



**Nyongesa v Republic (Criminal Appeal 49 (E006) of 2020)
[2022] KEHC 12476 (KLR) (25 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12476 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL 49 (E006) OF 2020
LK KIMARU, J
JULY 25, 2022**

BETWEEN

ALFRED SIMIYU NYONGESA APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal arising out of conviction and sentence of Hon M N Lubia
(Resident Magistrate) in Kitale Chief Magistrate's Court Criminal
Case (S O) No 97 of 2019 delivered on the 30th day of November 2020)*

JUDGMENT

1. The appellant, Alfred Simiyu Nyongesa, 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 diverse dates between 12th and April 19, 2019 at [Particulars Withheld] area, Kaibei Location within Trans-Nzoia County, the appellant intentionally caused his penis to penetrate into the vagina of EN, a child aged eleven (11) years old. In the alternative, the appellant was charged with the offence of 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 diverse dates between 12th and April 19, 2019 at [Particulars Withheld] area, Kaibei location within Trans-Nzoia County, the appellant intentionally caused the contact between his penis and the vagina of EN, a child aged eleven (11) years. When the appellant was arraigned before the trial court, he pleaded not guilty to the charges. After full hearing, the appellant was convicted on the main charge and sentenced to serve twenty (20) years imprisonment.
2. The appellant was aggrieved by his conviction and sentence. His grounds of appeal were that the trial court erred in relying on circumstantial evidence. The trial court was in error in shifting the burden of proof to the appellant. He faulted the trial court for convicting him yet the prosecution had failed to discharge its burden of proof to the required standard. The appellant finally challenged the trial



court's decision for failing to consider his defence. He urged this court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.

3. The appeal was heard based on the parties' rival written submissions. According to the appellant, the Prosecution witnesses' evidence was not corroborated. To this end, there were glaring contradictions that could not sustain a conviction. He further questioned the credibility of the *voire dire* examination of the complainant. He challenged the manner in which the identification of the perpetrator was done by the Prosecution witnesses. The appellant submitted that penetration, an ingredient to a charge of defilement, had not been established to the required standard of proof beyond any reasonable doubt. He dismissed the investigations conducted as shoddy. He further submitted that based on the evidence collected, the probative value of the evidence tendered by the Prosecution was not weighty enough to sustain a conviction. The appellant added that since he was a relative of the complainant, he ought to have been charged with incest and not defilement. He made reference to the charge sheet and urged this court to find the same defective for omitting the words 'unlawful' and 'intentionally' in the particulars of the offence. Finally, he submitted that the sentence meted on him was unlawful as it failed to consider his mitigation.
4. Ms Kiptoo, learned prosecutor, 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 evidence was sufficient. Additionally, the court relied on the direct evidence of the victim, that is, the complainant whose evidence was clear and sufficient. She cited section 124 of the [Evidence Act](#) in support of this submission. She discounted the allegation that the trial court had shifted the burden of proof to the appellant as untrue and unsubstantiated. She also submitted that the appellant's defence was taken into consideration by the trial court. However, it was properly rejected as it was an afterthought. Learned prosecutor finally defended the sentence meted on the appellant noting that it was merited and lawful. She urged the court to uphold the conviction and affirm the sentence that was imposed on the appellant.
5. The prosecution called a total of six (6) witnesses. The complainant, PW1, EN, was a class two (2) student at [Particulars Withheld] School. She was aged eleven (11) years old at the time of the offence. She used to live with the appellant, her younger brother PW6, GB and her mother prior to the alleged commission of the offence. The appellant was in a romantic relationship with the complainant's mother. They referred to him as *baba*. Her father lived in Mayanja. On April 12, 2019, the complainant's mother left the house after making breakfast. She left the complainant, the appellant and PW6 at home. The complainant and PW6 were asleep in the sitting room area while the appellant was asleep in the room he shared with the complainant's mother. Suddenly, the appellant walked into the sitting room. He then undressed the complainant. He thereafter removed his clothes and proceeded to sexually assault the complainant. She felt pain. She also bled. The appellant would repeat this act on three (3) other occasions.
6. PW6 testified that on one occasion, he was present and observed the appellant sexually assaulting the complainant. The sexual assault took place at night. At that time, there was sufficient light in the house from a lamp. He was thus able to positively identify the appellant.
7. On April 20, 2019 PW1, Janet Malova Makwata saw the complainant in the homestead of the late Jairo. She was attending a memorial ceremony at about 2: 00 pm She was in attendance as a service provider offering catering services. While working, PW1 noticed the complainant with other children. She appeared extremely dirty and hungry. She beckoned them and instructed them to take a bath and thereafter gave them something to eat. However, the complainant was reluctant. PW1 then spoke to the complainant whom she convinced to eat and be washed. As she was undressing her, PW1 noticed that the complainant had whitish discharge from her waist to her thighs. She noticed the presence of



