



REPUBLIC OF KENYA



KENYA LAW
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**Kagwe v Republic (Criminal Appeal L E008 of 2021)
[2022] KEHC 12573 (KLR) (4 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 12573 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL APPEAL L E008 OF 2021**

**M MUYA, J
AUGUST 4, 2022**

BETWEEN

JAMES RUHENI KAGWE APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against both conviction and sentence in
Mukurweini Cr. Case No.10 of 2020 Hon. Angima R.M)*

JUDGMENT

1. The appellant in this case was convicted and sentenced to life imprisonment for the offence of defilement contrary to section 8 (1) as read with section 8(2) of the [Sexual Offences Act](#) No 3 of 2006.
2. The particulars were that on the April 7, 2020 at [Particulars withheld] area in Mukurweini Sub-county, within Nyeri County, Intentionally, caused his penis to penetrate the vagina of MWW a child aged 7 years.
3. Being dissatisfied with both the conviction and sentence the appellant filed this appeal on the following grounds,
 - (1) That the learned trial magistrate erred in both law and fact in failing to appreciate that the voire dire examination allegedly done was improper contrary to the law requirements as under section 19 of the [Oaths and Statutory declaration Act](#).
 - (2) That the learned trial magistrate erred in law and in fact by failing to appreciate that three critical and essential elements to prove defilement namely, age, identity of the perpetrator and penile penetration were not proved to the required standards.
 - (3) That the learned trial magistrate erred in law and in fact in failing to appreciate that the instant matter premised on an existent grudge between the appellant on one side and PW3 and PW4



on the other side who used PW1 and PW2 to fabricate the case against the appellant hence occasioning a prejudice.

- (4) That the learned trial magistrate erred in both law and fact in relying on overly contradicted and material discrepancies capable of unsettling the judgment evidence occasioning a miscarriage of justice.
- (5) That the learned trial magistrate erred in both law and fact in failing to appreciate the fact that the prosecution did not prove its case beyond reasonable doubt as required in law.

BRIEF FACTS

4. The complainant in this case testified as PW1 and informed the court that she was aged 7 years old at the time and was in Grade 3. She described the accused/appellant as a neighbor going by the name Ruheni. She testified of how on the April 7, 2020 while in the company of one M her cousin, brothers N and K, they were stopped by the appellant on the way to the shops at Washiru.
5. He held her hand and told her companions to head to the shops and find them later. He led her away from the path onto a maize and Napier grass farm, there upon he told her to lie down and remove her clothes as he removed his. He proceeded to insert his male genital organ into hers after applying Saliva. Later they dressed up and the appellant went away leaving her behind. Later she met Muchiri and her brothers on the way home and explained to them of what had taken place. Upon arrival at home she reported the matter to Auntie Wambui as her mother was not present. Her Aunt reported the matter to her mother. She was taken to hospital that night. The matter was reported to police.
6. In his sworn evidence the accused testified that he was a teacher at [Particulars withheld] School and that on the day of April, 2020 he was digging up trenches for a fee for one Mbugua. He was doing odd jobs because it was during the covid 19 curfew restrictions time. On May 12, 2020 he went to work on his casual jobs and returned in the evening. It was while at home that three police officers went and arrested him and later caused him to be charged with this offence.
7. This being the first appellate court it has a duty to consider afresh and re-evaluate the evidence tendered in court so as to arrive at an independent determination *Okeno v R (1972) EA*.

ANALYSIS AND DETERMINATION

Voire dire examination of the minors

8. I have perused the submissions of the appellant on the provisions of section 19 of the *Oaths and Statutory declaration Act* cap 15 Laws of Kenya. He has cited several authorities and in particular the case of *Paul Ndogo Mwangi vs Republic* 2016) e KLR where it was held:-

“there are two stages which must be followed and must appear in the record of the trial court, first, the examination must endeavor to ascertain whether the witness understands the meaning nature and purpose of an oath, where the witness does not understand the meaning and purpose of an oath, the witness is examined by the court to ascertain whether the witness is possessed of sufficient intelligence to justify reception of his/her evidence though not upon oath.”...
9. I have perused the voire dire examination which, in respect of the victim is found at pages 4 and 5 of the proceedings and I am satisfied that it was properly conducted”



10. The second prosecution witness was a minor aged 13 years and was in class five at the time. His *voire dire* examination is found at page 11 of the proceedings. Likewise I do not find any fault in his conduct and neither has the appellant specified in what areas he was dissatisfied with the *voire dire* examinations. I find no good grounds to fault it.

AGE

11. The particulars of the charge indicate the age of the complainant to have been 7 years at the time. In her evidence in chief the complainant gave her age as seven years.
12. PW4 EMW is the mother of the complainant she gave her date of birth as 21st April 2012. She produced a birth certificate to corroborate her evidence. In his submission (at paragraph 28) the appellant admits that the age of the complainant was proved.

