



**JOA v Republic (Criminal Appeal E149 of 2022)
[2024] KEHC 4332 (KLR) (Crim) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4332 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E149 OF 2022
LN MUTENDE, J
APRIL 11, 2024**

BETWEEN

JOA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal arising from the original conviction and sentence in Sexual Offences Case No. 8 of 2017 at the Chief Magistrate’s Court Milimani, by Hon. C. M. Njagi - SRM on 1st July, 2022)

JUDGMENT

1. JOO, 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*. The particulars of the offence were that on 17th June, 2017 within Nairobi Area County, intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of AM a girl aged 10 years old.
2. In the alternative he faced the charge of committing an Indecent Act with a child contrary to Section 11(1) of that *Sexual Offences Act*. Particulars being that on 17th June, 2017 within Nairobi Area County, intentionally and unlawfully committed an Indecent Act with AM a girl aged 10 years old, by using his hands and penis touched her private parts namely vagina.
3. Having been taken through full trial, the appellant was acquitted of the principal charge but convicted of the alternative count of committing an Indecent Act with a child and sentenced to serve ten (10) years imprisonment.
4. Aggrieved, the Appellant proffered this appeal on grounds that: The offence was not proved as required by law; the testimony of the appellant that was plausible was not considered; and that the court erred



in relying on evidence presented in respect of the first count as the basis of the conviction on the alternative count.

5. Briefly facts of the case were that on 17th day of June, 2017 the complainant was playing with her brother J. outside their house when the appellant, her father returned home and told her to enter the house. When she resisted he pushed her inside the house and ultimately into the bedroom. He proceeded to forcibly remove her trousers and panty, then molested her. She screamed and PW5 MJ answered her call of distress. Upon reaching the house she found the door to the house open, the appellant who was naked was struggling with the complainant who was half naked and was struggling to get her trouser from the appellant. She took the child with the help of other neighbours. On questing the child she told them that the appellant had put her on the bed and molested her. Since her mother was away they took her to the police station. The child was taken to hospital where she was examined. Ultimately the victim was taken to a rescue home, at Kabete. The appellant who arrested was charged.
6. Upon being placed on his defence the appellant stated that on the fateful day, the complainant had been instructed by her mother, his wife, to warm rice and serve him. That she put the rice on fire and went to play and neighbours saw smoke emitting from the house. He beat the complaint and remained in the house having washed the pan. Soon thereafter he was arrested by the police following allegations that he had sexually assaulted the complainant. He accused neighbours of framing him up and couching the child to lie. He went on to explain that the child was his step daughter, and he married her mother after his first wife deserted their matrimonial home. That the mother of the complainant is jobless hence he was the one providing for them for the nine (9) years they have lived together as well as his biological children sired by the complainant's mother. That though the child was taken to a children home he was the one paying her fees.
7. The appeal was canvassed through written submissions. It is urged by the appellant that ingredients of the offence were based on the testimony of PW1 and PW5 that was fabricated hence the charge was not proved beyond reasonable doubt. That evidence adduced by the complainant was coached and unbelievable. That the Investigating Officer who coached the complainant per the content of the report the Children Officer was not availed to testify. That in light of contradiction between PW1 and the Children Officer, the magistrate ought to have resolved the case in favour of the appellant. Reliance was placed on the case of *Richard Munene vs. Republic* (2018) eKLR where the court stated that:

“Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused”.

8. No submissions were filed by the Respondent.
9. This being a first appellate court, I must examine and analyse evidence at trial afresh and reach independent conclusions bearing in mind that I had no opportunity of seeing and hearing witnesses who testified. In the case of *Okeno vs. Republic* (1972) EA 32, it was held that:

An Appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [*Pandya Vs. Republic* (1957) EA 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 conclusion (*Shantilal M. Ruwala Vs. Republic* [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 Peter Vs. Sunday Post, [1958] EA 424).”

10. The appellant was convicted for the alternative count of committing an Indecent Act with a child which is provided under Section 11(1) of the Sexual Offences Act (SOA) that enacts thus:

Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

11. The particulars of the offence were that the appellant used his hand and penis to touch the complainant's vagina. The appellant however contends that the complainant did not state anywhere that her breasts, buttocks or vagina were touched by the appellant to warrant the conviction which called for an acquittal.

12. The evidence of the child was that the appellant inserted his penis (urinating thing) inside her vagina (thing for urinating) and she screamed as she felt a lot of pain. This was the basis of conviction though the trial magistrate did not exhaustively analyse the evidence.

