



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Kibet v Republic (Criminal Appeal E101 of 2021)  
[2022] KEHC 17118 (KLR) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 17118 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CRIMINAL APPEAL E101 OF 2021  
AC MRIMA, J  
NOVEMBER 17, 2022**

**BETWEEN**

**JAMES KIBET ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal arising out of conviction and sentence of Hon SN Makila  
(Principal Magistrate) in Kitale Chief Magistrate's Court Criminal  
Case (SO) No E168 of 2021 delivered on 25th November, 2021)*

**JUDGMENT**

**Background:**

1. The Appellant herein, James Kibet, was charged with the offence of Defilement contrary to Section 8(1) as read with Section 8 (4) of the *Sexual Offences Act*.
2. The particulars of the offence were that on July 12, 2021 at [Particulars Withheld] village in Trans-Nzoia East Sub-County within Trans-Nzoia County intentionally and unlawfully caused his genital organ namely penis to penetrate into the vagina of MC, a child aged 16 years old.
3. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on the same day and in the same place, the Appellant intentionally caused his penis to touch the vagina of MC, a child aged 16 years old.
4. When the Appellant was arraigned before the trial Court, he pleaded not guilty to the charges. After a full trial, the Appellant was convicted on the main charge and sentenced to 15 years' imprisonment.



## The Appeal:

5. Aggrieved by the conviction and sentence, the Appellant filed an appeal to this Court. Amongst the grounds raised in support of his Appeal, he faulted the trial Court for convicting him based on contradictory and inconclusive evidence. He was of the view that the charge sheet was defective thus unable to sustain a conviction. He opined that the Prosecution did not discharge their burden of proof duty. Finally, he complained that the trial Court rejected his defence without furnishing cogent reasons. He thus urged this Court to allow the appeal, quash the conviction and set-aside the sentence that was imposed on him.
6. Parties filed respective written submissions in which they expounded on their rival positions.

## Analysis:

7. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See *Okono vs Republic* [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in *Ajode v Republic* [2004] KLR 81.
8. Having carefully perused the record, this Court is now called upon to determine whether the offence of defilement was committed, and if so, whether by the Appellant.
9. Before this Court endeavors to tackle the above issue, it is imperative to revisit the evidence.
10. The Prosecution called a total of 6 witnesses in establishing the charges levelled against the Appellant.
11. The Complainant, MC, testified as PW1, a class 8 pupil at [Particulars Withheld] Primary School was born on April 24, 2005. Her Birth Certificate was produced in evidence as Prosecution Exhibit 1. It corroborated her evidence.
12. The prosecution evidence had it that while the complainant was on her way back to school on July 12, 2021 at around 1:00 p.m., she met the Appellant. She recognized him as their neighbour who lived in their plot. He stopped her and inquired as to whether she had seen a stray sheep. She directed him to the point she saw one.
13. Upon giving her response, the complainant continued with her journey. Suddenly, the Appellant grabbed her by the neck and clothes. He dragged her to a nearby forest. He proceeded to undress her and removed his clothes. He lay her on the ground and sexually assaulted her. During the act, the Appellant covered her mouth so that the complainant was unable to scream.
14. The Appellant solely emerged from the forest after the ordeal, . He was spotted by PW3, SCB, the complainant's neighbour. The forest bordered the complainant's family land and PW3's. She exclaimed that it was bizarre to have seen the Appellant because she was under the pretext that the Appellant was still serving time for a crime he had previously committed.
15. Meanwhile, the complainant went back home. She informed her grandmother who called her mother PW2, EB, and informed her what had transpired. PW1's description of the Appellant instantaneously led PW2 to recognize him as their neighbour and tenant who had lived in their plot for about 2 months prior to the offence.
16. During PW2's cross examination, it emerged that the Appellant had been in rent arrears during the currency of the tenancy. As the Appellant had been arrested and was serving sentence, and it was



