



REPUBLIC OF KENYA



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

**Kemei v Republic (Criminal Appeal E001 of 2023)
[2025] KEHC 5051 (KLR) (23 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5051 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL APPEAL E001 OF 2023
JK NG'ARNG'AR, J
APRIL 23, 2025**

BETWEEN

VINCENT KEMEI APPELLANT

AND

REPUBLIC RESPONDENT

*(From the Conviction and Sentence in Sexual Offence Case Number
5 of 2020 by Hon. Omwange J. in the Magistrate's Court in Sotik)*

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. The particulars of the charge were that on diverse dates between 1st November 2019 and 6th January 2020 at [Particulars Withheld] in Konoin Sub County within Bomet County, he intentionally and unlawfully caused his penis to penetrate the vagina of P.C, a child aged 15 years.
2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on diverse dates between 1st November 2019 and 6th January 2020 at [Particulars Withheld] in Konoin Sub County within Bomet County, he intentionally touched the vagina of P.C, a child aged 15 years with his penis.
3. The Appellant pleaded not guilty to the charges before the trial court and a full hearing was conducted. The prosecution called four (4) witnesses in support of its case. The trial court found that the Prosecution had proved a prima facie case against the Appellant and put him on his defence. The Appellant gave unsworn testimony and did not call any witness.
4. In a Judgement dated 7th December 2022, the trial court found the Appellant guilty of the offence of defilement, convicted him and sentenced him to serve 15 years imprisonment.



5. Being aggrieved with the Judgment of the trial court, the Appellant, Vincent Kemei through an undated home-made Petition of Appeal appealed against his conviction and sentence on the following grounds reproduced verbatim: -
 - I. That the learned trial Magistrate erred in law and fact by basing my conviction on the Prosecution case which was not proved beyond reasonable doubt.
 - II. That the learned trial Magistrate erred in law and fact by basing my conviction on uncorroborated evidence of the complainant.
 - III. That my right to a fair trial was violated as I was not supplied with all documentary evidence including the investigation diary the Prosecution relied on during the case hence violating Article 50(2) of *the Constitution*.
 - IV. That the three ingredients of defilement e.g. penetration, age of the victim and identity of the perpetrator were not proved.
 - V. That the complainant was an untrustworthy witness.
 - VI. That the medical evidence did not support the complainant's testimony.
 - VII. That the vital witnesses were not called to testify in court.
6. The Appellant filed further grounds of Appeal and they are reproduced verbatim as:-
 - I. That the learned trial Magistrate erred in law and fact by failing to observe that Article 50(2) (h) of *the Constitution* was violated as he was not assigned any advocate.
 - II. That the learned trial Magistrate erred in law and fact by failing to observe the doubtful demeanour of PW4.
 - III. That the learned trial Magistrate erred in law and fact by failing to observe that the charge sheet was defective.
 - IV. That the learned trial Magistrate erred in law and fact by rejecting his defence which was cogent.
 - V. That the learned trial Magistrate erred in law and fact by imposing a harsh and excessive sentence.
7. This being the first appellate court, I have a duty to re-evaluate the evidence on record afresh. The Court of Appeal in the case of Mark Ouiruri Mose vs Republic (2013) eKLR, held that:-

“That this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse 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 demeanour of the witnesses and hearing them give evidence and give allowance for that”
8. I proceed to consider the case before the trial court and the parties' submissions in the Appeal in the succeeding paragraphs.

The Prosecution's Case.

9. It was the Prosecution's case that the Appellant defiled P.C (PW4) on the material dates between 1st November 2019 and 6th January 2020. PW4 testified that the Appellant married her and they had sexual intercourse on more than one occasion.



