



REPUBLIC OF KENYA



**Ekai v Republic (Criminal Appeal E022 of 2022)
[2023] KEHC 26066 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26066 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL APPEAL E022 OF 2022
RB NGETICH, J
NOVEMBER 30, 2023**

BETWEEN

SAMMY EKAI APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal against both conviction and sentence arising from the Judgment by Hon. N.M IDAGWA (SRM) delivered on the 2nd February, 2022 in Kabarnet Senior Principal Magistrate's Court S/O No. E043 of 2021)

JUDGMENT

1. The Appellant was charged with two counts of offences and alternative charge to count 1. Count 1 with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#) No.3 of 2006. The particulars of the offence being that the Appellant on the diverse dates between 27th day of April and 4th day of May, 2021 at unknown time in Baringo South Sub- County within Baringo County, the accused intentionally caused his penis to penetrate the vagina of FEE a child aged 13 years.
2. In the alternative, the appellant was charged with the offence of indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) No.3 of 2006. The particulars of the charge being that the accused on the diverse dates between 27th day of April and 4th day of May, 2021 at unknown time in Baringo South Sub- County, intentionally touched the buttocks, vagina, anus, breast of FEE a child aged 13 years with his hands.
3. Count II is the offence of deliberate transmission of life threatening sexual transmitted disease contrary to Section 26(1)(c) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the charge being that on diverse dates between 27th day of April and 4th day of May, 2021 at unknown time in Baringo South Sub- County within Baringo County, having actual knowledge that he was infected with UTI a life



threatening sexually transmitted disease the accused intentionally had unprotected sex with FEE which infected FEE with the said sexually transmitted disease.

4. The Appellant pleaded not guilty to both counts. The prosecution availed a total of 5 witnesses during the trial in support of the charges herein and upon hearing and determination of the matter, the court found the accused guilty in Count 1 and convicted him of the offence of defilement and sentenced him to serve 15 years imprisonment.
5. The Appellant having been aggrieved and dissatisfied with the decision by the trial court, appeals against the judgment on the following grounds: -
 - i. That the Honorable magistrate erred in law and fact by not considering relevant facts and the credible evidence tendered before court where the defendant's evidence was merely dismissed.
 - ii. That the trial court erred in law and fact by meting conviction and sentence which was harsh and excessive.
 - iii. That the trial court erred in law and fact by meting a harsh maximum sentence on the appellant.
 - iv. That the trial court erred in law and fact by shifting the burden of proof to the appellant.
 - v. That the trial court erred in law and fact by not considering the appellant's defense.
 - vi. That the trial court erred in law and fact by not considering that the evidence of the complainant was not sufficient to prove the appellant's guilt.
 - vii. That the appeal has a high probability of success.
 - viii. That the appellant is likely to suffer great prejudice unless the orders sought herein are granted.
6. The appellant prays from this court:-
 - i. That the sentence be set aside.
 - ii. That the judgement be quashed.
 - iii. That the appellant be set at liberty.
7. The appeal proceeded by way of written submissions, both parties filed their written submissions.

Appellant's submissions

8. The Appellant filed submissions dated 29th September, 2023 on the 2nd October, 2023. On whether the learned trial magistrate erred in law and fact in convicting the appellant for the offence of defilement when the ingredients of the offence were not satisfactorily proved against the appellant, the Appellant argued that there are two persons who the complainant mentioned during trial as having had sexual intercourse with. The first being the Appellant and the second being one Soja but in cross examination she refracted her first testimony when she was recalled for further cross examination by the defence counsel. She informed the court that the statement she gave at the police station was a lie and said the Appellant did not defile her although she was arrested in the appellant's house.
9. The Appellant further submits that the complainant was beaten while being interrogated and was taken to Marigat hospital. That the police officers confiscated the medication she had been given. He submits that once he opened the door, four police officers entered and started beating the girl and while at the police station, he heard the girl being beaten and forced to record her statement naming the appellant as the one who defiled her.



10. As to whether the evidence adduced was sufficient to convict the appellant. The appellant submits that according to PW3, the complainant had an old broken hymen and from his experience the infection (UTI) might have been from penetration or any other infection. He submits that in the two instances the complainant was called to testify, she stated that she had sex with Soja on 25th December 2020 and when she was recalled for cross examination, she stated that what she recorded at the police station was not true and she had only had sex with Soja.
11. The Appellant argue that the P3 produced indicates the age of injuries as 1 day old whereas the description on the physical state of injuries to the genitalia which gives special reference to the labia majora, the labia majora as intact, vagina - intact and the hymen as broken and old. That the complainant's testimony is that she had sex with the appellant on 28/4/2021 which she later recanted and further stated that she had sex with Soja on 25th December, 2020; that the complainant's testimony is not in tandem with the information filled in the P3 form.
12. In respect to age of the complainant, the Appellant submits that medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence and cited Ugandan case of *Francis Omuroni v Uganda* Court of Appeal; Criminal Appeal No. 2 of 2000 where the court held as follows: -

