



REPUBLIC OF KENYA



KENYA LAW
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**Nzomo v Republic (Criminal Appeal E069 of 2024)
[2025] KEHC 1315 (KLR) (4 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 1315 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E069 OF 2024
DR KAVEDZA, J
MARCH 4, 2025**

BETWEEN

JOHN MUTINDA NZOMO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. J. M. Ojwang (R.M) on 21st December 2022 at Kibera Chief Magistrate's Court Sexual Offences Case No. E022 of 2022 Republic vs John Mutinda Nzomo)

JUDGMENT

1. The appellant was charged and after a full trial convicted for the offence of defilement contrary to section 8(1) as read with 8(3) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the offence as per the charge sheet were that on 15th February 2022 a within Nairobi County, he intentionally and unlawfully caused his genital organ namely his penis to penetrate the female organ vagina of J.N a girl aged 13 years. He was sentenced to serve twenty (20) years imprisonment.
2. Being aggrieved, he filed an appeal challenging his conviction and sentence. In his petition of appeal, he raised five grounds which have been coalized as follows: The appellant challenged the totality of the prosecution's evidence against which he was convicted. The appellant argued that the elements of the offence charged were not proven beyond reasonable doubt. He urged the court to quash his conviction and set aside the sentence imposed.
3. This is the first appellate court and in *Okeno v. R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence which was before the trial court and come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.



4. To succeed in a prosecution for defilement, it must be proven that the accused committed an act that caused penetration with a child. "Penetration" under Section 2 of the Act means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

5. Further, section 8(1) and (4) of the *Sexual Offences Act*, No. 3 of 2006 provides thus: -

8. Defilement

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(3) 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.

6. The prosecution called on four (4) witnesses in support of their case. PW1, the complainant, J.N (name withheld) testified that she was 13 years old. She testified that she lived with her family [Particulars Withheld]. A clinic book showing her date of birth as August 1, 2006. On Tuesday, February 15, 2022, she was at the home of the appellant, John Nzomo. During the COVID-19 period, her mother was struggling financially and could not pay rent, so the appellant allowed them to stay with him. That day, the victim was sent home from school due to unpaid fees. She returned to the appellant's house and found him with his son watching TV. She testified that the appellant later woke her up, told her she was old enough to sleep with boys, removed her clothes, and inserted his penis into her vagina, having intercourse with her.

7. She further stated that no one else was in the house at the time. When the appellant heard people returning, he stopped, told her to wipe herself with tissue, and left. She took a bath and did not return to the house. Her sister returned with lunch, noticed she was upset, and asked why. The victim recounted the incident, and her sister confronted the appellant, who denied it. Her sister then called their mother, who took the victim to Nairobi Women's Hospital. The matter was reported to Muthangari Police Station.

8. During cross-examination, the victim reiterated that the appellant removed her clothes and penetrated her on his bed in his house. She confirmed that the appellant's son was present when she arrived but did not know where he went afterward.

9. As discussed in the Kenya Judiciary Criminal Procedure Bench Book 2018 paragraphs 94-96 no corroboration is necessary for the evidence of a child taken on oath although cross-examination is available for sworn or unsworn evidence of a child in the usual way:

"94. No corroboration is required if the evidence of the child is sworn (*Kibangeny arap Kolil v R* 1959 EA92). Unsworn evidence of a victim who is a child of tender years must be corroborated by other material evidence implicating the accused person for a conviction to be secured (*Oloo v R* (2009) KLR).

95. However, in cases involving sexual offences, if the victim's evidence is the only evidence available, the court can convict on the basis of that evidence provided that the court is satisfied that the victim is truthful (s. 124, Evidence Act). The reasons for the court's satisfaction must be recorded in the proceedings (*Isaac Nyoro Kimita v R* Court of Appeal at Nairobi Criminal Appeal No. 187 of 2009; *Julius Kiunga M'birithia v R* High Court at Meru Criminal Appeal No. 111 of 2011).