10. Daniel Too (PW2) who was the clinical officer testified that he examined the victim (PW4) on 20th January 2020, a week after the alleged sexual intercourse. PW2 further testified that upon examination, he found pus cells and that the victim had a longstanding broken hymen. PW2 testified that there were no signs of immediate penetration.
11. It was PW2's testimony that the victim did not have bruises and that indicated no recent sexual activity.
12. The Prosecution filed their written submissions dated 7th August 2023. They submitted that the victim was aged 15 years at the time of the commission of the offence and the same was proved by the production of the Birth Certificate as P.Exh 5. On the issue of penetration, they submitted that the victim's testimony was clear that penetration had occurred. They further submitted that the medical evidence also led credence to the victim's testimony.
13. It was the Prosecution's submission that even though the clinical officer did not observe any injury on the victim's genitalia, he observed an old broken hymen which indicated that there had been penetration though not recent. It was their further submission that by dint of section 124 of the *Evidence Act*, it was not mandatory that the victim's evidence be corroborated.
14. The Prosecution submitted that the Appellant was positively identified. That from the record, it was easily discernable that the Appellant and the victim were not strangers as they had been in a relationship for over two years prior to the Appellant's arrest. They further submitted that this was a case of recognition as the Appellant and the victim had lived as husband and wife.

Appellant's Case

15. The Appellant, Vincent Kemei (DW1) denied committing the offence. He stated that he was arrested in the year 2021 and taken to Mogogosiek Police Station where his finger prints were taken. DW1 further testified that he was taken for medical examination and was informed that he had committed the offence of defilement.
16. In his written submissions, the Appellant submitted that the ingredients of defilement i.e. age, penetration and identification were not proved beyond reasonable doubt. The Appellant further submitted that the victim's evidence had no probative value as her evidence was contradictory and as such the trial court needed to treat her as a hostile witness.
17. It was the Appellant's submission that the victim was not lured to engage in sexual intercourse but she voluntarily went to the Appellant's home. It was his further submission that he had married the victim and the victim wanted to live with him as his wife.
18. The Appellant submitted that the charge sheet was defective as he should have been charged under section 8(4) of the *Sexual Offences Act* as opposed to section 8(3) of the *Sexual Offences Act* as the trial court found that the victim was aged 16 years. He further submitted that this made the charge incurable and he relied on *Amos Nyandoha Otaha & another vs Republic (2015) eKLR*.
19. It was the Appellant's submission that the Prosecution failed to prove their case against him and shifted the burden of proof to him. It was his further submission that the sentence meted was excessive and harsh.
20. I have gone through and considered the trial court's proceedings, the undated Petition of Appeal filed on 25th January 2023, the undated Appellant's written submissions and the Respondent's submissions dated 7th August 2023. The following issues arise for my determination:-
 - i. Whether the Prosecution proved its case beyond reasonable doubt.



- ii. Whether the Appellant's defence placed doubt on the Prosecution case.
- iii. Whether the sentence preferred against the Appellant was just and fair.

Whether the Prosecution proved its case beyond reasonable doubt.

