



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Samwuel v Republic (Criminal Appeal 43 of 2018)  
[2022] KEHC 12471 (KLR) (25 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12471 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CRIMINAL APPEAL 43 OF 2018  
LK KIMARU, J  
JULY 25, 2022**

**BETWEEN**

**DERICK THUO SAMWUEL ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal arising out of conviction and sentence of Hon. P.C. Biwott  
(Senior Principal Magistrate) in Kitale Chief Magistrate's Court  
Criminal Case (S.O) No. 108 of 2017 delivered on 16<sup>th</sup> May 2018)*

**JUDGMENT**

1. The Appellant, Derick Thuo Samwuel was charged with defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act*. The particulars of the offence were that on September 11, 2017 at [Particulars Withheld] trading centre in Trans-Nzoia County, the Appellant intentionally caused his penis to penetrate into the vagina of SSN, a child aged 8 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 same day and in the same place, the Appellant caused contact between his penis and the vagina of SSN, a child aged 8 years old. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After a full trial, the Appellant was convicted as charged on the main count and sentenced to life imprisonment.
2. Aggrieved by his conviction and sentence, the Appellant filed an appeal to this court. In his petition of appeal, the Appellant raised several grounds of appeal challenging the verdict. He faulted the trial magistrate for relying on uncorroborated and contradictory evidence to convict him. He was aggrieved that two essential ingredients of the charge, being age of the victim and penetration, were not established to the required standard of proof. The Appellant was of the view that he was convicted on the basis of suspicion and not cogent evidence. He faulted the trial court for failing to take into



consideration his alibi defence and by shifting the burden of proof from the Prosecution to the defence. He pointed out that he was not medically examined to establish that indeed he had committed the offence. On sentence, he faulted the trial court for relying on extraneous evidence to convict him. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.

3. During the hearing of the Appeal, the Appellant presented to court written submissions in support of his Appeal. In summary, he stated that the age of the Complainant was not established to the required standard of proof. The evidence that was adduced by the Prosecution did not meet the threshold of establishing the age of the Complainant. The Appellant submitted that the evidence adduced by the Prosecution witnesses was so contradictory that it raised doubt that the alleged sexual assault actually occurred. He pointed out that there was contradiction between the evidence of the Complainant, her mother and the school teacher. All these contradictions taken in totality, went to the root of the credibility of the Prosecution's case.
4. The Appellant faulted the trial magistrate for failing to properly evaluate the evidence including his defence and thereby arrived at the erroneous decision to convict him. He pointed out that crucial witnesses were not called to testify in the case including the arresting officer and the investigating officer. He wondered how the trial court reached the verdict in the absence of the evidence of such critical witnesses. On sentence, he was of the view that the same was harsh and excessive in the circumstances and should therefore be reviewed by this court. He stated that he was a first offender, the sole breadwinner of his family, a young man with bright future prospects and rehabilitated in the period that he has been in prison. In the premises, therefore, the Appellant urged this court to allow the appeal.
5. In response, the Prosecution opposed the Appeal. Learned Prosecutor submitted that the Prosecution had discharged its burden of proof by establishing to the required standard of proof all the essential ingredients of the charge. In particular, the Prosecution submitted that the age of the victim (Complainant), the aspect of penetration and the identity of the perpetrator, being the Appellant, was established to the satisfaction of the court. There was no basis upon which the Appellant could complain that the evidence adduced by the Prosecution witnesses did not meet the legal threshold. The Appellant's defence was considered and properly dismissed as having no probative value. The Prosecution insisted that some of the issues raised on appeal were an afterthought and were not raised before the trial court. The Prosecution therefore urged the court to dismiss the appeal and affirm the sentence.
6. 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 court so as to reach its own independent determination whether or not to uphold the conviction. In doing so, this court is required to always keep in mind that it neither saw nor heard the witnesses and therefore cannot make any comment regarding the demeanour of the witnesses. (See *Njoroge v Republic* [1987] KLR 19). The issue for determination by this court is whether the Prosecution proved the charge of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* to the required standard of proof beyond any reasonable doubt.
7. For the Prosecution to establish the charge of defilement, it is required to establish three elements; the age of the victim (Complainant), whether there was penetration and finally the identity of the perpetrator (see *Daniel Wambugu Maina v Republic* [2018] eKLR). SSN told the trial court that she was eight (8) years old at the time of the alleged sexual assault (although evidence by PW5 Recho Maira Chepkemoi, a dentist based at Kitale County Referral Hospital indicated, an age assessment that the Complainant was seven (7) years old). She recalled that on September 11, 2017, while she was at home, their neighbour, the Appellant, called her to his house. Upon entering the house, the Appellant