96. The evidence of a child, sworn or unsworn, received under section 19 of the Oaths and Statutory Declarations Act is subject to cross-examination pursuant to the right to fair trial, which encompasses the right to adduce and challenge the evidence produced against the accused (art. 50(2)(k), CoK”
10. The complainant’s testimony did not require corroboration in accordance with the proviso to section 124 of the Evidence Act (Chapter 80 of the Laws of Kenya) if there are reasons to believe that the child was telling the truth.
 11. The trial magistrate observed that the complainant’s testimony was consistent and candid. The court found the complainant to be an honest witness, whose evidence remained coherent throughout the proceedings and she described in detail what transpired. The trial court determined that the complainant had no motive to fabricate the incident. Her evidence, subjected to cross-examination, remained credible and consistent. Consequently, the appellant’s identification by recognition was deemed reliable, and the court was satisfied that the appellant was properly identified.
 12. On additional corroborating evidence, PW2 the complainant’s mother testified that on 15th February 2022, around 1 pm, while at work, she received a call from her daughter, urging her to come home. Upon arriving, she found her younger daughter crying. When asked why, the minor recounted the ordeal. PW2 entered the house and confronted the appellant. He denied any wrongdoing. She then took the minor to Nairobi Women’s Hospital for examination.
 13. The medical officer who initially examined the minor, Clinical Officer Winnie Mutungi, was unavailable to testify during the trial. Instead, Clinical Officer John Njuguna (PW3) testified on her behalf. According to Winnie’s records, the minor reported vaginal pain. The examination revealed no physical injuries from front to back, but the genital examination showed normal external genitalia, swollen labia minora and majora, and a whitish mucous discharge. The hymen was torn, indicating genital injuries. All lab tests conducted were negative. The medical examination form (P3 form) was completed, and the findings were consistent. These documents were admitted as evidence.
 14. The investigating officer, No. 237431 Inspector Gertrude Otuma (PW4) from Gandani Police Station’s Gender and Children’s Desk stated that on 18th February 2022, members of the public brought the appellant to her office, alleging he had defiled a minor. She recorded witness statements, issued a P3 form, and received it back duly completed. PW4 also obtained a clinic book confirming the minor’s date of birth as 1st August 2006, which was produced as evidence of the victim’s age. After completing her investigation, she charged the suspect.
 15. The evidence by the prosecution leaves no doubt that the ingredient of penetration was proved beyond reasonable doubt.
 16. In his defence, the appellant admitted that the complainant and her mother and elder sister were living with him after her mother fell on hard times during the corona period. He told the court that they had a dispute and did not understand any of these allegations made against him. He denied committing the offence.
 17. The trial court evaluated the defence and deemed it implausible and unconvincing. Upon careful analysis of the evidence, I have independently reached the same conclusion, finding the defence lacking credibility and failing to cast doubt on the prosecution’s case.
 18. On the age of the complainant, the trial court considered the clinic book which was produced in evidence. It was recorded that the complainant was born on 1st August 2006. She was therefore fifteen



(15) years at the time of the offence. There is, therefore, no doubt that the complainant was a child at the time the offence was committed.

19. Upon reviewing the record, I observed that the trial court incorrectly stated the minor's age as 13 years old. This was an error. The minor was, in fact, fifteen years and six months old at the relevant time. However, I find that this error does not impact the appellant's conviction for the offence of defilement.
20. In light of the foregoing analysis, I conclude that the prosecution proved its case beyond reasonable doubt. Accordingly, the conviction is upheld.
21. Regarding sentencing, the appellant was sentenced to twenty (20) years' imprisonment. In determining the sentence, the court considered the appellant's mitigation and the fact that he was a first-time offender. The *Sexual Offences Act* prescribes a mandatory minimum sentence of twenty years for the offence in question.
22. As previously noted, the trial court erroneously recorded the minor's age as 13 years instead of 15 years. Under the *Sexual Offences Act*, the age of the minor victim is a material factor in sentencing. The record indicates that the appellant was convicted under Section 8(3) of the Act, which applies to offences involving minors aged between 12 and 15 years.
23. The minor victim in this case falls within this category. Consequently, the sentence imposed by the trial court was lawful and in accordance with the applicable provisions of the *Sexual Offences Act* and the supreme court decision in *Petition E018 of 2023 Republic vs Joshua Gichuki Mwangi*.
24. In the end, the appeal is found to be lacking in merit and is dismissed in its entirety.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 4TH DAY OF MARCH 2025.

D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Mutuma for the Respondent

Tonny Court Assistant