“ In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense...”
13. The Appellant argue that the age assessment report produced in court is short of the essential information and raises doubt on its credibility; that the date age assessment was done is not indicated, the procedure used by the clinical officer in arriving at the age of 14 is not given and no X-ray was produced to substantiate the information recorded by the medical officer in the P3 but just rubber stamped what the complainant stated. He raises doubt as to whether age assessment was done.
14. The Appellant further fault the trial court for failing to conduct voire dire examination voire dire as the child was of tender age and by failing to do so, the trial court could not establish whether the complainant understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.
15. On penetration, the Appellant submits that the trial Magistrate relied on the complainant's evidence, both having a similar UTI and the broken hymen whereas P3 form indicates that the broken hymen was old and that she was defiled a day before examination; but the two labias were seen to be with no bruises or inflammation. Further that the appellant's treatment chits and P3 form were not produced in court to show that he had the same UTI with the complainant though even if both had the same infection, it is not an ingredient of defilement.
16. That the broken hymen was old thereby contradicting the information contained in the treatment chit and the P3 that defilement occurred a day before. Broken hymen is not a sufficient proof of defilement. Further that the presence of blood in the urine is scientifically proved to be caused by different problems which happens when the kidney or other parts of the urinary tract let blood cells leak into urine; that foul smelly discharge is another common health issue in women of childbearing age and the most common cause being bacterial vaginosis which is not sexually transmitted infection and virgin females contract bacterial vaginosis.



17. The Appellant submit that the trial magistrate considered the fact that the complainant and the appellant were both found in the same house with the complainant and concluded that penetration was proved before the court. The Appellant urge this court to set aside conviction or in the alternative reduce sentence stating that he was aged 20 years at the time he was charged and was sentenced to 20 years imprisonment which sentence is excessive.

Respondent's submissions

18. On whether the defence of the appellant was considered the Respondent submit that the defence of the appellant was dully considered by the learned trial Magistrate when she stated in her judgment that the identity of the offender was not an issue in the case, since the complainant had stayed with the accused in the same house for five (5) days and she knew him by name. That his defence was considered weighed against that of the Prosecution and the courts finding was that it could not stand.
19. On whether the conviction and sentence meted out against the appellant was harsh and excessive, the state counsel submits that the evidence on record show that the complainant was (13) thirteen years old and section 8(3) (3) provides that a person who commits an offence of defilement with a child between the age of twelve and 15 years is liable upon conviction to imprisonment for a term of not less than twenty years and the sentence imposed was therefore proper and lawful and there is no reason to interfere with it; that there was no provision for a lesser sentence other than that meted out, however it is critical to consider practice and general principle and policy guiding sentencing alongside the said provisions of law; that there is no room for a much lesser sentence.
20. On burden of proof, the Respondent submit that the burden of proof was placed on the Prosecution to prove guilt of the appellant beyond reasonable doubt and the Appellant has not demonstrated that the burden was shifted to him.
21. That the court did not rely on evidence of the complainant alone but her evidence was well corroborated by the evidence of the medical officer who medically examined the complainant and found that there was recent penetration hence there was no doubt that she was defiled and investigations revealed that the appellant had committed the offence. Further, the appellant was properly identified by the complainant given the length of time she had spent with him; and under section 124 of the *Evidence Act*, even if the only evidence was that of the victim of the offence, the court could proceed to convict the appellant for reasons to be recorded in the proceedings if the court was satisfied that the complainant was telling the truth. That all the facts, circumstances of the case were clearly stated and explained in clear terms by the complainant.

Analysis and Determination

22. This being the first appellate court, I am required to reevaluate evidence adduced before the trial court and arrive at independent determination. This I do knowing that unlike the trial court, I did have the benefit of taking evidence first hand and observe demeanor of witnesses. For this, I give due allowance. The principles that apply in the first appellate court are set out in the case of *Okeno v Republic* [1972] EA 32 where it was stated as follows: -

“The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala v. Republic* [1957] EA 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, (See *Peters v. Sunday Post*, [1958] EA 424.)”

23. Further in the case of *Mark Oiruri Mose v Republic* [2013] eKLR Criminal Appeal No.295 of 2012 the Court of Appeal stated as follows:-

“It has been said over and over again that the first appellate Court has the duty to revisit the evidence tendered before the trial Court afresh, analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that.”

24. In view of the above, I have perused and considered the grounds of appeal, the record of appeal and the rival submissions by the parties and identify the following as issues for determination:-

- i. Whether ingredients for the offence of defilement were proved beyond reasonable doubt
- ii. Whether the sentence meted on the Appellant was harsh, excessive and unconstitutional.

(i) Whether ingredients for the offence of defilement were proved beyond reasonable doubt

25. The ingredients for the offence of defilement are proof of penetration, age of the minor and the identity of the assailant (See *C.W.K v Republic* [2015] eKLR).

(a) Penetration

26. On penetration, Section 2 of the *Sexual Offences Act* defined penetration as follows:

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

27. Penetration is proved through the evidence of the victim corroborated by medical evidence. Where the medical examination may not be available or conclusive, the court ought to weigh with thorough scrutiny and utmost caution, the evidence of the child in order to determine whether there was penetration.