the white discharge also on the complainant's private parts which were dry. There was a foul smell emanating from the complainant's private parts. When she touched the complainant's private parts, the complainant screamed in pain. She suspected that the complainant had been sexually assaulted. In fact, the complainant informed her that *baba* had defiled her on April 19, 2019. She then proceeded to wash the complainant and dressed her in the clothes she had. At about 7:00 pm, PW1 took the complainant to the Police Station at Kimwondo. She was advised to seek medical services whereupon Dr Sakit examined the complainant at a local clinic in Endebess. PW1 then took the complainant to Endebess Sub-County Hospital the following day and thereafter returned to the Police Station where they recorded statements. She testified that the doctors that examined the complainant observed that she had been defiled on more than one occasion.

8. PW3, Ontina Kemunto Emmah, a clinical officer at Endebess Sub-County Hospital testified that she saw the complainant on April 21, 2019. She observed that her skirt had some whitish and sticky stains. She was walking with an ungainly gait. She had suffered bruises that formed pus producing wounds on her genitalia. She was unable to flex her muscles as she was in pain. Her vaginal orifice and walls were inflamed. Her hymen was torn and old looking. There was a foul smelling puss emanating from her private parts. There were presence of numerous bacterial puss cells from the vaginal discharge. She also tested positive for a urinary tract infection. Her testimony was that the infection was sexually transmitted because the complainant was too young to get a urinary tract infection in any other way or form. She treated the complainant. She filled the P3 form that was produced and marked into evidence as prosecution's exhibit 2. The treatment notes, patient record book and PRC post rape care were produced as prosecution exhibits 1 (a), (b) and (c) respectively.
9. PW3 also examined the appellant on the same day. She found that he had penile discharge that produced a foul smell. The same was consistent with the infection that the complainant had. She observed that his underwear also had discharge similar to that found in the complainant's skirt. She observed the presence of numerous bacterial cells on his penile discharge. He was also treated for a urinary tract infection that was sexually transmitted. These findings were consistent with those found from the complainant's samples. Her conclusion was that the appellant had sexually assaulted the complainant following the consistent findings from the swab analysis done on the appellant and the complainant.
10. The complainant's complaint was received by PW4 Sgt Noah Siror Chepchoina on April 20, 2019 at 5:00 pm at Kimwondo Police Patrol Base. He advised PW1 to take the complainant for medical attention. He then recorded the evidence of the witnesses. PW4 then proceeded to arrest the Appellant where he was charged on April 23, 2019 with the present offence.
11. The complainant further visited Dr Rachel Muyira, PW5 a dentist working at Kitale County Referral Hospital. She conducted an age assessment on the complainant on April 23, 2019. She estimated the complainant's age to be eleven (11) years. She filled and signed the age assessment form and also produced the same together with the OPG as prosecution exhibits 3 (a) and (b) respectively.
12. After 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 he had a disagreement with his wife. Because of this, he chased his wife away. He remained at home where he was arrested. He was later escorted to the police station where he was charged with the present offence. He denied committing the same. He blamed his wife for framing him with the present charges.
13. 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 v 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 beyond any reasonable doubt that the appellant committed the offence that he was charged with.

