



**Sang v Republic (Criminal Appeal 2 (E002) of 2021)  
[2022] KEHC 12429 (KLR) (25 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12429 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CRIMINAL APPEAL 2 (E002) OF 2021**

**LK KIMARU, J  
JULY 25, 2022**

**BETWEEN**

**WILSON KIPTOO SANG ..... APPELLANT**

**AND**

**REPUBLIC ..... REPUBLIC**

**JUDGMENT**

1. The appellant Wilson Kiptoo Sang, was charged with the offence of defilement of a child contrary to section 8 (1) as read together with section 8 (3) of the [Sexual Offences Act](#). The particulars of the offence were that on diverse dates between 1<sup>st</sup> May 2019 and May 30, 2019 at [Particulars withheld] market within Trans-Nzoia County, the appellant intentionally caused his penis to penetrate into the vagina of EN, a child aged thirteen (13) 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 May 1, 2019 and May 30, 2019 at [Particulars withheld] market within Trans-Nzoia County, the appellant intentionally caused the contact between his penis and the vagina of EN, a child aged thirteen (13) years old. When the appellant was arraigned before the trial court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted on the main charge and sentenced to serve ten (10) years imprisonment.
2. The Appellant was aggrieved by his conviction and sentence. He faulted the trial court for shifting the burden of proof to the appellant. He submitted further that the Prosecution had failed to discharge its burden of proof to the required standard of proof. As a result, he was wrongly convicted. He further faulted the court for relying on contradictory, inadequate and fabricated evidence. Finally, he faulted the trial court for not considering 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 on the basis of the parties' written submissions. The appellant submitted that the duty of the Prosecution to establish the ingredients of the offence of the defilement to sustain a



conviction were not proved beyond any reasonable doubt. In particular, the Appellant argued that it was critical for the court to be furnished with DNA results of the Complainant's unborn child. In its absence, the identity of the perpetrator was not proved to the required standard of proof. He submitted additionally that the failure to collect medical evidence at the time of commission of the offence cast doubt on the identity of the perpetrator. He further submitted that the age of the pregnancy could not be ascertained since the Prosecution witnesses gave contradictory evidence. It was his submission that he was only arrested four (4) months after the commission of the alleged offence. According to the Appellant, this was not taken into account by the trial court as it cast doubt on whether the Prosecution had discharged its duty to prove the offence beyond any reasonable doubt. On his defence, the Appellant submitted that the same was cogent. In that light, he urged this court to consider that he had been framed having been in a relationship with the Complainant's mother that broke down.

4. Miss. Mumu, Learned Prosecutor for the State, submitted that all the ingredients to establish the charge of defilement had been sufficiently proved. She further affirmed that the trial court's sentence was merited. She urged this court to uphold the conviction and affirm the sentence that was imposed on the Appellant.
5. The Prosecution called a total of four (4) witnesses in a bid to establish that the offence had been committed by the Appellant. The Complainant EN, PW2 was a (13) thirteen year old student at Sibanga Primary School at the time of the alleged offence. She was born on January 12, 2006. She testified that the appellant had been her friend since 2019. They both used to work at Sirma Butchery and Hotel. One day in June 2019, the appellant and the Complainant got into a romantic relationship. While visiting her friend, the Complainant passed by the appellant's home. The Appellant then took her to his bed, removed her skirt and pant, undressed himself and had sexual intercourse with the Complainant. She bled. She was in pain. In her evidence, the complainant testified that she had been previously been sexually assaulted when she was in class six (6). When the Complainant noticed that she had missed her monthly menses, she confided in her mother PW3, SN as to what had transpired in the month of June 2019. She recognized the Appellant who worked in a local hotel within the area.
6. Following these revelations, PW3 took the Complainant to Kaplamai Health Clinic where results revealed that the Complainant was four (4) months pregnant. The matter was subsequently reported at Sibanga Police Station on 11<sup>th</sup> September 2019. PW4, SGT. Titus Munyekenye, the investigating officer received the complaint. He then recorded witness statements and collected evidence. On September 20, 2019, the Appellant was arrested and charged with the present offence.
7. The complainant was examined by PW1, DR. John Koima, a clinical officer at Kitale County Hospital on 13<sup>th</sup> September 2019. On examination, he confirmed that the Complainant was sixteen (16) weeks pregnant. There were pus cells in her urine. Her hymen was broken. His conclusion was that the Complainant had been sexually assaulted with penetration. He treated her with Amoxil and paracetamol. He then filled the P3 form on September 18, 2019 which was produced in evidence as Prosecution Exhibit 1. The Complainant's treatment notes were also produced in evidence as Prosecution Exhibit 2.
8. At 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. He testified that on June 30, 2019, he traveled to work in Kitale. His testimony was that he was a friend and colleague to PW3 who occasionally requested his financial assistance. They worked in the same hotel. He testified that he was in a romantic relationship with PW3. Later on September 24, 2019, PW3 requested for a loan in the sum of Kshs. 6,000.00 from the Appellant. He declined to assist her. This led to an altercation. He chased PW3 with a panga. She was later fired from the hotel. Two (2) days later, he was arrested and taken to the Police Station. His testimony was that he saw PW3 give money to the police. He was later asked to pay Kshs. 5,000.00



