



REPUBLIC OF KENYA



**KENYA LAW**  
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**Julius v Republic (Criminal Appeal E013 of 2021)  
[2022] KEHC 12954 (KLR) (21 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 12954 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CRIMINAL APPEAL E013 OF 2021  
JM MATIVO, J  
SEPTEMBER 21, 2022**

**BETWEEN**

**KENNEDY JULIUS ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal against Judgment, conviction and sentence passed in SO No. 18 of 2018, at Taveta, R v Kennedy Julius, delivered by Hon. Khapoya S. Benson, P.M. on 26.9.2019)*

**JUDGMENT**

1. The appellant seeks to overturn the conviction and sentence imposed on him in case number SO 13 of 2021, Taveta in which he was sentenced to serve life imprisonment for the offence of defilement contrary to section 8 (1) of the *Sexual Offences Act*<sup>1</sup> (the Act) as read with section 8(2) of the Act. There was no finding on the alternative charge of committing an indecent act with a child. The particulars of the offence were that on diverse dates between the month of May 2018 and June 26, 2017 at unknown time at [Particulars Withheld] village within Taita Taveta County, he unlawfully and intentionally caused his penis to penetrate the vagina of ML, a child aged 5 years.

<sup>1</sup> Act No 3 of 2006.



2. The principles to be kept in mind by a first appellate court while dealing with appeals are:<sup>2</sup>
3. The following is a proper evaluation and summary of the evidence led by the respective parties which culminated in this appeal. The prosecution case rested on the testimony of four witnesses namely, the complainant, her teacher, a clinical officer, and a police officer. The defence case rested on his sworn evidence. He did not call any witnesses.
4. The essence of the state's case was that the appellant defiled the complainant, aged 5 years. The appellant's defence on the other hand is that he was not involved at all, and that the prosecution did not establish the case against him to the required standard.
5. PW1, Efigenia Mbuni, an ECD testified that the complainant was her pupil, and that on June 26, 2018 noted that her behaviour had changed, that she appeared to be walking in difficulty, she was slow and fond of sleeping, she appeared disturbed so she called and her and interviewed her and she told her she stays with her grandfather and grandmother, and that her grandfather called her to the bedroom and defiled her, that she informed her grandmother who reported to the police but no action was taken. She said she reported to the headmistress who informed the World Vision Team officials who came and interviewed the minor. She said on July 13, 2018 together with the minor they proceeded to Taveta Police Station where the incident was reported and they were issued with a P3 form and they escorted the minor to Taveta Sub-County Hospital where she was treated and the P3 form was completed. She said she was presently staying with the minor. On cross-examination she said the grandmother was uncooperative, that she had separated with the appellant and there was another child who was also victimized by the appellant.
6. The complainant testified that the appellant did bad manners to her in one occasion. She said on another day he removed he also defiled her and she later told her grandmother. She also told her teacher.
7. PW3 Patterson Mwapulu, a clinical officer based at Taveta sub-county. He produced the P3 form. The key findings wee that the complainant's hymen was absent, no sperms were detected and the urine had bacterial infection. He produced the P3 form and treatment notes.
8. PW4, PC Faith Mburu attached to Taveta Police Station was the investigating officer, was in her office when PW1 and the complainant reported the complaint. She was recalled on May 27, 2019 when she produced the age assessment report showing that the minor was aged 6 years having been born on July 19, 2018.
9. The prosecution was unable to procure the attendance of the complainant's grandmother despite several adjournments and a warrant of arrest. She was said to be reluctant to attend court. On July 23, 2019, the prosecution closed its case.
10. In his sworn defence, the appellant he denied the charges.

<sup>2</sup> See [Ganpat v State of Haryana {2010} 12 SCC 59](#).

- a. There is no limitation on the part of the appellate court to review the evidence upon which the order appealed against is founded and to come to its own conclusion.
- b. The first appellate court can also review the trial court's conclusion with respect to both facts and law.
- c. It is the duty of a first appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the decision appealed against or the entire proceedings if they are flawed.
- d. When the trial court has breached provisions of the [Constitution](#) or ignored statutory provisions, or misconstrued the law, or breached rules of procedure, or ignored crucial evidence or misread the material evidence or has ignored material documents, or in any manner compromised the accused rights to a fair trial or prejudiced the accused etc. the appellate court is competent to reverse the decision of the trial court depending on the materials in question.



