



REPUBLIC OF KENYA



KENYA LAW
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**Rumba v Republic (Criminal Appeal E001 of 2022)
[2024] KEHC 13 (KLR) (12 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 13 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E001 OF 2022**

**KW KIARIE, J
JANUARY 12, 2024**

BETWEEN

FRANCIS NYAMAYI RUMBA APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O case NO. E006 of 2020 of the Chief Magistrate's Court at Mombasa by Hon. R.M. Amwayi—Senior Resident Magistrate)

JUDGMENT

1. F.N.R., the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the [Sexual Offences Act](#) No. 3 Of 2006.
2. The particulars of the offence are that on the 4th day of September 2020, at Msikiti Wamanyatta area, Likoni sub-county within Mombasa County, intentionally and unlawfully caused his penis to penetrate the vagina of F.U. M., a child aged 9 years.
3. The appellant was sentenced to life imprisonment. He was aggrieved and filed this appeal against both conviction and sentence. The appellant was represented by the firm of Ondindiko & Company advocates. He raised grounds of appeal as follows:
 - a. That the learned trial magistrate erred in law and fact by convicting the appellant to serve life imprisonment without considering that the identification being an essential element of defilement was not proved beyond reasonable doubt.
 - b. That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant to serve life imprisonment without considering that I the appellant was denied a right to a fair under article 50(2)(p) of *the Constitution*.



- c. That the learned trial magistrate erred in law and fact by sentencing the appellant to serve life imprisonment without considering that the sentence meted out was harsh and excessive.
 - d. That the learned trial magistrate erred in law and fact by sentencing the appellant to serve life imprisonment without considering that the period spent in remand custody prior to conviction and sentence was not put into consideration.
 - e. That the learned trial magistrate erred in law and fact by sentencing the appellant to serve life imprisonment without considering the defence.
4. The state did not file grounds of opposition or submissions.
 5. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court. I have drawn my conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno vs. Republic* [1972] EA 32.
 6. To sustain a conviction for the offense of defilement, the prosecution has to prove the following ingredients:
 - a. Whether there was penetration;
 - b. Evidence must show that the accused is the perpetrator; and
 - c. The age of the victim must be below eighteen years.
 7. In the case of *Fappyton Mutuku Ngui vs. Republic* [2012] eKLR Joel Ngugi J. said:
 8. Going by this definition of defilement, I agree with Mr. Mwenda on the issues which the court needs to determine. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.
 9. These are the ingredients I will endeavour to find if they are proven.
 1. The appellant was requested to go and assist the complainant in breaking open their padlock after they had misplaced the key. F.U.M (PW1) testified that after he had forced the padlock to open, he defiled her.
 2. It was argued that the appellant was not accorded a fair trial for the learned trial believed the prosecution case. An issue of appreciating evidence cannot be termed as an unfair trial. In any case, when a conviction has been challenged, the appellate court evaluates the evidence afresh and arrives at an independent conclusion. This is what will happen in this case.
 3. C.W. (PW2) the mother of the complainant testified that when she returned home on the 26th day of October 2020, she found the clothes of the complainant on the floor and her panty was blood-stained. When she asked her what had happened, the complainant attributed the blood stains to a fall. However, after insisting on an explanation, she implicated the appellant. She said he had defiled her. Before defiling her, he inserted his fingers into her genitalia. She went and reported to her mother, C.M.
 4. In her evidence C.M. (PW1) testified that after her daughter had reported to her what the appellant did to her, she went and asked him about the allegation but he denied it. She went and reported to the police and took her daughter to hospital.
 5. When the complainant was examined by Stephen Kalai (PW3), a clinical officer, on the 4th day of September 2020, she was in pain and crying. There was tenderness on the labia majora and



fresh lacerations on the vaginal wall. The hymen was freshly broken and she was unable to walk freely.

6. The appellant in his defence contended that F.U went to where he conducts business and ordered him to vacate. She was previously married to his brother. He requested her for more time to comply and she left. Later on, he was arrested and taken to the police where he was charged for an offence he was not involved in.
7. F.U. is the child complainant and it is unconvincing that he was having a business issue with her. There is no possibility she could have been married to his brother.
8. If we assume that he meant PW1, the complainant's mother, this defence was an afterthought. This witness was not asked anything about the said grudge over a business premises. The learned trial magistrate cannot be faulted for dismissing the defence.
9. A copy of child health card of F.A. was produced as an exhibit. It indicates that she was born on the 24th day of October 2010. At the time of the offence, she was nine years and eleven months old. Section 8 (2) of the *Sexual Offences Act* provides:

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.

The prosecution therefore proved the age of the complainant.

10. The direct evidence implicating the appellant was that of the complainant. The proviso to section 124 of the *Evidence Act* states:
11. 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.
12. In the instant case, the evidence of the complainant was corroborated by her mother's and the medical evidence. From the evidence on record, I have not been persuaded that the complainant is not telling the truth.
13. The upshot of the foregoing analysis of the evidence on record, I find that the appeal lacks merits and is accordingly dismissed.

DELIVERED AND SIGNED AT MOMBASA THIS 12TH DAY OF JANUARY, 2024

KIARIE WAWERU KIARIE

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

