



**Echarait v Republic (Criminal Miscellaneous Application  
E012 of 2022) [2024] KEHC 670 (KLR) (1 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 670 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT LODWAR  
CRIMINAL MISCELLANEOUS APPLICATION E012 OF 2022  
RN NYAKUNDI, J  
FEBRUARY 1, 2024**

**BETWEEN**

**EPEM ECHARAIT ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the conviction of 26th May, 2022 by the Resident Magistrate,  
the Honorable MK Muchiri in Lodwar Law court in S.O Cr. No. E51 of 2020)*

**JUDGMENT**

1. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the offence were that on 10<sup>th</sup> August, 2020, in Turkana Sub- County in Turkana County intentionally caused his penis to penetrate the vagina of KE, a child aged 13 years.
2. He was also charged with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the offence were more less the same.
3. The appellant was convicted on the main charge and sentenced to 15 years imprisonment.
4. Being dissatisfied with the said judgment the appellant lodged the present appeal relying on the following grounds:
  - i. That the learned trial magistrate erred in both law and facts when convicting the accused person without observing that prosecution side did not prove the age of the PW1.



- ii. That the learned trial magistrate erred in both law and facts when convicting the accused person without observing that no investigation was not done in this instance case.
- iii. That the learned trial magistrate erred both law and facts when convicting the accused person without observing that, single evidence in this instance case.
- iv. That the learned trial magistrate erred in both law and facts when convicting the accused person without considering the accused person defence.

Parties did not file written submissions in support of their arguments.

### **Analysis And Determination**

5. I have considered the appeal and submissions by both parties. I have also read the record of the trial court and the judgment. As a first appellate court, this court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See *Okeno v Republic* [1972] E.A 32.
6. The issues that arise for determination in this appeal are;
  - i. Whether the prosecution proved its case to the desired threshold;
  - ii. Whether the sentence meted upon the appellant was lawful.

### **Elements of offence of defilement**

7. 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

(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.
8. 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.
9. 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**

10. 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.
11. A child is defined as a person under the age of eighteen years. Is the victim herein a child?
12. According to the charge sheet PW1 was described as a minor aged 13 years old. The court noted that according to the age assessment report, the minor was about 12 years of age. PW2 produced the age assessment report where it was established that as at 14<sup>th</sup> August, 2020, PW1 was about 12 years old.
13. The trial court rightly found that the complainant was twelve years old at the time.
14. I find the age of the victim was 12 years old.

### **Penetration**

15. 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.”
16. 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.”
17. PW1’s testimony is that on 10<sup>th</sup> August, 2020 the accused person removed her skirt, spread her legs and put them across as he sat down and she was on top of him then had sexual intercourse with her by inserting his penis in her vagina.
18. PW3 the clinical officer who filled the P3 form and produced it as P. Exh. 1 confirmed that after examining PW1 he established that PW1’s hymen was broken. On cross examination by the accused person PW1 maintained that it was the accused person who defiled her.
19. The inevitable conclusion from the analysis of the evidence is that there was ample evidence to prove that penetration did occur. I find that the medical evidence supports there was penetration of the child.

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

20. The complainant PW1 in her Parol evidence stated that the incident occurred at around 7:00AM and that it was during daytime thus was able to identify the accused person. The trial court considered the fact that the case was identification by a single witness. There was no element of mistaken identity of the Appellant as the person who penetrated her genitalia. In the cases of *R v Turbull and Others* [1976] 3 ALL ER 549. Lord Widgery C.J had this to say:- “First , wherever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be convincing one and that a number



of such witness can all be mistaken. Secondly the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation” At what distance” In what light” was the observation impeded in any way, as for example by passing traffic or press of people. Had the witness ever seen the accused before” How often” if only occasionally, had he any special reason for remembering the accused” How long elapsed between original observation and the reason for remembering the accused” How long elapsed between original observation and the subsequent identification to the police” was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance.”

21. 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.
22. 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 error in convicting the appellant for defilement. The appeal on conviction therefore lacks merit and is hereby dismissed.

### **On sentence**

23. In *Benard Kimani Gacheru v R* [2002]eKLR in which the court of Appeal restated as follows;

“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 depend on the facts of each case. On appeal, the appellate court will 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 the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist”

Section 8 (3) of the *Sexual Offences Act* to convict provides as follows:

- (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.

24. In the “Muruatetu Case”, the Supreme Court outlined the following guidelines as being applicable when the Court was giving consideration to re-sentencing;

- “(a) age of the offender;
- (b) being a first offender;
- (c) whether the offender pleaded guilty;
- (d) character and record of the offender;
- (e) commission of the offence in response to gender-based violence;
- (f) remorsefulness of the offender;
- (g) the possibility of reform and social re-adaptation of the offender;



- (h) any other factor that the Court considers relevant.”
25. In my considered view, the accused mitigation ought to count in sentencing. The objectives of sentencing should be considered in totality. In this regard, section 10 of the *Sexual Offences Act* gives room for the exercise of judicial discretion.
26. Further, the sentencing objectives in Kenya have been captured in the Sentencing guidelines 2023 to be the following: -
- 1) Retribution: to punish the offender for his/her criminal conduct in a just manner.
  - 2) Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
  - 3) Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law abiding person.
  - 4) Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.
  - 5) Community protection: to protect the community by incapacitating the offender.
  - 6) Denunciation: to communicate the community’s condemnation of the criminal conduct.
  - 7) ) Reconciliation: To mend the relationship between the offender, the victim and the community.
  - 8) Reintegration: To facilitate the re-entry of the offender into the society.
27. The trial court while sentencing the accused persons noted the mandatory sentence to the offence of defilement and in my view, it took into account mitigating factors and the objectives of sentencing in totality. The offence of defilement of 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 and as such the sentence of 15 years is reasonable save that under section 333(2) of the criminal procedure code the pretrial detention be factored to the overall sentence for it to be effected from 11<sup>th</sup> August, 2020. In essence substantively the appeal on conviction and sentence stands dismissed with a minor reprieve of credit period spent in remand custody.
28. This Appeal is dismissed and this file is hereby closed.
- Orders accordingly.

**DATED AND SIGNED AT LODWAR THIS 1ST DAY OF FEBRUARY, 2024**

In the presence of  
Yusuf for the state  
Appellant present

.....

**R. NYAKUNDI**  
**JUDGE**