14. In order to sustain a conviction on a charge of defilement, the prosecution must establish the following three ingredients:
 1. Age of the complainant
 2. Penetration
 3. Identification of the perpetrator
15. The first ingredient is that of the complainant's age. The complainant testified that she was a class two (2) student at Challenge Farm Light and Power School. PW5 conducted an age assessment on the complainant. The age assessment form concluded that the complainant was eleven (11) years old at the time of the offence. This age assessment form was sufficient to prove that the complainant was aged eleven (11) years old at the time of the offence. The complainant was therefore a child within the meaning ascribed to the term under section 2 of the *Children Act*.
16. 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."
17. The complainant's evidence was that on diverse dates between 12th and April 19, 2019, the appellant sexually assaulted her on three (3) occasions. On one occasion, PW6 observed the appellant defiling the complainant. On general examination of the complainant, one (1) day after she had been sexually assaulted, PW1 observed that the complainant's private part had whitish discharge that had flowed from her waist to her thighs. There was also a foul smell emanating from her vagina. The complainant screamed in pain when her vagina was touched. The complainant, who informed her of the sexual assault, confirmed her suspicions that she had been sexually assaulted. PW3 saw the complainant on April 21, 2019. The complainant saw PW3 with the clothes she had on 19th and April 20, 2019. She observed that the complainant's skirt had some whitish and sticky stains. She had bruises on her genitalia. She was in pain. Her vaginal orifice and walls were inflamed. Her hymen was torn and old looking. There was a foul smelling emanating from her vagina. There was presence of numerous bacterial pus cells from her vaginal swab. She also tested positive for a urinary tract infection. She produced the P3 form, the treatment notes, patient record book and PRC post rape care into evidence. It was PW3's conclusion that the complainant had been defiled. This court finds that penetration was proved to the required standard of proof beyond any reasonable doubt on the basis of the complainant's testimony and the medical evidence.
18. The last ingredient that the prosecution had to establish was the identity of the perpetrator. The complainant testified that the perpetrator was her step-father. He is the appellant in these proceedings. She testified that on three (3) occasions, the appellant defiled her. This evidence was corroborated by PW6, her brother who, on one occasion, witnessed the appellant sexually assault the complainant. The complainant and PW6 were both able to recognize and identify the appellant as their step-father whom they referred to as *baba*. Similarly, PW3 took samples from the appellant's and complainant's private parts. Her observations were that they bore similar findings. They both produced a similar foul smell, tested positive for a urinary tract infection and presented numerous bacterial pus cells. In its findings, the trial court observed that the complainant was incapable of lying and was thus telling the truth. The trial magistrate had no reason to doubt the credibility of the complainant's testimony. Her



evidence had a ring of truth. This court arrives at the same findings and concludes that the appellant was positively identified as the perpetrator of the sexual assault.

19. Turning to the appellant's grounds of appeal; On the appellant's defence, this court finds that the trial court considered the appellant's defence. The court found that his defence was an afterthought and was thus dismissed as such. On inconsistencies with the date the appellant was charged in court and when the report was made, it was confirmed from the proceedings that the appellant was arraigned in court on April 23, 2019 after the report was made on April 20, 2019. This court discerns no mischief as alleged by the appellant. On whether the appellant ought to have been charged with incest instead of defilement, this court finds that the charges preferred were proper. The evidence adduced was sufficient to sustain a conviction on those charges. On whether the charge sheet was defective for omitting the words 'unlawful' and 'intentionally', this court finds that the particulars of the offence fully captured the offence the appellant was charged with. The same was proper. It was clear from the court's record that the appellant understood the charges preferred against him and entered his plea of "not guilty" once they were read out to him. He ably defended himself during the entire trial. He suffered no prejudice in the manner in which the charge was drafted.
20. 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.
21. The appellant was under the *Sexual Offences Act* sentenced to serve twenty (20) years imprisonment. In his mitigation at trial, the appellant maintained that he did not commit the offence. Regardless of the wordings of section 8 (2) of the *Sexual Offences Act* as couched in mandatory terms, this court upholds the sentence of the appellant of twenty (20) years imprisonment. This court finds that the trial court was fair and reasonable in sentencing the appellant. Consequently, this court sees no reason to interfere with the sentence of the appellant. The Appeal against the sentence is hereby dismissed. However, the sentence shall run from the date the appellant was arraigned in court i.e April 23, 2019 and not the date the appellant was convicted.

It is so ordered.

DATED AT KITALE THIS 25TH DAY OF JULY 2022.

L KIMARU

JUDGE

