



REPUBLIC OF KENYA



**KENYA LAW**  
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**Pale v Republic (Criminal Appeal 37 of 2019)  
[2022] KEHC 10888 (KLR) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 10888 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CRIMINAL APPEAL 37 OF 2019**

**LK KIMARU, J**

**MAY 31, 2022**

**BETWEEN**

**KEVIN PALE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal arising out of conviction and sentence of Hon. V. W. Wandera  
(Chief Magistrate) in Kitale Chief Magistrate's Court Criminal  
Case (S.O) No. 59 of 2017 delivered on the 2nd day of May 2019)*

**JUDGMENT**

1. Kevin Pale, the Appellant herein, was charged with the offence of defilement of a child contrary to Section 8 (1) as read together with Section 8 (2) of the *Sexual Offences Act*. The particulars of the offence were that on the 9<sup>th</sup> May 2017 at [particulars withheld] area within Trans-Nzoia County, the Appellant intentionally caused his penis to penetrate into the vagina of SNP, a child aged nine (9) years. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*. The particulars of the offence were that on the 9<sup>th</sup> May 2017 at [particulars withheld] area within Trans-Nzoia County, the Appellant intentionally caused the contact between his penis and the vagina of SNP, a child aged nine (9) years. When the Appellant was arraigned before the trial court, he pleaded not guilty to the charge. After full trial, the Appellant was convicted on the main charge and sentenced to serve life imprisonment.
2. The Appellant was aggrieved by his conviction and sentence. He petitioned this court on appeal on grounds that the trial court erred in relying on circumstantial evidence. To this end, he stated that the conviction was unsustainable as the Prosecution had failed to prove the charge to the required standard of proof beyond any reasonable doubt. He faulted the trial court's decision as having grave contradictions. He accused the trial court of shifting the burden of proof. In view of the foregoing,



the Appellant prayed that this court allows the appeal, quash the conviction, set aside the sentence that was imposed on him and forthwith set him at liberty.

3. The hearing of the Appeal proceeded with rival parties relying on their respective written submissions. According to the Appellant, the age of the Complainant was not ascertained as the evidence adduced was scanty. He challenged the mode of identification of the perpetrator. He was emphatic that owing to the poor lighting when the offence occurred, it would not have been possible for the Complainant to positively identify the perpetrator as she had testified. On penetration, he challenged the evidence of PW2 who disclosed that a torn hymen could have been caused by a myriad of reasons not attributed to sexual intercourse. In the circumstances, this vitiated the allegations that the Complainant was sexually assaulted. He discounted the evidence of the Complainant as untruthful as she had testified under duress. Finally, he submitted that the sentence meted out against him was harsh and excessive in the circumstances and failed to conform to the relevant provisions of the Constitution, the Criminal Procedure Code and Sentencing Policy Guidelines.
4. Ms Kiptoo, Learned Prosecutor on the behalf of the State, submitted that all the ingredients to establish the charge of defilement had been sufficiently proved. On the allegation that the court relied on circumstantial evidence to arrive at its conclusion, Learned Prosecutor submitted that the court relied on direct evidence. Be that as it may, the circumstantial evidence, if any, was credible to sustain a conviction. She submitted further that all witnesses called to testify gave truthful and corroborated evidence. On contradictions, it was submitted that they were minor and did not affect the credibility of the trial process and the evidence adduced by the prosecution witnesses. She submitted that the burden of proof never shifted from the Prosecution to the Appellant. She urged the court to uphold the conviction and affirm the sentence.
5. The Prosecution called a total of six (6) witnesses in a bid to establish its case against the Appellant. The Complainant, PW1, SNP, was a class three (3) pupil at [particulars withheld] Primary School. She was aged nine (9) years at the time of the incident. On the 9<sup>th</sup> May 2017 at 6:00 p.m., the Complainant, on the instructions of her elder brother J, went to buy a matchbox at Peter's shop. On her return home, the Complainant bumped into the Appellant who emerged from a thicket behind a neighbour's house. She recognized him as a vendor at a Makeshift Hotel located in Waigama village where he sold food produce. She had known him for three (3) years prior to the sexual assault. The Appellant then grabbed her, closed her mouth with his hand and dragged her into a two roomed semi-permanent house. The Appellant then shut the door of the house. The house was lit with a lantern. He took the Complainant onto the mattress that was on the floor, removed her clothes and lay her on her back. He then proceeded to sexually assault the Complainant. She experienced pain. During the ordeal, the Appellant blocked the Complainant's mouth with his hand to prevent her from screaming. After he was done, he asked the Complainant to leave the house and threatened to kill her if she disclosed to anyone what had transpired. The Complainant proceeded home where she lived with her grandmother. She did not inform anyone of the ordeal that night.
6. The following day, the Complainant went to school. It was here that her teacher, Ms. Adoli, noticed that the Complainant was walking with difficulty. The Complainant disclosed that she had been sexually assaulted. She was then asked by her teacher to go home and return to school in the company of her parent. She found that her uncle ES, PW3 was at home. Since her parent was not there, PW3 accompanied PW1 to her school. However, it was only disclosed to him that PW1 had been pricked by thorns. PW3 was not convinced by the narrative. Consequently, when they returned home, PW3 disciplined PW1 to compel her to disclose the truth. That is when she informed him as to what had transpired the previous day. PW3 recognized the Appellant as his neighbour of more than five (5) years. He notified his sister Annet and the village elder.



