not deny that he did not know PW 1 and PW 2. PW 1's testimony was clear and consistent as to what transpired on the material day when the Appellant used his penis to penetrate her vagina. She was steadfast when cross-examined and explained why she did not inform her parents of her ordeal but told PW 4. PW 1's testimony did not require corroboration in accordance with the proviso to section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya), if the trial magistrate recorded reasons why she believed the child was telling the truth. In this case though, the trial magistrate who delivered the judgment did not have the opportunity of hearing PW 1's testimony.

16. There was however, sufficient corroborative testimony. The fact of penetration was confirmed by the medical evidence presented by PW 6. Although he examined PW 1 6 days after the incident, the fact that PW 1's vagina had bruises corroborates the fact of penetration given PW 1's age. Although the Appellant suggested a grudge between him and PW 2 in cross-examination, this is displaced by the fact that PW 1 reported the incident not to PW 2 but to PW 4 who was an independent witness. The Appellant defence was, in light of the totality of the evidence, featherweight as it was a mere denial



of the offence. The prosecution thus proved that the Appellant is the person who caused the act of penetration.

17. The Proof of age of the victim is a question of fact. In this regard, PW 2 produced PW 1's birth certificate showing that she was born on 11.10.2011. She was therefore 6 years old at the time the felonious act took place. The prosecution proved all the elements of the offence.
18. As regards the sentence, section 8(2) of the *Sexual Offences Act* provides that 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. The trial court therefore meted out the sentence provided in law and there is no reason for the court to interfere with it.
19. The conviction and sentence are affirmed. The appeal is dismissed.

SIGNED AT NAIROBI

D.S. MAJANJA

JUDGE

DATED AND DELIVERED AT NANYUKI THIS 29TH DAY OF SEPTEMBER 2023.

A.K. NDUNG'U

JUDGE

