



REPUBLIC OF KENYA



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

**Kombini v Republic (Criminal Appeal E056 of 2023)
[2025] KEHC 1183 (KLR) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1183 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL APPEAL E056 OF 2023
WA OKWANY, J
FEBRUARY 13, 2025**

BETWEEN

ZETH ONDITI KOMBINI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal against the Judgment of Hon. B. Okong’o – RM
Nyamira dated and delivered on the 30th day of October 2023 in
the original Nyamira CMC Sexual Offence Case No. E078 of 2022)*

JUDGMENT

1. The Appellant herein was convicted for the offence of Defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act*. The particulars of the offence were that on diverse dates between 3rd December 2022 and 5th December 2022 at Nyamira South Sub-county, within Nyamira County, the accused person, intentionally and unlawfully caused his genital organ penis to penetrate the vagina of H. K., a child aged 13 years.
2. Upon conviction, the Appellant was sentenced to serve fifteen (15) years imprisonment thereby precipitating the filing of the instant appeal in which the Appellant listed the following grounds of appeal: -
 1. That the trial magistrate failed in both law and facts by convicting the appellant herein without observing that the offence of defilement was not proved beyond reasonable doubt.
 2. That the trial magistrate further erred in both law and facts by convicting the appellant without observing that the medical report tendered by the prosecution side had exonerated him from the said offence thus making is conviction unsafe.



3. That the trial learned magistrate erred in both law and facts by relying on an Hearsay (sic) in convicting the appellant since it was not found in the locus quo.
 4. That the trial magistrate further erred in both law and facts by convicting the appellant without observing that the said offence was generated by political interests and tribal based since the appellant was not coming from locality or same region.
 5. That for sure the investigation conducted in this case was scanty which would not have been used to secure conviction against the appellant herein thus asking this hon. Court to administer justice to the appellant.
 6. That it is not in dispute that the learned magistrate convicted the appellant herein on a mere ground that he was a teacher and on the evidence of the prosecution side thus acting in wrong principles.
 7. That more grounds shall be adduced during the hearing and after going through the certified copies of the lower court proceedings.
3. The appeal was canvassed by way of written submissions which I have considered.
 4. A summary of the prosecution's case was that on the morning of 3rd December 2022, the complainant (PW1), then aged 13 years, who was also the Appellant's former pupil, informed her mother (PW2) that she was going to church but later called the Appellant on phone and asked him to meet her at Kebirigo. The complainant met the Appellant and took her to his house at Kebirigo where they spent the night. The complainant stated that the Appellant defiled her on the said night before taking her to his rural home in Riosiri where he continued to defile her for 2 days. She explained that the Appellant released her to go back to her home on 6th December 2022. She produced her Birth Certificate as P Exhibit 1.
 5. PW2, RB, the complainant's mother confirmed that PW1 went missing from home on 3rd December 2022 and resurfaced on 6th December 2022. She suspected that the complainant had been defiled and escorted her to the hospital where, her suspicion was confirmed.
 6. PW3, Rodger Ongaga, the Medical Officer who examined the victim on 6th December 2022, confirmed that she had been defiled. He produced the P3 Form and Treatment Notes as P Exhibit 2 and 3.
 7. PW4, No. 239367 Inspector Nanjala Misiko testified about the investigations that were carried out by Investigating Officer CPL Vanice Michira who was at the time on transfer.
 8. When placed on his defence, the Appellant acknowledged that he knew the complainant as his former pupil at the local primary school and that he met the complainant on 3rd December 2022 after which they spent the night at his house. He testified that the complainant informed him that she had disagreed with her mother (PW2). He also stated that the complainant accompanied him to his rural home where they stayed for 2 nights before he released her to go back to her home. He however denied the allegation that he had defiled the complainant.

Analysis and Determination

9. I have carefully considered the Record of Appeal and the parties' respective written submissions. I find that the main issues for determination are whether the offence of defilement was proved, to the required standard, and whether the sentence passed by the trial court was legal and just.



10. Section 8 (1) of the Sexual Offences Acts states: -

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

11. Section 8 (3) of the *Sexual Offences Act* provides: -

“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

12. The ingredients of the offence of defilement are: -

- a. The age of the complainant;
- b. Penetration; and
- c. Positive identification of the perpetrator.

(See Daniel Onsongo Ochamba vs. Republic [2020] eKLR).

Age

13. In the case of Francis Omuroni vs. Uganda Court of Appeal; Criminal Appeal No. 2 of 2000, the court held as follows on proof of age of the sexual victim that:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense...”

14. In the present case, it was not disputed that the complainant was a child aged 13 years as at the time that the offence is alleged to have been committed. The complainant produced her Birth Certificate as P Exhibit 1 to prove her age. A perusal of the said certificate reveals that the complainant was born on 3rd March 2009. I am satisfied that the minority age of the complainant was proved beyond reasonable doubt.

Penetration

15. Section 2 of the *Sexual Offences Act* defines penetration as: -

“The partial or complete insertion of the genital organs of a person into the genital organ of another person.”

