



REPUBLIC OF KENYA



**Kibichii v Republic (Criminal Appeal E028 of 2022)
[2024] KEHC 3715 (KLR) (4 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3715 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL APPEAL E028 OF 2022
RB NGETICH, J
APRIL 4, 2024**

BETWEEN

DANCUN KIMAGUI KIBICHII APPELLANT

AND

REPUBLIC RESPONDENT

*(An Appeal against both conviction and sentence arising from the
Judgement by Hon. V.O AMBOKO (RM) delivered on the 29th March,
2022 in Kabarnet Chief Magistrate's Court S/O No. E041 OF 2021)*

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the [Sexual offences Act](#) No.3 of 2006. The particulars of the offence were that the Appellant on the night of 13th March, 2021 at around 20Hrs in Baringo Central Sub- County within Baringo County being a minor aged 15 years, forcefully and unlawfully caused his penis to penetrate the vagina of SJK a girl aged 12 years in contravention of the said Act.
2. The Appellant faced an alternative charge of 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 being that the Appellant on the 13th March, 2021 at around 20Hrs in Baringo Central Sub- County within Baringo County being a minor aged 15 years, forcefully and unlawfully caused his penis to touch the vagina of SJK a girl aged 12 years in contravention to the said Act.
3. When called upon to plead to the charges, the Appellant denied the charges and after full trial, judgement was delivered on the 24th March, 2022 where accused was found guilty of the charge of defilement and convicted under Section 215 of the [CPC](#). On the 21st April, 2022 the trial court sentenced the appellant to 20 years imprisonment. The trial court ordered the sentence to run from 24th March, 2022.



4. The Appellant having been aggrieved and dissatisfied with the decision of the trial court appeals to the High Court of Kenya against conviction and sentence vide a petition of Appeal filed on 06th May, 2022 which was later amended and filed on 4th October, 2023 on the following grounds:
 - i. That the learned trial magistrate erred in both law and fact by meting out harsh and excessive sentence on the Appellant without considering the facts adduced before court.
 - ii. That the learned trial Magistrate erred in law and fact in by failing to note that the prosecution witnesses gave inconsistent, contradictory and conflicting testimonies.
 - iii. That the learned trial Magistrate erred in law and fact by failing to find that the Appellant herein was not positively and properly identified.
 - iv. That the learned trial Magistrate erred in law and fact by failing to note that the investigations was shoddy and vital witnesses were not called to testify.
 - v. That the learned trial Magistrate erred in law and fact by failing to find that the prosecution did not prove their case to the required standards as required by law.
 - vi. That the learned trial Magistrate erred in law and fact by rejecting the Appellant's defence without giving cogent reasons.
 - vii. That the Learned trial magistrate erred in both law and fact conducting the proceedings in a language the Appellant never understood.
5. The Appellant prays for order that: -
 - i. The appeal be allowed.
 - ii. The conviction of Honourable V.O Amboko in Kabarnet criminal case No. E041 of 2021 delivered at Kabarnet on the 24th March, 2022 be quashed and sentence thereto be set aside.
 - iii. That the Appellant be set at liberty.
6. The appeal proceeded by way of both oral and written submissions.

Appellants Submissions

7. The Appellant submits that the singular issue for determination emerging from the Appellant's grounds of appeal is whether or not the ingredients of the offence of defilement were proved beyond reasonable doubt.
8. The Appellant submits that before a perpetrator is convicted of an offence of defilement, the court has to consider the crucial ingredients of the offence of defilement as pointed out in the case of *Dominic Kibet Mwarengu vs Republic* [2013] eKLR being
 - a. The age of the complainant.
 - b. Proof of penetration; and
 - c. Positive identification of the assailant.
9. That even though the proceedings in the trial court indicate that indeed the age of the complainant was ascertained and that there was proof of penetration, the Appellant was not positively identified.
10. On the issue of identification, they submit that the law on identification was stated in Criminal Appeal No. 24/2000 *Paul Etole & Another v Republic*. He urged the court to note that the prosecution



witnesses herein relied more on the evidence of recognition of the Appellant rather than identification. That they purport to have known the assailant before the incident and easily recognized him on the day of the crime. They rely in Bomet Criminal Appeal No. E004 of 2021 *Robin Koech v Republic* [2022] eKLR.