7. On 12<sup>th</sup> May 2017, PW4 DOO, the Complainant's father, got wind of what had happened while he was at work. His wife, who was at that time in Marakwet, called him and gave him the information. On receiving the information, PW4 returned home where he met his neighbour and two vigilantes. It was then that he was informed by his sister-in-law, Annet and PW1 that the Complainant had been defiled. Although he did not recognize the Appellant, he began looking for him while in the company of the vigilantes. The Appellant, who had gone into hiding, was eventually found at his grandmother's home. The Appellant was apprehended and taken to Kitale Police Station. He was received by police officers whereupon investigations commenced. PW6 Corporal Alice Tarigo took over the conduct investigations, collected evidence and recorded witnesses statements. She then charged the Appellant with the present offence.
8. The Complainant was seen on 13<sup>th</sup> May 2017 by Mr. Gichuli, a clinical officer at Kitale County Hospital for treatment. His evidence was presented by PW2, John Koima, his colleague at the hospital. On general observation, it was recorded that the Complainant was shy and appeared apprehensive. There was tenderness on her thighs. The age of injuries on the Complainant's private parts were estimated to be four (4) days old. Her hymen was torn and old looking. There were numerous puss cells found in her urine. It was Mr. Gichuli's conclusion that the Complainant had been defiled. She was put on treatment. The registration receipt revealing the age of the Complainant, the laboratory request form, the referral note to Ampath and the P3 form were all produced in evidence as Prosecution Exhibits 1,3, 4 and 5 respectively.
9. The Complainant was on 15<sup>th</sup> May 2017 taken to Kitale County Hospital's Dental department for age assessment. She was seen by PW5, Pharis Sitati. An X-ray was done. She prepared a report estimating the Complainant's age at nine (9) years old. The age assessment report was produced into evidence as Prosecution Exhibit 6.
10. After the close of the Prosecution's case, the trial court found that the Appellant had a case to answer. He was placed on his defence. The Appellant's sworn testimony was that that on 12<sup>th</sup> May 2017 at 5:00 p.m., he was going to the shop to buy sugar when an oncoming motorcycle approached him. The pillion passenger then jumped off the motorcycle, grabbed him by the hand and accused him of sexually assaulting the complainant. He was then escorted to Kitale Police Station. He was later arraigned in court on 17<sup>th</sup> May 2017 where he was charged with the present offence. He denied committing the offence.
11. This being a first appeal, it's the duty of this court to re-consider and to re-evaluate the evidence adduced before the trial magistrate so as to reach its own independent determination, whether or not to uphold the conviction of the Appellant. In doing so, this court is required to be mindful that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding the demeanour of the witnesses \_ (See *Njoroge -vs Republic* [1986] KLR 19)\_. In the present appeal, the issue for determination by this court is whether the Prosecution established to the required standards of proof that the Appellant committed the offence that he was charged with.
12. The following three ingredients must be established by the Prosecution to sustain a conviction on the charge of defilement:
  1. Age of the Complainant
  2. Penetration
  3. Identification of the perpetrator



