



REPUBLIC OF KENYA



**Nyongesa v Republic (Criminal Appeal E001 of 2021)
[2022] KEHC 12263 (KLR) (26 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 12263 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E001 OF 2021
JM BWONWONG'A, J
APRIL 26, 2022**

BETWEEN

EZEKIEL WANYAMA NYONGESA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgement Hon. S.O. Mogute, PM, dated
17th June 2020 in the CM's Court at Bungoma, in Sexual Offence
Case No. 100 of 2019, Republic vs Ezekiel Wanyama Nyongesa)*

JUDGMENT

1. The appellant has appealed against his conviction and sentence of ten (10) years imprisonment in respect of the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the [Sexual Offences Act](#) No 3 of 2006.
2. In this court the appellant has raised six grounds of appeal in his petition of appeal.
3. For convenience, I will start with ground 3 in which the appellant has faulted the trial court both in law and fact in convicting him on contradictory evidence and speculation. AN (name withheld), who is the complainant (PW 1), made an unsworn statement after undergoing a vore dire examination.
4. The evidence of AN was that her mother had sent her to go and collect fire wood from the kewa area (wet land). The complainant went to collect fire wood with her sister. There they met the appellant who was in a sugar cane plantation. The appellant called her. He told her to go to the middle of the sugar plantation. She complied, leaving her sister at the edge of that sugar plantation.
5. The appellant asked her to remove her pant and dress. She complied. The appellant then removed his penis and had sexual intercourse with her. She felt a lot of pain and she cried. The appellant got hold of her neck to prevent her from crying.



6. After the appellant finished what he was doing, he threw her into the trench. She then put her pant on and went home. She then told her mother (PW 2 Irene Nelima Watila) what had happened.
7. PW 2 testified that the complainant was not able to walk at that time. The mother met Calson Wasike (PW 4). PW 4 told her that it is was the appellant who had left the sugar cane plantation (the scene of crime). At that time PW 2 saw the appellant carrying grass in a sack. The appellant started to run away. Members of the public managed to arrest him and took him to Luuya police post.
8. The mother of the complainant took her daughter to hospital. She also took her clothes which she wore during the sexual intercourse. These clothes were blood stained. She identified the dress (exhibit 4 (a)), the white net (exhibit 4 (b)) and the black with yellow strips pant (4 (c)). The complainant was hospitalized for four days at Bungoma hospital.
9. John Barasa Juma (PW 3), is the clinical officer who examined the complainant. His findings were as follows. The complainant was aged nine years old. Her hymen was perforated. There was space between her anus and the vagina and as a result blood was seen in the urine. He produced his medical report of examination as exhibit Pex 3.
10. The appellant was re-arrested by No 7xxx6 Cpl Joseph Marwa (PW 5) from Nalondo police station. PW 5 was the investigating police officer. He charged the appellant with the offence of defilement following his investigations.
11. The appellant gave sworn evidence and called no witnesses. He denied committing the offence. The appellant testified that the mother of the complainant blamed him for taking over his work at the place of one Waliaula. The appellant also testified that the mother of the complainant claimed that he refused to take her husband to Mombasa. The appellant claimed that the mother of the complainant framed him up.
12. This a first appeal. As a first appeal court I have re-evaluated the entire evidence of both the prosecution and the defence. I find that the prosecution evidence is credible that the appellant defiled the complainant. I further find that the evidence of the complainant was corroborated by the conduct of the appellant in running away when she saw the complainant's mother. There is further corroboration of the complainant's evidence from Calson Wasike (PW 4); who saw the appellant at the scene of crime.
13. In view of the ample evidence, I find that the defence of the appellant is incredible and I hereby reject it.
14. I further find that the conviction of the appellant is based on the evidence produced before the trial court and not on speculation. I also find that there are no contradictions in the prosecution evidence as contended by the appellant.
15. I therefore find that there is no merit in ground 3 which I hereby dismiss.
16. In ground 4 the appellant has faulted the trial court for relying on a fabricated medical report and the birth certificate exhibit 1. I find on the ample evidence produced by the prosecution that these two documents were not fabricated. I therefore dismiss this ground for lacking in merit.
17. In ground 5 the appellant has faulted the trial court in failing to find that his education was violated. In view of the evidence tendered I find no merit in this ground which I dismiss for lacking in merit.
18. Ground 6 is in relation to the appellant being supplied with the record of appeal and the right to be heard in court. The appellant was supplied with the record of appeal and was accorded the right to address the court.



19. In grounds 1 and 2 the appellant has faulted the court for imposing a manifestly harsh sentence given that he was a first offender and that he was remorseful.
20. I find that the sentence imposed upon the appellant is the prescribed minimum mandatory sentence. I find no basis to interfere with it.
21. In the premises, I find that the appeal fails and is hereby dismissed in its entirety.

JUDGEMENT SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THROUGH VIDEO CONFERENCE THIS 26TH DAY OF APRIL 2022.

J. M. BWONWONG'A

JUDGE

In the presence of: -

Kinyua court assistant

The appellant – present in person

Mr. Oyiembo for the respondent

