



**JLA v Republic (Criminal Appeal E080 of 2022)
[2023] KEHC 23972 (KLR) (24 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23972 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E080 OF 2022
GL NZIOKA, J
OCTOBER 24, 2023**

BETWEEN

JLA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence in Criminal Case Sexual Offences No. E055 of 2022 at the Senior Principal Magistrate’s Court at Engineer delivered by Hon H. O. Barasa, Senior Principal Magistrate, on 24th November, 2022)

JUDGMENT

1. The appellant was arraigned before the Senior Principal Magistrate’s Court at Engineer charged vide Criminal Case Sexual Offences No. E055 of 2022 with the offence of defilement contrary to section 8 (1)(3) of the *Sexual Offences Act* (herein “the Act) and an alternative count of committing an indecent act with a child contrary to section 11(1) of the Act. The particulars of the charges are as per the charge sheet.
2. He pleaded not guilty and the case proceeded to full hearing. It was the prosecution’s case that, the appellant and the complainant (PW1) QKM, a girl aged 12 years were staying in the same plot at [Particulars withheld], within Kinangop Sub-County. That, on 13th May 2022, the appellant eloped with the complainant and took her to his cousin’s place at Gilgil. That, on 19th May 2022, he engaged in sexual intercourse with her, and continued engaging in the act until 2nd June 2022, when he and the complainant were tracked and/or traced to Gilgil and the appellant arrested.
3. The complainant was in the meantime issued with a P3 form and referred to Engineer Hospital where she was examined and found to have been defiled. The appellant was then charged accordingly.



4. At the close of the prosecution's case, the appellant was placed on his defence. He told the court that he was working as a watchman at Kwa Haraka. That, the complainant and the mother went to his place of work and informed him that, they had disagreed with the complainant's father who is his step uncle; and that, they did not want to go back home. That, the complainant's mother went ahead of them to the appellant's house and the appellant followed later with the complainant and then left her at his house. He returned to work and worked until 6:00am.
5. That, he went back to his house and the complainant's father went and beat him up, accusing him of undermining his family. That, he was taken to Gilgil where he stayed for three (3) weeks. After that, the complainant's father went beat him up. That, the entire matter arises out of a land dispute, whereby he had sold part of his land to raise money for succession cause and when he declined to give part of the proceeds to the complainant's father, he fabricated the matter herein against him.
6. The appellant stated that, the complainant is like his sister and the father is like his father being a step uncle and therefore he could not commit the offence herein. Further, he could not disclose the relationship between them when the complainant's father testified as he threatened him. He produced an agreement in support of the fact that, he sold the land as alleged.
7. At the close of the entire case, the learned trial Magistrate found the appellant guilty as charged on the main count, convicted him and sentenced him to serve twenty (20) years imprisonment.
8. The appellant is however aggrieved by the decision of the trial court and appeals against it on the grounds stated as follows:
 - a. That, the learned trial magistrate erred in law and fact by convicting the appellant but failed to note that the ingredients of the offence were NOT conclusively proved.
 - b. That, the learned trial magistrate erred in law and fact by convicting the appellant yet failed to find that his defense was cogent and believable.
 - c. That, I pray to be supplied with a copy of the original trial court's proceedings and its judgement.
 - d. That, further grounds shall be adduced at the hearing of this appeal.
 - e. That, I wish to be present during the hearing and determination of this appeal.
 - f. That, this application is filed and annexed with a sworn affidavit by the name Joseph Lubei Avuke.
9. However, the respondent opposed the appeal vide grounds of opposition dated 25th April 2023, in which states: -
 - a. That the age of the complainant was sufficiently proved as provided for under the [sexual offences Act](#) and a birth certificate produced as an exhibit.
 - b. That the penetration was proved through the evidence of the victim and corroborated by the doctor who examined the victim and produced P3 form in that regard.
 - c. That identification of the appellant as the perpetrator was also proved to the required standard.
 - d. That the trial court found that the prosecution case was proved beyond reasonable doubt and convicted the appellant to serve 20 years imprisonment.



