



REPUBLIC OF KENYA



KENYA LAW
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**Ekeno v Republic (Criminal Appeal E040 of 2021)
[2022] KEHC 14663 (KLR) (28 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14663 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CRIMINAL APPEAL E040 OF 2021
AN ONGERI, J
OCTOBER 28, 2022**

BETWEEN

ALFRED ATUTI EKENO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Original Conviction and Sentence by HON. KARANI
(RM) in Kericho/Kipkelion CR. Case No.9/2020 delivered on 30/7/2021)*

JUDGMENT

1. The appellant was 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](#) (SOA) in Kipkelion Criminal Case No 9 of 2020.
2. The particulars of the charge were that on July 13, 2020 at [particulars withheld] centre in Kipkelion within Kericho County, the applicant intentionally made his penis to penetrate the vagina of RM, a child aged 6 years.
3. The prosecution evidence was that RM a child of 6 years and a grade 1 pupil at [particulars withheld] primary school, was defiled by the accused person while she was on her way home from her aunt's vegetable stall. It was the prosecution's evidence that the accused person met RM while she was walking home and he held her hand and led her to his house, where he defiled her, and she screamed forcing the accused to stop defiling her. The child then walked outside of the accused persons house and went and reported the incident to her aunt F who telephoned the police and they came and arrested the accused person. The victim was then immediately taken to Kipkelion Hospital, where it was established after examination that there was evidence of defilement.
4. The appellant who denied the charges said in his defence that in his neighborhood, there was one PK who wanted to Kidnap him and steal his money. He said the said PK framed him with these charges.



The accused testified that after he was arrested, P relocated to an unknown area and has never appeared in court. He also stated that he and P had an intimate relationship.

5. The trial court found the appellant guilty as charged and sentenced him to life imprisonment.
6. The appellant is aggrieved with the conviction and sentence and he has appealed to this court on the following grounds:
 - i. That the learned trial magistrate erred in law and in fact by failing to note that the crucial witness never testified;
 - ii. That the learned trial magistrate erred in law and in fact by failing to analyze that the whole charge was framed and manipulated to suit the fabrication against the appellant;
 - iii. That the learned magistrate erred in law and in fact by not considering that the appellant and the mother of the juvenile had a long existing grudge;
 - iv. That the learned trial magistrate erred in law by failing to discover that the date of arrest and commission of offence was different making the charge sheet defective;
 - v. That the learned trial magistrate erred in law and in fact by depending on contradicting evidence to sentence the appellant.
7. The parties filed written submissions which I have duly considered.

The appellant submitted that the court should disregard the evidence of the prosecution witnesses as they were not straight forward and, on several occasions, they were reluctant to testify in court, and the court was forced to issue warrants of arrest to them, thus signifying that there was nothing which took place.
8. The appellant also submitted that whereas the charges of defilement depend on medical examination from relevant authorities, in this particular case there was a lot of contradiction surrounding the medical report and the evidence from the prosecution side. He stated that whereas the P3 was issued immediately after the commissioning of the offence on the July 13, 2020, the P3 form was filled on the 1 July 4, 2021, a year after the offence was committed, and that this cannot be a human error as there were many contradictions in the case from the beginning.
9. The appellant submitted that the witnesses who framed the case had existing grudges, as these witnesses were not willing to testify in court despite the fact that they had recorded statements.
10. It was submitted by the appellant that there was contradicting information in the court records as the records show that the appellant was arrested before the commission of the offence, thus making the charge sheet defective.
11. The respondent on the other hand submitted that the main charge and every ingredient of the charge against the appellant was proved beyond reasonable doubt. It was submitted that the respondent was able to prove the age of the victim, that there was penetration, and the victim was able to positively identify the accused person, thus eliminating any possibility of error.
12. The respondent submitted that the appellant's defence of an existing grudge between himself and the witnesses is illogical and not supported by any facts, and thus does not cast doubt on the weighty evidence tendered by the respondent. It was further submitted that the trial court considered the defence tendered by the appellant and found that it did not cast reasonable doubt on the respondent's case.



13. The respondent further submitted that there were no material contradictions in the evidence tendered by the respondent that would make the conviction of the appellant unsafe. It was further submitted that the sentence meted out against the appellant by the trial court is a legal and proper sentence, and that a sentence of life imprisonment in this case is justified and proportional to the offence which was committed against a vulnerable member of society.
14. This being a first appeal, it is the duty of the first appellate court to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether or not to support the findings of the trial court while bearing in mind that the trial court had the advantage of seeing the witnesses.
15. The Court of Appeal in *Gabriel Kamau Njoroge versus Republic(1987) eKLR*, stated as follows as regards the duty of the first appellate court:- ' As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect.'
16. In *Solomon Mwangi Kinyua versus Republic (2006) eKLR*, the Court of Appeal stated as follows: - 'We reiterate that it is, indeed, the duty of the first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusion in deciding whether the judgment of the trial court should be upheld.
17. The issues for determination in this appeal are as follows: -
 - i. Whether the prosecution proved its case to the required standard.
 - ii. Whether the charge sheet was defective.
 - iii. Whether the appeal should be allowed.
18. On the issue as to whether the prosecution proved its case to the required standard, the appellant in his submissions said that the prosecution failed to call crucial witnesses and further that the evidence adduced was contradictory.
19. There are three elements the prosecution must prove in a case of defilement as follows:-
 - i. Penetration
 - ii. The identity of the appellant and
 - iii. The age of the complainant
20. Penetration is defined under section 2 (1) of the *Sexual Offences Act* as follows: - 'the partial or complete insertion of the genital organs of a person into the genital organs of another person.'
21. I find that penetration was proved in this case. There is evidence that the appellant met the complainant while she was walking home and he held her hand and led her to his house, where he defiled her, and she screamed forcing the appellant to stop defiling her.
22. The complainant then walked outside of the appellant's house and went and reported the incident to her aunt F who telephoned the police and they came and arrested the appellant.
23. The complainant was then immediately taken to Kipkelion Hospital, where it was established after examination that there was evidence of defilement.



24. On the issue of identification of the appellant, the complainant knew the appellant and I find that he was positively identified.
25. On the issue of the age of the complainant, the definition of a child is the one assigned in the *Children Act* as follows: - 'an individual who has not attained the age of eighteen years.'
26. The birth certificate of the complainant was produced and the same shows that the complainant was born on March 26, 2014 and therefore on July 13, 2020, she was 6 years old.
27. I find that the prosecution proved its case to the required standard.
28. There is no requirement that a specific number of witnesses should be called by the prosecution.
29. I also find that there is no evidence that the charge sheet was defective.
30. The appeal herein has no merit and the same is dismissed.
31. I find that the conviction is secure and the sentence lawful.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 28TH DAY OF OCTOBER, 2022.

AN ONGERI

JUDGE