to secure his release He refused. He was charged with the present offence. He denied committing the offence. He urged the trial court to conduct a DNA test to ascertain the paternity of the Complainant's child.

9. 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 discharged its burden of proof to the required standard of proof being beyond any reasonable doubt, that the appellant committed the offence that he was charged with.
10. In order to sustain a conviction on a charge of defilement, the Prosecution must establish all of the following three ingredients:
  1. Age of the Complainant
  2. Penetration
  3. Identification of the perpetrator
11. The first ingredient is that of the Complainant's age. According to the P3 form relied in evidence, the complainant was thirteen (13) years old at the time of the alleged offence. The complainant testified that she was thirteen years old at the time of the alleged offence. Her testimony regarding her age was corroborated by the evidence of PW3, the mother of the Complainant. Based on the above evidence, this court finds that the age of the Complainant was established to the required standard of proof. The Complainant was a child within the meaning ascribed to the term under section 2 of the *Children Act*.
12. 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."
13. Complainant's testimony was that in June 2019, the appellant defiled her at his home. The Complainant was examined by PW1, a clinical officer at Kitale County Hospital on September 13, 2019. On examination, he observed that the Complainant was sixteen (16) weeks pregnant. There were pus cells in her urine. Her hymen was broken. His conclusion was that the Complainant had been sexually assaulted. There was evidence of penetration. He treated her with Amoxil and paracetamol. This court holds that the Prosecution had established the aspect penetration to the required standard of proof beyond any reasonable doubt.
14. The last ingredient that the Prosecution had to establish was the identity of the perpetrator. The Complainant testified that she was in a romantic relationship with the appellant as of June 2019. During the period of the relationship, the Complainant had sexual intercourse with the appellant. She further testified that she became pregnant as a result thereof. She reiterated that the appellant was the father of her unborn child. The appellant on the other had denied the allegation that he had had sexual intercourse with the complainant. In his testimony, the appellant urged the court to order that a DNA test be done to ascertain the paternity of the child. In his view, he had been framed as the complainant only reported the alleged sexual assault four (4) months after the incident had occurred.
15. The general rule regarding the evidence of the victim as a sole witness in sexual offences is that the same is sufficient to secure the conviction of an accused person, without corroboration, if the trial court is satisfied as to the truthfulness of the victim's testimony. In analyzing the evidence advanced as to



whether the identity of the perpetrator had been established, the trial court found that the complainant was truthful. She repeatedly stated that she had met the accused on several occasions. In the trial court's conclusion, the appellant had asked the complainant to engage in sexual relations with him.

16. This court notes that critically important was the date when the alleged offence is said to have occurred and the time lapse between the date the alleged offence occurred and the date it was reported to the police. There was a period of four (4) months that lapsed which the trial court ought to have considered. While it is not always necessary for DNA evidence to be adduced to establish the ingredients to the offence of defilement, this court finds that the present facts necessitated its production. The investigating officer was under duty to collect further evidence to remove any iota of doubt that indeed the Appellant was the perpetrator of the alleged offence. This court finds that although section 124 of the *Evidence Act* allows courts to convict an accused person on the sole evidence of a victim, the present case necessitated further production of corroborative evidence. This is because, based on the four (4) month lapse of time, this court cast doubt as to whether indeed the Appellant, to the exclusion of any other men, committed the offence. Furthermore, while the offence in the charge sheet indicated the incident to have occurred in May 2019, the Complainant testified that the offence took place in June 2019. Taking into account the circumstances of this case and that DNA evidence and/or any other evidence was necessary to tie the Appellant to the offence, and the discrepancies as to the date when the alleged offence is said to have taken place, this court finds that the conviction of the Appellant was unsafe.
17. Consequently, this Appeal succeeds. The conviction of the Appellant is quashed and the custodial sentence is hereby set aside. The Appellant shall be forthwith set a liberty and released from prison unless otherwise legally held.
18. It is so ordered.

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

**L KIMARU**

**JUDGE**

