



REPUBLIC OF KENYA



**PN v Republic (Criminal Appeal 58 of 2023)
[2024] KEHC 1564 (KLR) (21 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1564 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 58 OF 2023
DR KAVEDZA, J
FEBRUARY 21, 2024**

BETWEEN

PN APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the conviction and sentence delivered by Hon
D.O Onyango (PM) on 17th February 2012 at Kibera Chief Magistrate's
Court Criminal Case no. 3227 of 2010 Republic vs Peter Ngaruiya)*

JUDGMENT

1. The appellant was charged and convicted for the offence of defilement contrary to section 8 (1) as read with 8(2) of the *Sexual Offences Act*, No. 3 of 2006. He was sentenced to serve life imprisonment. Being dissatisfied with the conviction and sentence, he filed a petition of appeal.
2. The grounds raised were that the appellant challenged the totality of the prosecution's evidence against which he was convicted. He challenged the charge sheet as being defective. He complained that the trial court failed to consider his defence. Finally, he contended that the sentence imposed was harsh and excessive.
3. The prosecution filed grounds of opposition. The grounds raised are that the appeal is misconceived and unsubstantiated. The appeal is an abuse of the court process. The appeal lacks merit and should be dismissed.
4. As this is the Appellant's first appeal, the role of this appellate court of first instance is well settled. It was held in the case of *Okeno vs. Republic* [1972] EA 32, and further in the Court of Appeal case of *Mark Oruri Mose vs. R* [2013] eKLR, 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.

5. The prosecution called five (5) witnesses in support of their case. PW, PW 1, the appellant's mother told the court that she lived with her grandson who was also the appellant's nephew aged 6 years old. It was her testimony that in May 2010, she left home to fetch water from a nearby stream. She came back only to find the complainant crying. On inquiry, he informed her that the appellant had bought him 'mandazi' and lured him to his house, made him kneel and bend on all fours, and undressed him, and his penis into his anus. When she confronted the appellant, he became hostile and assaulted her until neighbours came to her rescue. She reported the incident to the police and was referred to Nairobi Women's Hospital where the complainant was treated.
6. The complainant (JT) a minor gave unsworn testimony and told the court that the appellant was his uncle. That he bought him a cake and took him to his house. He made him kneel on all fours and inserted his penis into his anus. He was in a lot of pain. He also threatened him not to inform anyone. Despite the threats, he informed his grandmother of the incident who escorted him to the police and later to hospital for treatment.
7. Susan Wanjiku (PW 3) testified that he helped PW 1 escort the complainant to report the incident to the police station and also a dispensary.
8. Dr. Zephaniah Kamiru (PW 4) based at the Police Surgery examined the complainant and filled out a P3 form. The complainant was examined four months after the alleged incident. Upon examination, the anal opening was normal. He opined that it was likely the injuries would have healed due to the passage of time.
9. PC Harrison Mwaura (PW 5), the Investigating Officer summarised the prosecution's evidence. He maintained that when he first came into contact with the complainant, who had problems controlling his bowels. He produced a discharge summary from Nairobi Women's Hospital after it became difficult to trace the doctor who examined the complainant.
10. After the close of the prosecution's case, the trial court that the appellant had a case to answer and he was put on his defence. In his defence, he gave brief unsworn evidence. He told the court that he got unwell upon his arrest and did not add anything to the charges he was facing.

Analysis and Determination.

11. The appeal was canvassed by way of written submissions which have been duly considered. To succeed in a prosecution for defilement, the prosecution 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." The other ingredients are proof of the age of the victim and the positive identification of the assailant.
12. The appellant challenged the totality of the prosecution's evidence against which he was convicted. He argued that the prosecution failed to establish the elements of the offence of defilement. In addition, the medical evidence was marred with contradictions.
13. I will now analyse the evidence on record to ascertain whether the essential ingredients of the offence preferred against the appellant were established to the required standard of proof. Regarding proof of age, I wish to state at the outset that the importance of proving the age of a victim, proof of penetration, and positive identification of the assailant in sexual offences is paramount.