PENETRATION

13. Section 2 of the *Sexual Offence Act* provides for penetration thus:- “ means the partial or complete insertion of the genital organ of a person into the genital organ of another person” It is the appellants contention that the complainant did not specify the date that the penetration took place. Secondly, that it was not possible to penetrate such a kid with her panty and trouser at the knee level. It is further his contention that penetration was not possible if as she alleges he had removed his trouser and shorts to his knees.
14. A perusal of the complainants evidence at page 7 of the proceedings line 2 she states. “he did bad manners to me.” I was lying on the ground. Ruheni then slept on my stomach. He did bad manners to me. He put it in my “susu” He put in, his private parts. He put his thing for susu inside my susu”
15. PW6 – James Nderitu Njaramba a clinical Officer testified on behalf of his colleague one Erick Kamau who examined the complainant on April 8, 2020. Upon examination, the clothes were not blood stained but they were soiled. Upon examining the genitalia, the labia majora was found’ to be normal. There was redness of labia minora but no discharge was noted.
16. Upon analyzing the above, I am satisfied that the ingredient of penetration was proved.

IDENTIFICATION

17. At page 5 line 16 of the proceedings, the complainant testified to have known the appellant as Ruheni as he was a neighbor. In her evidence in chief she mentioned the appellants names more than a dozen times narrating of what he did to her. She also mentioned of how the said Ruheni (appellant) stopped them when they were on their way to the shops in the company of Muchiri Pw2) and her brother Ndaiga and Kevin.
18. PW2 – at page 12 line 9 of the proceedings he states” Ruheni called us and he send us to buy cigarettes and sweets, At page 11 line 5 he again states “Ruheni called us while coming from the napier grass near the culvert. He was alone. We gave him the cigarettes and sweets” During cross-examination he reiterated to have known the appellant very well. It is quite clear that the appellant was known by the PW1 and PW2 before, as a neighbor. Though not expressly stated the incident took place during the day as there are no allegations that it took place at night and hence difficulties in identification.
19. I am satisfied that from the circumstances obtaining in this case, the appellant was properly recognized by the victim and her witness PW2. There was therefore, positive identification.



ALLEGATION OF GRUDGE

20. It is the contention of the appellant that the complainant and her witness PW2 testified against him at the behest of PW3 and PW4 who bore a grudge against him.
21. During cross-examination he stated that he had no problem with the children who were known to him before but he had a problem with the mother of the victim who was his father's lover and that she ganged up with his father to frame his brother who is languishing in jail on trumped up charges.
22. The mother of the victim testified as PW3. During cross-examination by the appellant she testified that she knew the appellant before and that he did not have a good reputation. That he was a teacher before but left teaching on account of defiling children. She denied bearing a grudge against him. The appellant did not allege that she was his father's mistress and that she had ganged up with him to destroy the family. This allegation is therefore an after thought and is without any proper foundation.

DISCREPANCIES IN EVIDENCE

23. I have carefully perused and analyzed the evidence on record and I am in agreement with the trial magistrate that the discrepancies if any were so minute as to create any doubts on the mind of the court.

CONCLUSION

24. The upshot is that I come to the conclusion that this case was proved beyond reasonable doubt and I find no good reason to interfere with the finding of the learned trial magistrate on conviction.
25. The conviction is upheld.

SENTENCING

26. The appellant was convicted for the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* No 3 of 2006 which carries a life imprisonment term. The sentencing notes by the learned trial magistrate shows that she had called for a probation report which was negative. She had also considered the developed jurisprudence on courts discretion on sentencing where minimum sentences are provided for in law before sentencing the appellant to life imprisonment.
27. I have perused the probation report and in particular as regards conduct/character. It states that offenders character is not good. He is said to have been sacked while working as a teacher at Wangera [Particulars withheld] primary School due to alleged sexual offences against children. He had also defiled his uncle's child but the issue was not reported. Granted these allegations however true, remain as allegations unless tested in court of law and proved. So for all intents and purposes, the appellant is a first offender. The punishment for imprisonment for life, for a first offender is unduly harsh. I find the imprisonment for life was uncalled for as the court had discretion in sentencing.
28. I accordingly reduce the sentence for life imprisonment to that of thirty years imprisonment. The appellant will serve thirty years imprisonment from the time of Sentence.

JUDGEMENT DELIVERED, DATED AND SIGNED IN NYERI ON THE 4TH DAY OF AUGUST, 2022.

HON. JUSTICE M. MUYA

JUDGE



In the presence of :

In person: Applicant

Miss Waweru : Respondent

Court assistant: Kinyua

30 days Right of Appeal

