



REPUBLIC OF KENYA



KENYA LAW
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**GOO alias O v Republic (Criminal Appeal E025 of 2023)
[2023] KEHC 26155 (KLR) (29 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26155 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E025 OF 2023
RE ABURILI, J
NOVEMBER 29, 2023**

BETWEEN

GOO ALIAS O APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal against the conviction and sentence by the Hon. R.M.
Oanda delivered on the 27th April 2023 in the Principal Magistrate's
Court in Winam in Sexual Offence Case No. E072 of 2021)*

JUDGMENT

Introduction

1. The appellant herein GOO alias O was charged with the offence of defilement contrary to section 8(1) as read with section 8 (2) of the *sexual Offences Act* no. 3 of 2006. The particulars of the charge are that on the 27th day of October 2021 in Kisumu Central Sub County within Kisumu County, he intentionally caused his penis to penetrate the vagina of JOA a child aged 8 years old.
2. The appellant pleaded not guilty to the charge and the matter proceeded to trial where the prosecution called six (6) witnesses. The accused was placed on his defence and he gave a sworn testimony denying the charges brought against him.
3. In his judgement, the trial magistrate found that the prosecution had proved the charges brought forth against the appellant and proceeded to sentence the appellant to serve 20 years' imprisonment.
4. The appellant being aggrieved by the conviction and sentence imposed on him filed his Petition of Appeal dated 5th June 2023 on the even date raising the following grounds of appeal:
 - i. That the learned trial magistrate erred in law and in fact in convicting the appellant on evidence which did not meet the required standard.



- ii. That the learned trial magistrate erred in law and in fact in relying on extrinsic evidence that was not adduced during trial.
 - iii. That the learned trial magistrate erred in law and fact by depending on evidence which was based on theory and conspiracy and that the said offence was not proven beyond reasonable doubt by the prosecution's witnesses.
 - iv. That the learned trial magistrate erred in law and fact by convicting the appellant on charges not compatible to the offense.
5. The parties agreed to dispose of the appeal by way of written submissions.

The Appellant's Submissions

6. The appellant submitted that the prosecution did not tender evidence sufficient to sustain a conviction against the Appellant as the veracity of the documents coupled with the failure by the prosecution to avail the witness to whom PW2 is said to have narrated the ordeal casts doubt as to whether indeed PW1 was penetrated by the Appellant and that therefore it was clear that the prosecution failed to discharge its burden of proof and the benefit of such an event goes to an accused person.
7. The appellant submitted that in view of the foregoing, his appeal had merit and ought to be allowed and he be acquitted of the charges brought against him.
8. On the part of the Respondent, it was submitted that the conviction of the appellant was sound and that the sentence imposed was lenient. That the prosecution proved all elements of the offence of defilement as provided for in the law and the case of *George Opondo Olunga v Republic* [2026] eKLR being identification of the offender or recognition of the offender, penetration and the age of the victim. The respondent reiterated the evidence of witnesses who testified on each of the elements of defilement and concluded that the conviction of the appellant could not be faulted. On sentence, it was submitted that the section under which the appellant was charged and convicted provides for life imprisonment hence the trial court was very lenient considering the seriousness of the offence against an 8 years old child hence the same should be upheld.

Analysis and Determination

Role of the Court

9. I have considered the grounds of appeal and the submissions for and against. This being a first appellate court; it is expected to re-evaluate and reassess the evidence adduced before the trial court afresh and arrive at its own independent conclusions. I am however reminded to bear in mind that I neither saw nor heard the witnesses as they testified and give due regard for that. See *Okeno v R.* (1972) E.A. 32.

Evidence before the Trial Court

10. Revisiting the evidence adduced before the trial court, PW1 the complainant testified that the appellant was her father and that she knew him as E, a name her mother called him. She testified that they do not stay with the appellant and that at a time when her mother had gone to the market, the appellant came to her bed and used his penis to penetrate her.
11. She testified that she was taken to a doctor who referred them to Jaramogi Oginga Odinga Teaching and Referral Hospital and that they also went to the police station at Kondele. The complainant identified the appellant in court.



