



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**HCCRA NO. E017 OF 2021**

**ALFRED OKUN OPIYO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*[Being an appeal from the Judgment of Hon. F. M. Rashid (RM) delivered on 22<sup>nd</sup> March 2021 in SPM's Court in Winam Criminal Case No. 42 of 2018]*

**JUDGMENT**

The Appellant, **ALFRED OKUN OPIYO**, was convicted for the offence of **Defilement** contrary to **Section 8 (1) (2)** of the **Sexual Offences Act**. He was then sentenced to 25 Years Imprisonment.

1. Being dissatisfied with both the conviction and the sentence, the Appellant lodged an appeal before this Court. In his Petition of appeal, the Appellant raised 8 grounds of appeal, which can be summarized as follows;

*(i) The charge and the particulars in the charge sheet were inapplicable to the facts presented by the prosecution.*

*(ii) There was no medical evidence in support of the charge of defilement.*

*(iii) There was no evidence establishing either defilement or an indecent act with a child.*

*(iv) The trial court shifted the burden and incidence of proof to the appellant.*

*(v) The court arrived at a skewed decision because it took into account "exterior issues and matters."*

*(vi) The appellant's Defence was not given consideration.*

*(vii) The trial court heaped evidential value, and in buttressing a weak prosecution case against the appellant,*

*(viii) The decision was against the weight of the evidence on record.*

*(ix) The sentence was manifestly harsh and excessive in the circumstances.*

2. Being a first appellate Court, I am enjoined to re-evaluate all the evidence on record.

3. When making my own determination on the issues which arose at the trial, I have to bear in mind the fact that I did not have the benefit of observing the witnesses when they were giving evidence. Therefore, if there is an aspect of the decision of the trial court which was based upon the demeanour of a witness, this Court would have to respect such decision unless it was demonstrated that the decision was otherwise wrong.

4. **PW1, "EA"** is the Complainant. She testified that on 13<sup>th</sup> May 2018 she went to visit Lavender, who is a daughter of the Appellant. She went there at about 4p.m.

5. Whilst she was playing with 2 children, it started raining. And the Appellant called her to go into the house where he was.

6. Once inside the said house, the Appellant defiled her, causing her to bleed. But he warned the Complainant against informing anyone about what had transpired.
7. Although the Complainant screamed, nobody could hear her as the Appellant was covering her mouth with his hand.
8. **PW1** testified that the Appellant defiled her twice. He first did it on the bed, and then on a seat.
9. After **PW1** was released, she went to the house of her aunt; who is a sister to her mother. **PW1** stayed at the home of her aunt for 3 nights.
10. The Complainant said that she went back home on a Tuesday.
11. During cross-examination **PW1** said that she did not go home on the day when she was defiled because her mother was not at home.
12. **PW2, M**, testified that on the material day the Complainant was picked from home by a daughter of the Appellant.
13. **PW2** is the mother of the Complainant.
14. At the time when **PW1** was leaving from home, **PW2** was not there; she had gone to the home of Mzee Orao.
15. Upon her return home, **PW2** did not find the Complainant there. After learning that the Complainant had gone with Lavender; and because **PW2** was to make a return visit to Mzee Orao, **PW2** did not go for the Complainant immediately. She went the following day, as Mzee Orao's home was near the home of the Appellant.
16. **PW2** said that she met the Appellant's wife, who told her that, although the Complainant had been at the Appellant's home, she would be asked to leave for home because the following day was a school day.
17. But the Complainant did not return home on the Monday, prompting **PW2** to return to the Appellant's home. However, **PW2** did not find the Complainant at the Appellant's home on that Monday.
18. **PW2** testified that the Appellant informed her that the Complainant should have returned home on the Sunday.
19. Thereafter, **PW2** traced the Complainant at the home of the Complainant's aunt, P.
20. **PW3, FRANCIS W. OKUMU** was a Social Worker, employed at Kisumu Urban Preparedness. His responsibility entailed the rescue of abused children. **PW3** testified that the outfit he worked with, rescued the Complainant and provided her with shelter.
21. **PW3** assisted the police to arrest the Appellant.
22. **PW4, KEZIA TANUI** was a Clinical Officer at the **JOOTRH**. She produced in evidence, the Post Rape Care (**PRC**) Form for the Complainant.
23. She testified that the Complainant had been defiled by the Appellant. The said information was provided by the Complainant when she visited the hospital on 22<sup>nd</sup> May 2018. This is what **PW4** stated in her evidence;  
  