16. This position was fortified in the case of Mark Oiruri Moses vs. Republic [2013] eKLR where the Court of Appeal stated as follows: -

“...Many times the attacker does not fully complete the sexual act during the commission of the offence. That is the main reason why the law does not require the evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ...”



17. Similarly, the Court of Appeal, in the case of Erick Onyango Ondeng vs. Republic [2014] eKLR held that: -

“In Sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.”

18. Further, in Bassita Hussein vs. Uganda Supreme Court Criminal Appeal No. 35 of 1995, the Court stated: -

“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims over evidence and corroborated by medical evidence or other evidence.”

19. The complainant narrated the circumstances under which she was defiled as follows: -

“...When it reached 5pm, I told the accused I want to go home and he told me to stay with him, we cooked supper and watched TV and I slept with him. He did to me a marriage act. He had sex with me. I was wearing a dress, a top and a sweater and red slippers. I was also wearing pants. The accused told me to remove my dress and my clothes and I removed them and the accused also removed his clothes. He was wearing a black sweater, with a white stripes and a shirt and a trouser, the accused then inserted his penis inside my vagina. It took about 10 minutes. He did not use protection. I told him to stop but he didn't. I was feeling some pain. Blood did not come out. It was my first sexual encounter. I slept with the accused on the same bed. The following day, the accused defiled me again, then we took breakfast and went to Kisii town to Riosiri, the rural home of the accused and then we went to Riosiri market and he bought for me a dress and then we went to Riosiri home. Then we stayed there with his mother and brother and the accused had his room and I slept with the accused in his room and he continued defiling me...”

20. PW3, the Clinical Officer, examined the complainant and established that she had been defiled, based on the discovery of puss cells and thick discharge that he saw upon conducting vaginal swabs on the victim. He testified that the puss cells could only be attributed to a person who has had sexual intercourse.

21. Having regard to the evidence of the complainant, which was not dislodged on cross examination, coupled with the medical evidence, I find that it was proved that the complainant had been defiled.

Identification of the Appellant

22. It was not disputed that the Appellant was well known to the complainant as her former teacher. The Appellant also confirmed that the victim called him and that they spent a night at his house at Kebirigo and 2 nights at his rural home in Riosiri. I am satisfied that the Appellant was positively identified by the complainant as her assailant.

23. I have considered the Appellant's testimony, when placed on his defence, and I find that it amounted to mere denial of the offence which did not displace the otherwise watertight and compelling evidence that was presented by the prosecution witnesses. I find that the Appellant's claim that the complainant went to his house and refused to go back home because she had disagreed with her mother did not adequately explain why he kept the complainant, a child of tender years, in his custody for 3 days without reporting to any authority that the child had run away from home. I find that the Appellant's evidence did not dislodge the prosecution's case. I therefore confirm the conviction by the trial court.



Sentence

24. It is trite that an appellate court will not ordinarily interfere with the sentence passed by the trial court unless it is shown that the sentence was harsh or manifestly excessive or that the trial court acted on some wrong principle or overlooked some material facts.
25. In *Mokela vs. The State* (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:

“It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy *carte blanche* to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served.”
26. In the oft cited case of *Ogolla s/o Owuor vs. Republic*, [1954] EACA 270, the predecessor of the Court of Appeal pronounced itself on sentencing as follows:-

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”
27. As I have already stated in this judgment, Section 8 (3) of the *Sexual Offences Act* stipulates that a person convicted for the offence of defiling a child aged between twelve and fifteen years is liable, upon conviction, to imprisonment for a term of not less than twenty years.
28. In the present case, the trial court sentenced the Appellant to 15 years imprisonment. The trial court rendered itself as follows during sentencing: -

“The court notes that the accused person is a P1 teacher and has been bestowed upon immense responsibilities to nurture and teach young children to become responsible citizens in future. The court notes the accused person abused that responsibility by defiling a gullible young girl of 13 years who he was supposed to guide and protect as his former teacher. The court condemns in the strongest terms possible the actions of the convicted accused person and will give the sentence herein to be a lesson to other perpetrators that their days are numbered and also that when you are in a position of authority you ought to use your position carefully and responsibly. The *sexual offences act* prescribes a sentence of 20 years (section 8 (1) (3) the required mandatory minimum, however, the court also ought to consider mitigating circumstance of the accused who has a wife and two children. That said, the accused person is hereby sentenced to serve 15 years’ imprisonment.”
29. I note that the trial court, upon considering all the circumstances of the case and the mitigating factors, departed from passing the minimum mandatory sentence of 20 years and sentenced the Appellant to 15 years’ imprisonment. I find that the sentence passed by the trial court was not only legal but also commensurate with the gravity of the offence of defilement.
30. The Appellant took advantage of the naivety of his former pupil and defiled her for days before sending her away back home on a matatu. It is even more perplexing that the Appellant stated, during mitigation, that he is a family man with two children when he had no qualms about harming another child.
31. In sum, I find that the instant appeal is not merited and I therefore dismiss it.
32. It is so ordered.



**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA
MICROSOFT TEAMS THIS 13TH DAY OF FEBRUARY 2025.**

W. A. OKWANY

JUDGE

