



**Sang v Republic (Criminal Appeal E12 of 2021)  
[2024] KEHC 246 (KLR) (24 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 246 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPSABET  
CRIMINAL APPEAL E12 OF 2021  
RN NYAKUNDI, J  
JANUARY 24, 2024**

**BETWEEN**

**ELIJAH KIPKEMEI SANG ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal on conviction and sentence from the  
judgment in Cr. Case no. 2744 of 2014 by Hon. J. Orwa (SPM))*

**JUDGMENT**

1. The Appellant was charged with the offence of Defilement contrary to section 8(3) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the offences were that on the 11<sup>th</sup> Day of September 2014 at Sosiot village in Nandi County, Elijah Kipkemei Sang intentionally and unlawfully caused his penis to penetrate the vagina of SJ a child aged 14 years.
2. Alternatively, he was charged with an offence of committing an Indecent Act with a child contrary to section 11(1) of the [sexual offences Act](#). The particulars of the offences were that on the 11<sup>th</sup> Day of September 2014 at Sosiot village in Nandi County, Elijah Kipkemei Sang intentionally and unlawfully caused his penis to penetrate the vagina of SJ a child aged 14 years.
3. The Appellant was found guilty as charged, convicted and sentenced to serve twelve years imprisonment. He was aggrieved with both conviction and sentencing after which he instituted the present appeal. The appeal is based on two grounds which are couched as follows:
  - (1) The trial Court erred in law and in fact by failing to find that the offence of defilement was not proved beyond reasonable doubt.
  - (2) The Trial Judge erred in law and fact by sentencing the appellant to serve 12 years in jail.



4. A review of the facts of the case as adduced in the trial court is as follows: PW1; S.J the complainant in this matter testified that she was 14 years of age when the alleged offence was committed. She stated that on the 11<sup>th</sup> of September, 2014 she was unwell and as such she was at home with her younger sibling. The appellant who is a person known to her as an herbalist came by and offered to treat her. The appellant sent PW1's younger sister to go and get guavas. At this point the appellant got an opportunity of defiling the complainant since they were left alone at the scene. The appellant warned the complainant against screaming, he threatened to stab her with a knife if she raised an alarm. PW1 felt pain as the appellant was defiling her. When PW2 came back PW1 was crying. PW1 informed PW2 about what the appellant had done to her. They informed their auntie who raised an alarm.
5. The minor was taken to Poto Poto dispensary where she was examined and went to the police where the P3 form was issued. She also gave evidence to the effect that the accused persons had threatened to kill her with a knife. Upon-cross examination by Mr. Sang for the accused, she stated that she did not see the knife and that they were standing when he did it.
6. PW2; SC, the complainant's sister confirmed that the accused person came home to treat PW1 and sent her to fetch guavas when she had PW1 crying. She ran to find out what was going on when PW1 told her what had happened.
7. PW3; the complainant's step mother testified that PW2 ran to her and reported that the accused had done something bad to the complainant. She ran to the accused and asked him what he had done. She testified that the police helped her to arrest him as the complainant was take to hospital.
8. PW4; Wilson Birgen a clinical officer who examined the complainant testified that there was blood on her pants, that the hymen was freshly broken and that there were lacerations on the vaginal walls.
9. PW5; No.57687, Sergeant Henry Simiyu testified that on the 11<sup>th</sup> of September 2014 a report of defilement was made. The accused person was brought to the police station in company of members of the public and he issued the complainant with a P3 form. He also issued a P3 form to the accused. He later escorted them to Poto Poto health center, where the minor was examined and a post rape care form filled and the accused person was also treated.
10. From the above prosecution evidence, the court found that the prosecution established a *prima facie* case and proceeded to put the Appellant on his defense. Further the court complied with section 211 of the Criminal Procedure Code.
11. The defence case is based on a single witness, the Appellant. He denied having committed the offence. He testified that on the 11<sup>th</sup> September 2014, he was busy doing his work as usual. He testified that he went for lunch when some people came and attacked him and averred that he had defiled a child.
12. This being a first appeal, this court is obligated to consider the evidence afresh in order to reach its own independent conclusion. In doing so, I must bear in mind that, unlike the trial court, I did not have the opportunity of observing the demeanor of the witnesses as they testified.

### **Findings and Determination**

13. In determining this appeal this court shall satisfy itself that the ingredients of the offence of defilement were proved as so required in law; beyond reasonable doubt. I have carefully perused through the proceedings and the judgement of the trial court as well as the evidence on record before this court and the written submissions. The issues for determination in this appeal are:
  - (i) Whether the prosecution proved its case to the desired threshold;



- (ii) Whether or not the sentence was excessive.

### Elements of offence of defilement

14. 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](#) which provides:

“8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

8(4) 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.”

15. The specific elements of the offence defilement arising from Section 8 (1) of the [Sexual Offences Act](#) which the prosecution must prove beyond reasonable doubt are:

- (1) Age of the complainant;
- (2) Proof of penetration in accordance with section 2(1) of the [Sexual Offences Act](#); and
- 3) Positive identification of the assailant.

