



REPUBLIC OF KENYA



**Okumu v Republic (Criminal Appeal E052 of 2021)  
[2022] KEHC 10906 (KLR) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 10906 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL APPEAL E052 OF 2021**

**SN RIECHI, J**

**MAY 31, 2022**

**BETWEEN**

**SILAS WANYAMA OKUMU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal arising from the conviction and sentence by Hon G. P. Omondi (SRM)  
in original Bungoma CMC's S.O No. 23/2020 delivered on 4th May, 2021)*

**JUDGMENT**

1. The appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offence Act, 2006 the particulars being that on the night of 16<sup>th</sup> and 17<sup>th</sup> December, 2019 in Bumula Sub County within Bungoma County intentionally caused his penis to penetrate the anus of MAR, a child aged 12 years.
2. He faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006 particulars being that on the night of 16<sup>th</sup> and 17<sup>th</sup> December, 2019 in Bumula Sub County within Bungoma County intentionally caused his penis to come into contact with the anus of MAR, a child aged 12 years.
3. The appellant pleaded not guilty whereupon the prosecution called 4 witnesses in support of its case.
4. PW-1 MAR stated that she is a standard III student at (particulars withheld) and knew the appellant as their neighbour staying in a rented house. On the fateful day, she had been sent by her mother at around 7 pm to buy a candle when her way back, she met the appellant who was on a motorcycle. He asked the victim to board so he could give her a ride, he took her to his house, locked her in promising her he would be back after delivering the motorcycle. There was nobody else in the house and when the appellant came back, he defiled her in the anus. He took her home and attempted to defile her



again and the victim screamed attracting the attention of her mother and neighbours. The incident was then reported.

5. PW-2, RAA, stated that the victim is her third child who was born on 29/3/2007. That there is a distance of about 500 metres between her house and the appellant's. That the appellant was married but at the time, the wife had travelled to the rural home. At around 2.20 am, she heard screams whereupon she got out with neighbours after looking for her daughter from 9 pm in vain. She saw somebody running away and she took her daughter to the house for interrogation. She later took her to Kimaeti Police Station, then to Kimaeti Health Centre and later Bungoma County Referral Hospital where the P3 form was filled.
6. PW-3, Elias Adoka, a clinical officer based at Bungoma County referral hospital examined the victim on 3/2/2020 approximately 1½ months after the incident. From the treatment notes from Kimaeti Health Centre, he noted that the hymen was intact though the perineum was soiled with faeces indicative that she had been defiled through the anus. Age assessment was conducted by Dr. Kamau and placed the victim's age at between 13 and 14 years.
7. PW-4 PC Peter Masai Chepkurui from Kimaeti Police Station stated he recorded the victim's statement after being brought in by her mother on 17/12/2019 complaining that she had been defiled on the anus by somebody known to her whereupon he filled the P3 and referred them to hospital. He investigated the incident, arrested the appellant and charged him.
8. The appellant was put on his defence and elected to give sworn statement to the effect that he had separated a fight between his Colleague MN and the wife (PW-2) and the said wife threatened him that he will suffer dearly. That on 23/2/2020 the said wife came with 2 other people who arrested him.
9. On cross examination, he stated that when they were attacked, he was alone with MN and that he knows neither her name nor the complainant. He said that the grudge was when they fought on 11/12/2019. After a full hearing, he was convicted and sentenced to serve 10 years imprisonment. He was dissatisfied and lodged the instant appeal based on the following grounds;
  1. That the trial magistrate erred by convicting on the basis of contradictory evidence.
  2. That the learned trial magistrate erred in convicting notwithstanding the fact that some witnesses were to be recalled for cross-examination.
  3. That trial magistrate failed to consider the Charge Sheet and the prosecution's evidence before convicting.
10. The appeal was disposed of by way of written submissions. Only the appellant complied, the same is on record and have been considered.
11. This being a first appeal, the duty bestowed on it is as stated by Mativo J in *Sylvester Wanjau Kariuki vs. Republic* (2016) eKLR, where the learned summarized the duty thus;

The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely...The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment



of the evidence reflects the greatness of mind – sans passion and sans prejudice. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test.

12. The facts in this matter are fairly straight-forward. It has been stated time and again that the essential ingredients to be established in a case of defilement are; the victim’s age, the element of penetration and the identity of the perpetrator.
13. On the victim’s age, PW-2 stated that the victim was her third born child having been born on 29/3/2007. PW-3 on his part stated that the age assessment done by Dr. Kamau placed her age at between 13 and 14 years. The trial court indeed found this evidence to be correct thus the conviction based on the witness testimony and the age assessment report. Indeed, the appellant has not challenged the validity of the victim’s age.
14. It is trite law that the age of a victim of sexual offence is crucial as the age determines the sentence to be handed down. If the victim was born in 2007, by 2019, she should have been 12 years. It therefore appears that there is a slight difference in the years as presented by the parties. In [Joseph Kieti Seet -vs- Republic](#) (2014) eKLR it was held as follows:

It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuroni -Versus- Uganda, Court of Appeal Criminal Appeal No. 2 of 2000. It was held thus:

“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 ....
15. As to whether this amounts to contradiction, Odunga J in *M.K vs Republic* (2020)eKLR, cited with approval *John Cancio De SA vs. v N Amin* (1934) 1 EACA 13 where the court in analyzing what amounts to contradiction held;

Probably every judge has had occasion at some time or other to regard discrepancies as showing veracity, and to regard uniformity as showing fabrication, but it depends upon the nature of the discrepancies and the uniformity. If two people allege that they made a journey together from Kampala to Nairobi and they differ on such details as the time the train stopped at Eldoret, what they had for lunch and dinner, and whether it rained on the journey and where, it would be more reasonable to argue a difference in memory than that the journey was never undertaken. But if one says they made the whole of the journey by rail, and the other says they went to Entebbe by car and thence by air to Nairobi, it would be more reasonable to argue that the journey never took place than that one or both suffered from a defective memory.
16. Having carefully perused the evidence on record, the court finds that the inconsistency in age is superficial and the court’s finding on the same is hereby upheld. In any case, the age as put forth by the witnesses still falls under the band provided for under Section 8(3) of the [Sexual offences Act](#).
17. On the element of penetration, evidence adduced at the trial court indicates that the victim was defiled in the anus. Section 2 of the [Sexual Offences Act](#) defines a genital organ to include the anus. When the victim was examined by PW-3, one and half months after the incident, he relied on the treatment notes from Kimaeti Health Centre and noted that the hymen was intact but the perineum was soiled with faeces. He formed an opinion that the victim had been defiled through the anus.



18. On the identity of the assailant, it was the prosecution's evidence that the appellant was well known to the victim. It was stated by PW-1 and PW-2 that the appellant lived in a rented house near their home. This explains why the victim readily accepted to be offered a ride by the appellant.
19. The appellant's defence that there was bad blood between PW-2 and himself over a fight he had quelled down does not hold water in the court's opinion. This line of defence was correctly dismissed by the trial magistrate.
20. On the contention that the prosecution's evidence was contradictory, the court has perused through the record and noted no contradictions in the evidence tendered in the trial court. In his submissions, the appellant has not pointed out the instances where the prosecution contradicted its evidence. This limb is therefore dismissed for lacking in substance. Similarly, going through the record, there is no instance where the appellant applied to recall any witness or witnesses.
21. The instant appeal is hereby dismissed for lacking in merit.

**DATED AT BUNGOMA THIS 31<sup>ST</sup> DAY OF MAY, 2022.**

**S.N. RIECHI**

**JUDGE**

