



**Jenda v Republic (Criminal Appeal E039 of 2022)
[2023] KEHC 22681 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22681 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E039 OF 2022
RE ABURILI, J
SEPTEMBER 28, 2023**

BETWEEN

FRANCIS OTIENO JENDA ALIAS FRANCO APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in Winam Senior Principal Magistrate's Court Sexual Offences Case No. 69 of 2020 delivered on 4th August 2022 by Hon. F. Rashid (PM))

JUDGMENT

1. The Appellant Francis Otieno Jenda was convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#) No. 3 of 2006. Particulars of the offence for which he was sentenced to serve fifteen (15) years imprisonment are that on the 20th day of July 2020 in Kisumu East Sub county, within Kisumu County in the Republic of Kenya, he unlawfully and intentionally caused his penis to penetrate the vagina of MAO A girl child aged 14 years.
2. From the trial court record, the Appellant was arrested on 25th July 2020 and presented to court for plea on 27th July 2020 at Winam Senior Principal Magistrate's Court. He pleaded not guilty to the charge and maintained his innocence throughout the trial until his conviction and sentence of 15 years' imprisonment on 4th August 2022.
3. It is however important to note that he was released on bond pending trial on 17th August 2020.
4. Aggrieved by the conviction and sentence imposed, the Appellant filed this appeal on 10th August 2022. In his petition dated 4th August 2022, the Appellant sets out the following grounds of appeal:
 - i. That the trial court failed to observe that the sentence imposed is/was manifestly harsh and disproportionate.



- ii. That the court be pleased to consider that the ingredients forming the offence was not proved beyond reasonable doubt.
 - iii. That the court be pleased to consider the circumstances that surrounded the veracity of the offence.
 - iv. That the court be pleased to consider that the investigations tendered was shoddy.
 - v. That the trial court failed to consider that the P3 form contradictive in nature in terms of the dates the complainant was taken to hospital.
 - vi. That the Appellant hereby beseeches the superior court to indulge into the same and or be pleased to reduce the sentence proportionately as enshrined in Article 50(2) p and 49(1), (a) (c) (f), 50(2) (g) (h) (i) of *the Constitution*.
 - vii. That the trial court failed to consider the appellant's defence statement which was cogent and reasonable.
 - viii. That I wish to be present at the hearing of this appeal and or be supplied with trial record to enable me erect more grounds.
5. The appeal was admitted to hearing on 21st December 2022 and directions given on the mode of disposal of the appeal. Both parties filed written submissions to canvass the appeal. The Appellant filed his submissions on 13th June 2023 while the Respondent through the ODPP on behalf of the State filed its submissions on 4th May 2023 opposing the entire appeal and urging this court to dismiss the appeal.
 6. The Appellant in his submissions addressed two main issues: consistencies and mitigation. On the 1st issue, the appellant submitted quite incoherently that the trial magistrate failed to highlight the conduct of proceedings and circumstances that surrounded the prosecution witness. He submitted that there were inconsistencies in the prosecution's evidence and that there was no corroboration of the complainant's evidence.
 7. He further submitted that there was no evidence that the complainant was coerced and that there was contradiction in the P3 form and the Post Rape Care form.
 8. The appellant wondered why PW1 did not question the complainant's whereabouts after her disappearance, for almost one week, arguing that that silence was an indication that PW1 knew the fact of the ongoing affair between the Appellant and PW 2. He argued further that it appeared as if PW1 was privy to the ongoing affair between PW 1 and the Appellant.
 9. The Appellant further denied that there was evidence of penetration now that the complainant was examined after lapse of 8 days following the alleged defilement and in view of the alleged contradictions between the P3 form and Post Rape Care in terms of information contained therein.
 10. The Appellant further submitted that in view of the conduct and attitude and behaviour of the complainant, it was inevitable to state that she was an adult of sound mind.
 11. On mitigating factors, the appellant submitted that the prosecution failed to dislodge the appellant's defence. That the defence was cogent and that the appellant was a first offender and remorseful, who seeks for leniency hence this court should consider the conduct of proceedings and the peculiar nature of the circumstances of the offence.
 12. Following the Appellant's grounds of appeal, the prosecution submitted that the case before the trial court was proved beyond reasonable doubt. That all the elements of defilement as defined under



Section 8(2) and 8(3) of the *Sexual Offences Act* were proved beyond reasonable doubt namely; age of the complainant was proved because she was born on 7th August 2006 as testified by her mother PW 2; that penetration was proved by medical evidence in the P3 form and Post Rape Care form produced as P. exhibits 3 and P. Exhibit 2 respectively.

