



**EE v Republic (Criminal Appeal E003 of 2020)
[2023] KEHC 24034 (KLR) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24034 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CRIMINAL APPEAL E003 OF 2020
RN NYAKUNDI, J
OCTOBER 25, 2023**

BETWEEN

EE APPELLANT

AND

REPUBLIC RESPONDENT

(Being a review from original conviction and sentence in Kakuma Senior Principal Magistrates Court sexual offences Case No. 5 of 2019, Hon. J M Wekesa PM on 15th January, 2023)

JUDGMENT

Coram: Before Justice R. Nyakundi

Mr. Kakoi for the State

1. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on the 9th of October, 2018 in Turkana West Sub-County within Turkana County, intentionally caused his penis to penetrate the vagina of BL, a child aged 14 years.
2. He was also charged with 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 particulars of the offence are that on the 9th of October, 2018 in Turkana West Sub-County within Turkana County, intentionally touched the vagina of BL, a child aged 14 years.
3. The appellant was convicted on the main charge and sentenced to serve twenty (20) years imprisonment.
4. Being dissatisfied with the said judgment the appellant lodged an appeal filed on January 27, 2023 against both his conviction and sentence. The grounds were amended in his written submissions as follows:



- i. That the learned trial magistrate erred in law and in fact when she convicted the accused person without observing contradictory testimonies of the prosecution witnesses.
- ii. That the learned trial magistrate erred in both law and in fact when she convicted the accused person without observing that the age of the victim was not proved.
- iii. That the learned trial magistrate erred in both law and in fact when she convicted the accused person without observing that the prosecution did not prove penetration.
- iv. That the learned trial magistrate erred in both law and fact when she convicted the accused person without observing that the P3 form was filled after 5 months of the incident.
- v. That the learned trial magistrate erred in both law and fact when she convicted the accused person without considering his defence.

Parties filed written submissions in support of their arguments.

Appellant's Submissions

5. The appellant submitted that at the victim (PW1) gave contradictory evidence and that the age together with the issue of penetration were not properly considered. The appellant further challenged the validity of the P3 form pointing out that there were many errors regarding the date it was issued and the date when it was filled by the clinical officer, who admitted that the same was filled five months later. Finally, he submitted that the prosecution did not prove its case to the required standard.

Respondent's Submissions

6. Mr. Edward Kakoi, prosecution counsel in opposing the appeal submitted that on the issue of age, the fact of her age was not disputed by the appellant who knew her well and that she was a class five pupil, which gives credence that she is a minor. Counsel submitted that this limb was sufficiently proved.
7. On the issue of penetration, counsel submitted that the complainant gave testimony that indeed she was defiled and as such penetration was proved.
8. It was submitted for the prosecution that the appellant and the complainant knew each other for reasons that the appellant is husband to the complainant's sister.
9. Counsel submitted that the complainant testified that she was 16 years of age and that her father testified that she was born on 11.01.2005 and as such she was 16 years at the time of defilement.
10. On sentence, the prosecution submitted that the appellant was sentenced to 20 years imprisonment as provided for under the *Sexual Offences act*. That the appellant defiled the complainant knowing very well that he was HIV positive therefore posing a serious danger of infecting the complainant with HIV. Further that the appellant owed the complainant a duty of care as a guardian, this makes the situation more aggravating. Counsel urged the court to maintain the sentence passed by the lower court.

Analysis And Determination

11. I have considered the appeal and submissions by both parties. I have also read the record of the trial court and the judgment. As a first appellate court, this court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanour of the witnesses. See *Okeno vs. Republic* [1972] E.A 32.

The issues that arise for determination in this appeal are;



- i. Whether the prosecution proved its case to the desired threshold;
- ii. Whether the sentence meted upon the appellant was lawful.

Elements of offence of defilement

12. The appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the [Sexual Offences Act](#) which provides:
 - 8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - 8(3) “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.”
13. The specific elements of the offence defilement arising from section 8 (1) of the [Sexual Offences Act](#) which the prosecution must prove beyond reasonable doubt are:
 - 1) Age of the complainant;
 - 2) Proof of penetration in accordance with section 2(1) of the [Sexual Offences Act](#); and
 - 3) Positive identification of the assailant.
14. In the case of [Charles Wamukoya Karani vs. Republic](#), Criminal Appeal No. 72 of 2013 it was stated that:

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

What does the evidence portend?

Age of the complainant

15. In a charge of defilement, the age of the victim is important for two reasons: i) defilement is a sexual offence against a child; and ii) age of the child has also been used as an aggravating factor for purposes of determining the sentence to be imposed; the younger the child the more severe the sentence.
16. A child is defined as a person under the age of eighteen years. Is the victim herein a child?
17. The appellant herein submitted that the issue of age could only be ascertained by a doctor. However, a birth certificate was produced in evidence to prove the victim’s age. The trial court rightly found that the complainant was fourteen years old at the time.

