



REPUBLIC OF KENYA



KENYA LAW
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**Ntongai v Republic (Criminal Appeal E055 of 2022)
[2022] KEHC 15524 (KLR) (21 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15524 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E055 OF 2022
TW CHERERE, J
NOVEMBER 21, 2022**

BETWEEN

ALLAN KINYUA NTONGAI APPELLANT

AND

REPUBLIC RESPONDENT

*((Being an appeal against conviction and sentence in Tigania Criminal
Case S.O No. 25 of 2019 by Hon.Ongira (RM) on 23rd April,2021)*

JUDGMENT

1. Allan Kinyua Ntongai (Appellant) was charged with defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* No 3 of 2006 (the Act). appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No 3 of 2006. The offences were allegedly committed on May 29, 2019 against MWM a child aged 16 years.
2. Complainant stated that on the material day, she met Appellant whom she referred to as Kisali who took her to his house and defiled her. Robert Muriithi stated he saw complainant walk from the house of Appellant whom she referred to as Kisali. That he asked her what she was doing in Appellant's house and she said Appellant had dragged her there. He escorted complainant to his father who then accompanied both to Appellant's house and later reported the matter to police.
3. Complainant was examined on June 3, 2019 and a P3 tendered in evidence revealed that she had a vaginal tear and her hymen was broken. Complainant's complaint was investigated by PC Kawira who preferred charges against Appellant.
4. Appellant in his sworn defence denied the offence. He stated that he was framed by Complainant's father as a result of a land dispute between them.



5. After considering both the Prosecution and Defence cases, the learned trial magistrate found the Prosecution case proved and convicted on April 19, 2021 and was on April 23, 2021 sentenced to 10 years' imprisonment
6. Dissatisfied with both the conviction and sentence, Appellant lodged the instant Appeal and in the amended grounds raised the following issues:
 - i. The charge sheet was defective
 - ii. Prosecution case was not proved beyond any reasonable doubt
 - iii. Defence was not considered
 - iv. The time he spent in custody was not considered

Analysis and determination

7. I have perused the petition of appeal, the submissions by the parties. This is the first appellate court and our duty as such was well set out in the case *Shantilal M Rulwala vs Republic* [1957] EA 570 where the court held that:

It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."
8. The elements constituting the offence of defilement are proof of penetration, the age of the minor and the identity of the assailant (See *CWK v Republic* [2015] eKLR).
9. It is trite that the age of a minor is a critical component of a defilement charge and that it is an element which must be proved by the prosecution beyond reasonable doubt. (See *Kaingu Kasomo vs Republic* Criminal Appeal No 504 of 2010).
10. Proof of the age of a victim of defilement is crucial because the prescribed sentence is dependent on the age of victim. (See *Hadson Ali Mwachongo vs Republic* Criminal Appeal No 65 of 2015 [2016] eKLR & *Alfayo Gombe Okello vs Republic* Cr App No 203 of 2009[2010] eKLR.
11. Complainant's stated that she was 16 years which fact was confirmed by the clinical officer that examined her.
12. Concerning penetration, Section 2 of the Act defines penetration to entail: -

"partial or complete insertion of a genital organ of a person into the genital organ of another person."
13. The P3 form dated June 3, 2019 tendered in evidence revealed that she had a vaginal tear and her hymen was broken and I find that the trial magistrate correctly found that penetration was proved.
14. Concerning Appellant's culpability, there is no doubt that complainant was the sole witness to the offence. In the case of *Stephen Nguli Mulili v Republic* [2014] eKLR the Court of Appeal had this to say regarding reliance on Section 124 of the *Evidence Act* to convict:

"as a general rule of evidence embodied in Section 124 of the *Evidence Act*, an accused person shall not be liable to be convicted on the basis of the evidence of the victim unless such



evidence is corroborated. The proviso to that section makes an exception in sexual offences and provides as follows:

“Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.” (emphasis added).

15. Appellant and complainant are neighbors and the fact that Appellant was not a stranger to the complainant was corroborated by the prosecution witnesses and conceded by Appellant. The incident happened in broad day and the trial magistrate’s finding that Appellant was positively recognized was well founded.
16. Appellant’s contention that he was convicted on inconclusive evidence is therefore without merit.
17. Concerning the Appellant’s contention that the charge is defective charge, he submitted that the defect is in the fact that the charge sheet stated that the offence was contrary to Section 8(1) (4) of the [Sexual Offences Act](#), a section that is non-existent. His view was that he was prejudiced when the trial court convicted him on a defective charge sheet.
18. The type of complaint by the Appellant should be decided on the test provided in Section 382 of the [Criminal Procedure Code](#) which provides that:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the Complainant, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice”.
19. A finding, sentence or order passed by a court of competent jurisdiction shall only be reversed or altered on appeal or revision if the error, omission or irregularity in the Complainant, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial occasioned a failure of justice: And in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.
20. The section provides insulation from attack of such finding or sentence except on the basis that injustice resulted from the error or defect. (See [Samuel Kilonzo Musau v Republic](#) Criminal Appeal No 153 of 2013). The offence of defilement is known to law and is established in section 8(1) of the [Sexual Offences Act](#). The appropriate penalty clauses are section 8(2) (3) and (4) of the Act.
21. In the absence of evidence to demonstrate that the defect occasioned Appellant any injustice, the ground fails.
22. Concerning sentence, Section 333(2) of the [Criminal Procedure Code](#) provides that:
 - (2) Subject to the provisions of section 38 of the [Penal Code](#) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.



23. Appellant was arrested on September 2, 2019 and was released on bond on after 9 days on February 13, 2019. The record reveals that the learned trial magistrate did not take this period into consideration at the point of sentencing the Appellant.
24. From the foregoing analysis, I make the following orders:
1. The appeal only succeeds on sentence
 2. The 10-year sentence shall commence from April 10, 2021

DELIVERED AT MERU THIS 21ST DAY OF NOVEMBER 2022

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Kinoti

Appellant - Present in person

For the State - Ms. Mwaniki (PPC)