- removed her clothes, then undressed himself before sexually assaulting her. The Complainant said that she felt pain but could not tell anyone of her ordeal because the Appellant had warned her to keep what had transpired between them a secret.
8. On the following day, i.e. September 12, 2017, the Complainant went to school. PW2, RNM, her teacher, noticed that the Complainant was walking with an unusual gait. Further, she was emitting a foul smell from her private parts (vagina). She was not her usual self because she was not playing with other children. PW2 called a female member of staff. They asked the Complainant what had happened but at first she was reluctant to disclose. Upon being examined, PW2 noticed that the Complainant had bruises in her vagina. It was then that she informed PW3 MK, the Complainant's mother.
  9. The Complainant disclosed to her teacher and later her mother that it was the Appellant who had defiled her. From the Complainant's and PW3's testimony, it was evident that the Appellant was well known to them prior to the incident. PW3 took the Complainant to the hospital where she was examined by PW4 Kirwa Labatt, a clinical officer based at Kitale County Referral Hospital who noted that the Complainant had indeed been sexually assaulted. He noted that the Complainant "had bruises on the walls (vulva), vaginal walls were lacerated. They hymen was broken. Penetration was there on her vagina. She had no discharge from the vagina." PW4 treated the Complainant before releasing her to go home. The medical treatment notes and the duly filled P3 form were produced into evidence as Prosecution's exhibits No. 1 and 2 respectively. PW5 produced the age assessment report as Prosecution Exhibit No. 3.
  10. When the Appellant was put on his defence, he denied committing the offence. He stated that he was elsewhere when it was alleged that he sexually assaulted the Complainant. He admitted that the Complainant's parents were his neighbours.
  11. From the above facts, this court holds that the Prosecution was able to establish the age of the Complainant as being between seven (7) and eight (8) years. The Complainant stated that she was eight years. Her mother PW3 testified that she was born in 2009 while PW5 in her age assessment concluded that the Complainant was seven (7) years old. The Complainant was therefore a child within the meaning ascribed to the term under Section 2 of the *Children Act*.
  12. As regards penetration, the Complainant's testimony coupled with that of the clinical officer (PW4) established to the required standard of proof that indeed the Complainant was penetrated. The Complainant's testimony was corroborated by medical evidence which confirmed that the Complainant had injuries consistent with sexual assault (defilement). This court therefore holds that the Prosecution proved to the required standard of proof that indeed the Complainant was penetrated.
  13. On the issue of the identity of the perpetrator, the Complainant, her mother and even the Appellant himself confirmed that they were neighbours. They were well known to each other prior to the sexual assault. The identity of the Appellant was therefore not in doubt. The issue for determination by this court is whether the Prosecution established the identity of the perpetrator to the required standard of proof. The only evidence that connected the Appellant to the sexual assault is that of the Complainant herself. This court is aware that children of the Complainant's age are impressionable and likely to be influenced by trusted adults in their lives to implicate someone by strategic suggestion.
  14. In the present appeal, upon re-evaluation of the evidence adduced by the Prosecution on the question of the identity of the perpetrator, this court holds that the Prosecution established to the required standard of proof beyond any reasonable doubt that it was the Appellant that sexually assaulted the Complainant. The Complainant knew the Appellant prior to the sexual assault. Her evidence was cogent, credible and unrehearsed. It was obviously truthful in line with the proviso to Section 124 of the *Evidence Act*. This court reached the conclusion that there was no reason whatsoever for the



Complainant to implicate the Appellant if he was indeed not the perpetrator. There existed no grudge or bad blood between the family of the Complainant and the Appellant. The Appellant's defence constituted a mere denial and therefore did not displace the strong culpatory evidence that was adduced against the appellant by the prosecution.

15. The grounds of appeal put forward by the Appellant have not raised any issues that would dent the strength of the Prosecution's case. In the premises therefore, this court holds the Appellant's appeal against both conviction and sentence lacks merit and is hereby dismissed. The conviction and sentence of the trial court is hereby upheld.

It is so ordered.

**DATED AT KITALE THIS 25<sup>TH</sup> DAY OF JULY 2022.**

**L. KIMARU**

**JUDGE**