I find the age of the victim was 14 years old.

Penetration

Section 2(1) of the [Sexual Offences Act](#) defines penetration as:

“The partial or complete insertion of the genital organs of a person into the genital organ of another person.”



18. In the case of *Mark Oiruri Mose v R* [2013] eKLR the Court of Appeal stated that:

“Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl’s organ.”

19. In light thereof, the appellant argued that the hymen being torn is not conclusive evidence. That it could have been caused by other factors. As the trial court rightly noted, the medical report produced as exhibit indicated that the victim’s hymen was torn and that the victim informed the examining doctor that it was her first time to have sexual intercourse on the day of the incident.

20. The victim positively identified the appellant as the one that defiled her and said that they were related since he was husband to her elder sister. She further confessed that prior to the incident, he had courted and wooed her severally (on two occasions) telling her he loved her and but she refused his advances until on the fateful day he grabbed her, pinned her on the ground, removed her clothes and his as well and defiled her. She also informed her sister that she had had sex with the accused herein on two occasions.

21. The inevitable conclusion from the analysis of the evidence is that there was ample evidence to prove that penetration did occur. I find that the medical evidence supports there was penetration of the child.

Was the appellant the perpetrator?

22. The Appellant was a person known to the complainant. There was no element of mistaken identity of the appellant as the person who penetrated her genitalia.

23. The evidence by the prosecution leaves no doubt that the appellant caused penetration of the complainant. Accordingly, I find that the elements of defilement namely, penetration and minority age of the victim were proved beyond doubt. The conviction was therefore proper.

24. In the upshot, I find that the Appellant was positively identified as the assailant herein; there was no mistaken identity or error. Accordingly, I find that the prosecution proved their case beyond reasonable doubt and that the trial court did not error in convicting the appellant for defilement. The appeal on conviction therefore lacks merit and is hereby dismissed.

On sentence

25. The appellant argued that he was convicted on unsound evidence and prayed that the appeal be allowed. Section 8 (3) of the *Sexual Offences Act* to convict provides as follows:

8(3) “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.”

“An appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own facts upon which a judge exercises his discretion. It is the practice that as an appellate court, this Court will not normally interfere with the discretion of the sentencing Judge unless the sentence is illegal, or unless Court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice. *Ogalo s/o Owura v R* [1954] 21 EACA 126, *R v. Mohamedali Jamal* [1948] 15 EACA 126”



26. Though the trial court is empowered to impose a lesser sentence than the sentence prescribed in the Sexual Offences Act for the offence committed by the appellant but it must be satisfied that there are substantial and compelling mitigation to justify such a lesser sentence. For an appeals court the jurisdiction is to enter into those circumstances on the record of proceedings to establish that such mitigation factors exist to render a different sentence than the one imposed by the trial court. The court has to bear in mind that the sentencing proceedings fall in a class of sui generis. On appeal I received no such evidence fit to inform myself as to a better or fair sentence outside the scope of the sentence passed by the trial court. Nevertheless, I weigh the nature and the seriousness of the offence, the personal circumstances of both the victim and the appellant and further the interest of the community in so far as the objectives of criminal justice deliverables are concerned. I infer from the record that the appellant in committing the act of defilement violated the victim's right to dignity, privacy and the integrity of a person. This significantly tipped the scales of justice more weighted to aggravating factors than any other mitigation of lesser weight to convince the court to rule otherwise for the interest of justice. I interpose at this stage to find out the principles of relevance from the comparative case from South African jurisdiction in *S v Matyiil* 2011 (1) SACR 40 (SCA) Para 13, where the following was stated applicable to the present scenario. "There is, moreover, a chasm between regret and remorse. Man accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgment of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for him or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; whether he or she does indeed have a true appreciation of the consequences of those action".
27. However lengthy the regret and remorse the appellant seems to urge this court to go for a lesser sentence none of it is compelling and substantial to review custodial sentence of 20 years imprisonment. In my considered view the appeal on both conviction and sentence is lost for want of merit. The lead submissions by the appellant on matters of sentence have not persuaded me to depart from the custodial sentence of 20 years save for a rider that the sentence so imposed be effected from the March 10, 2019 in consonant with section 333(2) of the Criminal Procedure Code.

In the upshot, the appeal herein is dismissed.

DATED AND SIGNED AT LODWAR THIS 25TH DAY OF OCTOBER, 2023

In the Presence of

The Applicant

Mr. Yusuf for the DPP

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R. NYAKUNDI

JUDGE