- unknown to PW2 as to when he would be set free, then, in order to free the room which was rented to the Appellant and to stop the arrears from accruing further, PW2 organized with the village elder and removed the Appellant's items in the house. An inventory was duly taken and the items were taken to Kaplamai Police Post where they were stored pending collection by the Appellant.
17. The foregoing state of affairs was affirmed by PW5, PC Julius Odhiambo, a police officer attached to the said Police Post and who was also the arresting officer.
  18. The matter was thereafter reported at Kaplamai Police Post by PW1 and PW2. The report was received by PW5 who then referred the two to Kaplamai Health Centre for examination. PW1 was later attended to at Kitale County Referral where a P3 Form was filled on July 13, 2021.
  19. On examination of the complainant (PW1) by a Clinician one S K Rono, it was observed that the complainant's hymen was torn and old looking. Her labia majora and labia minora were bruised. Her vaginal walls were inflamed, reddish and had a white discharge indicative of forceful frictions. It was further noted that there were no spermatozoa. It was medically concluded that the complainant had been defiled.
  20. The complainant was put on pain killers and counselled. PW4, one Gabriel Michuki Kamau, a colleague to the said S K Rono who earlier on had examined the complainant, testified as PW4 and produced the P3 Form and treatment notes for the complainant.
  21. The investigations were conducted by PW6, PC Leonard Chebii. He collected evidence and preferred the instant charges against the Appellant.
  22. The Appellant was arrested when he went to the Police Post to collect his items. He was then transferred to Sibanga Police Station and later charged.
  23. After the close of the prosecution's case, the trial Court found that the Appellant had a case to answer and was placed on his defence.
  24. The Appellant opted to tender unsworn testimony. He stated that he returned home on July 9, 2021 after serving a prison sentence following a finding of guilt for not wearing a mask on June 5, 2021.
  25. He found that his house had been occupied by another tenant. He inquired for his goods from PW2, who informed her that his items were at her house. Instead of receiving his items, PW2 and the village elder lured him to accompany them at the Center on July 12, 2021.
  26. The Appellant then reported the matter at Kaplamai Police Post with a view of seeking assistance to get his items back. In lieu, the Appellant was arrested and charged with the present offence. He denied committing the offence.
  27. It is on the basis of the above evidence that the trial Court found the Appellant guilty of the offence of defilement and convicted him. He was then sentenced.
  28. It is also the foregoing evidence which this Court must now review and ascertain whether the ingredients of any of the offences which the Appellant was charged with were proved. Needless to say, if this Court finds that the main offence of defilement was proved, then the matter shall end there. There will be no legal basis for consideration of the alternative offence.
  29. It is established by law and settled judicial precedents that the offence of defilement carries three components. They are the age of the victim, penetration and whether the accused was the assailant.
  30. This Court will deal with each of the issues in turn.



### **Age of the Victim:**

31. The age of a person may be proved in many ways. It may be by way of medical evidence or any official documentation for instance Certificate of Birth, Child Health and Nutrition Card, School registration documents, among others. The age may also be proved by evidence of the parents or persons who may positively testify to the fact.
32. A Birth Certificate was produced during the trial. The complainant was born on April 24, 2005. As the offence was allegedly committed on July 12, 2021, then the complainant was aged about 16 years old. The complainant was, therefore, a child within the meaning ascribed to the term under the *Children's Act*.

### **Penetration:**

33. The Appellant argued that the prosecution failed to establish penetration. As a consequence, the trial Court erred in convicting him.
34. In this case, penetration was alluded to by the complainant, PW2 (the mother of the complainant) and PW4 (the Clinical Officer).
35. The complainant narrated her ordeal with the attacker. It was her testimony that the assailant held and dragged her into a forest where he removed her underwear and sexual intercourse with her.
36. When the complainant eventually reached home and informed her grandmother, PW2 was informed and took the complainant to hospital. PW2 observed the complainant's private parts and noted some discharge. She thought it was semen.
37. PW4 produced the treatment notes and the P3 Form which had been filled by his colleague Clinical officer. The Clinical officer had examined the complainant one day after the ordeal. He noted that the vaginal walls were inflamed and were reddish which indicated forceful frictions. Further, the labia majora and labia minora were bruised, but had no tears.
38. On the re-evaluation of the above evidence, this Court is satisfied of the fact that the complainant's sexual organ was penetrated by a male sexual organ. Penetration was, therefore, proved.