*“On 13/5/2018 at 4.00p.m while Lavender went to Church, Lavender's father, the accused herein called her, closed her moth with his hand and forcefully removed her pant and penetrated her vagina using his penis on the chair.”*
24. **PW4** further testified that the Complainant's outer genitalia was normal, however there was some whitish discharge.
25. During cross-examination **PW4** said that at the time of examination, on 22<sup>nd</sup> May 2018, the Complainant did not have any injuries on the vagina. She also said;  
  
*“There was no evidence of sexual activity.”*
26. **PW5, PC LINDA KAILU**, was a police officer attached to the Kondele Police Station.
27. She adduced in evidence, the Statement of the Investigating Officer, PC Osero.
28. After **PW5** testified, the prosecution closed its case.
29. The Appellant gave a sworn defence and called 2 witnesses.
30. The Appellant told the Court that the Complainant did visit his home on the material date. However, he denied having defiled her.

31. **DW1** said that he was together with his wife and his daughter on that day.
32. He scared the Complainant, using a cane, and told her to leave from his home.
33. **DW2, BENTA AUMA**, is the wife of the Appellant.
34. She saw the Complainant at her home on the material date. However, **DW2** insisted that the Complainant never entered into the main house, where **DW2** was together with their daughter.
35. **DW3, LAVENDER** testified that on the material date, she was in their house, together with her parents.
36. **DW3** said that the Complainant was playing outside the house; and that she never entered the house.
37. She told the Court that the Complainant was not her friend, and that she did not know her.
38. Having re-evaluated the evidence on record, I note that there were no injuries on the Complainant's vagina, at the time when she was examined. However, the hymen was absent.
39. The Appellant submitted that the absence of a hymen does not on its own, establish penetration. Therefore, the Appellant concluded that the trial court erred when it held that there had been penetration.
40. I do agree with the Appellant, that if the only evidence provided was that the Complainant's hymen was absent, that alone cannot be proof of penetration.
41. But in this case that was not the only evidence. The Complainant testified that the Appellant had removed

*“his thing and put it in mine (my thing) which I use to urinate (witness points at the vagina). Blood started oozing from my vagina.”*

42. In the circumstances, the absence of the Complainant's hymen is attributable to the actions of the Appellant, as described above. I so find because the Complainant also made it clear that it is the Appellant who was the first person to defile her.
43. I also note that whilst the Appellant testified that the Complainant had told him that she did not know anybody at his home, the Complainant had given the names of Lavender (**DW3**) and Akoth, as some of the Appellant's children. In effect, the Complainant was not a stranger to the Appellant's home, as the Appellant would have us believe.
44. The Complainant was even aware that one of Lavender's brothers was deceased; and the Appellant confirmed that one of his children was deceased.
45. It strikes me that when the Appellant and his 2 witnesses denied any knowledge about the Complainant, that was a calculated attempt to distance the Appellant from the events of the material day: but the said attempt was not successful.

#### **Competent and Compellable Witnesses**

46. It is common ground that there is no legal requirement on the minimum number of witnesses who must testify, before an accused person can be convicted.
47. However, it is well settled that when the evidence adduced was barely adequate, the failure by the prosecution to call competent and compellable witnesses attracts an adverse inference, that if such witnesses were produced in Court, their evidence would be adverse to the prosecution case.
48. It therefore follows that unless the evidence adduced was barely enough, there would be no need to call more witnesses to prove the said case.
49. The Appellant cited 4 persons whom he described as crucial witnesses. Those were;
- (a) *The Medical Practitioner who completed/filled the P3 Form.*
  - (b) *PO a.k.a PA, the aunt to the complainant and a sister to PW2.*
  - (c) *Nyaloka, mentioned at line 12 on page 17 of the record.*
  - (d) *A sister to PW1 and a daughter to PW2, whose name was not disclosed.*

50. As the learned trial magistrate noted in her Judgment, a **P3** Form was not produced as an exhibit during the trial. In the circumstances, the medical practitioner who allegedly completed or filled the **P3** Form cannot have been a crucial witness.

51. P, is an aunt of the Complainant. She was not at the scene where the offence was committed. The only role she played was to allow the Complainant to stay at her house, after the incident which gave rise to the case herein. In the event, I find that she was not a crucial witness.

52. Nyaloka is said to have informed the Complainant's mother about some "blood flowing on her legs."

53. However, the Complainant and the Appellant never mentioned the said P when they were testifying in Court. I fail to appreciate how or why she could be deemed to have been a crucial witness.

54. The Complainant's un-named sister was said to have informed PW2 that it is Lavender who had gone to the home of PW2, to pick her up. To my mind, whether or not Lavender picked-up the Complainant from their house was immaterial. I so hold the Appellant and his 2 witnesses confirmed that the Complainant was at the Appellant's home on the material day.