11. The appellant submits that the incident in the instant appeal as stated in the charge sheet and by PW1 and PW2 occurred at night around 20.00hours and the Penal Code clearly defines "night" or "night time" as the interval between half past six o'clock in the evening and half past six o'clock in the morning and at such time visibility is not clear.
12. Further that neither PW1 nor PW2 despite stating that they saw the Appellant indicated the source of lighting at that particular place to aid in visibility. That this was acknowledged by the Trial Court in its judgment at page 43 of the Record of Appeal. PW1 stated that she could see the face of the Appellant but could not state the colour of clothes he wore. PW2 on the other hand indicated that the Appellant was wearing a white shirt and black trouser and could be seen from far which begs the question, if indeed it was not dark, why would PW1 not identify the white colour of the T-shirt worn by the Appellant? That this fact is to show that it was indeed dark and both PW1 and PW2 could not clearly see and or recognize the Appellant.
13. The Appellant further urges the court to take note of the evidence of PW2 at page 10 - 12 of the Record of Appeal and submit that the PW2 did not indicate that he saw the face of the Appellant and the only thing he indicated as having clearly seen is the white T-shirt.
14. The appellant further submitted that PW1 and PW2 indicated that the incident occurred behind a shop and if the same is on a road side, passersby would have seen. That it is equally to be noted that none of the parties said anything about the voice of the Appellant despite the fact that they claim to have known him. That the only crucial thing was the visual identification/recognition which was not clearly proved. They place reliance in the criminal appeal case of *Titus Wambua Vs Republic* Criminal Appeal 23 of 2014 and in *Cleophas Otieno Wamunga vs Republic* (1989) KLR 424 and equally, in the earlier mentioned case of *Joseph Muchangi Nyaga a Another -Vs-Republic*
15. That the foregoing citations are clearly in tandem with their instant appeal in that the conditions for a favourable identification/recognition at that time 20.00hrs were poor hence the Appellant could not be clearly seen. That none of the prosecution witnesses expressly indicated that they saw the Appellants face nor did they indicate the source of lighting at that time which time was night. If there was no other source of light, then one could conclude that they were not able to identify the assailant and submitted that the trial court erred in both law and fact in holding that the Appellant was positively identified and urged this court to quash the conviction, set aside the sentence and order that the Appellant be forthwith set free.

Respondent's Submissions

16. The Respondent submits that the Appellant was charged with defilement of a minor aged 12 years old and the prosecution was required to prove that the Appellant was identified, proof penetration and the age of the minor as 12 years old.
17. That on identification, the Appellant was identified by the minor. That the minor said she knew where he studied and where he lived which was confirmed by the Appellant in his defence. Further the minor's mother found the Appellant during the act.
18. In respect to penetration, the respondent submitted that the minor gave a detailed account of what transpired, that the appellant removed his penis, wore a condom and inserted his private organ in her



- private part. That this was confirmed by the doctor who examined the child and found that there was blood around the labia and from internal genital organ. That the hymen was broken and there were epithelial cells. He confirmed there was defilement and defilement was therefore proved.
19. On age, the respondent submit that the charge sheet indicated the victim was 12 years old and the same was proved by birth certificate produced and the age was also indicated in the P3 Form.
 20. On argument that the prosecution did not call vital witnesses, the respondent submit that Section 143 of the *Evidence Act* provides that there is no particular number of witnesses to prove a fact and under section 124 of the *evidence Act*, the court can rely on a single witness if the court was satisfied that the victim was truthful and in this case, the complainant's evidence was corroborated by her mother who found the Appellant during the act and the doctor's evidence which confirmed defilement.
 21. The prosecution counsel further submitted that during trial, the Appellant indicated he was also a minor and produced a birth certificate, however trial court requested verification of birth certificate and the record shows there was a letter from the registration of birth department which confirmed that the birth certificate had been forged. That the letter also indicated the date of birth for the accused was 17th November, 1999 and he was not therefore a minor.
 22. On the issue of the Appellant's defence of alibi, the respondent submitted that the defence of alibi was an afterthought and no notice was given to the prosecution at the beginning of trial to enable the prosecution during trial to verify the Appellant's whereabouts on the day of the incident and secondly, he did not give evidence of the engagement party he purported to have attended and urged this court to reject the defence of alibi.
 23. On the issue of sentence, the respondent submitted that it is within the parameters of the law. That the mandatory minimum sentence for defilement of a girl aged 12 years is 20 years. The respondent urged this court to find this appeal has no merits and dismiss in its entirety.

