



REPUBLIC OF KENYA



**Liuva v Republic (Criminal Appeal 066 of 2022)
[2024] KEHC 3027 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3027 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL 066 OF 2022
AC MRIMA, J
MARCH 14, 2024**

BETWEEN

EMMANUEL KHALAWA LIUVA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. S.K. Mutai (SPM) in Kitale Chief Magistrate's Court Criminal Case (S.O.) No. E002 of 2022 delivered on 29 th September 2022)

JUDGMENT

1. Emmanuel Khalawa Liuva, the Appellant herein, was charged with the offence of Defilement contrary to Section 8(1)(2) of [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of the offence are that on the 1st day of January 2022 in Trans-Nzoia East Sub-County within Trans-Nzoia County, intentionally and unlawfully caused his penis to penetrate the vagina of J.C. a child aged 13 years.
3. The Appellant also faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006.
4. The particulars of the alternative charge are that, on the 1st day of January 2022 in Trans-Nzoia East Sub-County within Trans-Nzoia County intentionally touched the vagina of J.C a child aged 13 years with his penis.
5. The Appellant pleaded not guilty on both counts. Four witnesses testified on behalf of the prosecution. Upon close of their case, the trial Court made the finding that a prima facie case had been made against the Appellant. He was put on his defence. He gave a sworn defence and did not call any witness.
6. Ultimately, upon close of the defence case, the Appellant was found guilty of the offence of defilement contrary to Section 8(2) and 11(1) of the [Sexual Offences Act](#).



7. On considering mitigation the Appellant was sentenced to 20 years' imprisonment.

The Appeal:

8. The Appellant was dissatisfied his conviction. He abandoned his original Petition of Appeal dated 10th October 2022 in favour of an undated one where he cited his ground of appeal as follows;
1. That the learned magistrate erred in failing to realize that the prosecution failed to prove penetration and further the alleged part of PW1 was not produced in Court to validate that the offence was committed.
 2. That the learned trial magistrate erred in failing to hold that the section of *sexual Offences Act* that I was charged with is at variance with the evidence tendered by prosecution witnesses on the age of PW1.
 3. That the learned trial magistrate erred in failing to consider the credible defence put forth by the Appellant.
9. On the foregoing, the Appellant prayed that the appeal be allowed, conviction quashed, sentence set aside and he be set at liberty.

The Submissions:

10. In his undated written submissions, the Appellant sought to discredit the evidence of the Clinical Officer who testified as PW3 by submitting that the failure to state the probable type of weapon that caused injury on the complainant's labia minora and the failure to classify the degree of injury could not lead to the conclusion attributable to that of defilement.
11. It further was his case that there was no vaginal swab that was taken to prove that there were organisms or spermatozoa in the complainant's vagina even though laboratory results were produced as exhibits in Court.
12. The Appellant further punched holes on proof of penetration by stating that there were no treatment notes given to the complainant from Shalom Hospital and Kapenguria County Referral Hospital which could have been conclusive evidence that the act of penetration was proved.
13. In reference to PW2's and PW4's evidence, the Appellant submitted that there was fabrication of evidence as regards the age of the complainant in order to ensure that he ends up in jail. It was his case that he ought to have been charged with Section 8(1)(3) as per that age stated by PW1 and PW4.
14. As regards the claim that the trial Court failed to consider his credible defence, the Appellant submitted that he was framed because he was owed Kshs. 1,800/- for milk. He submitted that he had explained his whereabouts and established his alibi since the evidence on record proved that he was not at the scene on the material date and time.

The Response:

15. The Prosecution challenged the appeal through written submissions dated 16th June, 2023.
16. In a bid to demonstrate that the elements necessary to prove the charge of defilement were established, it was its case that the complainant testified that she was 13 years old. Reference was also made to the Clinic Card produces as exhibit 1 which indicated that the complainant was 13 years old having been born on 26th March 2009.



