



REPUBLIC OF KENYA



KENYA LAW
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**Ngeno v Republic (Criminal Appeal E001 of 2023)
[2024] KEHC 2169 (KLR) (6 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2169 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KILGORIS
CRIMINAL APPEAL E001 OF 2023
F GIKONYO, J
MARCH 6, 2024**

BETWEEN

ELIUD KIPLANGAT NGENO APPELLANT

AND

REPUBLIC RESPONDENT

*(From the conviction and sentence of Hon. M.I.G. Moranga
(S.P.M) in Kilgoris SPM SOA Case No. 55 of 2020 on 18.05.2022)*

JUDGMENT

1. The appellant filed this appeal against the appellant's conviction, and sentence of 15 years imprisonment imposed on 18.05.2022 for the defilement of the complainant- a girl aged 17 years.
2. In the undated memorandum of appeal filed on 31.01.2023, he cited the following grounds of appeal;
 - i. That the trial magistrate erred in both law and fact by convicting the appellant in the present matter without sufficient evidence that met the standard of any reasonable doubt.
 - ii. That the appellant pleaded guilty during the time of the trial because of ignorance and the fact that he is a first offender.
 - iii. That the trial magistrate erred in both law and fact by totally presuming justice by not keeping in mind that he was not properly informed about the laws of Kenya.
3. The appellant prayed that the appeal be allowed and the sentence of 15 years imprisonment be set aside and re-trial be ordered.



Directions of the court

4. The appeal was canvassed by way of written submissions. The appellant has filed. The prosecution has not filed.

Appellant's submissions.

5. The appellant submitted that the prosecution's case was full of contradictions, innuendos, and hearsay. The appellant argued that PW2, PW3, and PW4 were never at the scene of crime and their evidence was based on hearsay. That there is a contradiction in evidence tendered by PW1 and PW2 as to the time the alleged act occurred. Therefore, the evidence of the said witnesses is of no probative value. The appellant relied on the case of *Kinyatti v Republic Cr. Appeal No. 60 of 1983 (CA)*, Article 50 (4) of *the Constitution*, *The Case of Burunyi & Another v Uganda Cr. Appeal No. 1968 EA 123*.
6. The appellant submitted that the evidence of PW3 did not point at the accused person as the person who defiled the minor. Further, the minor stated that she was defiled by Noel Kiptoo who was responsible for her pregnancy.
7. The appellant submitted that P3 cannot be used as proof of penetration for the complainant who had had previous sexual intercourse.
8. The appellant submitted that the trial court misinterpreted his statement to wait for the birth of the child to prove paternity as an admission of sexual encounter. The appellant therefore argued that suspicion however strong cannot provide a basis for inferring guilt. The appellant relied on the case of *Mary Wanjiku Gichira Versus Republic, Criminal Appeal No. 17 of 1998*.

Analysis And Determination.

Court's duty

9. As a first appellate court, this court is obligated to re-evaluate the evidence 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 vs. Republic [1972] E.A 32*
10. I have considered the grounds of appeal, the evidence adduced in the lower court, and the respective parties' submissions. I find the main issues for determination are;
 - i. Whether the prosecution proved its case beyond reasonable doubt.
 - ii. Whether the sentence was manifestly harsh and excessive

The charge and particulars

11. The appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No. 3 of 2006.
12. It was alleged that on 04.08.2020 at [particulars withheld] village of Transmara East sub-county within Narok County the appellant intentionally caused his penis to penetrate the Vagina of MC a girl aged 17 years.
13. In the alternative charge, the appellant was charged with the offence of committing an indecent act contrary to Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006.



14. It was alleged that on 04.08.2020 at [particulars withheld] village of Transmara East sub-county within Narok County intentionally touched the vagina of MC a girl aged 17 years with his penis.

Elements of offence of defilement

15. Section 8 (1) as read with Section 8 (4) of the [Sexual Offences Act](#) establishes the offence of defilement as follows:

“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 Sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”

16. The specific elements of the offence defilement arising from Section 8 (1) of the [Sexual Offences Act](#) which the prosecution must prove beyond a 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.

Age of the complainant

17. Under the [Sexual Offences Act](#), defilement is a sexual offence committed against a child, thereby making proof of age an essential element of the offence. A child is a person below the age of 18 years ([Children Act](#)). Age of the child is also an aggravating factor for purposes of determining the sentence to be imposed; the younger the child the more severe the sentence. See penalty clauses in SOA.
18. Was the age of the victim proved?
19. PW1 testified that she was 17 years old and in form three at GH school. She produced a certificate of birth as P Exh 1 which showed that PW1 was born on 31.01.2003. She was 17 years old at the time of the incident.
20. PW2 testified that she is the mother of PW1 and that PW1 is 17 years old.
21. Based on evidence adduced by the prosecution, this court finds the victim was 17 years old at the time of the offence.

Penetration

22. Penetration is defined in Section 2(1) of the [Sexual Offences Act](#) as:

“The partial or complete insertion of the genital organs of a person into the genital organ of another person.”

23. Penetration was further explained by the Court of Appeal in the case of Mark Oiruri Mose v R [2013] eKLR 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.”.