16. In the case of [Charles Wamukoya Karani v Republic](#), Criminal Appeal No. 72 of 2013 it was stated that:

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

What does the evidence portend?

### Age of the complainant

17. The age of the complainant is one of the critical ingredients of the offence of defilement which must be proved by the prosecution beyond reasonable doubt. Under section 8(1) of the [Sexual Offences Act](#) a person is deemed to have committed defilement if he or she does an act which causes penetration with a child. Under Section 2 (1) of the [Sexual Offences Act](#), the definition of a child is the one assigned in the [Children Act](#). This entails any human being of less than eighteen (18) years. The onus of proving age resides with the prosecution.

18. The significance of proving the ingredient of age in defilement cases was clearly spelt out by Mwilu J (as she then was) in the case of [Hillary Nyongesa v Republic](#) (Eldoret Criminal Appeal No.123 of 2000) stated that:

“Age is such a critical aspect in Sexual Offences that it has to be conclusively proved ... And this becomes more important because punishment (sentence) under the [Sexual Offences Act](#) is determined by the age of the victim.”

19. A similar position was taken in [Kaingu Elias Kasomo v Republic](#); Malindi Court of Appeal Criminal Case No. 504 of 2010 the court emphasized on the importance of proving the age of the victim of defilement as the sentence imposed upon conviction depend on the victim’s age

20. Therefore, in a charge of defilement, the age of the victim is important for two reasons:



- i) defilement is a sexual offence against a child; and
  - ii) age of the child has also been used as an aggravating factor for purposes of determining the sentence to be imposed; the younger the child the more severe the sentence.
21. A child is defined as a person under the age of eighteen years. Is the victim herein a child?
22. The appellant herein has not raised any issue as to the age of the child, an issue therefore that is not in dispute. The trial court rightly found that the complainant was fourteen years old at the time. A clinical card was produced evidencing that she was born in June 2000 which confirms that the complainant's age at the time of the offence.
23. I find the age of the victim was 14 years old.

### **Penetration**

24. Section 2(1) 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.”
25. In the case of [Mark Oiruri Mose v R](#) [2013] eKLR the Court of Appeal stated that:
- “Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that 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.”
26. In dealing with this issue, I shall revert to the record. The complainant in her testimony took the court through how the accused defiled her. She stated that the appellant who is a person known to her as a herbalist came by and offered to treat her. The appellant sent PW1's younger sister to go and get guavas. At this point the appellant got an opportunity of defiling the complainant since they were left alone at the scene. The appellant warned the complainant against screaming, he threatened to stab her with a knife if she raised an alarm. The findings of the clinical officer who testified as PW4 support the complainant's testimony that she was defiled. Upon examining the complainant, he found that there was blood on her pants, that the hymen was freshly broken and that there were lacerations on the vaginal walls. This is prima facie evidence of penetration hence there can be no doubt that penetration was occasioned on the complainant.

### **Was the appellant the perpetrator?**

27. The courts have set out what constitutes favorable circumstances for correct identification by a sole testifying witness. The same was established in [Maitanyi vs Republic](#), (1986) eKLR 196 where it was stated that: -
- “subject to well-known exceptions it is trite law that a fact maybe proved by the testimony of a single witness but his rule does not lessen the need for testing with the greatest care the evidence of the single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although



based on the testimony of a single witness, can safely be accepted as free from the possibility of error”

28. The Appellant was a person known to the complainant. There was no element of mistaken identity of the Appellant as the person who penetrated her genitalia.
29. The evidence by the prosecution leaves no doubt that the appellant caused penetration of the complainant. Accordingly, I find that the elements of defilement namely, penetration and minority age of the victim were proved beyond doubt. The conviction was therefore proper.
30. In the upshot, I find that the Appellant was positively identified as the assailant herein; there was no mistaken identity or error. Accordingly, I find that the prosecution proved their case beyond reasonable doubt and that the trial court did not err in convicting the appellant for defilement. The appeal on conviction therefore lacks merit and is hereby dismissed.

#### **On sentence**

31. The appellant argued that in the absence of a case proven to the required standard, this court should find that the sentence is unlawful. Section 8 (3) of the *Sexual Offences Act* to convict provides as follows:

“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.”

32. The court of Appeal, on its part in *Benard Kimani Gacheru v Republic* (2002) eKLR restated that;

“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 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 discretion of the trial court on sentence unless, any of the matters already stated is shown to exist.”

33. Similarly, in *Mokela vs 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 condition imposed by a sentencing court on how or when the sentence is to be served.”

34. The offence is serious. I take into account that the accused is first offender. In the circumstances, 12 years’ imprisonment is not excessive but appropriate sentence. I see no reason of interfering with the sentence imposed by the trial court. His appeal on sentence fails, save that section 333 (2) of the CPC comes to the aid of the appellant. to have the commencement date of 11<sup>th</sup> September, 2014.
35. In the upshot, the appeal herein is dismissed

**DATED AND SIGNED AT ELDORET THIS 24<sup>th</sup> DAY OF JANUARY, 2024**



**R. NYAKUNDI**

**JUDGE.**

In the presence of:

Appellant present

Mr. Mugun present State Counsel

