**Tanui v Republic. (Criminal Appeal 25 of 2018)**
**[2022] KEHC 11266 (KLR) (30 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11266 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAROK**

**CRIMINAL APPEAL 25 OF 2018**

**F GIKONYO, J**

**MAY 30, 2022**

**BETWEEN**

**NICHOLAS CHELANGA TANUI ..... APPELLANT**

**AND**

**REPUBLIC. ..... RESPONDENT**

***(From the conviction and sentence of Hon.H. Ng'ang'a (S.R.M) in Narok SOA No. 3 of 2018 on 1st August 2018)***

## JUDGMENT

### Amended petition of appeal

[1] On August 1, 2018, the trial court convicted the appellant and sentenced him to serve 20 years' imprisonment for defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006.

[2] Being dissatisfied by the conviction and sentence, the appellant filed the initial petition of appeal setting out 9 grounds of appeal.

[3] On September 14, 2021, the appellant after receipt and perusal of the original trial court record and judgment sought to amend his grounds of appeal under section 350 (2)(v) of the *CPC* as follows;

i. That the learned trial magistrate erred in law and fact by holding that the age of the victim (PW1) was not proved to show when there was nothing or no evidence was proved to show that PW1 was a minor.

ii. That the learned trial magistrate erred in law and fact by holding that penetration was proved while the evidence in record does not prove the same.

iii. That the learned trial magistrate erred in law by failing to critically analyze the appellant's defence and did not give it an objective and open-minded analysis.

[4] Ultimately, he prayed that this court allows his grounds of mitigation.

[5] The matter was canvassed by way of written submissions.

**Analysis And Determination.**

**Court's duty**

[6] As a first appellate court, I will re-evaluate the evidence and make own conclusions, except, bearing in mind that I neither saw nor heard the witnesses, thus, demeanour of witnesses is best observed by the trial court. See *Okeno v Republic* [1972] EA 32

[7] I have considered the grounds of appeal, evidence adduced in the lower court and the rival submissions of parties. The following two broad issues emerge for determination;

i. Whether the prosecution proved its case beyond reasonable doubt. The allegation of a grudge will also be evaluated.

ii. Whether the sentence was manifestly harsh and excessive

**Elements of offence of defilement**

[8] The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with section 8 (3) 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(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."

[9] The specific elements of the offence defilement arising from section 8 (1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are:

1) Age of the complainant;

2) Proof of penetration in accordance with Section 2(1) of the *Sexual Offences Act*; and

3) Positive identification of the assailant.

10. See the case of *Charles Wamukoya Karani vs. Republic,* Criminal Appeal No. 72 of 2013.

11. What does the evidence portend?

**Age of the complainant**

12. Defilement is committed against a child. Therefore, proof of age of the victim is important element of the offence. I should also state that 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.

13. A child is defined as a person under the age of eighteen years. Is the victim herein a child?

14. The appellant submitted that age of the complainant was not proved. He argued that age assessment report should not be produced by a police officer but a doctor who conducted the age assessment. The appellant relied on the cases of O*uma Nache Vs Epublic and Juma Kalio vs Republic* Cr. App. No. 71 of 2000.

15. PW1 testified that she was in class 5 at [Particulars Withheld] Primary School and was aged 13 years old. PW5 an investigating officer stated that, upon age assessment, it was found that PW1 was 14 years old at the time. PW5 produced the age assessment report as P Exh 2.

16. On this question of age, I am content to cite the case of *Fappyton Mutuku Ngui vs. Republic* [2012] eKLR where it was held:

> ... That "conclusive" proof of age in cases under *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.

17. The evidence show, and I find the age of the victim was 14 years old.

**Penetration**

18. The appellant submitted that the evidence tendered by PW3 that PW1 tested positive for pregnancy was not positive prove of penetration.

19. The respondent, on the other hand, submitted that the fact of penetration was proven by the prosecution beyond reasonable doubt.

20. 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."

21. Penetration was discussed at length in the case of *Mark Oiruri Mose v R* [2013] eKLR by the Court of Appeal as follows: -

> " Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ." (Emphasis added).

22. In light thereof, it is totally indefensible the argument by the appellant that the trial court misconstrued the evidence of PW3, Clinical officer Lawrence Ngaiwatei on penetration.

23. Lawrence Ngaiwatei testified as PW3 and produced the P3 Form in evidence. According to the P3 Form, PW1's genitalia was normal, there was no discharge. However, she tested positive for pregnancy. The witness concluded that PW1 had been defiled.

