



**Festo v Republic (Criminal Appeal E242 of 2023)
[2025] KEHC 2867 (KLR) (Crim) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2867 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E242 OF 2023
AB MWAMUYE, J
FEBRUARY 13, 2025**

BETWEEN

JOSPHAT MUNYUA FESTO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the original conviction and sentence by Hon.
M. Thibaru (RM) delivered on 17th March, 2023 in Makadara Chief
Magistrate's S.O. Case No. 47 of 2021, Republic -vs- Josphat Munyua Festo)*

JUDGMENT

1. The Appellant Josphat Munyua Festo preferred the appeal herein against the conviction and sentence in Makadara Chief Magistrate's Court S.O Case No. 47 of 2021. The Appellant faced a charge of defilement contrary section 8 (1) as read together with Section 8 (3) of the [Sexual Offences Act](#).
2. The particulars are that, on the 2nd day of March, 2021, in Embakasi South Sub-County within Nairobi County, intentionally caused his penis to penetrate the vagina of SK a child aged 12 years.
3. On the alternative charge, he was charged with the offence of committing an indecent Act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006.
4. The Prosecution called a total of six (6) witnesses and at the end of the trial, the Appellant was found guilty and convicted on the main count of defilement and consequently sentenced to 20 years imprisonment. On his part, the Appellant tendered sworn defence testimony and did not call any additional witnesses.



5. The Appellant was aggrieved by the decision of the Trial Court and he preferred the appeal herein on the following grounds of appeal: -
- i. That the Hon. Trial Court Magistrate erred in law and fact when she failed to realize that the circumstantial evidence adduced at the Trial Court did not place the accused person at the scene of the alleged crime.
 - ii. That the Hon. Trial Court Magistrate erred in law and fact by failing to find that penetration was not proved as required in law.
 - iii. That the Hon. Trial Court Magistrate erred in law and fact by failing to find that I was not properly identified as the perpetrator of the offence alleged as defined by law.
 - iv. That the Hon. Trial Court Magistrate erred in law and fact by failing to find that the complainant in this case was an incredible witness whose evidence could not be used to base a conviction.
 - v. That the Hon. Trial Court Magistrate erred in law and fact for failing to find that the Trial Court never established the age of the complainant as it forms the main element of Defilement case.
 - vi. That the Hon. Trial Court Magistrate erred in law and fact in convicting the Appellant based on the complainant's single evidence without giving the reason for her believing in the said complainant's testimony.
6. The parties filed and exchanged written submissions in the Appeal. The Appellant's Written Submissions were dated 13th June, 2024; while those of the Respondent were dated 18th December, 2024.
7. In his written submissions, the Appellant argues that the Trial Court misapplied Section 124 of the *Evidence Act* while convicting him. He further submitted that the credibility of the prosecution witnesses should be questioned for giving contradictory testimonies. The Appellant also alludes that the elements for the offence were not established and the prosecution's case is not sufficient to warrant his conviction. He placed reliance on various case laws which I have considered. He further submitted that the Trial Court failed to consider his defense and pleaded on his innocence and urged this court to allow the appeal and quash his conviction and set aside his sentence.
8. On the other hand, the Respondent submitted that all elements of the offence were proved beyond reasonable doubt and the appeal should be dismissed since the Trial Court's conviction and sentence was safe and proper.
9. This is the first appellate court and our duty as such was well set out in the case *Okeno Vs. Republic* [1972] E.A 32 as follows:-

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Rulwala Vs. Republic [1957] E.A. 570). 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."

10. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the Appellant, as well as the submissions filed by the Director of Public prosecutions and it comes out clearly that the issues for determination in this matter are;
 - i. Whether the charge against the accused was proved beyond reasonable doubt
 - ii. Whether the credibility of the prosecution witnesses was reliable,
 - iii. Whether the Appellant's defence was duly considered by the Trial Court and;
 - iv. Whether the sentence imposed was justifiable in the circumstances.
11. The elements constituting the offence of defilement are proof of penetration, the age of the minor and the identity of the assailant (See *C.W.K v Republic* [2015] eKLR). I wish to consider whether the three ingredients were proved beyond reasonable doubt.

a. Penetration.

12. Penetration is a key ingredient in proving the offence of defilement under Section 8(1) of the *Sexual Offences Act*. Section 2 of the Act defines penetration as "the partial or complete insertion of the genital organs of a person into the genital organs of another person."
13. Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred.
14. In the present case, the complainant (PW1) testified that the Appellant forcibly dragged her into his house, removed her clothes and inserted his penis into her vagina, causing pain. PW4, a clinical officer, corroborated this evidence by stating that the complainant had lacerations on the right labia and posterior, redness in the vaginal area, and hymenal tears at 3, 6, 9, and 12 o'clock positions. This medical evidence is strong and supports the finding that penetration did occur. The case of *John Onzere Kambi v Republic* [2013] eKLR supports the position that even partial penetration suffices to prove this element.
15. The Appellant, in his submissions, argued that penetration was not established beyond reasonable doubt, relying on *John Mutua Munyoki v Republic*, where the Court of Appeal emphasized the need for strict compliance with Section 124 of the *Evidence Act* when relying on the testimony of a complainant in a sexual offence case. However, in the instant case, the Trial Court explicitly recorded its satisfaction that the complainant was truthful and corroboration was provided by medical evidence. In *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013, the Court held that medical evidence must corroborate the complainant's testimony to establish penetration. Given the complainant's direct account and the medical evidence, penetration was sufficiently proved beyond reasonable doubt.



b. Proof of age

16. In respect to age, the Court of Appeal in *Edwin Nyambogo Onsongo vs. Republic* (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

“... 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.”

