



REPUBLIC OF KENYA



**Ng'ang'a v Republic (Criminal Appeal 84 of 2023)
[2024] KEHC 3312 (KLR) (9 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3312 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 84 OF 2023
DR KAVEDZA, J
APRIL 9, 2024**

BETWEEN

RICHARD NJUGUNA NG'ANG'A APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. L. Onyina (Ag- SPM) on 30th April 2014 at Kibera Chief Magistrate's Court Sexual Offences No. 876 of 2011 Republic vs Richard Njuguna Ng'ang'a)

JUDGMENT

1. The Appellant was charged and after full trial convicted by the Subordinate Court of the offence of defilement contrary to section 8(1) and (2) of the *Sexual Offences Act* (the *Act*). The particulars were that on 28.02.2011 in Nairobi County, he intentionally and unlawfully caused his Penis to penetrate the Vagina of MC, a child aged 8 years old. He was sentenced to serve 20 years' imprisonment. Being dissatisfied, he file an appeal against the conviction and sentence in line with his petition of appeal.
2. This is the first appellate court and in *Okeno v. R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.
3. With the above, I now proceed to determine the substance of the appeal.
4. In his undated Memorandum of Appeal, the Appellant has raised five grounds of appeal. He complains that the trial magistrate failed to comply with the provisions of Section 124 of the *Evidence Act*. He further complains that from the totality of the evidence, the prosecution failed to prove its case beyond reasonable doubt. He also complained that the trial magistrate erred by relying on his weak defence to convict him, contrary to the law.



5. In order to succeed in a prosecution for defilement, it must be proven that the accused committed an act that caused penetration with a child. “Penetration” under section 2 of the [Act](#) means, “the partial or complete insertion of the genital organs of a person into the genital organs of another person.”
6. The prosecution case was as follows. The Complainant (PW1) provided unsworn testimony stating that she is 9 years old. She testified that on 26.02.2003, she was dropped in school by her mother (PW2) by 8.00am.in the morning. She proceeded to class but realized that she had forgotten her locker keys at home. She informed the teacher about the same and the teacher asked her to go for the keys. She proceeded home using a short-cut and on her way back to school, she met a strange man who told her that she could not pass unless she told him her name. The man then pulled her by her right hand and dragged her into the bushes. He asked her to remove her underpants but she declined. The man forcefully undressed her. He laid on top her and inserted his penis into her vagina, causing her to feel a lot pain. This act went on for about four minutes, after which the man left her. PW1 started to bleed from her private parts. During the ordeal, PW1 could not scream for help as they had gone far into the bushes and no one would hear; the perpetrator was even lying on her face too.
7. A few minutes after the ordeal, PW1 left the bush and started tracing her way back towards the school when she met a lady who helped her upon seeing blood on her skirt. The lady carried her on her back and took PW1 to school, after which she was taken to the hospital.
8. In her testimony, PW1 gave clear and graphic testimony of the ordeal. PW1 remained steadfast that it was the appellant who took her into the bush and subjected her to the act of sexual assault. Besides, despite not mentioning having known the appellant from before, the incident happened in broad daylight and this was sufficient for her to identify him and remember his face thereafter. I therefore hold that the Appellant is the one who committed the act of sexual assault.
9. PW1’s testimony did not require corroboration in accordance with the proviso to section 124 of the [Evidence Act](#) (Chapter 80 of the Laws of Kenya) if there are recorded reasons why the trial magistrate believed the child was telling the truth. In this case, the trial magistrate recorded in his judgement that PW1’s narration of what happened was quite consistent and reliable. It was his finding that she was a truthful witness and that she met the provisions of section 124 of the [Evidence Act](#). I have also thoroughly gone through the testimony of PW1 and noted that she was consistent all through her testimony.
10. Regarding additional corroborating evidence, the prosecution called EWK (PW6), the director of the complainant’s school. She recounted that on the relevant date, she received a distressing call notifying her of a student’s sexual assault. Upon arriving at the school, she encountered PW1, visibly shaken and with blood-soaked attire. PW1 recounted the incident, corroborating the complainant’s testimony. Additionally, PW6 revealed her acquaintance with the appellant, having shared a neighborhood and familiarity with his family. She mentioned observing the appellant near the school’s perimeter on several occasions, prompting her to investigate his presence in the bushes. This account strengthens PW1’s assertion that the appellant accosted her along her route to school.
11. Additionally, the prosecution called Dr. CB (PW7), a medical officer at the Gender Violence and Recovery Centre in Nairobi Women Hospital, who produced a medical report on behalf of Dr. Ad who no longer worked at the hospital. She stated that when PW1 was examined, her vagina had a large posterior tear between the vagina and anus, and blood was oozing from the site. PW1 was immediately admitted and taken to theatre for examination under anaesthesia. The interior genital finding was a long posterior vaginal wall tear. Thereafter, a vaginaplasty and perineal body repairs surgery was conducted.



12. The prosecution also called Dr. ZK (PW4), a doctor at the police department in Nairobi, who examined both PW1 and the appellant and produced the P3 form and medical report respectively for the two. He stated that PW1 had a stitched wound on the posterior vaginal wall, close to the upper part of the anus, and the hymen was absent. He further examined the appellant's genitalia but there was nothing remarkable.
13. The medical evidence of both PW4 and PW7 corroborate with PW1's testimony regarding the incident and conclusively prove defilement.
14. On the age of PW1, the trial court considered the birth certificate produced in evidence by PW5. She was born on 26.02.2003 meaning that she was 8 years old at the time of the offence. There is therefore no doubt that PW1 was a child. The conviction on the charge of defilement is therefore affirmed.
15. On the sentence, section 8(2) provides that a person who commits an offence of defilement with a child below the age of eleven years is liable upon conviction to life imprisonment. The prosecution proved that the child was 8 years old hence the court ought to have imposed the sentence of life imprisonment. However, the court exercised discretion and imposed a sentence of 20 years imprisonment. In this respect the trial court did not err imposing the sentence of 20 years' imprisonment after considering the facts of the case. I therefore do not find any reason to interfere with the sentence. It is affirmed.
16. The appeal is dismissed for lacking in merit.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 9TH DAY OF APRIL 2024

D. KAVEDZA

JUDGE

In the presence of:

Mr. Mongare present for the Respondent

Appellant present on the platform

Nelson Court Assistant