14. The complainant's grandmother (PW 1) indicated that the complainant was 6 years old at the time of the alleged incident. The Investigating Officer told the court that she was unable to get the birth certificate from the complainant's mother but the P3 form indicated that the minor was 6 years old. The trial court also noted the minor was 6 years old from his demeanour and was a child of tender years. I am thus satisfied that the age of the complainant was ascertained in light of the holding in the Ugandan case of *Francis Omuroni - Versus- Uganda*, Court of Appeal Criminal Appeal No. 2 of 2000 and reiterated in the case of *Musyoki Mwakavi vs Republic* [2014] eKLR where it was held that:

“ Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense”

The prosecution, therefore, adduced credible evidence to prove that indeed the complainant was a child at the time the offence was allegedly committed.

15. The question I must now grapple with is whether the prosecution adduced sufficient evidence to prove that the appellant defiled the child victim as alleged. PW 2 after a *voir dire* examination gave an unsworn statement in which he narrated how the appellant who was his uncle forcefully defiled him in his house while his grandmother was away. It was his evidence that the incident took place during the day. That the appellant removed his penis and inserted it into his anus.
16. The trial court warned itself against relying on the unsworn evidence of the minor and found that the minor was telling the truth. The court established that the minor had no reason to implicate his uncle and accepted his evidence which was clear on his encounter at the hands of his uncle.
17. The complainant's testimony did not require corroboration in accordance with the provision of 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 noted that the complainant had no grudge against the appellant. In addition, his demeanour during the trial was well documented, and the trial court found that there was no reason why he would lie. The trial court was therefore satisfied that the victim was telling the truth.
18. Regarding the identity of the perpetrator, the complainant knew the appellant as his uncle and identified him as the one who sexually assaulted him. The identification was therefore by recognition. From the evidence, the complainant was very clear on the events that took place and the identity of the perpetrator.
19. After my appraisal of the evidence on record, I am unable to fault the finding of the learned trial magistrate. The prosecution evidence leaves no doubt in my mind that the appellant defiled the complainant and the elements of the offence have been proved beyond reasonable doubt.
20. The appellant also argued that the charge sheet was defective. I have analysed the charge sheet and find that the same is not defective. The ground of appeal therefore fails.
21. The appellant faulted the trial magistrate for rejecting his defence even though it was not challenged by the prosecution as per Section 212 of the *Criminal Procedure Code*. In his defence, the appellant did not raise any issue regarding the charges he was facing. This was well documented in the trial court's judgement. The defence was therefore considered by the trial court and found to be baseless. For the foregoing reasons, I have come to the same conclusion as the learned trial magistrate that in this case, the prosecution proved its case against the appellant beyond any reasonable doubt. I am thus satisfied that the appellant was properly convicted.



22. Regarding the sentence imposed by the trial court, the appellant submitted that the sentence was manifestly harsh and excessive. However, during the sentence, the trial court noted the mandatory nature of the sentences under the *Sexual Offences Act*, No. 3 of 2006. He then proceeded to sentence the appellant to life imprisonment.
23. It is trite that although sentencing is at the discretion of the trial court, the discretion must be exercised judiciously in accordance with the law considering the facts and circumstances of each case. The punishment prescribed by the law for the offence of defilement is a minimum is life imprisonment for a child below the age of 11 years. The court record shows that the appellant was a first offender.
24. Although sentences are intended, *inter alia*, to punish an offender for his wrongdoing, they also aim to rehabilitate offenders to renounce their criminal tendencies and become law-abiding citizens. I have no doubt that the sentence imposed by the trial court, in this case, was lawful but considering that the appellant was a first offender, I am satisfied that the sentence was harsh and manifestly excessive.
25. For the above reason, I hereby set aside the sentence of life imprisonment imposed by the trial court and substitute it with a sentence of twenty (20) years imprisonment. The sentence shall take effect from the date of the appellant's conviction. The sentence shall however be computed in consideration of the 1 year, 6 months and 18 days spent in remand custody.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 21ST DAY OF FEBRUARY, 2024

D. KAVEDZA

JUDGE

In the presence of:

Appellant present in person

Ms. Ntabo for the Respondent

Nelson Court Assistant

