



**Kirui v Republic (Criminal Appeal E005 of 2023)
[2024] KEHC 3459 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3459 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL E005 OF 2023
RN NYAKUNDI, J
APRIL 11, 2024**

BETWEEN

VICTOR KIPNGENO KIRUI APPELLANT

AND

REPUBLIC RESPONDENT

*((Being an appeal from the judgment of Hon. R.
Odenyo in Eldoret law court cr. SO. NO. E031 of 2022))*

JUDGMENT

1. 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](#) No. 3 of 2006. The particulars of the charge were that on 3rd February, 2022 at about 4:00PM at (Particulars withheld) village in (Particulars withheld) sub-county in Uasin Gishu County, the appellant intentionally and unlawfully caused his genital organs to penetrate the genital organ of N.J a girl aged 6 years old.
2. The appellant faced an alternative being committing an indecent Act with a child contrary to section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the offence were more less the same.
3. The appellant was convicted on the main charge and sentenced to life imprisonment.
4. Being aggrieved with the said judgment the appellant lodged the present appeal based on the following grounds:
 - i. That the learned trial magistrate erred by relying on irrelevant evidence.
 - ii. That the evidence adduced was contradictory and inconsistent
 - iii. That the prosecution did not provide enough evidence to prove that the appellant committed the crime.



- iv. That the prosecution at much deeper level failed to investigate the cause or rather address the root cause of the matter as regards to the offense imposed on the appellant.
 - v. That it is against the background that the complainants anchored the alleged offence.
5. Parties filed written submissions in support of their arguments.

Appellant's Submissions

6. The appellant submitted that in the evidence tendered in court by the prosecution witnesses, the court should find that the same was circumstantial evidence and the evidence relied upon to convict the appellant is inherently flawed, unreliable, irrelevant hearsay and or a unattributed to the author or source.
7. It was submitted that the evidence of the prosecution witnesses is full of loopholes, which leave a lot of unexplained issues. That PW1 and other witnesses contradicted in accounts and their evidence in chief. The charge sheet indicates that the appellant was arrested on 6th February, 2022 and other witnesses as the investigation officer states that at about 6:00PM, members of the public brought the suspect herein, which means that the appellant was arrested on 2nd February, 2022. The appellant essentially submitted that the case is full of falsehood.
8. The appellant argued that he is being used as a scapegoat. He stated that during his defence he tried to express himself concerning his arrest but the trial court being manifestly bias, did not give the appellant some time to speak up.
9. In sum, the appellant submitted that his right to fair trial was violated and such he prayed that the appeal may be allowed, the conviction quashed and the sentence set aside.

Respondent's Submissions

10. The Respondent in opposing the appeal submitted along the lines of the elements of defilement. On age, the respondent submitted that the complainant's birth certificate S/No (Particulars withheld) produced as Exh 1, indicates that the complainant's date of birth is 09/09/2015. Therefore, as at 03/02/2022 the complainant was 5/1/2 years old.
11. On identification, it was the respondent's submissions that according to the complainant's testimony, the appellant used to work for their family as a herdsman. The same was corroborated by the complainant's father. That the appellant himself admitted to being an employee of the complainant's family.
12. On penetration, the respondent submitted that the element was well established. That PW3, Dr. Irene Nasimiyu, testified that she medically examined the complainant. She produced a P3 form in which she indicated her findings. She established that the complainant's genitalia had an injury with an active bleeding. She also found a tear at 6 O'clock position which was actively bleeding.
13. In sum, the Respondent submitted that the ingredients of the offence of defilement were proved to the required standard. That the evidence was consistent and pointed unerringly at the appellant as the perpetrator.

Analysis And Determination

14. I have considered the appeal and submissions by both parties. I have also read the record of the trial court and the judgment. As a first appellate court, this court is obligated to revisit and re-evaluate the



evidence afresh, assess the same 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.

15. The issues that arise for determination in this appeal are;
 - i. . Whether the prosecution proved its case to the desired threshold;
 - ii. Whether the sentence meted upon the appellant was lawful.

Elements of offence of defilement

16. 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* which provides:

8(1) person who commits an act which causes penetration with a child is guilty of an offence termed defilement

8 (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.”

17. The specific elements of the offence defilement arising from Section 8 (1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are:

- i. Age of the complainant;
- ii. Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*; and
- iii. Positive identification of the assailant.

18. In the case of *Charles Wamukoya Karani Vs. Republic*, Criminal Appeal No. 72 of 2013 it was stated that:

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

What does the evidence portend?

Age of the complainant

19. In a charge of defilement, the age of the victim is important for two reasons: i) defilement is a sexual offence against a child; and ii) age of the child has also been used as an aggravating factor for purposes of determining the sentence to be imposed; the younger the child the more severe the sentence.
20. In the present case, the complainant’s birth certificate was produced, confirming the minor’s age to be 5/1/2 years. The issue was however not contested.

Penetration

21. Section 2(1) of the *Sexual Offences Act* defines penetration as:

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

22. The trial court in coming up with its finding relied on the testimony of PW1 and PW5 who corroborated what PW1 stated. PW1 was consistent in her evidence that the appellant defiled her.



23. The Learned Trial Magistrate after considering the evidence in its totality concluded that there was sufficient and credible evidence against the appellant thereby rendering him guilty of the offence of defilement.
24. From the foregoing, having thoroughly read through the record, the court is persuaded that the appellant was properly convicted.
25. The inevitable conclusion from the analysis of the evidence is that there was ample evidence to prove that penetration did occur.

Was the appellant the perpetrator?

26. The complainant stated that the accused was known to her. That he worked for them as a herdsman. The same was corroborated by the complainant's father. That the appellant himself admitted to being an employee of the complainant's family. The trial court found the appellant to have been positively identified. In considering all the material on record, I couldn't agree more.
27. The evidence by the prosecution leaves no doubt that the appellant caused penetration of the complainant. Accordingly, I find that the elements of defilement namely, penetration and minority age of the victim were proved beyond doubt. The conviction was therefore proper.
28. find that the Appellant was positively identified as the assailant herein; there was no mistaken identity or error.
29. Accordingly, I find 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.
30. On sentence I rely on the following principles as set out in S vs. Malgas 2001 (1) SACR 469 (SCA) at para 12 where it was held that:

“A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate (See also Benard Kimani Gacheru vs Republic 2002 eKLR)

31. The following characterization of the trial court record which forms the sole of primary source to address this appeal, I am of the considered view that despite strong submissions by the Appellant systematic and background factors bear high culpability of the Appellant to the extent that there are no substantial circumstances to review the sentence of imprisonment downwards. The appeal on sentence lacks merit in the set of circumstances captured in the impugned judgement. In my view the court below made no errors in principle warranting Appellate intervention. As a result the Appeal on Conviction and sentence is upheld affirming the entire judgment of the court below.
32. Orders accordingly

DATED AND SIGNED AT ELDORET THIS 11TH DAY OF APRIL, 2024



In the Presence of
Mr. Mugun for the State
Appellant

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R. NYAKUNDI

JUDGE

