



**Aziz v Republic (Criminal Appeal E021 of 2023)  
[2023] KEHC 24312 (KLR) (24 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24312 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL APPEAL E021 OF 2023  
DR KAVEDZA, J  
OCTOBER 24, 2023**

**BETWEEN**

**COLLINS ONZERE AZIZ ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against a conviction and sentence of Kibera Law Court Sexual Offence Case No 60 of 2019 of Hon P. Mutua SPM delivered on 22/09/2022)*

**JUDGMENT**

1. The appellant was charged, convicted and sentenced to serve 15years imprisonment for the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offence Act No.3 of 2006. It was alleged that on 28<sup>th</sup> June 2019 at around 1100hrs at Kibera within Nairobi County, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of CA a child aged 17years.
2. The Appellant being aggrieved filed the present Appeal on grounds that the age of the complainant was not proved beyond reasonable doubt. The appellant contended that the trial court failed to consider his mitigation; that the sentence is harsh and excessive and that the trial court relied on poor investigation by the Respondent. The Appellant urged the court to allow the appeal and quash the conviction.
3. The Appellant and the Respondent filed their respective submissions in respect to the appeal. This being the first appellate court I am mindful of my duty to reassess and reevaluate the evidence tendered in the trial court afresh and make my determination. This was the determination by the court in Odhiambo vs. Republic (2008) KLR 565, where the court said that:

“... The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence”.



4. In order to prove their case the prosecution called 6 witnesses. PW1 (CA) the complainant testified that on 28/6/2019 while taking porridge at home, the appellant undress her and sexually assaulted her. That he put his penis in her vagina. At the time, they were only two in the house. The complainant then threw the pants in the toilet and left the appellant selling mandazi. She later informed her mother who took her to hospital to get medical attention. She testified that she was 19 years old.
5. PW2 JOO the complainant's father stated that on 28/6/2020 while at work, he received a call from the complainant's mother who informed him that the complainant had been defiled. He told the mother to take her to hospital. He told the court that the complainant was born on 25/5/2002.
6. PW3 John Njuguna a medical practitioner attached to Nairobi Women Hospital stated that the complainant was brought to the hospital with allegations of being defiled by a person known to her. On examination, her genitalia was normal with no injuries. Her hymen was foul smelling and with old tears.
7. PW4 David Wafula a security personnel testified that he was walking along Kabiria road when he met a crowd of people who informed him of the incident. He then effected the arrest.
8. PW5 Grace Syombua attached to Riruta police station told the court that once the case of reported he searched for the alleged perpetrator but he could not be found. However, he was arrested 15 days after the incident. She testified that she recorded statements from the complainant and her parents.
9. PW6 SA testified that on 28/06/2019, her daughter the complainant herein informed her that she had been defiled. The perpetrator was their neighbour. She informed the complainant's father and he advised her take her to hospital. She later reported the incident to the police station.
10. After the close of the prosecution's case, the trial court found that the appellant had a case to answer and he was put on his defense. He gave unsworn evidence and did not call any witnesses. He denied ever defiling the complainant. He stated that on the material date he was away from home.

### **Analysis and Determination.**

11. In ground 1, the appellant argued that the age of the complainant was not proved beyond reasonable doubt. He submitted the complainant's mother never corroborated the evidence of the complainant's age. Learned prosecution counsel submitted that the birth date was indicated in the birth certificate as 23<sup>rd</sup> May 2002. He argued that this was sufficient to prove the age of the complainant.
12. The importance of proving the age of the complainant in sexual offences was emphasized in *Chipala vs. Rep.* [1993] 16 (2) MLR the Malawian High Court held at 499 that:
 

“...It seems to me that other than a certificate of a medical practitioner, or his oral testimony, to the effect that, in his opinion, such a person has or has not attained a specified age, or other documentary proof, or the testimony of a person who has personal knowledge gained at the time of such person birth, such as parents, no other evidence is receivable as proof of the age of such a person.”
13. I note that in the records at the hospital, it is indicated that the appellant was born on 1/1/2002, the father in his testimony stated that the complainant was born on 25/5/2002, the birth certificate presented to court indicate that the complainant was born on 23/5/2002.
14. The complainant in her oral evidence tells court that she was 19 years at the time she was giving evidence which was on 12/10/2020. It therefore means that as at 28/6/2019 when the offence was allegedly committed she was 18 years old. The Birth Certificate presented to court was obtained one month after



the offence had occurred. The appellant raised doubts as to its credibility. Whether it was acquired to secure a conviction is yet to be determined.

15. It is however curious how PW 2 and PW 6 who are the complainant's parents provided divergent dates of birth. These contradictions in addition to the timing of the acquisition of the birth certificate all point raise doubts as to the age of the complainant. Bearing in mind, no other document such as a birth notification was presented in court to show how the birth certificate of the complainant.
16. It is quite clear that contradictions as to the age of the complainant. Consequently, the doubts raised should have been resolved in favour of the appellant.
17. In ground 2, the appellant faulted the trial court for convicting him yet the prosecution failed to prove whether there was penetration. Under section 2 of the *Sexual Offences Act*, penetration has been defined as 'the partial or complete insertion of the genital organs of a person into the genital organs of another person'. The Medical officer in her testimony stated that the Complainant had already taken a birth before going to the hospital, she further stated that upon examination she noted that the complainant had a foul smell, the hymen was torn and the vulva was swollen. With this findings I am inclined to find that penetration was proven. The ground therefore fails.
18. The issue of Identification was not contested but I shall however address the same briefly. It is evident that the appellant was well known to the complainant, since they were neighbors. The alleged incident also took place in broad daylight and therefore chances that the complainant could fail to identify the appellant are very minimal.
19. Having evaluated all the evidence on record afresh, I have come to the conclusion that the conviction was unsafe. The prosecution failed to prove the exact age of the complainant. It therefore failed to prove its case against the appellant beyond reasonable doubt as required by law.
20. For the foregoing reasons, I find that this appeal has merit. Accordingly, I allow the appeal, quash the conviction and set aside the sentence imposed. The Appellant is set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

**JUDGMENT DATED AND DELIVERED VIRTUALLY THIS 24<sup>TH</sup> DAY OF OCTOBER 2023.**

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**D. KAVEDZA**

**JUDGE**

**In the presence of:**