12. In cross-examination, the complainant testified that no one had told her to say what she was saying in court. She reiterated the same in re-examination.
13. PW2 AB, the complainant's mother testified that on the 27.10.2021, she was at the market place and when she returned home, she found the complainant ready to go to school which she asked her to do.
14. She testified that the complainant's father queried her about how she was looking at the complainant and that when she washed the complainant's clothes, she found sperms in her panties. It was her testimony that when the child came back from school, PW2 queried her and eventually, the complainant revealed that her father had defiled her when PW2 had gone to the market.
15. PW2 testified that she called a neighbour to come and confirm the information. She testified that she was given contacts for the Gender Based Violence Unit at Russia Hospital where the complainant was examined and given medication and subsequently sent to Kondele Police Station.
16. PW2 testified that she decided to talk to the appellant who started to shout at the complainant and became violent destroying things in the house. She testified that the complainant was 9 years old and that the appellant was not the biological father to the child.
17. In cross-examination, PW2 stated that initially, the child did not want to inform her of the incident. She stated that she caned the complainant child whenever she lied.
18. PW3 Dr. Lucy Ombok testified that the complainant was taken to hospital after a change of clothes and that she filled a P3 form for her which she produced as PEX2. It was her testimony that the complainant was afraid and in a fair general condition with no injuries on any part of the body.
19. It was her testimony that the complainant had been treated with PEP. She testified that on examination, the complainant had normal external genitalia and that she had a broken hymen and experienced pain when passing urine.
20. Dr. Ombok also produced a PRC form filled by one Effie Awuor as PEX1 that showed that on the genitalia, there was redness, tenderness and inflammation and that on the vagina, there were lacerations, bruises and a vaginal discharge. It further provided that the hymen was broken and the anus intact. She testified that lab investigations revealed pus and epithelial cells as well as yeast but no spermatozoa.
21. In cross-examination, Dr. Ombok stated that the date of defilement was 27.10.2021, the matter was reported on 28.10.2021 and that she examined the complainant on the 9.11.2021. She stated that a broken hymen was not an injury per se as it was an external occurrence. She further stated that the complainant had an infection and that she did not examine the appellant.
22. In re-examination, Dr. Ombok testified that the complainant had a sexually transmitted disease.
23. PW4 Dorothy Achieng, a social worker in Manyatta testified that on 30.11.2021, she received a call from her colleague informing her of the case so she went to the office where she found the victim and her mother and that when she spoke to the victim, the latter told PW4 that her father went to her and demanded sex when her mother had gone to the market. She further testified that the victim told her that her father threatened the victim and so she removed her inner wear and was penetrated. She testified that the victim's mother narrated to PW4 the same story and that PW4 subsequently accompanied them to Kondele Police Station. She identified the appellant in court.
24. In cross-examination, she stated that she was in church when she heard about the incident. In re-examination, PW4 stated that they did the reporting then took the child to the hospital.



25. PW5 Godwin Khamala Waliama, a government analyst at Kisumu Government Chemist testified on a report he prepared, signed and sealed on the 16.9.2022 following a request by CPL. Rael Ouko of Kondele Police Station with a request to do DNA analysis on the following items;
- Item 1 - Buccal swab of GO
- Item 2 – Buccal swab from JOO
- Item 3 - High Vaginal swab of JO
- Item 4 – Penile swab of GO
26. It was his testimony that upon analysis, he noted that: -High vaginal swab (Item 4) had brownish stains which tested negative for seminal fluid.
27. He testified that DNA profile were obtained and that he came up with two conclusions: -
- i. That DNA profile generated vide by stains from the vaginal swap matched the DNA profile generated by the referenced sample from J, the complainant.
 - ii. The DNA generated by the penile swab matched the DNA profile presented by the reference sample of accused person.
28. The witness clarified that it had taken long hence seminal fluid or semen could not be found in the high vaginal swab of the complainant. Further, that absence of seminal fluids did not negate the report. PW5 testified that he was not tasked with establishing whether the appellant was J father and that due to the time lapse since the incident occurred, as the samples were collected on 4.7.2022, one could not find seminal fluids.
29. PW6 CPL Rael Okoth Ouko testified that on 30.10.2021 while perusing the Occurrence Book, he realized that he had been allocated a case under OB 28/30/10/2021 at 10.50hrs so he called the person and realized that it was the complainant's mother who came back to the office and she interrogated both the mother and complainant and they shared their version of the incident.
30. It was her testimony that while she was recording the mother's statement, the mother was informed that the appellant was removing his things from the house and that later, members of the public brought the accused person and they booked him in. She testified that she took the complainant to Russia hospital where the clinician found that there was defilement and that they then went to the scene of the incident.
31. In cross-examination, PW6 stated that the appellant was arrested by members of the public who declined to record their statements.
32. In re-examination, she testified that the minor kept shouting the name of Mama S and that her statement would not assist as she got a narration from the mother to the survivor and advised the child to be taken to the hospital. She also stated that the child's mother was telling the child to tell the truth and that the victim was afraid that her mother would cane her.
33. Placed on his defence, the appellant testified that the complainant was his daughter, a child to PW2, his second wife and attributed his arrest and charge to the domestic troubles he and the complainant's mother, his 2nd wife had. He stated that PW2 suspected that the appellant loved the first wife more than PW2. He further cast aspersions on the credibility of the minor stating that she had said that she had lied before and that she cannot know bad things. He also stated that Mama S had not been called as a witness. He produced as defence exhibit 1 the statement of A, PW2.