13. The first ingredient is the age of the Complainant. PW1 testified that she was ten (10) years old when she was gave her evidence in court. This was about one (1) year after the alleged sexual assault occurred. She further testified that she was a class three (3) pupil at [particulars withheld] Primary School. PW2 produced the P3 form (Prosecution Exhibit 5) which indicated that she was nine (9) years old at the time of the sexual assault. This evidence was further corroborated by the testimony of PW4, the Complainant's father. Additionally, PW5 produced the Complainant's age assessment report form (Prosecution Exhibit 6) to establish this fact. This court thus finds that the Complainant was nine (9) years old at the time of the sexual assault. The Complainant was therefore a child within the meaning ascribed to the term under Section 2 of the *Children Act*.
14. The second ingredient is that of penetration. Section 2 (1) of the *Sexual Offences Act* defines "penetration" to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person."
15. The Complainant's uncontroverted evidence was that on 9<sup>th</sup> May 2017, the Appellant accosted him when she was on her way home. He forcefully dragged her into a house. He then removed her clothes and inserted his "dudu" into her vagina that she uses to urinate. She felt pain. On examination at the private part, PW2 disclosed that the Complainant had tenderness on her thighs. She suffered injuries on her vagina. Her hymen was torn and old looking. There were numerous puss cells found in her urine. It was the clinical officer's conclusion that the Complainant had been defiled. The P3 form was produced into evidence. This court finds that penetration was proved to be required standard of proof beyond any reasonable doubt.
16. The last ingredient that the Prosecution had to establish was the identification of the perpetrator. In this instance, it was only the Complainant who identified the perpetrator. Her evidence was that while on her way home on 9<sup>th</sup> May 2017 at about 6:00 p.m., the Appellant bumped into her. He then grabbed her by the hand and took her into a semi-permanent house. The complainant testified that the house was well lit with a lantern. She was therefore able to identify the Appellant. She knew the Appellant prior to the material day. She recognized him as a vendor who used to sell food produce at a Makeshift Hotel located in Waigama village over a period of the previous three (3) years. Once he closed the door behind them, the Appellant proceeded to remove her clothes. He then lay her on her back and sexually assaulted the Complainant. She experienced pain during the ordeal.
17. While the Complainant was the single identifying witness, this court relies in the proviso of Section 124 of the *Evidence Act* and finds that the evidence of the complainant though of a single witness, was truthful. The Complainant's testimony was sincere. She knew the Appellant prior to the sexual assault. He was a neighbour. She had no reason to give false testimony against the Appellant. In fact, the Appellant failed to rebut this evidence. This courts thus finds that the Appellant was positively identified as the perpetrator of the sexual assault.
18. This court finds that the Prosecution established the ingredients of defilement to the required standard of proof beyond any reasonable doubt. Consequently, the Appellant's appeal against the conviction lacks merit. It is hereby dismissed.
19. The Appellant was under the *Sexual Offences Act* sentenced to serve life imprisonment by dint of Section 8 (2). The trial court considered his mitigation. However, as rightly put by the trial court, the wordings of the said provision were couched in mandatory terms. However, this court takes notice of the recent decided case of HC Pet No. E017 of 2021; Philip Mueke Maingi & 5 others versus the AG and another. It is a persuasive decision. This court has considered the mitigation the Appellant submitted at trial. Taking into account the recent decision of the High Court on Sexual Offences and the Appellant's mitigation, this court shall interfere with the custodial sentence imposed on the



Appellant. This court substitutes the sentence of life imprisonment with a determinate sentence of twenty five (25) years imprisonment. The period of the Appellant's sentence shall run from the date of his conviction by the trial court.

20. It is so ordered.

**DATED at KITALE this 31st day of May 2022.**

**L KIMARU**

**JUDGE**