Analysis And Determination

24. This being the first appellate court my duty was well set out in the case *Okeno v Republic* [1972] EA 32 as follows:-

“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 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 conclusions. (*Shantilal M. Rulwala v 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.”
25. In view of the above, I have perused the petition of appeal, the record of appeal and the rival submissions by the parties. The ingredients for the offence of defilement are penetration, the age of the minor and the identity of the assailant (See *C.W.K v Republic* [2015] eKLR). The appellant did not challenge proof of penetration and minor's age in this appeal. The prosecution is required to prove the 3 ingredients. What I consider to be in issue are as follows: -
 - i. Whether the appellant was positively identified as the person who defiled the complainant.
 - ii. Whether the sentence meted on the Appellant was harsh, excessive and unconstitutional.



(i) Whether the appellant was positively identified as the person who defiled the complainant

26. Record show that PW1 testified that Duncan chased her and when she caught up with her, she pulled her behind the shop and defiled her. The complainant stated that she knew the accused before. She said that she knew his home and where he schooled. She said she knew the accused as Duncan. The complainant stated that she was able to recognize the accused since it was not too dark. From the foregoing, it is clear that the Appellant was not a stranger to the victim having interacted with him at home severally. Having known the accused before the offence, there is no doubt that she was able to recognize him at the time of the incident as the person who committed the act.
27. On whether the applicant's defence was considered, I note from the judgment that the learned magistrate considered the accused's defence. I agree with the trial magistrate that the defence was a mere denial. The defence did not shake the prosecution's evidence.
28. On arguments of inconsistency in evidence adduced, this was considered in the case of *Philip Nzaka Watu v Republic* [2016] eKLR where the Court of Appeal stated as follows: -
- “However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomenon exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses.
- Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question”.
29. In view of the above, contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. It is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case. Upon perusing evidence adduced herein, I find that issues raised are trivial and do not call for rejection of evidence adduced.

(ii) Whether sentence imposed against the applicant was harsh and excessive

30. The Appellant argues that the sentence imposed was harsh and excessive in the circumstances. The Appellant was sentenced to serve 20 years imprisonment. The Court of Appeal while dealing with the issue of sentence in the case of *Bernard Kimani Gacheru v Republic* [2002] eKLR restated as hereunder: -
- “It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”



31. In view of the above, I have carefully considered the facts of this case, the severity of the offence, the principles of proportionality, deterrence and rehabilitation and the mitigating and aggravating factors and the lasting effect the incident may occasion in the life of the minor herein. I have also considered the purpose of sentencing and the principles of sentencing under the common law. I note that under section 8(3) of the *Sexual Offences Act*, a person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
32. I take note of the fact that the minor was 13-year-old school going girl while the appellant was above 18 years old at the time he committed the offence. There is no doubt that the appellant took advantage of the minor and defiled her leaving long lasting and the psychological effect on her. I find the sentence of twenty (20) years imprisonment imposed was appropriate in the circumstances and will not interfere.

Final Orders: -

33. Appeal on both conviction and sentence is hereby dismissed on both conviction and sentence.

JUDGMENT DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNETTHIS 4TH DAY OF APRIL 2024.

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RACHEL NGETICH

JUDGE

In the presence of:

CA Sitenei.

Ms. Ratemo for state.

Appellant in person.

