



**BS v Republic (Criminal Appeal 151 of 2023)
[2024] KEHC 1453 (KLR) (19 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1453 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 151 OF 2023
DR KAVEDZA, J
FEBRUARY 19, 2024**

BETWEEN

BS APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered
by Hon. E Boko (SPM) on 30th December 2021 at Kibera Chief
Magistrate’s Court Criminal Case no. E110 of 2020 Republic vs BS)*

JUDGMENT

1. The Appellant was charged and after full trial convicted by the Subordinate Court of the offence of defilement contrary to section 8(1) and (4) of the *Sexual Offences Act*. The Appellant was sentenced to serve 15 years’ imprisonment. He appeals against conviction and sentence in line with his undated petition of appeal. The Appellant has filed amended grounds of appeal and the parties have filed written submissions which I have considered.
2. 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 analyze and re-evaluate the evidence that 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. With the above, I now proceed to determine the substance of the appeal.
3. In his submissions, the Appellant has raised four grounds of appeal. He complains about the circumstances leading to his arrest; particularly, he argues that the report of the offence was made after his arrest, rendering the arrest illegal. The key witnesses, including a certain girl who was sent by the appellant to call the complainant PW1 and PW2’s wife, among others, who were not called to testify yet



were crucial witnesses. He further complains that the prosecution's case was marred with contradictory statements; while PW1 stated that PW2 was her uncle, PW2 said that he was her cousin.

4. The thrust of the grounds of appeal is that the prosecution failed to prove its case beyond reasonable doubt. To succeed in a prosecution for defilement, it must prove 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. The prosecution case was as follows. The Complainant (PW 1) gave sworn testimony. She stated that she was in form one and that she knew the accused. On October 27, 2020, the Appellant approached her, introduced himself and she gave him her phone number. They started talking and about a week later, while PW1 was taking food to her aunt, she met the appellant along the way. He accompanied her and they came back together, following which he asked her to go to his place. While at the appellant's place, he started removing her clothes but she declined. When he tried to remove her trousers, she put it back on. She tried to scream but the appellant told her to be quiet as there were neighbours around. He pushed her to the bed, removed her trousers, and in PW1's words, they had sex. After the act, PW1 told the appellant that she was annoyed as she was neither willing nor ready to have sex with him.
6. In her testimony, PW 1 gave clear and graphic testimony of her ordeal. She recalled that she had known the Appellant for about a week before the incident and that they had been in constant communication on the phone. I therefore hold that the Appellant is the one who committed the act of penetration.
7. PW 2'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 the trial magistrate recorded reasons why she believed the child was telling the truth. The trial magistrate concluded that upon comparing the complainant's detailed account with the appellant's defence, devoid of any mention regarding the complainant except for his arrest, there was no basis to cast doubt on the credibility of the complainant's testimony. The magistrate found it plausible that the complainant and the appellant had a pre-existing relationship or friendship, leading to an invitation to the appellant's house where they engaged in a sexual encounter.
8. What about the other corroborating evidence? The prosecution called PW2, who was staying with PW1 at the material time. He told the court how his wife told him that there were reports that PW1 does not stay in the house during the day. On November 3, 2020, he asked PW1 what she does and she took him to the appellant's house about 300 metres away. They found the appellant in the house and later proceeded to Kabete Police Station. PW 2 is an independent witness to whom PW 1 reported what she does during the day.
9. Lastly, there is the evidence of the Clinical Officer (PW 3) who produced the P3 medical report and the Post Rape Care (PRC) Form on behalf of his colleague who examined PW1 on November 14, 2020. He told the court that PW 1 had no physical injuries, but there was a hymenial tear at 6 o'clock and a whitish-thick discharge. After the lab examination, all tests including pregnancy were negative.
10. The appellant argues that while PW1 said that this was her first sexual encounter, the medical evidence noted that there were no blood stains and that it is doubtful, as blood stains follow a first sexual encounter. He also argued that the medical evidence did not specify the age of the hymen. PW3 in cross-examination clarified that first-time penetration can occur without a tear or blood, as not all penetration causes bleeding. He also stated that as per the age of the incident, the tear was still fresh. I hold that these findings are consistent with penetration and corroborate PW 1's testimony that the Appellant penetrated her.
11. The Appellant complains that essential witnesses were not called, including a girl who was sent by the appellant to call PW1, PW2's wife, and some neighbours. It is trite law that the prosecution need not



call a multiplicity of witnesses to establish a fact. Section 143 of the Evidence Act provides that in the absence of any requirement by the provision of law, no particular number of witnesses shall be required to prove a fact. However, it has been held that where the prosecution fails to call a particular witness who may appear essential, then the court may make an adverse inference as a result of failure to call that witness (see *Bukenya and Others v Uganda* [1972] EA 549 and *Erick Onyango Odeng'v Republic* [2014] eKLR).

12. It is my finding that given the totality of the evidence, the medical evidence presented was sufficient to convict the appellant. Therefore, it was not necessary and would neither add nor subtract from the prosecution case in light of the finding in line with the provision of section 124 of the Evidence Act.
13. The appellant further complained that the prosecution's case was marred with inconsistencies and contradictory statements. Particularly, he pointed out that on one hand, PW1 told the court that PW2 was her uncle; on the other hand, PW2 told the court that he was a cousin to PW1. The trial magistrate considered this issue and held that PW1 could be referring to PW2 as an uncle because maybe she did not know the details of how they are related or maybe the age difference between her and PW2, who is of the age capable of having a child older than PW1. In any case, the trial magistrate rightly concluded that the relationship between the two was not what was at issue in this case, and I agree with the finding.
14. The Appellant also complains that no report in relation to the offense had been made at the time he was arrested by a person purporting to be a police officer, thus rendering the arrest illegal. From the testimony of PW2, the appellant was arrested in his house by members of the public, among them PW2, and he was later rearrested at the police station. There need not be a report made at the police station before effecting an arrest, and I find that this was not prejudicial to the prosecution's case.
15. On the age of PW 1, the trial court considered the birth certificate produced in evidence by PW 4. She was born on December 4, 2005 meaning that she was aged 14 years and 11 months. There is therefore no doubt that PW 1 was a child.
16. The appellant was charged and convicted under section 8(4) of the Act, which provides for children above the age of 16 years. However, as I have already found above, PW 1 was a month short of turning 15 years and therefore falls within the provisions of section 8(3), which provides for a child aged between 12 years and 15 years. Consequently, I set aside the conviction under section 8(1) as read with 8(4) of the act and convicted the appellant under section 8(1) as read with 8(4) of the Act.
17. On the sentence, Section 8(3) of the Sexual Offences Act provides that a person who commits an offence of defilement with a child aged between twelve years and 15 years shall upon conviction be sentenced to imprisonment for twenty years. The prosecution proved that the child was one month short of turning 15 years old. This court is guided by the Supreme Court's decision in *Francis Karioko Muruatetu another v Republic* [2017] eKLR and the decision of the Court of Appeal in *William Okungu Kittiny v Republic* [2018] eKLR, where the court held the mandatory minimum sentences were no longer applicable. In this respect, upon considering the circumstances of the case,
18. I sentence the appellant to 10 years' imprisonment from the date of conviction. The period of one (1) year and one (1) month spent in remand custody is to be considered during the computation of the sentence.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 19TH DAY OF FEBRUARY 2024

D. KAVEDZA



JUDGE

In the presence of:

Appellant present in person

Ms. Ntabo for the Respondent

Joy Court Assistant