17. Further to the foregoing, the decision in *Mwalango Chichoro -vs- Republic* was referred to where it was observed that the proof of age is established by documentary evidence such as birth certificate, baptism card or by evidence of the child if the child is sufficiently intelligent.
18. On the aspect of penetration, the Respondent submitted that the law does not envisage absolute penetration into the genitalia or the release of spermatozoa or screening of the male organ for the act of penetration to be complete. To that end, the decision in *Lang'at Dinyo Domokonyang -vs- Republic* (2017) eKLR was relied on.
19. The Respondent referred further to the evidence of the Complainant who stated that she was raped by the Appellant and that of PW3 who examined her and produced P3 forms and treatment notes.
20. As regards the identity of the perpetrator, the Respondent submitted that the Complainant's testimony conclusively identified the Appellant since she knew him as a neighbour and met during the day, engaged in a conversation before the act.
21. The Respondent submitted that the Appellant did not contest this limb of the offence of defilement.
22. The decision in *Roria -vs Republic* 1967 EA was referred to where it was observed that the circumstances were tenable to enable the complainant identify and recognize the appellant.
23. It was its case that the prosecution led cogent and overwhelming evidence that proved all the elements of the offence of defilement. The Respondent submitted that there were no contradictions, incredibility and inconsistencies in prosecution witnesses and even if there were any, they were not substantial to the extent of affecting the conviction.

Analysis:

24. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See *Okono vs. Republic* [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in *Ajode v. Republic* [2004] KLR 81.
25. Having carefully perused the record, this Court is now called upon to determine whether the offence of defilement was committed, and if so, whether by the Appellant.
26. It is established by law and settled judicial precedents that the offence of defilement carries three components. They are the age of the victim, penetration and identification of the assailant.
27. This Court will deal with grounds of appeal alongside the consideration of the ingredients of the offence of Defilement.
28. The Appellant's first ground of appeal is in respect to failure by prosecution to prove the ingredient of penetration.
29. The Appellant was charged under Section 8(1)(2) of the *Sexual Offences Act*. It provides as follows;
 - 8.(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - (2) 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.



30. The term ‘penetration’ is defined by Section 2 of the said Act in the following way;
- “penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;
31. This position was fortified in Mark Oiruri Mose vs R (2013) eKLR when the Court of Appeal stated thus: -
- 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.... (emphasis added).
32. Later the Court of Appeal, then differently constituted, in Erick Onyango Ondeng v. Republic (2014) eKLR held as such on the aspect of penetration: -
- In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.
33. I now turn to the evidence. The Complainant testified that she was sent to collect milk at the homestead of Balozi. It was her case that he found Baba Blessing there who asked her to wait for him to milk the cow.
34. It was her testimony the he (Baba Blessing) entered the bedroom and on returning to the sitting room where she was, he got hold of her, overpowered her and lied on her chest. She stated that he removed her biker and pant and inserted his penis to her vagina.
35. It was further her evidence that she struggled with him when he left her, he told her to keep quiet. He tried to give her Kshs. 100 for but the Complainant refused.
36. On making her way home, the complainant stated that she met her mother, who had come for her, at the gate of the of Baba Blessing. She testified that she informed her of what had happened and they went back to him to confront him about the incident.
37. The Complainant’s mother, RC, testified as PW2. It was her evidence that on 1st January 2022 at around 5.30pm, she sent her daughter to collect milk form Babe Blessing’s (Appellant’s) homestead. She stated that when the Complainant delayed coming back, she went looking for her whereupon she met her at the gate of the Appellant.
38. PW2 testified that her daughter informed her there that the Appellant had raped her.
39. It was her evidence that on confronting the Appellant, he simply denied. PW2 thereafter stated that she went back home with the Complainant and on pulling her skirt up, she found out that she had no pant on. She had it in her hand.
40. PW2 stated that she then called the complainant’s father who sent a motorbike and took the complainant to Kesogon Police Post and thereafter was referred to Kapenguria County Referral Hospital.
41. Clement Kalesingor, a Senior Clinical Officer at Kapenguria County Referral Hospital testified as PW3. It was his evidence that that she attended to the Complainant on 3rd January 2022. It was his case that she told her that she was defiled by someone known to her.