Analysis and Determination

34. I have considered the grounds of appeal, evidence adduced in the lower court and the respective parties' submissions. I find the following broad issues for determination.
- i. Whether the prosecution proved their case beyond reasonable doubt; and;
 - ii. Whether the sentence was manifestly harsh and excessive Whether the charge sheet brought against the appellant was defective.
35. The Appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) 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(2) "A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."
36. The specific elements of the offence of defilement arising from Section 8 (1) of the [Sexual Offences Act](#) which the prosecution must prove beyond reasonable doubt are:
- i. Age of the complainant;
 - ii. Proof of penetration in accordance with section 2(1) of the [Sexual Offences Act](#); and
 - iii. Positive identification of the assailant.
37. On these elements; "The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant." (Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013).
38. Regarding the age of the complainant, 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 been used as an aggravating factor for purposes of determining the sentence to be imposed; the younger the child the more severe the sentence.
39. A child is defined as a person under the age of eighteen years. Is the victim herein a child? PW2 testified that the complainant was 9 years old and in class 2 and she produced her birth certificate as PEX3 that showed that the complainant was born on the 14.07.2013. This meant that the complainant was 8 years and 2 months old at the time of the incident.
40. On the basis of the evidence adduced, I find that the age of the victim was proved to be 8 years, 2 months old as at the time of the incident.
41. On whether there was proof of penetration of the child's genitalia beyond reasonable doubt, 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."
42. The complainant was firm in her testimony that she was defiled by the appellant who was her father. She told the court how the appellant "went to her bed and asked her to remove her clothes then used



his penis to penetrate her”. Her testimony was corroborated by the PRC form produced as PEx1 that showed that on the genitalia there was redness, tenderness and it was inflamed while on the vagina, there were lacerations, bruises and vaginal discharge and further, the hymen was broken.

43. It must be noted that the PRC form was filled a day after the incident occurred on the 28.10.2021. The P3 form was filled on the 9.11.2021 some 12 days after the incident occurred and still showed that the complainant experienced pain while passing urine and that the hymen was broken.
44. In his defence, the appellant denied the offence and blamed his arrest on domestic troubles they had with the complainant’s mother, his 2nd wife. He further stated that the complainant was a perennial liar and as such she lied about the incident.
45. The appellant raised issue in his submissions before this court with the prosecution’s failure to call certain witnesses and that this lapse ought to be interpreted in his favour and lead to his acquittal.
46. The law on the number of witnesses to be called is found in Section 143 of the *Evidence Act*, Cap. 80 which states that:

“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”
47. The legal principle was affirmed in *Keter v Republic* [2007] EA 135 as follows:

“... the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond reasonable doubt.”
48. The witnesses that were called by the prosecution were sufficient to establish the case against the Appellant. The witnesses that were not called by the prosecution were known to the Appellant. However, they were not eye witnesses. They were only persons whom PW2 told what had happened to PW1. They were neighbours and they cannot be said to be so crucial that failure to call them as witnesses for the prosecution should attract a negative inference that had they been called; they would have given evidence that is adverse to the prosecution’s case.
49. The evidence of PW1 on what the appellant who was her father did to her and what she told her mother and what the doctor established on examining her was clear that the child was penetrated.
50. Further to the above, Section 124 of the *evidence Act* provides that a court can convict based on the evidence of the victim alone in sexual offences. In this regard the Court of Appeal case of *Stephen Nguli Mulili v Republic* [2014] eKLR is instructive that:

