



REPUBLIC OF KENYA



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**DO v Republic (Criminal Appeal E020 of 2024)
[2025] KEHC 6757 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 6757 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E020 OF 2024
A. ONG'INJO, J
FEBRUARY 20, 2025**

BETWEEN

DO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of Hon. C.N.C Oruo(PM) in Rongo
PM Court SO No E032 of 2023 delivered on 26th Day of March 2024)*

JUDGMENT

1. The Appellant DO was convicted and sentenced to serve 30 years imprisonment for the offence of defilement of a child aged 9 years old. The sentence was ordered to start running from 8.11.2023 when he was 1st held in custody.
2. The Appellant was aggrieved by the conviction and sentence and he filed the appeal herein vide Petition filed on 8.4.24 on the following grounds;
 1. That the plea as taken was not unequivocal.
 2. That my rights under Article 50(20) (g) (h) were disregarded and violated.
 3. That the learned magistrate disregarded my right to mitigation and presentence report thus against the tenets of fair trial.
 4. That the learned trial magistrate disregarded all the open discrepancies in the particulars of the offence as captured by the prosecution.
 5. That the sentence meted out herein is overly harsh, excessive and inordinate in spite of me being a first offender.



6. That I beg to add more grounds once supplied with lower court records.
2. Reasons wherefore the Appellant prayed that this appeal be allowed, conviction quashed and sentence set aside.
3. The Prosecution tendered evidence of 5 witnesses and the Appellant when called upon to defend himself elected to remain silent and wait for the courts verdict.
4. PW1 testified that whenever her mother PW3 went to work and she remained with her father the Appellant herein he put her on his bed and lie on her and remove his penis and put in her private part.
5. She said the Appellant would remove his penis from the trouser and insert in her vagina. That she wanted to report to her mother but the Appellant threatened to kill her. PW1 said the Appellant had been defiling her since 2022 and on one occasion she got lost and went to report to the police. She said she had also reported to her teacher. That the police took her to hospital and she was examined and treated.
6. The Complainant testified that she was the eldest of her other siblings and that nobody had defiled her before. She said the Appellant normally defiled her when her mother went to work during holidays or when she goes back home for lunch. That when her mother went to the Police Station and found her the father was arrested.
7. In cross examination the Complainant told the Appellant he had defiled her severally and instructed her not to tell her mother PW2 Suleiman Onyango Omedo the Clinical Officer at Rongo Sub-County Hospital examined the Complainant and filled P3 form in which he indicated that the Complainant had reddish coloration of the labia majora and minora with broken hymen. He also said that Lab tests revealed epithelial cells which was a sign of infection. PW2 produced P3 form as EXP2.
8. PW3 FA the mother of the Complainant testified that on 1.11.2023 she returned home and found the Complainant was missing and the other children told her that the Complainant had left. That she searched for the Complainant but did not find her in the neighbourhood or even from friends. That the following day as she went to report to the Police Station she found the Complainant who was crying. That PW1 told her that the Appellant who was her father had been defiling her. PW3 went back home to inquire from the Appellant why he defiled the child. She said she had lived with the Appellant for 9 years but the child never told her that she had been sexually abused by the Appellant.
9. PW4 Lilian Nyaboke Clinical Officer at Rongo Sub-County Hospital examined the Appellant when he was presented by the police from Rongo Police Station on allegations he had defiled a child. She filled P3 form in respect to examination she did on the Appellant.
10. PW5 P.C Rosalia Chepchichir of Kamagambo Police Station investigated the offence herein and established that the Appellant had defiled the Complainant severally with the last episode being on 31/10/2023 and the Complainant ran to go and report to the police. That the Complainant was taken to hospital and P3 filled and Appellant was arrested and charged.
11. When the Appellant was placed on defence he elected to remain silent and wait for court's verdict.
12. This appeal was canvassed by way of written submissions.
13. The Appellant's submissions are dated 22.11.24 he submitted that the age of the complainant was not proved because the prosecution only produced the age assessment report. That the age assessment report was not produced using the proper procedure as the maker of the report did not attend court to shade light on the scientific method which was used to ascertain the age of the victim. The Appellant



- also submitted that there was no corroboration of the evidenced tendered by PW1 and therefore the conviction was unsafe and should be quashed. The Appellant submitted that the idea of defilement was only concocted the same was misleading and had no basis. That there was no evidence tendered that there was defilement.
14. Regarding penetration the Appellant submitted that reddish coloration of the labia majora and minora is not proof of penetration. That broken or absence of hymen is also not proof of penetration and that epithelial cell can be present in various circumstances. The Appellant said that the complainant did not tell anyone what was happening to her and there was no indication of healed scar on her vagina. The Appellant further submitted that the prosecution evidence raised doubts that were not resolved as the medical evidence did not support the claim by PW1 that the Appellant penetrated her genitalia. The Appellant submitted that he had a Spinal cord decompression and he raised the issue on his plea on 6.11.23 but the trial court did not take any action and it was after his conviction that he was admitted at Jaramogi Oginga Odinga Teaching Referral as per the discharge summary dated 20.9.24. He said that he is now disabled and he always lying down or crawling on knees seeking for justices. The Appellant also argued that the sentence meted to him was harsh amounting to unfair trial taking to account that he was a first offender. He sought for a more lenient sentence.
 15. The Respondent filed submissions dated 17th October 2024 and submitted that the Prosecution had proved the 3 ingredients of the offence of defilement namely penetration, age and identity of the assailant beyond all reasonable doubt and the appeal should be dismissed.
 16. Regarding the Appellant's submissions that his right under Article 50(2)(g) and (h) of the *Constitution* the Respondent said the Appellant was informed of all his rights and he replied in the affirmative.
 17. The ground that the court disregarded the Appellant's mitigation the Respondent submitted that the trial court took into consideration mitigation and instead of sentencing him to the mandatory life sentence gave him 30 years.
 18. The Respondent also submitted that the Prosecution evidence did not have discrepancies as claimed by the Appellant and the particulars of the offence were clear enough for the Appellant to plead and make his defence.
 19. Concerning the ground that sentence meted against the Appellant was harsh and excessive the Respondent submitted that when the Appellant was accorded the chance to defend himself he elected to remain silent. That he was convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* under which the sentence provided is life imprisonment.
 20. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* which provides:
 - 8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - 8(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."
 21. However, the Trial Magistrate sentenced him to 30 years imprisonment. The Respondent submitted that the Appellant took advantage of the Complainant whom he adopted at a very young age and although the trial Magistrate exercised discretion it was their view that the sentence was very low and lenient in the circumstances.