28. The complainant stated that she had sex with the Appellant twice on the night of 28th April, 2021 and the Appellant used Trust condom.

29. PW3 Langat Chirchir who is a clinical officer at Marigat Sub-County Hospital testified that he had copies of the P3 form and 2 copies of treatment sheets. He testified that on examining complainant aged 13 years on the 6th May, 202, he found the labia minora and majora intact but there was blood discharge from external genitalia. He further stated that the complainant had an old broken hymen and a whitish brown foul smell discharge which was an indication of infection and urinalysis conducted confirmed an infection. The appellant was equally examined and found to have urinary tract infection. The doctor’s opinion was, the presence of infection and blood in urine was indication of penetration. PW3’s evidence was corroborated by pw4’s evidence who visited the Appellant’s house and found the complainant hiding under appellant’s bed while naked. Even though the complainant when recalled said she only had sex with one soja, in totality evidence adduced pointed at her having sex with the Appellant herein. Her initial evidence in my view is more credible. There is no doubt in my mind that penetration was proved.



30. On proof of age, the Court of Appeal in *Edwin Nyambogo Onsongo v Republic* (2016) eKLR stated as follows: -

“... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim’s age, it has to be credible and reliable.”

31. The complainant herein stated that she was aged 14 years. Age assessment was also done and she was found to be 14 years and report produced in court by the investigation officer. That evidence was not shaken in cross examination or by appellant’s evidence in defence. In view of the above court of appeal decision and evidence adduced, there is no doubt that the complainant’s age was proved beyond reasonable doubt.

32. On identity of the assailant the complainant testified that she met Appellant on 27th April 2021 who took her to his house at Marigat Inn where he accommodated her for five days from 27th April, 2021 to 2nd May, 2021. She did household chores in Appellant’s house and he paid her Kshs.250/= for the work. Having stayed with the Appellant for 5 days, the Appellant was therefore no longer a stranger to her and there is no doubt in respect of the Appellant’s identity.

33. On issue of *voire dire* examination of the minor, the purpose of *voire dire* was explained by the court in *Johnson Muiruri v Republic* [1983] KLR 445 as follows:

“

1. Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a *voire dire* examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.

2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.

3. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child’s ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.

A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.

The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction.”



34. On perusal of the record, I find that it is indeed true that trial Magistrate did not conduct the *voire dire* examination on the complainant who stated that she was aged 14 years. The question, is whether failure to conduct *Voire dire* examination is fatal to prosecution case. In the case of *Maripett Loonkomok v Republic* [2016] eKLR, the Court of Appeal sitting at Mombasa stated as follows: -

“It follows from a long line of decisions that *voire dire* examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child’s intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that; “In appropriate case where *voire dire* is not conducted, but there is sufficient independent evidence to support the charge... the court may still be able to uphold the conviction.”

35. Further the court of Appeal in *Athumani Ali Mwinyi v R* Cr.Appeal No.11 of 2015 held that:-

“In appropriate case where *voire dire* is not conducted, but there is sufficient independent evidence to support the charge... the court may still be able to uphold the conviction.”

36. From the above decisions of the court of appeal, it is clear that *voire dire* examination on children of tender years must be conducted in cases where children testify in court. However, failure to do so does not per se vitiate the entire prosecution case if there is sufficient independent evidence.

37. On the peculiar facts and circumstances of this case, it is my considered view that the trial was not vitiated by the failure to conduct *voire dire* examination.

38. From the record I note that the learned trial magistrate in the judgement, took into consideration the accused defense, when she stated in her judgment that the identity of the offender was not an issue in the case, since the complainant had stayed with the accused in the same house for five (5) days and she knew him by name. That his defence was considered weighed against that of the Prosecution and the courts finding was that it could not stand.

(ii) Whether sentence imposed was harsh and excessive

39. Sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The discretion is however limited to the statutory minimum and maximum penalty prescribed for a particular offence.

40. In the case of *Shadrack Kipchoge Kogo v Republic* Criminal Appeal No. 253 of 2003(Eldoret), the Court of Appeal stated as follows;

“Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred”

41. Similarly, in the case of *Wanjema v Republic* (1971) EA 493 the court stated as follows: -

“An appellate court should not interfere with the discretion which a trial court has exercised as to the sentence unless it is evident that it overlooked some material factors, took into consideration some immaterial fact, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case.”



42. In determining whether to revise the sentence imposed herein, I note section 8(1), (3) of the *Sexual Offences Act* provides as follows:

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

43. I note that the mandatory minimum sentence provided under the law is 20 years. The appellant was however sentenced to 15 years imprisonment being a sentence below the minimum provided by statute. In my view, sentence imposed was appropriate; it is not excessive and I have no reason to interfere. The upshot is that the appeal is dismissed in its entirety.

Final orders:-

44.

1. Appeal on conviction and sentence is hereby dismissed.
2. Sentence served in remand to be reduced from sentence imposed by the trial court.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KABARNET THIS 30TH DAY OF NOVEMBER, 2023.

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RACHEL NGETICH

JUDGE

In the presence of:

Mr. Momanyi & Mr. Elvis – Court Assistant.

Ms Kogo for accused.

Mr. Mongare for State.