13. The principal charge was of defilement. Section 8(1) of the SOA provides that:

A person who commits an act which causes penetration with a child is guilty of an offence termed defilement

14. To prove the charge of defilement existence of the essential elements must be demonstrated which are:

1. Age of the victim
2. Act of penetration; and;
3. Positive identification of the assailant,

15. In the case of Francis Omuroni vs. Uganda, Criminal Appeal No.2 of 2000 the Court of Appeal held that:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by a birth certificate, the victim's parents or guardian and by observation and common sense.”

16. In Fappyton Mutuku Nguu vs. Republic (2012) eKLR the court delivered itself thus:

“That “conclusive” proof of age in cases under Sexual Offences Act does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.”

17. In Mwalongo Chichoro Mwajembe vs. Republic (2016) eKLR the Court of Appeal held that:

“The question of proof of age has finally been settled by recent decisions 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. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See Denis Kinywa-Vs- Republic, Criminal Appeal No.19



of 2014 and Omar Uche -Vs- Republic, Criminal Appeal No.11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in Francis Omuroni - Vs- Uganda, Criminal Appeal No. 2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable”

18. This is a case where the complainant told court that she was ten (10) years old. PW4 Julia Auma, her mother testified to her age as ten (10) years. And, the appellant, her step-father per his testimony did not dispute the fact of age.
19. On the issue of penetration, Section 2 of the [Sexual Offences Act](#) defines penetration as:

“The partial or complete insertion of the genital organs of a person into the genital organs of another person;”
20. The complainant testified that the appellant found her playing outside with her sibling and instructed her to play away from him then told her to enter the house. He pushed her inside the bedroom. He forcefully removed her trouser and panty, he removed his boxers put her on the bed then removed his “thing” and inserted into her thing used for ‘susu’. She alluded to the act as “tabia mbaya” translated to mean bad manners. She screamed because of pain and was rescued by neighbours.
21. It is argued by the appellant that he was framed by neighbours and the Investigating Officer. PW5 who ran to the house upon hearing the child scream testified to have found her with only the “top” without trousers and the child told her that the appellant had done “bad manners” to her. She noted that the appellant was completely naked. Her evidence on the aspect of dressing up corroborated that of the complainant.
22. The appellant alleged that neighbours coached the child to lie but did not give any reason that would prompt them to do so. PW5 had no idea the appellant was the child's step-father and/or he was the one taking up parental responsibility of the child whose mother was jobless.
23. Soon after the child was rescued she was taken to MFS Mbagathi Medical Facility. It was established that the child had reddening of vestibule urethra. PW3 Peninah Angwenyi a Clinical Officer opined that the reddening was a sign of pressure on the area.
24. In the case of Bassita vs. Uganda S.C. Criminal Appeal No.35 of 1995 the Supreme Court held that:

“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victim's own evidence and corroborated by the medical evidence or other evidence. Though desirable, it is not hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt.”
25. In George Kioji vs. Republic Criminal Appeal No. 270 of 2012, Nyeri the Court of Appeal held that:

“Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be



convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80, Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”

26. Section 124 of the *Evidence Act* provides that:

Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

27. The minor referred to the act as “tabia mbaya” and when she was rescued she told the neighbours that the appellant had done bad manners to her. In the case of *Kediang Lokilepuang alias Geoffrey vs. Republic* (2019) eKLR, Sitati J held that in Kenyan context “bad manners” is actually indecent act.
28. The appellant argues that he was simply disciplining the complainant but did not explain why he had to do so while naked and the child half naked. PW4 was not present when the incident occurred. She depicted the complainant as a truant. She defended the appellant, her husband of eight (8) years arguing that he was not capable of committing such an act.
29. The court believed the complaint and found that she had been molested. The explanation by the complainant as to what happened amounts to partial penetration which exerted pressure on the urethra of the complainant. This was defilement.
30. Submissions based on the children officer’s report that was filed four (4) years later that was not interrogated is neither here nor there. In the premises I set aside the conviction and sentence on the alternative count and return a verdict of guilty in respect of the appellant on the main count of defilement, then proceed to sentence him to serve twenty five (25) years imprisonment.
31. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 11TH DAY OF APRIL, 2024.

L. N. MUTENDE

JUDGE

In The Presence Of:

Appellant

Mr. Oyugi for the Appellant

Ms. Arunga for the Respondent

Court Assistant – Gladys