Analysis and Determination.

22. In a first appeal, the duty of the court was stated in *Mark Oiruri Mose vs. R* (2013) eKLR thus;
- the Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.”
23. Having considered the grounds of Appeal, and revisited the evidence tendered before the trial court afresh as well as the submissions by the rival parties, the issues for determination are:-
- i. Whether the ingredients of the offence of defilement were proved beyond reasonable doubt.
 - ii. Whether there were discrepancies in the prosecution evidence
 - iii. Whether the sentence was harsh and excessive.

Proof of penetration

24. Whether there was prove of penetration Section 2 (1) of the Sexual Offence Act defines penetration:-
- As partial or complete insertion of the genital organs of a person into the genital organs of another person.”
25. According to PW1 the Complainant said that his father had been defiling her when her mother would leave for work where she washed clothes for people. That her father would call her to his room, remove her clothes and defile her by inserting his penis into her vagina. The complainant also stated that her father had been defiling her since 2022 until sometime in October 2023 and she could not tell her mother as the Appellant used to threaten her that he would kill her. That on the 1/11/23 the complainant also called her to his bedroom, he removed her panty and instructed her to lie on the bed where he defiled her.
26. The complainant knew the Appellant and identified him as her father as they lived with him and his mother PW3 FA.
27. The evidence of the Complainant is corroborated by PW2 a Clinical Officer who examined her and established that she had inflamed labia majora and minora and her hymen was broken. He established that there was penetration.

Age of the victim

28. The Court of Appeal in the case of *Edwin Nyambogo Onsongo Vs Republic* [2016] eKLR stated as follows on proof of age.
- ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof.”” we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim’s age, it has to be credible and reliable.”



29. The prosecution produced an aged assessment report for the Complainant which indicated that at the time of the incident the complainant was 9 years old. The Appellant did not dispute the age of the complainant when cross examining the prosecution witnesses or when put on his defence. The Appellant had been staying with the complainant since he married her mother and being that he was in a position of the father of the child he had the responsibility to know her age. He did not tell the court whether the child's age was different from that in the charge sheet, age assessment report and P3 Form. The ground that age was not proved to the required standard cannot stand.

On Identification of the assailant

30. The Appellant and the victim lived together in the same house and the offence was being committed by the Appellant in the house where they cohabited. The complainant said that the Appellant had defiled her severally until on 31st day of October, 2023 when she got fed up and decided to get lost and went to report to the police. Her mother PW3 looked for her and when she went to report that she was missing she found her at the police station that is when she informed her that the Appellant has been defiling her and threaten to kill her. Therefore, there was no doubt that the complainant knew the assailant very well and clearly narrated what he had been doing to her.

31. As to whether the sentence was harsh and excessive Section 8 (2) of the Sexual Offence Act provides for life imprisonment. However, the trial magistrate while sentencing the Appellant gave him 30 years imprisonment and in consideration that he had been in remand custody during trial it was ordered that his sentence runs from 8.11.23. I suppose that this was in consideration of the decision in Julius Kitsao Manyeso vs. Republic in the Court of Appeal at Malindi where it was held that life imprisonment is unconstitutional being that it is indeterminate. In the Manyeso case where the facts were almost similar as the victim was aged below 11 years the Court of Appeal set aside life imprisonment and substituted it thereof with 40 years imprisonment. In Amin *Mohamed Igiro vs. Republic Criminal Appeal 41 of 2022* the Court of Appeal at Malindi set aside life imprisonment and substituted therefore a set of 35 years imprisonment where the Appellant was charged and convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. Following the above precedents from the Court of Appeal the sentence was therefore lawful and the trial magistrate properly exercised his discretion. This court has no reason to interfere with that sentence bearing in mind that the Appellant stood in loco parentis to the 9 years old innocent and vulnerable child.

32. On whether there were contradictions in the prosecution's evidence this court has reevaluate the evidence in the trial court and found no material contradictions that would prejudice the Appellant in any way and the Appellant did not specifically refer to the alleged contradictions in his submissions.

33. This court therefore finds that the Appeal lacks merit and the same is dismissed.

DELIVERED, DATED AND SIGNED AT MIGORI BY THIS 20TH DAY OF FEBRUARY, 2025.

A. ONGINJO

JUDGE

Judgment delivered in the presence of:

