



**Ochungo v Republic (Criminal Appeal E013 of 2021)
[2022] KEHC 13150 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13150 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E013 OF 2021
JR KARANJA, J
SEPTEMBER 29, 2022**

BETWEEN

LUCAS OCHUNGO APPELLANT

AND

REPUBLIC STATE

JUDGMENT

1. The appellant, Lucas Ochungo, appeared before the resident magistrate at Busia facing a charge of defilement, contrary to S 8(1) (3) of the *Sexual Offences Act*, in that, on the September 15, 2020 at [particulars withheld] within the County of Busia defiled a juvenile aged twelve (12) years. Alternatively, it was alleged that the appellant indecently assaulted the juvenile, contrary to S 11 (1) of the *Sexual Offences Act*.
2. The appellant denied the charge and after a full trial was convicted on the main count of defilement and sentenced to twelve (12) years imprisonment in accordance with section 8 (3) of the *Sexual Offences Act*.
Being aggrieved by the conviction and sentence the appellant preferred the present appeal on the basis of the grounds set out in the petition of appeal filed herein on June 10, 2021.
3. Learned counsel, Mr JV Juma, appeared for the appellant at the hearing of the appeal while the learned prosecution counsel, Mr Mose, appeared for the state/respondent.

Both parties filed their respective submissions for and against the appeal.

This court has given due consideration to the rival submissions in the light of the grounds in support of the appeal and having done so, it's duty was to re-visit the evidence availed at the trial and arrive at its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.



4. In that regard, the prosecution case was briefly that the child complainant (PW 1) lived with her mother, FAO (PW 2), next to the home of the appellant, who was their neighbor.

On the material date, the appellant arrived at his home seemingly intoxicated and called for the complainant and other children including her siblings to prepare tea for him and cut the napier grass.

5. The children undertook the assigned chores and eventually left the scene save for the complainant who was not yet done with doing or washing the dishes. In the process, while she had taken the dishes into the appellant's bedroom, the appellant 'grabbed' the complainant and placed her on his bed. He then proceeded to sexually assault her before her mother came looking for her.
6. The mother enquired from the appellant the whereabouts of her daughter but the appellant responded that she was not at his home. Meanwhile, the complainant was directed to leave the appellant's home through the back door. Later, after being questioned by her mother, the complainant disclosed that she had been defiled by the appellant and that it was not the first time that he had done so.
7. The complainant's mother (PW 2) reported the matter to the police at XXXX police station where PC MC (PW 4) was stationed. The officer investigated the matter by recording statements from necessary witnesses and after establishing that the complainant was indeed defiled preferred the present charge against the appellant.

A clinical officer, Alusa Cetrick (PW 3), carried out a medical examination on the complainant and concluded that she had been defiled. He thereafter prepared and signed the necessary medical examination report (P Ex 2 (b)).

8. The appellant's defence was a denial and a contention that the complainant was forced by her mother to implicate him with the offence and that the complainant did not tell the truth in court. The appellant's witness, MO (DW 2), who is a sister-in-law of the appellant said that the appellant was at home on September 9, 2020. She prepared breakfast for him. He then left the place after taking the breakfast. She contended that the alleged incident of defilement happened on that day.
9. The trial court considered the evidence in its totality and concluded that the prosecution discharged its burden of proof with regard to the main count of defilement on which the appellant was convicted and sentenced.

This court, after having re-considered the evidence holds the view that the appellant was properly convicted as there was sufficient undisputed evidence that the complainant was actually sexually assaulted. Her evidence was in that regard credibly corroborated by that of the clinical officer (PW 3) and her mother (PW 2).

10. Indeed, the appellant did not dispute the fact of defilement but maintained that he was not responsible for the unlawful act.

The actual bone of contention was therefore whether the appellant was the person who sexually offended the complainant. Her evidence in that regard indicated that the appellant was indeed the offender. The two were not strangers to each other and it would appear that they had similarly encountered each other on a previous occasion which went unnoticed and unreported.

11. The appellant did confirm that he was known to the complainant and that he was a neighbour to her family. This was also confirmed by the appellant's sister-in-law (DW 2) who nonetheless referred to the September 9, 2020 as the date of the offence instead of the September 15, 2020. This mix-up of dates was a clear indication that she knew nothing about the offence and that she was not present anywhere near the scene when it occurred.



12. The appellant contended that he was implicated by the complainant after she was told what to say by her mother. However, there was no evidence to confirm the fact either from the prosecution or the defence. On the contrary, the prosecution evidence indicated that no such thing happened and that the allegation was an afterthought by the appellant after he found himself on the wrong side of the law.
13. It could not therefore be said or even suspected that the complainant was coached on what to say by her mother and that she never spoke the truth in court. She gave her sworn testimony which was tested in cross-examination but remained steadfast and unshaken. Indeed, the trial court found her evidence to be truthful and credible and correctly acted on it to convict the appellant. In so doing, the trial court took into account the provisions of S 124 of the Evidence Act.
14. For reasons foregoing, it is the finding of this court that the conviction of the appellant by the trial court was sound and proper.

With regard to the sentence, the prosecution in the charge sheet invoked S 8 (3) of the Sexual Offences Act which provides that:-

' 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'.

15. The trial court imposed a sentence of twelve (12) years imprisonment which ran contrary to the aforementioned provision of the Sexual Offences Act. It would therefore follow that the sentence as imposed by the trial court was irregular and unlawful although it would have been worst had the trial court applied S 8 (2) of the Sexual Offences Act which it thought was the appropriate provision in the circumstances of this case.

The prosecution/respondent urged this court to enhance the sentence imposed against the appellant by the trial court.

16. In sum, this appeal is wanting on merit and is hereby dismissed in its entirety with orders that the sentence of twelve (12) years imprisonment imposed upon the appellant be set aside and substituted for a sentence of twenty (20) years imprisonment in terms of S.8 (3) of the Sexual Offences Act.

Ordered accordingly.

JR KARANJAH

J U D G E

DATED, DELIVERED & SIGNED THIS 29TH DAY OF SEPTEMBER 2022