24. PW3 was very clear that penetration did occur. Notably the incident was reported late. However, this does not rule out penetration. The inevitable conclusion from the analysis of the evidence is that there was ample evidence to prove that penetration did occur. I accordingly find so and reject the appellant's argument that pregnancy is not a proof of penetration.

25. PW1 testified that in September 2017 she was going to the river, the appellant who is their neighbor followed her to the river. He removed her clothes, inner clothes and did 'tabia mbaya' to her. Subsequently during the same month, the appellant defiled her four times during Saturdays when she would go to the river. During the incidences PW1 was accompanied by her younger sisters aged 10 years and 6 years but she would leave them fetching water alone. On 1st December 2017 the complainant discovered she was pregnant but she did not inform her mother. When the mother discovered, she told her that the appellant was responsible for it.

26. The submission by the appellant that there were no samples of DNA to link him with the said defilement case may not yield much as the evidence of the complainant was clear that the appellant had sex with her on numerous occasions leading to her pregnancy. This is proof of penetrations.

27. Medical evidence was provided by Lawrence Ngaiwatei who testified as PW3 and produced the P3 Form in evidence. According to the P3 Form, PW1's genitalia was normal, there was no discharge. However, she tested positive for pregnancy. The witness concluded that PW1 had been defiled.

28. PW3 was very clear that penetration did occur. Notably the incident was reported late. However, this did not rule out penetration.

29. The analysis of the evidence is that there was ample evidence to prove that penetration did occur. I accordingly find so and reject the appellant's argument that pregnancy is not a proof of penetration.

30. In light thereof, it is totally indefensible the argument by the appellant that the trial court misconstrued the evidence of PW3, Clinical officer Lawrence Ngaiwatei on penetration.

31. But by whom?

**Was the appellant the perpetrator?**

32. The Appellant was a person known to the complainant. PW1 testified that the appellant was their neighbor. The appellant had defiled her on four occasions in September with a promise to marry her. There was no element of mistaken identity of the Appellant as the person who penetrated her genitalia.

33. The appellant submitted that the trial court failed to consider his unsworn testimony that there was a grudge over a parcel of land between him and PW2; the mother of the complainant. The respondent dismissed this allegation in their submission stating that the appellant never cross examined PW2 over the said issue. The appellant only raised it in his defence leading to the conclusion that it is far-fetched and an afterthought.

34. The appellant simply testified that he refused to lease a parcel of land to the complainant's mother (PW2) which he claimed explains why they brought up the charges. I do not find anything which show that there was a grudge between the two families. The defence is mere afterthought. I dismiss this ground of appeal.

35. The evidence by the prosecution leaves no doubt that the appellant caused penetration of the complainant. Accordingly, I find that the elements of defilement namely, that the appellant penetration a child was proved beyond doubt. The conviction was therefore proper.

36. In the upshot, I find that the Appellant was positively identified as the assailant herein; there was no mistaken identity or error. Accordingly, I find that the prosecution proved their case beyond reasonable doubt and that the trial court did not error in convicting the appellant for defilement. The appeal on conviction therefore lacks merit and is hereby dismissed.

**Whether there existed a grudge.**

37. The appellant simply testified that he refused to lease a parcel of land to the complainant's mother (PW2) which explains why they brought up the charges. I do not find anything which show that there was a grudge between the two families. The defence is mere afterthought. I dismiss this ground of appeal.

**On sentence**

38. The applicable penalty clause herein is section 8 (3) of the *Sexual Offences Act* to convict which provides:

> " 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."

40. I take into account that the accused is first offender, and that he showed remorse at the trial as was observed by the trial court. The offence is, however, serious for it involves a child victim. The evidence depicts the appellant as a person who took advantage of a minor to satisfy his sexual desires through false promises of marriage. The victim was forced into child motherhood. This ruins her life in a permanent way; physically, emotionally and status-wise. In the circumstances, 20 years' imprisonment is not excessive but appropriate sentence. I see no reason of interfering with the sentence imposed by the trial court. His appeal on sentence fails.

41. In the upshot, the appeal herein is dismissed.

**Of Section 333(2) CPC.**

42. The appellant was first arraigned in court on 08/01/2018. The sentence will run from the date he was first arraigned in court; 08/01/2018. It is so ordered

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 30TH DAY OF MAY, 2022**

**F. GIKONYO M**

**JUDGE**

**In the Presence of:**

The Appellant

Ms. Torosi for Respondent

**Mr. Kasaso - CA**