- e. That we implore the court to dismiss the appeal and sustain the sentence imposed by the trial court.
10. The appeal was disposed of vide filing of submissions. The appellant filed submission on 31st March 2023, wherein he states that the prosecution had the duty to prove the elements of defilement being the age of the complainant, penetration and identification of perpetrator. He conceded that the identification is not in contention as he was neighbours with the complainant, PW2 NKM and PW3 SLL.
11. However, he argued that the age of the complainant was not proved to the required standard as the evidence on the same was riddled with contradictions and inconsistencies. That both the complainant and PW2 Naomi stated that she was thirteen (13) years while PW4 Dr. Patrick Maina Wakahiu stated and the PRC, P3 forms, and charge sheet indicated that the complainant was twelve (12) years. Further, the contradictions go to the root of the prosecution case. He relied on the case of Kaingu Elias Kasomo vs R - Criminal Appeal No. 504 of 2010 (unreported).
12. That penetration was not proved as the evidence of PW4 Dr. Maina that the complainant had a normal external genitalia, hymen with old tears and no presence of pus cells, and thus did not support the complainant's evidence that she had sexual intercourse for the first time with the appellant. That, PW4's Dr. Maina's conclusion that there was penile vaginal penetration was not supported by any evidence as there was no spermatozoa or emissions in the complainant's vaginal canal.
13. The appellant relied on the case of Saitoti Ole Nkoingoni v Republic (2018) eKLR where the court held that the complainant's evidence that it was her first time experiencing sexual intercourse was contradicted by the doctor's evidence that she had repeated sexual intercourse and that it was a material contradiction that went to the root of the prosecution's case.
14. The appellant further submitted that, the maker of the medical evidence was not called as required by section 77 (3) of the *Evidence Act* (Cap 80) Laws of Kenya, which prejudiced him as he was unable to cross-examine the witness properly as PW4 Dr. Maina was relying on documents drafted by his predecessor and not his own examination and findings.
15. Furthermore, the complainant was not an honest witness as her evidence was full of contradictions and inconsistencies that were not explained and went to the root of the prosecution's case. That in the circumstances, the prosecution did not prove its case to the required standard and therefore the appeal be allowed.
16. However, the respondent, in its submissions dated 20th February 2023 submitted that the appellant was positively identified by the complainant who knew him as her neighbour and he requested her to accompany him to the butchery to buy meat. That, instead of returning home, the appellant took her to Gilgil and locked her in a house where he would return every evening to defile her.
17. Further, penetration was proved by the evidence of the complainant that was corroborated by the P3 form produced in court by the doctor. Furthermore, the age of the complainant was proved to be twelve (12) years through the production of her birth certificate.
18. That the court found the complainant's testimony to be consistent, clear, reliable and believable leaving no doubt in the court's mind that she was a truthful witness. Further, the appellant abused his duty as a neighbour and defiled a school going child who he knew well, and urged this court to uphold the sentence of the trial court.
19. I have considered the appeal in the light of evidence adduced in the trial court and the arguments advanced herein vide the aforesaid submissions. Indeed the role of the first appellate court is to review



or re-evaluate the evidence adduced in the trial court afresh and draw its own conclusion, giving room for the fact that it did not benefit from the demeanour of the witnesses.

20. The aforesaid role was well articulated by the Court of Appeal in the case of *Okeno vs. Republic* (1972) EA 32, where it observed that: -

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya V R* 1975) E.A. 336 and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M. Ruwala V. R* [1957] E.A. 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate’s findings 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”

21. Be that as it were, the appellant herein was convicted of the offence of defilement created under section 8 (1) of the Act which states that: -

“(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

22. Thus the elements of the offence are settled. The prosecution needs to prove that, the complainant defiled was a minor and/or a child. That, there was penetration and that, the accused was the perpetrator of the crime.

23. The subject elements have been restated through various decisions of the courts including *Agaya Roberts vs. Uganda*, Criminal No. 18 of 2002, and *Bassita Hussein vs. Uganda* Criminal Appeal No. 35 of 1995, where the Supreme Court of Uganda where court stated that, in order to constitute the offence of defilement the following must be proved: (i) the facts of the sexual intercourse (ii) the age of the victim being under 18 years (iii) participation by the accused in the alleged sexual intercourse.

24. As regards the first element in proof that, the complainant is a child, the definition of the child under the Children’s Act states that “child” means an individual who has not attained the age of eighteen years.”

25. In the instant case, the particulars of the charge states that, the complainant QKM is a child aged twelve (12) years. To prove the same the complainant testified that, she was thirteen (13) years old at the time of giving evidence and in standard seven (7) at [Particulars withheld] Primary School. PW2 NKM, the complainant’s mother testified that the complainant had turned thirteen (13) years old in July 2022. She produced the complainant’s birth certificate which showed that she was born on 20th July 2009. Therefore at the time the offence was allegedly committed the complainant was indeed twelve (12) years old. There is no evidence to the contrary and I find as well stated by the trial court that, indeed the complainant was a child as defined in law. The alleged inconsistency on the same as argued by the appellant is neither here nor there.