11. After analysing the prosecution evidence, the defence and the law, the court was persuaded that the elements of the offence had been established. She convicted him and sentenced him to serve life imprisonment.
12. The appellant seeks to overturn the judgment citing 5 grounds. In my view, one ground will dispose this appeal, which is, whether the prosecution proved its case to the required standard.
13. The nub of the appellant's submission is that it was unsafe to convict him on the strength of the sole evidence of the minor. He also cited section 109 of the *Evidence Act* which places the burden of prove on he who alleges. He also cited section 124 of the *Evidence Act* which requires reasons to be recorded that the court is satisfied that the victim is telling the truth. Citing *PP v Dato Seri Anwar Bin Ibrahim*<sup>3</sup> in support of the proposition that a maximum evaluation of the credibility of a witness must be done at the close of the case before the court can rule that a prima facie case has been made out.
14. The essence of the respondent's advocates submissions is that the ingredients of the offence, namely, age of the complainant; penetration; and identity of the perpetrator were proved.
15. The accused enters the proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the state has on evidence put before the court satisfied the court beyond a reasonable doubt that the accused is guilty. The term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning.<sup>4</sup> A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if the court believes the accused is guilty or likely guilty, that is not sufficient. In those circumstances the court must give the benefit of the doubt to the accused and acquit because the state has failed to satisfy the court of the guilty of the accused beyond a reasonable doubt. On the other hand, the court must remember that it is virtually impossible to prove anything to an absolute certainty and the state is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, the court is sure that the accused committed the offence, it should convict since this demonstrates that the court is satisfied of his guilty beyond reasonable doubt.<sup>5</sup>
16. The state is required to prove the guilt of the accused beyond reasonable doubt. Proof beyond reasonable doubt requires more than proof on a balance of probabilities. It is not, however, proof to an absolute degree of certainty or beyond a shadow of a doubt. Where there is proof beyond reasonable doubt no reasonable doubt will remain as to the guilt of the accused. If a reasonable person would still entertain a reasonable doubt as to whether the accused is guilty, the accused is entitled to be acquitted. Fanciful or remote possibilities do not introduce a reasonable doubt.
17. It is competent to convict an accused person on the strength of evidence of a single witness. However, the evidence of certain classes of witnesses is insufficient, standing alone, as proof the facts deposed to. Such witnesses- for example, accomplices, young children and complainants in sexual cases, usually requires to be corroborated. By corroboration is meant evidence other than that of the witness which is consistent with the witness's version of the facts and which tends to show the guilt of the accused. To be of evidential weight the fact or facts corroborated must be material ones. Corroboration of insignificant facts will not usually help to strengthen the state case.

<sup>3</sup> No 3 of 1999.

<sup>4</sup> See the 1997, the Supreme Court case of *Canada in R vs Lifchus* {1997}3 SCR 320.

<sup>5</sup> Ibid.



18. From the standpoint of the state what is important is for there to be 'implicatory corroboration.' By this is meant evidence that implicates the accused in the commission of the offence. The corroboration can come from the evidence of another witness or from the evidence of the accused. The confession of an accused person, properly taken under the rules can be used as evidence corroborating other evidence. Even the failure of the accused to tell the truth can sometimes be corroborative of other evidence.
19. In certain situations, a 'cautionary rule' applies. In these situations, the courts have to be aware of the dangers which arise from accepting certain types of evidence, especially if that evidence is uncorroborated. It is not enough that the court should warn itself on a token basis of the dangers of accepting these types of evidence. This warning must be put into practice by the court exercising great caution before accepting the evidence. This is the import of the proviso to section 124 of the Evidence Act.
20. An accused can be convicted on the basis of the uncorroborated testimony of a single competent and credible state witness. However, the credibility and reliability of this witness must be very carefully assessed to see whether it is safe to convict on the basis of his or her testimony alone. The credibility and reliability of this witness must be very carefully assessed to see whether it is safe to convict on the basis of his testimony alone. The court must satisfy itself that the complainant's evidence is satisfactory in all material respects.
21. The trial judge must weigh the evidence and consider its merits and demerits and decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The exercise of caution must not be allowed to displace the exercise of common sense. Of course, such evidence must be approached with caution and the merits thereof weighed against any factors which militate against its credibility. In essence, a commonsense approach must be applied. If the court is convinced beyond a reasonable doubt that the sole witness has spoken the truth, it must convict, notwithstanding that he was in some respects unsatisfactory. Where the evidence of the single witness is corroborated in any way which tends to indicate that the whole story was not concocted, the caution enjoined may be overcome and acceptance facilitated. But corroboration is not essential. Any other feature which increases the confidence of the court in the reliability of the single witness may also overcome the caution.
22. Upon evaluating the totality of the evidence, the circumstances of this case and the prosecution evidence, I am not persuaded that the conviction was based on strong, credible and reliable evidence. I find and hold that the appellants appeal is merited. I allow the appeal, quash the conviction, set aside the sentence. I order that the appellant Kennedy Julius be released forthwith from prison unless otherwise lawfully held.

Right of appeal explained.

**SIGNED AND DATED AT VOI THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2022**

**JOHN M MATIVO**

**JUDGE**

**SIGNED, DATED AND DELIVERED VIRTUALLY THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2022**

**OLGA SEWE**

**JUDGE**