24. PW1 testified that she went to the appellant's home. They slept with the appellant in the appellant's bed at the appellant's house on 04.08.2020 and they had sex. She later found out that she was pregnant. She, however, stated that the pregnancy was for Noel Kiptoo.
25. PW2 testified that PW1 was taken to the police station and was found to be pregnant.
26. PW3 a clinical officer examined PW1 and noted that there was no spermatozoa but she was pregnant. On examining her genitalia, he noted the hymen was broken but not fresh, there was no laceration with whitish discharge. He concluded that the girl was defiled. He produced a p3 form, treatment notes, and PRC form dated 07.08.2020 as P Exh 2, 3, and 4 respectively.
27. PW3, could not tell who the perpetrator was. He stated that the pregnancy was about two months at the time he examined her.
28. The appellant denied defiling PW1 but stated that he was waiting for the child to be born to know if it belonged to him.
29. The inevitable conclusion from the analysis of the evidence is that there was a penetration of the genitalia of PW1. Accordingly, this court finds that the prosecution proved beyond reasonable doubt that there was a penetration of PW1- a child. But by whom?

Was the appellant the perpetrator?

30. PW1 testified that in July 2020 she was in Kapchumbe town. She met the appellant who requested her phone number. The appellant kept calling her. The appellant called her while she was in Gorgor on 02.08.2020 and inquired where she was. The appellant wanted to know when PW1 would be going back to her home. She told him that she was going back on 04. 08.2020. They met at the hill. They took a walk on the hill up to 6:30 p.m. They went to the appellant's home ate at his mother's and slept at the appellant's house where they had sex.
31. PW1 further testified that she was taken to Ngorenkiriki Hospital where she was found to be pregnant. She stated that the pregnancy was for Noel Kiproo who was in Nairobi. She however stated that she had slept and had sex with the appellant on 04.08.2020.
32. PW2 testified that her daughter disappeared from home on 03.07.2020. They looked for her and found her on Thursday after 3 days. She was informed that PW1 was at the appellant's place.
33. PW4, the investigating officer testified that he was called by the OCS and informed to collect the appellant and PW1. From his investigations, he gathered that the appellant had found PW1 at Kapchumber while grazing cattle and reported that she had become his girlfriend. Both eloped to an unknown place for four days. They were later found going to the Gorgor shopping center when they were arrested and taken to the Abossi police station.
34. In his defence the appellant testified that he was arrested while eating with his friend and taken to Abossi police station. PW1 was later brought to Abossi police station. He claimed that he did not defile PW1. He however was waiting for the child to be born to know whether the child was his.
35. DW2 testified that the appellant was arrested in the hotel where she had served him tea. She however did not know why the appellant was arrested.
36. DW3 testified that he was with the appellant taking lunch when the appellant was arrested.



37. The appellant was well known to the complainant. The complainant gave evidence that they slept with the appellant on the material day and they had sex. She gave an account on how the appellant sought after her, all his romantic escapades and sexual intercourse with her. From the evidence that was adduced there was no possibility of mistaken identity.
38. The fact that she may have had other previous sexual encounters does not 'blot out' the defilement by the appellant. The appellant seems to place too much premium that the complainant stated that the pregnancy was by Kiptoo. This does not help his defence. Except, such revelations should prompt further investigations for possible defilement by others. This court hopes responsible authorities will pick up this piece of information for action.
39. The pieces of evidence analyzed herein prove that there was no mistaken identity of the appellant as the perpetrator of the offence in question. The evidence by the prosecution leaves no doubt that the appellant caused the penetration of the complainant. The appellant may or may not be the father of the child born by the complainant herein but at a particular time, he defiled her.
40. In the upshot, the court finds that the Appellant was positively identified as the assailant herein; there was no mistaken identity or error.
41. Accordingly, this court finds 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

42. The trial court applied Section 8 (4) of the *Sexual Offences Act* to convict. The section provides:
8(4) A person who commits an offence of defilement with a child between the age of Sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”
43. This court considers that the accused was a first offender. But the offence is serious, and its manner and circumstances require a real deterrent sentence. This court notes that the girl was aged 17 years. In these circumstances, a sentence of 15 years was not excessive. Nonetheless, it is capable of acting as a deterrent measure on these debauchery sexual attacks on children, yet, allowing them to be reintegrated back into society and be a productive citizen. This court, therefore, sees nothing upon which it may interfere with the sentence imposed of 15 years' imprisonment. Accordingly, the appeal on the sentence is dismissed.

Of Section 333(2) CPC.

44. This court has perused the trial court record and found that the appellant was first arraigned in court on 10.08.2020. He was released on bond on 08.09.2020. He remained out on bond till 18.05.2022 when he was convicted and sentenced. In this circumstance, the sentence shall run from 18.05.2022 the date he was convicted.

Conclusion and orders

45. The appeal on conviction and sentence is dismissed.
46. The sentence of 15 years imprisonment shall run from 18.05.2022
47. It is so ordered



DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 6TH DAY OF MARCH, 2024.

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HON. F. GIKONYO M.

JUDGE

In the presence of:

C/A – Mr. Leken

Mr. Okeyo for DPP - Present

Appellant - Present

