



**Ouma alias Ken v Republic (Criminal Appeal E104 of 2022)
[2024] KEHC 2326 (KLR) (1 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2326 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E104 OF 2022
RPV WENDOH, J
MARCH 1, 2024**

BETWEEN

KENNEDY OKUMU OUMA ALIAS KEN APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant herein is Kennedy Okumu Ouma alias Ken. He was convicted for the offence of defilement contrary to section 8 (1) as read with Section 8(3) of the *Sexual Offences Act*.
2. In the alternative he faced a charge of committing an indecent act with a child Contrary to section 11 (1) of the *Sexual Offences Act*.
3. The particulars of the charge are that on diverse dates between October 2021 and December 2, 2021 at South East Kanyamkago Location, intentionally caused his penis to penetrate the vagina of M.A.O. a child aged 13 years or that he caused his penis. No finding was made on the alternative charge.
4. Upon conviction, the appellant was sentenced to serve 15 years imprisonment. The appellant is disastified with the whole Judgment of the trial court.
5. He preferred this Appeal citing the following amended grounds of Appeal;-
 1. That the provision of section 333 (2) of the Criminal Procedure Rules was not complied with;
 2. That the sentence is harsh.
6. The appellant prays that the court exercise its discretion and sentence be reduced.
7. In his submissions, the appellant urged that the trial court misguided itself by failing to consider his mitigation; that the court did not consider Section 333(2) of the *Criminal Procedure Code* as was decided in the case of Criminal E049/2021 Paul Omondi & others v Republic, in that when



sentencing, the court should consider the period that the appellant stayed in remand in sentencing since he was not on bond during the trial.

8. The appellant invited the court to exercise its discretion in sentencing and not be fettered by section 8 (3) *Sexual Offences Act*, that provides for minimum sentence. He urged the court to consider the *Judiciary Sentencing Policy Guidelines, 2016*.
9. The appeal was opposed and the prosecution counsel Mr. Kaino filed submissions in which he submitted that the three ingredients required to prove a charge of defilement were proved because the complainant's age was assessed at 14 years. There was proof of penetration, because the complainant was found to be pregnant at the time of examination. As to identification, counsel urged that three witnesses PW5, PW6 and PW7 found and rescued the complainant from the appellant's house and hence identification is not an issue. Counsel argued that the defence was not believable and urged the court to dismiss the appeal in its entirety.
10. This being a first appeal, this court is required to re-examine all the evidence tendered in the trial court, analyse it and arrive at its own conclusion but allow for the fact that it neither saw nor heard the witnesses testifying an opportunity which the trial court had.
11. This court is guided by the decision in *Okeno v Republic* [1972] EA 32 where the court said:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v R.*, [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post*, [1958] E. A. 424.”
12. The case proceeded to full hearing with the Prosecution calling a total of eight witnesses as follows; PW1 Kasuri Dola, a Clinical Officer based at Uriri Sub- County Hospital; PW2 TA, the complainant's mother; PW3 R0, the father of the complainant; PW4 M.A. the complainant; PW5 Daniel Onyango Odero Assistant Chief of Got Uriri sub-Location; PW6 Harun Ndiza Ondego a village Elder; PW 7 Jairo Omwera of Nyumba Kumi [particulars withheld] village and PW8; PC (W) Luciana Akoth Moses, the Investigating officer.
13. PW4 M. A. recalled that sometimes in October 2021 about 7:00pm when going home from School, he met the appellant riding a motor cycle; he stopped and asked her to be his girlfriend which she accepted. He asked her to go home, change from school uniform which she did, went to meet him on the road and she boarded his motor cycle to his home in Oruba where he opened his house asked her to undress and he inserted his penis in her vagina. PW1 spent the night with the appellant. He left her in the house next day as he went to work and asked her not to open the door. She was kept in the house for three days and they engaged in sexual intercourse every night;
14. On 2/12/2021, the Chief went to the appellant's house, asked for the owner of the house and he told him that he was home. The Chief took her to his home and called her father. The father came and they took her to hospital where it was found that she was pregnant.