17. The age of the complainant is a key element in offences under the *Sexual Offences Act*, as different age brackets attract different penalties. In *F.O. v Uganda, Court of Appeal No. 2 of 2000*, it was held that medical evidence is paramount in determining the age of the victim. The prosecution produced an age assessment report through PW6, an investigating officer, which indicated that the complainant was between 11 and 12 years old at the time of the offence. This evidence was neither challenged nor rebutted by the defence. Therefore, the Trial Court correctly found that the complainant was a minor as defined under the Act.

Identity of perpetrator

18. Positive identification of the perpetrator is crucial in securing a conviction. The complainant testified that the Appellant grabbed her and pulled her into his house. PW5, a neighbor, saw the complainant enter the Appellant’s house, and PW2 and PW3 confirmed that they found the complainant inside the Appellant’s house when they knocked. The Appellant was known to these witnesses, and he was found at the scene, making a case of positive identification. In *Kariuki Njiru & 7 Others v Republic, Criminal Appeal No. 6 of 2001*, the Court emphasized that identification evidence must be scrutinized and free from the possibility of error. Given that multiple witnesses corroborated the complainant’s identification of the Appellant, this Court finds no error in the Trial Court’s finding on identification.
19. On credibility of Prosecution witnesses, the Appellant contends that the prosecution witnesses were inconsistent and unreliable. In particular, he points to discrepancies in the testimonies of PW1, PW2, and PW5 regarding the manner in which the complainant was taken into the house and whether the Appellant attempted to escape upon being confronted.
20. In *Ndung’u Kimanyi v Republic* (1979) KLR, the Court of Appeal stated that a witness in a criminal case should not raise suspicion about their trustworthiness or be found unreliable. However, minor discrepancies in testimonies do not necessarily render evidence unreliable, provided that the core elements of the offence are consistent. In this case, despite slight variations in secondary details, the key facts regarding the presence of the Appellant with the complainant in the house and the medical evidence remain uncontroverted.
21. Additionally, under Section 124 of the *Evidence Act*, a court may convict on the sole evidence of the complainant if it is satisfied that she is telling the truth. The trial magistrate exercised this discretion and found the complainant to be credible. This court, having reviewed the record, sees no reason to interfere with that finding.
22. On whether the Trial Court considered the Appellant’s defence, the Appellant contends that the Trial Court erred in dismissing his defence and shifting the burden of proof. He argues that he was framed



due to an existing grudge with PW5 over rental premises. The Trial Court found that the defence was an afterthought, given that the Appellant did not raise it when cross-examining PW5.

23. In *Sims* (1946) KB 531, the court held that when an accused pleads not guilty, the prosecution must prove every element of the charge beyond reasonable doubt. The Trial Court, however, is only required to consider the defence of the accused and weigh it against the prosecution's evidence. In the present case, the Trial Court did consider the Appellant's defence but found it unpersuasive. The Appellant admitted that he was at the scene but alleged that the complainant was outside his house. However, the testimony of multiple witnesses contradicts this assertion, and his claim of being framed lacks supporting evidence. The mere existence of an alleged grudge does not, in itself, negate the overwhelming evidence presented by the prosecution.
24. Lastly, on whether the sentence imposed was justifiable in the circumstances. The Court of Appeal while dealing with the issue of sentence in the case of *Bernard Kimani Gacheru vs. Republic* [2002] eKLR restated as hereunder: -

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the Trial Court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the Trial Court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the Trial Court on sentence unless, anyone of the matters already states is shown to exist.”

25. An appellate court should not interfere with a sentence unless the Trial Court acted upon wrong principles or overlooked material factors. (See *Ogolla s/o Owuor v Republic* [1954] EACA 270). The Appellant was convicted under Section 8(1) as read together with Section 8(3) of the *Sexual Offences Act*, which prescribes a mandatory minimum sentence of twenty (20) years for defilement of a child aged between twelve and fifteen years. This court notes that the Trial Court imposed the sentence as required by law as it is lawful and proportionate to the offence committed.
26. Having re-evaluated the entire evidence and submissions, this court finds that the prosecution proved all the ingredients of defilement beyond reasonable doubt. The Trial Court properly assessed the credibility of witnesses, gave due consideration to the defence, and imposed the correct sentence as prescribed by law.
27. Accordingly, the Appeal is hereby dismissed in its entirety, and the conviction and sentence of the Trial Court are upheld. It is so ordered.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 13TH DAY OF FEBRUARY, 2025.

.....
BAHATI MWAMUYE
JUDGE