21. It is trite law that for the offence of defilement to be established, the age of the victim, penetration and positive identification or recognition of the offender have to be proved.
22. In regards to age, the victim (PW4) testified that she in class 8. No. 247003 PC Peter Mugun (PW1) who testified as the Investigating Officer produced a Birth Certificate as P.Exh 5. The production or authenticity of the Birth Certificate was not challenged during cross examination. I have looked at the Birth Certificate and it indicates that the victim (PW4) was born on 18th May 2004. It is my finding that at the time of the commission of the offence, the victim was aged 15 years old.
23. With regard to the issue of identification, the victim (PW4) testified that she was married to the Appellant and they engaged in sexual intercourse. When PW4 was cross examined, she testified that she saw the Appellant for the first time at the Centre. This was in essence contradictory testimony.
24. The Investigating Officer's (PW1) testimony was not helpful in terms of the positive identification of the Appellant as the perpetrator of the offence. PW1 testified that they arrested the Appellant on 20th January 2020. PW1 further testified that there were witnesses who saw the Accused with the victim. Unfortunately, such witnesses were not produced in the trial court to give such evidence.
25. On the evidence tendered, I am not satisfied that the Appellant was positively identified as the perpetrator of the offence. It is my finding that the Prosecution did not establish beyond reasonable doubt that the Appellant was the perpetrator of the offence.
26. With regard to penetration, Section 2 of the [Sexual Offences Act](#) defines penetration as the partial or complete insertion of genital organs into the genital organs of another person. The Prosecution has to prove penetration or act of sexual intercourse to sustain a charge of defilement.
27. Penetration can be proved through the evidence of the victim corroborated by medical evidence. It should however be noted that if the medical evidence is insufficient, courts can convict solely on the evidence of a victim provided they believe the testimony of the victim and record such reasons.
28. In the instant case, I proceed to carefully evaluate the medical evidence and the victim's testimony.
29. Regarding medical evidence, Daniel Too (PW2), a clinical officer from Mogogosiek Health Centre testified that he examined the victim (PW4) and found that she had an old broken hymen and upon urinalysis, she had pus cells. That he examined the victim a week and found no signs of immediate penetration. PW2 produced the victim's P3 Form, PRC Form, and victim's treatment notes as P.Exh 1, P.Exh 2, and P.Exh 3 respectively.
30. It was PW2's testimony that he also examined the Appellant and he did not find any bruises on the Appellant's genitalia which indicated no recent sexual activity. He produced the Appellant's treatment notes as P.Exh 4.
31. I have looked at the exhibits above and they corroborate the clinical officer's (PW2) testimony that there was no penetration. I accept the findings and conclusion of the clinical officer that there was no penetration. I must also state that the fact that the victim was examined a week after the alleged commission of the offence did not help matters at all.



32. However, the court is allowed to use the sole testimony of the victim as a basis for conviction. Section 124 of the Evidence Act provided:-

Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth

33. In *George Kioji v. Republic*, Cr. App. No. 270 Of 2012 (Nyeri), the Court of Appeal held:-

“Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”

34. I have carefully gone through the victim’s (PW4) testimony. PW4 testified that she has sexual intercourse with the Appellant on 8th December 2019. She further testified that the Appellant went to their home sometime in January 2020 to seek her forgiveness and they later engaged in sexual intercourse at the Appellant’s place. When PW4 was cross examined, she testified that she saw the Accused for the first time at the Centre and that the Appellant had taken her by force.

35. As I have earlier stated, this evidence was contradictory and it casts doubt in this court’s mind as to the truthfulness of the victim. The credibility of the witness in this court’s mind suffered a great deal as a result of the contradictory evidence. It is trite that the standard of proof in criminal cases is proof beyond reasonable doubt and in regards to penetration, it is my finding that the Prosecution who bore the burden of proof failed to discharge that burden.

36. There was deep suspicion that penetration did occur but suspicion no matter how strong cannot be used as a basis for a conviction. The Court of Appeal in *John Mutua Munyoki v Republic* [2017] KECA 376 (KLR) held:-

“.....All this is but suspicion and speculation. This can never be the basis of a conviction.....”

37. The ingredients of defilement i.e. age of the victim, identity of the perpetrator and penetration had to be proved conjunctively and not disjunctively. When an ingredient could not be adequately established, it created doubt and that doubt however small must go to the benefit of the Appellant.

38. In the final analysis, the Prosecution failed to prove its case against the Appellant.

39. In the end, the Appeal is allowed. I hereby set aside the Appellant’s conviction and quash his sentence. The Appellant is set at liberty forthwith unless otherwise lawfully held.



JUDGEMENT DELIVERED, DATED AND SIGNED THIS 23RD DAY OF APRIL, 2025.

.....

J.K.NG'ARNG'AR

JUDGE

Judgement delivered in the absence of the Appellant and in the presence of Mr. Njeru for the Respondent.
Siele/Susan (Court Assistant).