15. PW2 and PW3, the parents of the complainant told the court that she disappeared from home on 30/11/2021. PW3; reported to the school the next day that the complainant was not home. On 6/12/2021, PW3 received a call from the Chief of Kilo that they had his daughter at the Chief's camp where he went and found PW4 with the complainant, the Chief and two village elders. The Chief asked him to take the girl to hospital where upon examination, she was found to be pregnant; that the Chief told him he found the complainant in the appellant's house and that she was 14 years old.
16. PW5 testified that on 2/12/2021, he received a phone call from one of his village elders, Harun Ondogo (PW6) who informed him that he had found a school girl in the appellants house; that the girl was taken to his office, she was interrogated and found to be 13 years from North Kanyamkago and revealed the father's name as R.O. PW5 traced the girl's father who went to the Chief's office and the matter was reported to Uriri Police Station. PW6 recalled that on 2/12/2021 PW7 called to inform him that he had seen a school girl at Kamuga village. He proceeded to the home of Samwel Otieno where he found PW7 with the girl M.A. He called PW5 to inform him of what they had found and later took her to Chief's office then to Awendo Hospital and made a report to Uriri Police station.
17. PW7 told the court that on 2/12/2021, he received information that a schoolgirl was detained in Kennedy's house in the home of Samwel. He asked PW6; they went together and found the girl. He went back to the home on 3/12/2021 where the complainant identified the appellant as the person who had married her and he was arrested.
18. PW1 examined the complainant on 2/12/2021 when she was taken to the hospital with a history of defilement. He found that the hymen was not properly broken but the girl was pregnant and had a urinary diseases. The P3 form was filled on 4/12/2021. He estimated her age to be 13 years.
19. The appellant testified on oath in his defence and called two other witnesses. He denied knowledge about the charge but that on 2/12/2021 he was at work till 6:00pm and on 3/12/2021 two people knocked on his door ie Jaro; that they alleged to have rescued a school girl from his house and took him to the police station. He denied ever seeing the complainant before.
20. DW2 BAO the mother to the appellant recalled on 3/12/2021 when the appellant called him from the police station alleging he had been arrested because of a girl. She denied seeing the girl but saw her for the first time in court. DW2 said that the accused was away.
21. DW3 Vallary Achieng testified that the appellant is her husband since 2018 and that on 3/12/2021 somebody knocked on the door and demanded Kshs. 35,000/= when the appellant denied having; that the man alleged that the appellant had a school girl from October till 3/12/2021. The appellant was called out and arrested. She denied that the complainant was found in the appellants house.
22. I have now considered the evidence on record, grounds of appeal and submissions by both sides.
23. As for the amended grounds of appeal, it seems that the appellant was only appealing against sentence though he did not state it explicitly. For that reason I will also consider whether the conviction was proper.
24. To prove a charge of defilement the prosecution has the duty to prove beyond any reasonable doubt the following:-
 1. Proof that the complainant is a minor;
 2. Proof of penetration;
 3. Proof of identity of the appellant;



4. Proof of age.
25. A minor must be a child aged 18 years and below; see Section 2 of the [Sexual Offences Act](#):-
- The partial or complete insertion of the genital organs of a person into the genital organs of another person.” While, “genital organs” includes the whole or part of male or female genital organs and for purposes of this Act includes the anus.”

26. The Court of Appeal when addressing the question of age in Sexual Offences said :-

.... The question of proof of age has finally been settled by a recent decision of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence among other credible forms of proof.

See also *Francis Omuroni v Uganda* Criminal Appeal No. 2 of 2000 the court also observed that age can be proved by observation.

27. In the instant case, PW1 told the court that she was 14 years of age. An age assessment report by a Dental Surgeon (Pexhibit 4) was produced which confirmed that the complainant was 14 years old. This court is satisfied that the complainant was 14 years old at the time of the offence. Though the charge states that she was 13 years, that is not a serious defect in the charge sheet because it can be corrected under section 382 [Criminal Procedure Code](#) and besides 13 years and 14 years fall within the same bracket under section 8 (3) if the [Sexual Offences Act](#) which determines the sentence based in age.

Proof of Penetration

28. PW3 is the only witness to the offence. She narrated in detail what took place between her and the appellant; that he caused her to undress, and so did he and he put his penis in her vagina. This did not happen once but for all the nights she spent with the appellant. PW1 corroborated PW3’s testimony. He found that the hymen was partially torn and she was pregnant. It is therefore a fact that PW3 had taken part in a sexual activity.

Whether the appellant was the papetrator.

29. PW3 told the court that she had been left in the house alone when the Chief went to remove her from the house. PW7 said that he acted on information when he found the complainant in the house alone. PW6 confirmed finding PW3 alone in the appellant’s house on the said morning. The allegation that PW7 demanded money from the appellant is not believable because he had only alleged that PW7 had a grudge with him.
30. Besides the allegation that PW7 had a grudge against the appellant, that does not hold water because the conflict was not known to PW6 and PW7 and there is time nor reason alluded to for PW4 to frame the appellant with this charge.
31. As regards the presence of DW3 in the appellants house on 3/12/2021; PW3 and PW7 said that PW3 was alone in the said house. Besides that evidence comes like an afterthought because it was never put to PW6 and PW7 when they testified.
32. After considering all the evidence on record the trial court found that the testimonies of PW4, PW6 and PW7 were well corroborated. I have no reason to find otherwise that the complainant found in the appellants house on 2/12/2021. The defence is not believable and she had been missing from home and was defiled.



33. I find that the offence of defilement was proved beyond reasonable doubt. The appellant conviction was properly founded and I affirm it.
34. The appellant was handed 15 years imprisonment which is lawful
35. The complainant's innocence was stolen at 14 years of age. She was left pregnant and hence her life was changed completely with a child who was not planned for.
36. In exercise of this court's discretion I hereby set aside the sentence imposed and substitute it with 12 years imprisonment. The sentence to commence on the date the appellant was arraigned in court on 6/12/2021. The appeal succeeds to that extent.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 1ST DAY OF MARCH, 2024.

R. WENDOH

JUDGE

In presence of:

Ms. Wainaina for the state

Appellant Present

Ms. Emma/ Phelix –Court Assistant