26. As regards the issue of defilement, it was the evidence of the complainant that, the appellant defiled her. Proof thereof requires the prosecution establish there was penile penetration. Penetration is defined under the Act as follows: -
- “ the partial or complete insertion of the genital organs of a person into the genital organs of another person”
27. In her oral evidence, the complainant stated that, the appellant took her to his cousin’s house in Gilgil on 19th May 2022. That they did not sleep together that night but the following day, they slept together. She clarified that sleeping together meant, they had “sexual intercourse”. That on the second day, they left for another house of the appellant’s cousin where they were given a room to live in. That, while staying there they “continued to have sexual intercourse.” She stated “I had sexual intercourse with the accused for several days.” She further confirmed that, after she was traced by her parents and police officers, she was taken to Engineer Sub-County Hospital for examination.
28. In support of the afore evidence, the prosecution through the evidence of PW4, Dr. Patrick Maina, a Medical Officer at Engineer Sub-County Hospital who produced a P3 form filled by Dr. Owour, told the court that, the complainant was examined on 7th June 2022, and found to be of an estimated age of twelve (12) years old. That upon examination of her genitals it was found to be normal externally, however with old tear at position 3’ and 9 O’clock. That, the doctor concluded that, there was evidence of penile vaginal penetration. The witness also produced treatment note showing similar results. The appellant had no objection to the witness producing the medical documents. His submissions to the contrary have no basis. Based on the aforesaid I find adequate evidence of penile penetration in the absence of any other evidence to the contrary or rebuttal.
29. The question that arises and which relates to the last element of defilement herein is whether it is the appellant who committed the offence. As already stated, the complainant pointed at the appellant as the perpetrator of the crime. This appellant denied the offence. However, analysis of the evidence reveals that the appellant and the complainant were not only residing at a place known as “Kwa Haraka” but were neighbours. They were indeed well known to each other whether they were related or not, as alluded to by the appellant, in his defence, it cannot be verified as he did not bring up the relationship during the prosecution case. In fact the appellant conceded identity is not an issue. They were neighbours. Further evidence reveals that the appellant was working as a watchman. He testified to that effect. PW1 the complainant stated that, she was told by the appellant’s wife to go for meat with him. That they found the hotel closed, and saw a fire in front of the hotel where the meat was being sold. That the appellant told her to warm herself near the fire, and they both went to warm themselves. She then saw her mother and she hid fearing, she would be beaten. That, her mother was with the appellant’s wife.
30. At this stage it suffices to note that, PW2 N who is the complainant’s mother told the trial court that, she told the complainant to go out of the house as she was feeling dizzy. That, when she did not return back to the house she went to look for her. She did not find her. She went to the appellant’s house and learnt from the appellant’s wife that, the appellant had gone with the complainant. That, they went to where the appellant was working as a watchman but did not find him. That, shortly thereafter the appellant appeared and inquired as to what they were looking for. This evidence of PW2 N corroborates the evidence of PW1 the complainant, that, the mother and appellants wife were searching for her on the night she did not go back home.



31. In addition, PW1 testified that, the appellant went to get his clothes at 2.00am and they left at 4.00am for Gilgil. The same evidence was corroborated by PW2 Naomi that, the appellant's wife told her, the appellant picked his clothes at 2.00am and left.
32. Furthermore, the complainant testified that, when she used the appellant's cell phone to alert the parents of her whereabouts, the appellant destroyed it. This evidence was corroborated by the evidence of PW5 No. 106274 PC (W) Esther Ashaba to the effect that, upon receipt of the report of complainant missing, they tracked the number she had called from and established it was at Kiserian. That "after sometime the phone number was not in use".
33. Similarly, the complainant testified that, she used a different number and she managed to talk to her parents. Again that evidence was corroborated by PW5 PC (W) Ashoba that they tracked the number and established the cell phone was from Gitari, Gilgil. That, the officer who was tracking the number and the complainant's father went to Gilgil where they found the complainant, and the appellant. It is therefore clear that, the complainant's evidence is well corroborated.
34. To the contrary the appellant, denies having been with the complainant all those days but admits having seen her on the material day she disappeared. He then at the defence case, introduces an issue of fabricated charges due to a land issue between him and the complainant's father. Can that defence withstand the heat of trial. I do not think so. Firstly, because he did not cross-examine any witnesses on the same. Therefore it becomes an afterthought, untested, unsubstantiated and not tenable. Secondly if that were the case, then who defiled the complainant. It is noteworthy that, the complainant stated that, she had not been engaged in a sexual activity before.
35. Finally, the evidence of all witnesses supports the charge and the complainant's evidence that the appellant eloped with her and was arrested in Gilgil with her. Therefore I find no substance in the grounds of appeal. I find that the trial court was well guided in its finding and I uphold both conviction and sentence. The sentence meted out is provided under the law
36. However, I note from the record that the appellant was in custody throughout the trial. In the circumstance, his sentence shall run from 8th June 2022 when he was arraigned in court, however the period between 8th June 2022 to 15th December 2022 when he was sentenced shall not attract any remission as he was not serving the sentence. The rest of the custodial sentence will be subject to remission (if applicable).
37. It is so ordered

DATED, DELIVERED AND SIGNED THIS 24TH DAY OF OCTOBER 2023.

GRACE L. NZIOKA

JUDGE

In the presence of:-

Appellant present virtually

Mr. Ndiema for the respondent

Ms Ogutu court assistant

