



**Ali v Republic (Criminal Appeal E050 of 2023)
[2023] KEHC 24479 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24479 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E050 OF 2023
TW CHERERE, J
OCTOBER 26, 2023**

BETWEEN

HUSSEIN ALI APPELLANT

AND

REPUBLIC RESPONDENT

*(An Appeal from conviction and sentence in Isiolo Criminal Case
S. O No. 3 of 2006 by Hon.L.K. Mutai (CM) on 31st March, 2023)*

JUDGMENT

1. Hussein Ali (Appellant) was charged with defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006 (the Act). Appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006. The offences were allegedly committed 22nd November, 2021 against AB a child aged 15 years.
2. Complainant who was 15 years in 2021 disappeared from home on 22nd November, 2021 and upon her return on 25th November, 2021 disclosed that she had been living with the Appellant and had engaged in sexual intercourse. In her evidence, complainant stated she had engaged with sexual intercourse with Appellant only once. Upon being examined by a clinical officer on 26th November, 2011, complainant was found with an old scar on her broken hymen. Subsequently, Appellant was arrested on 28th November, 2021 and charged.
3. In his defence, Appellant stated that he had been framed after he stopped working for complainant's family as a bodaboda rider.
4. After considering both the Prosecution and Defence cases, the learned trial magistrate found the Prosecution had proved the charge of defilement, convicted and sentenced Appellant to serve 15 years' imprisonment



5. Dissatisfied with both the conviction and sentence, Appellant lodged the instant Appeal and raised 8 grounds which I have summarized into three grounds:
 - i. Prosecution case was not proved
 - ii. The sentence was harsh
6. This being a first appeal, the court is expected to analyze and evaluate afresh all the evidence adduced before the lower court and draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See *Okeno vs. Republic* [1972] EA 32, *Pandya -vs- Republic* [1957] EA 336 and *Kiilu & another vs. Republic* [2005]1 KLR 174.
7. An accused is innocent until the prosecution proves its case beyond any reasonable doubt. In the English case of *Woolmington vs. DPP* 1935 A C 462 in *Miller v Minister of Pensions* {1947} 2 ALL ER 372, the Court held at page 373:

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability”.
8. A certificate of birth tendered in evidence reveals that complainant was born on 02nd February, 2006 from which the trial magistrate ruled that complainant was 16 years the time of the commission of the offence.
9. The evidence on record reveals that Appellant was not a stranger to the complainant. Appellant did not deny that he had been with her from 22nd to 26th November, 2011 and the trial magistrate’s finding that his defence to the case was irrelevant was therefore well founded. From the foregoing, I find that the prosecution case that Appellant defiled complainant was well founded.
10. The trial court having ruled that complainant was 16 years when the offence was committed ought to have convicted Appellant under the provisions of Section 8(4) of the *Sexual offences Act* which provides that:

A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.
11. Notably, the use of the word “liable”, connotes that the trial court has discretion to impose a lesser sentence where the circumstances so dictate. This was the holding in the case of *Daniel Kyalo Muema vs Republic* [2009] eKLR where the Court of Appeal stated that the words “shall be liable to” did not in their ordinary meaning require the imposition of the stated penalty but merely expressed the stated penalty which could be imposed at the discretion of the court.
12. I have considered the seriousness of the offence. Appellant who was 21 years at the time of conviction was a first offender and it is in my considered view not in the interest of justice to confine him to a life of hopelessness.



13. Consequently, I uphold the conviction but substitute the 15 years' sentence with an imprisonment term of five (5) years which shall commence from 28th November,2021 when Appellant was arrested.

DELIVERED AT MERU THIS 26TH DAY OF OCTOBER 2023

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Kinoti

Appellant - Present

For DPP - Ms.Rita Rotich (PPC)