55. Therefore, whether the Complainant went there alone, or she was accompanied by Lavender, would not alter the fact that the Complainant was at the scene of crime.

56. In effect, I do not consider any of the four (4) persons, who the Appellant has identified, as crucial witnesses. I so find because it has not been shown that there was any crucial evidence which any one of them could have been the only witness who could provide.

### **Contradictions**

57. The Appellant submitted that there were several unresolved contradictions that would have raised sufficient doubt in the mind of the Court.

58. However, the Appellant did not specify the contradictions he had in mind. Therefore, this Court cannot conclude that the unspecified contradictions demonstrate that the prosecution witnesses were either not telling the truth or that the story of defilement of the Complainant by the Appellant was a fabrication.

59. In the case of **PHILIP NZAKA WATU Vs REPUBLIC [2016] eKLR**, which was cited by the Appellant, the Court of Appeal held that;

***"The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe."***

60. It can never be over-emphasized that a conviction can only be properly founded upon cogent and credible evidence which inspires confidence. But it is equally true that human recollection is not perfect.

61. In this case of **PHILIP NZAKA WATU Vs REPUBLIC [2016] eKLR**, the Court of Appeal expressed itself thus;

***"However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people can perceive the same phenomena exactly the same way."***

***Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses."***

***Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."***

62. It is for that reason that the Appellant ought to have pinpointed the specific contradictions he was alluding to; and to have demonstrated that they were of such a magnitude that would make conviction unsafe.

63. The Appellant failed to satisfy the Court that the alleged contradictions or inconsistencies were of a magnitude that would render the conviction unsafe.

### **Rejection of the Defence case**

64. The trial court held that the defence was an afterthought. That holding was premised on the court's perception that the Appellant's wife and his daughter were more likely than not to support one of their own.

65. I do share the Appellant's contention that notwithstanding the relationship between the Appellant and his 2 witnesses, the trial court ought to have evaluated their evidence appropriately.

66. I have given due consideration to the defence. Essentially, the said defence is a denial by the Appellant. He said that although the Complainant went to his home, he did not commit the offence.

67. In support of his defence, his wife and his daughter also testified that the Appellant did not commit the offence. DW2 and DW3 said that they were with the Appellant at all material times, and that the Appellant did not defile the Complainant.

68. I note that in her evidence-in-chief, the Complainant said that Lavender was at their house when the Complainant reached there. However, it was the Complainant's evidence that Lavender left shortly after the Complainant arrived.
69. During cross-examination, it was suggested to the Complainant that Lavender was not at home when the Complainant arrived.
70. In effect, when the Complainant was testifying, the Appellant's line of defence was that Lavender was not at home when the Complainant arrived.
71. Thereafter, when the Appellant was put to his defence, he and his 2 witnesses testified that Lavender was in the company of the Appellant throughout. That change in the line of defence may be described as an afterthought.
72. Secondly, the Complainant was never asked to indicate whether or not the Appellant's wife was present at the house.
73. Surely, if the Appellant's wife had been inside their house, together with the Appellant, it may have been improbable for the Appellant to sexually molest the Complainant in her presence. Therefore, the Court would have expected the Appellant to suggest to the Complainant that his wife was in his company all through the material time. However, as no such issue was raised when the Appellant was cross-examining the Complainant, I find that it was an afterthought for the Appellant to later emphasize that his wife was with him throughout.

#### **Sentence**

74. Pursuant to **Section 8 (2)** of the **Sexual Offences Act**, a person who commits an offence of defilement with a child aged 11 years or less shall, upon conviction, be sentenced to imprisonment for life.
75. The Appellant was sentenced to 25 Years imprisonment.
76. He has submitted that the said sentence was excessively disproportionate to the offence.
77. The Appellant committed the offence with a child who was less than 11 years old.
78. At that time, his last born, Lavender, was about 18 years old.
79. Considering that he had begotten six children, that means that the others were much older than the Complainant. I therefore consider this to have been a very unfortunate incident, in which the victim was possibly equivalent to the age mate of the perpetrator's grandchild.
80. In the circumstances, I find that the sentence of 25 years imprisonment was not excessive.
81. Accordingly, the appeal is unsuccessful, and it is dismissed.
82. I uphold both the conviction and the sentence that were handed down by the learned trial magistrate.

**DATED, SIGNED and DELIVERED at KISUMU THIS 20TH DAY OF DECEMBER 2021**

**FRED A. OCHIENG**

**JUDGE**