



**NAK v Republic (Criminal Appeal E003 of 2022)
[2022] KEHC 16596 (KLR) (16 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16596 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CRIMINAL APPEAL E003 OF 2022
AN ONGERI, J
DECEMBER 16, 2022**

BETWEEN

NAK APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence by Hon. E. W.
KARANI (RM) in Kericho S O No.E029 of 2021 delivered on 11/2/2022)*

JUDGMENT

1. The Appellant was sentenced to 20 years imprisonment on 11/2/2022 for Defilement contrary to section 8(1) as read with section 8(2) of the [Sexual Offences Act](#) (SOA) No.3 of 2006.
2. It was alleged that the Appellant committed the offence on 26/3/2021 at [Particulars Withheld] village, Tabaita sub location in Soin-Sigowet sub county within Kericho County whereby the Appellant intentionally caused his penis to penetrate the vagina of DC (name withheld) a child aged 12 years.
3. The prosecution evidence was as follows;

That on the 26th of March 2021, PW1 was home together with her sister, her mother and the accused person who is her step-father, where they ate dinner together. At around 9pm, her step-father quarreled with her mother and he wanted to beat her, this made their mother to leave the house, leaving PW1 and her sister behind with their step-father. The accused person then pretended to follow PW1's mother outside, but he later came back alone and found her and her sister sleeping. The accused then undressed PW1 and her sister and he defiled PW1 and threatened to kill her if she screamed. After defiling her, the accused then woke up PW1's sister and he sent the two children away to their aunt N's house. It is while they were on their way to their aunt's house that they met police officers who questioned them on where they were going, and PW1 informed them that the accused had sent them away to their aunt's house after defiling her. The police officers then took PW1 and her sister back to their house and it



is while they were on their way that they met the accused person who was then arrested and taken to the police station.

4. The Appellant's defence was as follows;

That on the 26th of March, 2022, he woke up as usual, and although he had differed with his wife, he went to work and returned in the evening when he was told that his wife was away taking alcohol. The accused stated that he then went to the bar where his wife was, and he found his wife and her sister taking alcohol, and when he confronted his wife, the wife said that there is nothing the accused could do about it. The accused testified that he was angered with his wife's actions and he later went out to eat and watch video, and at 9.30PM, having parted ways with his friends, he started walking back home. He stated that on his way home, he met three men in civilian clothing who identified themselves as police officers and started questioning him about his wife's whereabouts, and they slapped him. He testified that he was arrested and thereafter taken to the cells and later charged in court. He testified that he had quarreled with his wife who framed him in the charges.

5. The trial court found that the prosecution proved the charge of Defilement and sentenced the Appellant to 20 years imprisonment.

6. The Appellant is aggrieved with the conviction and sentence and he has now appealed to this court on the following grounds;

- i. That he pleaded not guilty at the trial and still maintains the same;
- ii. That the learned trial magistrate erred in both law and fact in relying on uncorroborated, inconsistent, contradictory evidence;
- iii. That the learned trial magistrate erred in both law and fact by failing to analyze that he was not medically examined despite of his early arrest as stipulated under section 36(1) of the *Sexual Offences Act*, 2006;
- iv. That the learned magistrate erred in both law and fact by not considering that the prosecution side fails its mandate by not providing enough evidence to prove that he committed the said crime;

7. The parties filed written submissions as follows;

The respondent submitted that there are three ingredients that must be proved for the charge of defilement, and they include Identification of the perpetrator, penetration and age of the child.

8. The respondent submitted that the identification of the accused person by PW1 was by recognition which is more credible and assuring, as the accused person was PW1's step father. It was also submitted that there was penetration of PW1 by the accused as the P3 form which was produced in court indicated broken hymen, blood discharge, pus and sperm cells and this corroborated PW1's testimony and confirmed defilement.

9. The respondent submitted that PW1's birth certificate was produced in court and it confirmed the age of Pw1 as 12 years. The respondent submitted that the medical examination of the victim coupled with the positive identification of the appellant was of such a high probative value as to render the medical examination of the appellant superfluous as there were no pending gaps to be filled by such.

10. The appellant did not file his written submissions.



11. This being a first appeal, the duty of this court is 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 opportunity to see the witnesses.
12. In *Gabriel Kamau Njoroge v Republic* (1987) eKLR, the court of appeal stated as follows regarding 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.”
13. In *Pandya -vs- Republic* (1957) EA 336, the duty of the first appellate court was stated as follows:- “On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”
14. The issues for determination are as follows;
 - i. Whether the prosecution proved its case to the required standard.
 - ii. Whether the Appellant ought to have been taken for mental examination.
15. On the issue as to whether the prosecution proved its case to the required standard, there are three elements the prosecution must prove in a charge of defilement as follows;
 - i. Penetration.
 - ii. The identity of the Appellant.
 - iii. The age of the complainant.
16. I find that the complainant knew the Appellant who was her step father. The incident occurred after the Appellant chased away the mother of the complainant. The incident occurred in a single room where the Appellant and the mother of the complainant who were husband and wife were living at their matrimonial home.
17. On the issue of penetration, PW4, Josphat Kipkurui Ngeno, the Clinical Officer who examined the complainant confirmed the same.
18. PW4 said the hymen was broken and there was blood discharge and on high vaginal swap, spermatozoa was seen.
19. The definition of penetration is as follows; “the partial or complete insertion of the genital organs of a person into the genital organs of another person.”



20. I find that the same was proved. There is evidence that it was the Appellant who defiled the complainant.
21. On the issue of age, PW3 the mother of the Appellant produced the birth certificate of the complainant which showed that she was born on 16/1/2009, therefore on 26/3/2021 she was 14 years old.
22. On the issue as to whether the Appellant ought to have been taken for mental examination, I find that there is no such requirement.
23. I find that the conviction herein is secure and the sentence lawful.
24. I dismiss the appeal and uphold both the conviction and sentence.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 16TH DAY OF DECEMBER 2022.

A. N. ONGERI

JUDGE