42. It was his case that upon examining the Complainant, she had redness on labia minora. He then made the conclusion that she had been defiled due the redness and the complainant's narration. He produced P3 form and lab results as Exhibit 3 and 4 respectively.
43. Upon assessing the foregoing, the trial Court drew the following findings;
- ...I find that the evidence adduced by the complainant (PW1) is consistent and supported by the evidence of PW2 and PW4 who actually confirmed that the complainant was defiled by the accused.
- I further find that the P3 form produced by PW3 as an exhibit clearly confirmed that the complainant was defiled by the redness of labia minora.
44. The trial Court also considered the Appellant's evidence and made the following conclusion
- ...the defence adduced by the accused are just but mere denials which does not challenge the prosecution case which I find to be strong and credible. His assertions that he was not at the scene and was framed are without basis...the evidence on record linked the accused to the offences he was charged with.
45. I have keenly re-looked at the evidence. Both the Laboratory Request and treatment form and P3 form are dated 1st January 2022. They belong to the Complainant and were issued by Kapenguria Teaching and Referral Hospital and produced by the Senior Medical Officer as exhibits 3 and 4 respectively.
46. Whereas the two documents, more so the Laboratory request form, do not speak much about the occurrence of defilement, at the very least they do corroborate the claim that indeed defilement was the reported incident.
47. Had the examination involved the taking of swabs from the complainant, it would have been more comprehensive.
48. However, that notwithstanding, the examination of the labia minora and the redness seen thereon was sufficient that indeed there was at the very least contact.
49. That said, my attention is drawn to the definition of defilement by *Sexual Offences Act*. The act encompasses partial or complete insertion of a person's genital organs in the genital organs of another person.
50. It is my finding therefore that even if PW3, the Clinical officer, had not adduced evidence, it would not necessarily disprove the aspect of penetration. That is so because its absence is not decisive for the act of defilement to be established.
51. The Court of Appeal in Eldoret spoke to the foregoing in Criminal Appeal 312 of 2018, *Evans Wanjala Wanyonyi v Republic* [2019] eKLR when it cited with approval the decision in Criminal Appeal No. 84 of 2005 (Mombasa) *Kassim Ali -vs- Republic* where the Court stated;
- ... [The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.
52. From the foregoing, the evidence of the complainant that of her mother and the Investigation officer to the exclusion of the hospital would be sufficient to secure a conviction.
53. In addition, the mere denials by the Appellant as to the occurrence of the offence do not raise any doubt let alone of reasonable magnitude as to question that indeed there was a sexual encounter between the Complainant and the Appellant.



54. In the premises, I do find that the trial Court's finding on the ingredient of penetration cannot be faulted.
55. The second limb of the appeal was the Appellant's contention that the trial Court failed to find that the Section of Sexual Offences Act he was charged with was at variance with the evidence tendered on the age of the Complainant.
56. The Appellant was charged under section 8(1)(2) of the Sexual Offences Act.
57. Exhibit 1, is the complainant's child health card. It indicates that she was born on 26th March 2009. As of 1st January 2022, when the offence was allegedly committed, the complainant was 12 years and 10 months.
58. It is the Appellant's case, therefore, that according to section 8(1)(2) of the Sexual Offences Act, he ought to have been sentenced to life imprisonment since the Complainant had not attained the age of 13 years old as indicated in the particulars of the charge sheet.
59. The Appellant, therefore, contended that he was charged under the wrong section of the Sexual Offences Act as far as the age of the Complainant is concerned was a well construed effort of fabrication of the evidence by the prosecution to ensure that he ends up in jail.
60. Save from just claiming fabrication of evidence, nothing was availed to corroborate the same. In this Court's assessment, there only was an error of computation of the age of the Complainant by the Investigation Officer that resulted in quoting the wrong section of the law. No evidence was fabricated.
61. Notably, the Appellant was sentenced to the 20 years a term shorter than imprisonment for life, the sentence prescribed under section 8(1)(2). In the premises, the Appellant did not suffer any prejudice.
62. As for the claim of alibi, the Appellant did not adduce any evidence of being elsewhere other than the scene of crime on the material date. The claim is baseless and is hereby dismissed.
63. In the end, the whole appeal is found and hereby held to be without merit in its entirety and is hereby dismissed.
64. It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 14TH DAY OF MARCH, 2024.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Emmanuel Khalawa Liuva, the Appellant in person.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Chemosop/Duke – Court Assistants.