### **Identity of the Perpetrator:**

39. The Appellant vehemently opposed that he was the Perpetrator. He fronted a defence that he was just being set-up since PW2 had removed his items from his room when he was serving a prison term and which items PW2 refused to release back to him and consequently planted the case on him. According to the Appellant, he was arrested when he went to the Police Post to seek assistance towards getting his items back.
40. This Court has keenly considered the defence. The issue of the Appellant's items was attested to by the complainant, PW2, PW5 and PW6.
41. PW2 stated that despite the fact that the Appellant, who was her tenant, was in rent arrears, he was arrested for another offence and imprisoned. With no indication on when the Appellant was likely to return, PW2 consulted the village elder and they removed the items from the room. They prepared an inventory of all the items in the room and took them to the Kaplamai Police Post where the Appellant was to collect once he was freed.



42. On release, the Appellant went to PW2's house and noted that the room he occupied had been let to another person and his items were at the Police Post. PW2 advised the Appellant to wait for the village elder so that they would later on go to the Police Post where the Appellant would verify and collect his items.
43. The above was confirmed by PW5 who was a police officer attached to the Police Post. PW5 also confirmed that the Appellant went to the Police Post to collect his items and not to seek assistance on the whereabouts of his items. PW6 also attested to the facts. He was the investigating officer and the officer-in-charge of the Kaplamai Police Post.
44. As they were awaiting the collection of the items foretasted, the complainant was attacked and sexually assaulted. A report was made to the police at the Police Post and the name and identity of the attacker given to the police. PW5 knew the attacker. When the Appellant later on appeared at the Police Post, PW5 readily arrested him. PW5 consulted with PW6 and transferred the Appellant to Sibanga Police Post for security reasons.
45. The presence of the Appellant around the scene of the crime and at the very time was confirmed by PW3, who was a neighbour to PW2 and also knew the Appellant well. In fact, PW3 was shocked to see the Appellant around PW2's place since she knew he was in prison.
46. The evidence of the complainant that she met the Appellant at the forest during lunch break was, hence, duly corroborated. Further, the Appellant's contention that he was framed does not hold since he knew where his items were and went to collect them at the police post. Therefore, the narrative which the Appellant fronted in his defence that he was unaware of where his items were and that PW2 was unwilling to release the items back to him cannot stand. To this Court, the defence was a mere afterthought and holds no water. It is hereby rejected.
47. As the trial Court observed the witnesses who testified during the trial and did not impugn their demeanors, this Court can only depart from such findings on the clearest of cases. Unfortunately, this is not one of such cases.
48. The upshot is that the Appellant was positively identified as the one who sexually assaulted the complainant. As such, he was rightfully found guilty of defilement and convicted.
49. The appeal against the conviction is hereby dismissed.

**Sentence:**

50. The Appellant was sentenced to serve 15 years' imprisonment. The sentencing Court commented that it was abreast with emerging jurisprudence regarding mandatory sentences. Irrespective of that, the Court was convinced that a sentence equivalent to the minimum sentence prescribed under Section 8(4) of the *Sexual Offences Act* was suitable in the circumstances of the case.
51. The Court did not, therefore, err. The sentence was lawful. The Court exercised its discretion in sentencing and none of the factors that can impugn such a sentence as discussed in *Wanjema vs Republic* (1971) EA 493 has been proved.
52. Consequently, the appeal on the sentence equally fails.

**Disposition:**

53. Drawing from the above, the appeal is wholly disallowed and is hereby dismissed.
54. It is so ordered.



**DELIVERED, DATED AND SIGNED AT KITALE THIS 17<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open Court and in the presence of: -**

**James Kibet**, the Appellant in person.

**Miss Kiptoo**, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

**Regina/Kirong** – Court Assistants.