13. On identification of the perpetrator, it was submitted that the appellant was well known to the complainant as her friend before the incident. On sentence, it was submitted that the 15 years' imprisonment imposed on the appellant though minimum but was lawful under Section 8(3) of the *Sexual Offences Act*. It was submitted that notwithstanding the recent decision on Mandatory Minimum Sentences, the sentence imposed was fair and just hence this court should not interfere with it. Reference was made to several decisions.

Analysis and Determination

14. This being a first appeal, this court's duty is as stipulated in *Okero vs Republic* among others. See also *Kiilu & Another vs Republic* (2005) KLR 174 where the Court of Appeal stated that:

“an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions.”

It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding 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.”

15. Revisiting the evidence adduced before the trial court in line with the above decision, the prosecution's evidence was as follows:-
16. PW 1 MA, the complainant testified after *voire dire* examination that she was 14 years old and recalled that on the 20th July 2020 at 6.00pm, she ran away from her home in Nyamasaria after her mother beat her up because she was befriending the appellant so the appellant picked her up and took her to Chiga. He escorted her to Ahero, his grandmother's home where she stayed and he too slept there once then he returned to Nyamasaria, leaving her at Ahero. He returned to Ahero on a Thursday. She stated that on 20th July 2020 he had sex with her at Nyamasaria. That when she told him that she wanted to return to her home, he beat her up. She only returned to her home after one week and a report was made at Kondele police station upon which she was taken to Russia Hospital with her mother and she was examined, a P3 form and Post Rape Care form filled. She identified her birth certificate S/No. xxxx and recognized the appellant who was in court saying she had known him since 2019 and that he had defiled her severally before and that he had forced her to have sex with her but she did not tell anyone.
17. In cross examination, she admitted that she had an affair with the appellant and that she was 13 years old the past year. She stated that the appellant took her to his grandmother's house and on 28th November 2020, he defiled her in Nyamasaria in his house. She reiterated that he had defiled her severally before that and that she left his house at 9.00am the following day.
18. In re-examination, she stated that the appellant defiled her on 20th July 2020 and on 28th November 2020 and on other dates before those two dates.



19. PW2 CA, the mother to PW1 testified how on 20th July 2020, she send PW1 to fetch water but PW1 left with the appellant and they disagreed at the gate. She got this information from her neighbour so she disciplined PW1 who left and went to sleep at a neighbour's house and that it was not until 24th July 2020 when she returned. PW2 realised that PW1 had disappeared with the Appellant so she took PW1 to Nyamasaria Police post then to Kondele police station before going to Russia Hospital. She stated that the complainant was 14 years and produced her birth certificate as P. Exhibit 3. She identified the appellant as her neighbour and denied ever having a disagreement with him. She denied knowing that the Appellant was having a love affair with PW1. She stated that PW1 told her that she was with the Appellant on 20th July 2023. She reiterated her testimony in cross examination.
20. PW3 was Calvin Okoth Odhiambo a Clinical Officer based at Gender Based Violence & Recovery Centre at Jaramogi Oginga Odinga Teaching and Referral Hospital (JOO TRH). He attended to the victim on 25th July 2020 and filled her Post Rape Care form. He stated that the victim reported that the appellant Frank was her boyfriend and that on genital examination, the hymen was absent, there was whitish discharge, pus cells and epithelial cells. On high vaginal swab, HIV and pregnancy tests were negative. Treatment for STI was given for PEP and emergency contraceptives. The PRC form was produced as P. Exhibit 2. In cross-examination, the witness stated that whitish discharge was a sign of infection.
21. PW 4 Dr. Lucy Ombok of JOOTRH examined and filled the P3 form for PW1 on 25th July 2020. She testified that the victim reported being defiled by her boyfriend. On examination, the hymen was broken, normal external vagina, no discharge or blood found. That the victim had been given PEP and was on STI drugs. In cross examination, she stated that the patient was penetrated and she went to PW4 after 8 days following the incident. In re-examination, she stated that whitish discharge is a UTI transmitted through sexual intercourse.
22. PW 5 Police Constable Recho Odete received a report on 23rd July 2020 from PW2, of a missing child, PW1. She produced the Investigations diary as P. Exhibit 4 for OB No. 11/23/7/2020 at 11.40 hours and OB No. 15/25/7/2020 at 12.20 hours of defilement. She stated that the appellant was arrested by PC Chelule.
23. Placed on his defence, the Appellant testified on oath as DW1 and stated that he was a casual worker and that the date of alleged incident he was not there. That he was a boda rider and was based at Nyamasaria. That he was arrested and taken to court. He stated that he knew the victim and her mother too. He denied defiling her, saying she lied to court. He claimed that he disagreed with the victim's mother because of money. That he carried the complainant's mother on his motorbike but she did not pay.
24. Upon conviction, in mitigation, the Appellant asked for forgiveness saying he was very remorseful.
25. After considering the mitigations, the trial magistrate imposed fifteen (15) years imprisonment.
26. It is that conviction and sentence that provoked this appeal, filed on 10th August 2022.