“With regard to the issues of corroboration and the appellant being proved as the one who defiled the complainant, section 124 of the Act is clear that the court may convict on the evidence of the alleged victim alone provided that the court is satisfied that the alleged victim was truthful. From the record it appears that the trial court was satisfied that the victim told the truth.”
51. The critical question to ask is whether the complainant was indeed truthful. It is my view that there is nothing to suggest that the complainant was untruthful in her testimony. The child was found on medical examination to have been defiled which injuries in her genitalia were fresh. That evidence could not have been fetched from nowhere. I am satisfied that the element of penetration was proved beyond reasonable doubt.



52. On whether the appellant was positively identified to be the person who defiled the minor, it bears repeating that the Appellant was a person known to the complainant. He was her step-father. The appellant himself testified that the complainant was her daughter, the child to PW2, his second wife. Accordingly, I do not find any element of mistaken identity of the Appellant.
53. The appellant denied committing the offence and blamed it on his differences with PW2. Even if the appellant had domestic differences with PW2, there is nothing to show that the child was coached to lie about her father defiling her. The appellant was left at home with the child. PW2 went to the market early in the morning to buy items only to return and find the child already awake and dressed for school which was unusual. From the statement of PW2 which the appellant produced as an exhibit, it detailed the events of that morning with the appellant monitoring how PW2 was getting curious about the complainant. The appellant insisted that the child be given hot water to bath. PW2 had not discovered exactly what had transpired to the child and she allowed the child to go to school as it was getting late.
54. The evidence by PW2 on the conduct of the appellant when she inquired from the complainant and the act of the appellant preparing to leave the house on learning that the matter was now known before he was pounced on by members of the public who arrested him and escorted him to the police all point to his guilty conscience. Further, from the court record, I find that the evidence adduced by the prosecution proved beyond reasonable doubt that penetration occurred.
55. In sum, I find that the prosecution proved beyond reasonable doubt that the appellant penetrated PW1, a child aged 8 years and 2 months old. Therefore, the conviction was proper. The Appeal on conviction therefore lacks merit and is hereby dismissed.

Whether the sentence imposed was manifestly harsh and excessive

56. Under the *Sexual Offences Act*, sentence for defilement is prescribed based on the age of the victim of the sexual assault. Although the Act does not expressly state, the manner the penalty is prescribed show that, the younger the victim, the more severe the sentence. Therefore, it appears to me that, age of the victim of sexual offence is an aggravating factor which the court should always consider amongst others in sentencing.
57. In this case, the complainant was of the age of 8 years 2 months old at the time of the offence. Thus, the appropriate penalty clause is Section 8(2) of the Act which provides that:

“ A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”
58. The appellant was sentenced to serve 20 years’ imprisonment.
59. Sentencing is exercise of discretion by the trial court which should never be interfered with unless the trial court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle (See *Shadrack Kipkoech Kogo v R. and Wilson Waitegei v Republic* [2021] eKLR).
60. It should also be noted that the appellant took an unfair advantage to secure and satisfy his sexual desires on a child of only 8 years and 2 months old. The Court considers the offence to be quite egregious, and it was committed against a minor. It bears repeating that the penalties enacted in the SOA reflect a deliberate intention by the legislature; (1) to protect the rights of the child; and (2) to signify the seriousness of the offence of defilement.



61. Seriousness of the offence is a relevant factor in sentencing and in sexual offences. Generally, it is worth of note that, the assault leaves the innocent victim with eternal and time-explosive dent on the integrity of the person as a human being. The aggravating factors weigh heavy; against the mitigating factors of the appellant.
62. In the circumstances I find no reason to interfere with the sentence passed by the trial court which was extremely lenient considering that the penalty section provides for the mandatory life imprisonment.
63. I therefore find no merit in the appeal herein both on conviction and sentence which I hereby dismiss. I uphold the conviction of the appellant and the sentence imposed. As the appellant was in custody for five days before he was released on bond pending trial, the sentence imposed shall take into account the said five days from 30th October 2021 to 4th November, 2021.
64. The lower court file with the copy of judgment and order to be returned to the lower court.
65. This file is closed. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 29TH DAY OF NOVEMBER, 2023

R. E. ABURILI

JUDGE