Determination

27. Having considered the evidence adduced before the trial court, the grounds of appeal as filed and the written submissions by both the appellant in person and the Respondent State though the ODPP, the main issue for determination is whether the prosecution proved all the elements of the offence of defilement as charged beyond reasonable doubt.
28. To sustain a conviction on a charge of defilement, the prosecution must prove beyond reasonable doubt the following essential ingredients: -



a. Age of the complainant:

29. In this case, the prosecution adduced evidence by way of a birth certificate for the complainant, as P. Exhibit 3 Serial No. xxxx issued on 28th July 2020 with registration for 12th July 2012 showing that the complainant was born on 7th August 2006.
30. The offence allegedly took place on 20th July 2020. As at the latter date, the complainant was aged 14 years and 13 days. I am therefore satisfied that the complainant was a child within the meaning of the Children's Act and her age bracket was between 12 and 15 years.
31. I observe that the birth certificate was issued after the offence was allegedly committed. However, as the registration took place on 12th July 2012, it is clear to me that her birth certificate had not been taken by her mother and what remained was to present birth notification and get the birth certificate issued.
32. The Appellant in his defence denied committing the offence. He was under no duty to admit the charge or to prove his innocence. However, in his submissions in support of his grounds of appeal claimed that from the behaviour and conduct of the complainant, and attitude, it was inevitable to state that she was an adult of sound mind. In other words, the appellant is now claiming that the complainant was not a child. However, as I have stated above, there was no contrary evidence that the complainant was born on 8th July 2006 as per her birth certificate produced as an exhibit.
33. In addition, the appellant did not, in his defence, which he was not obliged to give to rebut the prosecution's evidence, although his right to adduce and challenge that evidence was guaranteed, claim that he believed that the complainant was an adult or that she deceived him into believing that she was an adult thereby invoking the defence obtaining in section 8(5) of the *Sexual Offences Act* which provides that:

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- (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.”

34. For the above reasons, I find the prosecution to have proved beyond reasonable doubt that the complainant was a child and the idea by the appellant in his submissions that her behaviour and conduct was that of an adult of sound mind is unsupported and an afterthought as it did not form part of his defence.
35. The second element that must be proved beyond reasonable doubt by the prosecution is penetration of genitalia of the complainant by the appellant's penis. PW1 testified that after she was beaten by her mother, PW 2 on account of her having a love affair with the appellant, the appellant took her away to his place at Nyamasaria then to his grandmother's house in Ahero and back to Nyamasaria and that he had sex with her on 20th July 2020 and that even before then, she had sex with him. In her sworn testimony which the trial court believed, she stated that the appellant was her boyfriend.



36. The appellant claimed in his submissions that there was no corroboration of the evidence of PW1 and that there were contradictions in the Post Rape Care and the P3 form. I have re-evaluated that evidence and I am satisfied that PW 1's evidence was well corroborated although corroboration in sexual offences is not mandatory. PW 2 corroborated PW 1's testimony that PW 1 ran away after being disciplined by PW 2 and she stayed away prompting PW 2, as shown by the police OB report and Investigations diary produced as exhibits, to report to the police of a missing child.
37. The child reappeared and was taken to the police station and to hospital where she was examined by a Clinical Officer PW3 on 25th July 2020 who also filled the PRC Form and confirmed that she had been penetrated. In this case, the complainant's vagina had whitish discharge, epithelial cells and Pus cells meaning she had a sexually transmitted disease and they put her on STI prophylaxis treatment and emergency contraceptives.
38. This testimony was further corroborated by the evidence of PW 4 Dr. Lucy Ombok who examined the complainant later on 28th July 2020 for purposes of filling the P3 form which was produced as P. Exhibit 1.
39. The Appellant also claimed in this appeal that there were contradictions in the PRC and P3 form. I have perused the exhibits in issue and I find no material contradictions in the sense that the PRC was filled 5 days after the defilement and before the complainant had received any treatment hence the infections of STI were evident whereas on 28th July 2020 when the complainant was examined, she was on treatment for the STI hence the whitish discharge epithelial and pus cells were absent.
40. In addition, albeit the P3 form was filled 8 days after the incident, the complainant was examined immediately she returned from the appellant's house on 25th July 2020 and PRC filled showing sexual penetration and the STI infections that were apparent. It therefore follows that the alleged contradictions are not supported at all and that there was no doubt in the mind of PW 4 that the complainant was penetrated, from her own examination and that absence of discharge or blood was not lack of evidence of penetration, which was properly established by PW3 on examination of the complainant on 25th July 2020.
41. In *Basita vs Uganda S. C Criminal Appeal No. 35 of 1995*, the Supreme Court of Uganda stated as follows concerning proof of the element of penetration:

“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victim's own evidence and corroborated by the medical evidence or other evidence. Though desirable, it is not hard and fast rule that the victims evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution my wish to adduce, to prove its case such evidence must be such that is sufficient to prove the case beyond reasonable doubt.”
42. In the present appeal, I am satisfied that penetration of the complainant's vagina was proved by the testimony of PW1 supported by the medical evidence as adduced by PW 3 and PW 4.
43. The next element that must be proved beyond reasonable doubt in defilement cases is identification of the perpetrator. In the instant case, the complainant PW1 testified that the appellant was her friend and that previously, they had sexual intercourse. In addition, she testified that the appellant took her to his grandmother's house in Ahero where she stayed before he went and collected her. The Appellant too testified that he knew the complainant and her mother well.



44. The appellant testified that he was not there on the date that the incident took place and that the complainant lied to court. He added that he disagreed with the complainant's mother because he carried her on a motor cycle but she did not pay him. I observe that none of the questions put to the witnesses PW1 and PW 2 suggested any form of disagreement over unpaid fare money.
45. In addition, albeit the appellant was under no duty to give any defence to exonerate himself, he merely stated that he did casual jobs and that he was a boda rider and was not there when the incident took place. This in itself cannot amount to a defence of alibi capable of being determined by the court.
46. In my humble view, this defence of 'I was not there' did not and does not fit the defence of alibi as the appellant never said where he was on the dates that the complainant testified that he rode away with her to his place at Nyamasaria then to his grandmother's house. The complainant who was not a child of tender years vividly narrated what happened after her mother beat her on 20th July 2020 at 6.00pm and how she ran away and was picked by the appellant who also picked his bag and escaped with her until 24th July 2020 when she returned to her home, according to PW 2.
47. The victim was also clear the appellant had had sex with her previously as he was her boyfriend and even added that they also had sex on 28th November 2020 which was after the 20th July 2020 meaning, the appellant continued having sex with the complainant even after he was arrested in connection with the defilement of 20th July, 2020.
48. I have no reason, from the evidence adduced, to doubt the testimony of PW 1 that it was the appellant and not any other person who defiled her. I further find that the allegation in the appellant's defence that he had a disagreement with PW2 over unpaid fare was an afterthought.
49. That defence in my view, amounted to a mere denial and did not displace the watertight evidence adduced by PW1 on the identity of the appellant as the person who defiled the complainant.
50. Accordingly, I am satisfied that the appellant was positively identified as the perpetrator of the offence of defilement against the complainant herein. That proof is beyond reasonable doubt.
51. The appellant's submission that the prosecution failed to dislodge his defence does not assist him as the prosecution could not have been expected, in the circumstances of this case, to go on a fishing expedition to look for non-existent evidence to dislodge the defence of "I was not there" which defence only came during the testimony of the appellant in court and which defence never disclosed where the appellant was at the time the victim vividly recalled that he defiled her in his house at Nyamasaria after taking her to his grandmother's house in Ahero and returning her to Nyamasaria.
52. On the whole, I find and hold that the prosecution proved all the elements of defilement beyond reasonable doubt as against the appellant. I find the conviction of the appellant was sound and safe. I uphold it and dismiss this appeal against conviction.
53. On the submission and assertion that the sentence imposed was harsh and never took into mitigation, I observe that the appellant in mitigation sought for forgiveness and leniency of the court. The court considered the mitigations and the fact that he was a first offender and sentenced him to serve fifteen (15) years imprisonment.
54. Under Section 8(3) of the *Sexual Offences Act*, 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.
55. The appellant was sentenced to serve fifteen years' imprisonment instead of the prescribed minimum of twenty years. The trial magistrate exercised discretion in sentencing the appellant and I find no



reason to interfere with that discretion which was exercised judiciously and leniently, bearing in mind the use of the words 'is liable to' which takes away the mandatoriness of the sentence of 20 years' imprisonment.

56. Accordingly, I find no reason to interfere with lawful sentence imposed by the trial court in exercise of judicial discretion after considering the appellant's mitigation.
57. The appellant was on bond during the trial period. He was arrested on 25th July 2020 according to the charge sheet dated 27th July 2020 and apprehended in court on 27th July 2020. He was released on bond on 17th August 2020.
58. In calculating the prison term imposed, I hereby invoke the provisions of Section 333(2) of the Criminal Procedure Code and order that the fifteen (15) years imprisonment shall be calculated taking into account the period from 25th July 2020 and 17th August 2020 when the appellant was in custody before he was released on bond on 17th August 2020.
59. In the end, I find this appeal on conviction and sentence devoid of any merit, save in the latter case for the application of Section 333(2) of the Criminal Procedure Code. The appeal is dismissed.
60. I so order.
61. File closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 28TH DAY OF SEPTEMBER, 2023

R. E. ABURILI

JUDGE

