



**Omboki v Republic (Criminal Appeal E018 of 2022)
[2024] KEHC 3804 (KLR) (22 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3804 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E018 OF 2022
GL NZIOKA, J
APRIL 22, 2024**

BETWEEN

FRANCIS AMBASO OMBOKI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the decision of; Hon. J. Karanja, Senior
Principal Magistrate (SPM), delivered on 3rd June, 2021, vide Sexual
Offence No. 97 of 2018, at the Chief Magistrate’s Court at Naivasha)*

JUDGMENT

1. The appellant was arraigned before the Chief Magistrate’s Court at Naivasha charged vide Criminal Case S/O No. 97 of 2018, 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 (herein “the Act”).
2. That on 9th November 2018, in Naivasha Sub-County within Nakuru County, he unlawfully and intentionally caused his penis to penetrate the genital organ namely vagina of P.A.M a girl aged eight (8) years.
3. He is also charged in the alternative charge, with the offence of; committing an indecent act with a child contrary to section 11(1) of the Act. That, on 9th November, in Naivasha Sub-County within Nakuru County, he unlawfully and intentionally did cause his genital organ namely penis to come into contact with the genital organ namely vagina of P.A.M a girl aged eight (8) years.
4. He pleaded not guilty to both counts and the case proceeded to full hearing. The prosecution called a total of five (5) witnesses in support of its case. The prosecution case in brief is that, PW1, “P.A.M” (herein “the complainant”) was on her way to the toilet when the appellant grabbed her hand and took her into his house.



5. That the appellant removed her clothes; a green and white dress and underwear, and then removed his trouser and underwear and directed her to his bed and did “bad manner” to her. That, she screamed but the appellant covered her mouth.
6. That (PW2) B, the complainant’s younger brother, saw them go into the appellant’s house and peeped through a newspaper wherein he saw the appellant remove the complainant’s clothes while in bed. He then went back home.
7. That later in the evening the appellant went to the complainant’s house and when (PW2) B saw him he informed the father what had happened between the complainant and the appellant.
8. As the complainant’s father did not want to confront the appellant, he called his landlord and neighbour and inquired from the appellant whether the allegations were true but the appellant denied the same. The next day, the complainant was taken to hospital for examination and the examination revealed that she had been defiled. The appellant was then arrested and charged accordingly after investigations.
9. At the conclusion of the prosecution case, the trial court ruled that the appellant had a case to answer and placed him on his defence. He gave a sworn testimony and denied committing the offence. He told the trial court that he owed the complainant’s father a sum of Kshs. 3,000.
10. That on 9th November 2022, when he returned home from work the complainant’s father asked for his money but the appellant requested that he pays him in instalments. However, the claimant started crying and alleged that the appellant had defiled the complainant.
11. That, he and the neighbours suggested they go to hospital to have the complainant examined but the father refused and declined to allow him to enter the hospital and instead told them to go to the police station where he was arrested and remanded.
12. At the conclusion of the case, the trial court held that the prosecution had proved its case beyond reasonable doubt, found the appellant guilty on the main count, convicted and sentenced him to serve a term of life imprisonment.
13. However, the appellant is aggrieved by both conviction and sentence and has appealed against the decision of the trial court based on the following grounds as verbatim reproduced:
 - a. That the learned trial magistrate erred in law and fact by convicting the appellant but failed to note that the ingredients of the offence were not conclusively proved.
 - b. That the learned trial magistrate erred in law and fact by convicting the appellant yet failed to find that his defense was cogent and believable
 - c. That the learned trial magistrate erred in law and fact when he convicted the appellant yet failed to find that prosecution did not discharge the burden of proof
 - d. That the learned trial magistrate erred in law and fact by convicting the appellant but failed to note that the evidence of identification by recognition of the appellant was not positively proved
 - e. That I pray to be supplied with a copy of the original trial courts proceedings and its judgment.
 - f. That further grounds shall be adduced at the hearing of this appeal
 - g. That I wish to be present during the hearing and determination of this appeal



- h. That this petition is filed and annexed with an affidavit by the name Francis Ambaso Ombaki
14. The appellant, without leave of court, filed amended grounds of appeal together with his submissions as here below reproduced:
- a. That the learned trial magistrate erred in law and fact by awarding a conviction on a prosecution case that was marred with uncorroborated evidence.
 - b. That the learned trial magistrate erred in law and fact by not finding that the ingredients of the offence were not conclusively proven beyond reasonable doubt.
 - c. That the learned trial magistrate erred in law and fact by awarding a sentence that is not only excessive but also harsh in circumstances of the offence.
 - d. That the learned trial magistrate erred in law and fact by failing to inform the appellant his right to have an advocate assigned to the appellant by the state and at state expense if substantial injustice would otherwise result.
15. However, the respondent opposed the appeal through grounds of opposition dated 19th April, 2023 in which it states: -
- a. That the age of the complainant was sufficiently proved as provided for under the [Sexual Offences Act](#).
 - b. That penetration was proved under the [Sexual Offences Act](#) through the evidence of the doctor examined the complainant and produced P3 form
 - c. That the trial court found that the prosecution case was proved beyond reasonable doubt and subsequently convicted him in line with section 215 of the Criminal Procedure Code.
 - d. That the sentence imposed by the trial court was proper and in line with the [Sexual Offences Act](#). further, that the court considered mitigation and circumstances of the offence and used discretion in sentencing the appellant
 - e. That the petition is misconceived and lacks merit and ought to be dismissed forthwith and the conviction and sentence be upheld
16. The appeal was disposed of through written submissions. The appellant in undated submission argued that, the prosecution failed to prove the age of the complainant beyond reasonable doubt. That age is an important ingredient of the offence as it determines the sentence to be meted out. He argued that, no legal document was produced to prove age despite the fact that neither the complainant nor her father (PW3), Abel, knew the exact date the complainant was born. Moreover, the complainant stated she was ten (10) years old contradicting the age in the charge sheet that indicated she was eight (8) years old.
17. Further, the trial Magistrate erred in admitting the age assessment report produced by (PW5) No. 72266 CPL Boniface Aboko, the Investigating officer, who was neither the maker nor a medical expert in the process contravening of section 77 (1), (2) and (3) of the [Evidence Act](#) (Cap 80) Laws of Kenya.
18. Furthermore, he was not served with the age assessment report before it was produced in court which denied him an opportunity to prepare his defence in contravention of his right to a fair trial as enshrined in [the Constitution](#) of Kenya, 2010.
19. On penetration, the appellant submitted that, no tangible evidence was tendered to prove penetration beyond reasonable doubt. That, the trial Magistrate relied on the complainant's evidence that was



- uncorroborated as the medical evidence by (PW4) Benjamin Kuria, did not prove that he defiled the complainant.
20. The appellant furthermore argued that the hymen of the complainant could have been broken through other activities other than sexual intercourse and relied on the case of; PKW vs Republic [2012] eKLR where the Court of Appeal held that, it is erroneous for courts to assume the absence of hymen in a girl child is proof of defilement as scientific and medical evidence has proved there some girls are born without a hymen. That the Court further stated that, hymen can be broken by other factors other than sexual intercourse; such as insertion of items like tampons, masturbation, injury and medical examination, or engaging in vigorous activities such as horseback.
 21. The appellant further submitted that, the prosecution's case was marred with contradictions between the evidence of the complainant that she left her brother (PW2) Brighton sleeping, and the evidence of (PW2) who testified to have seen the appellant and complainant together in his house.
 22. On sentence, the appellant argued that the court failed to take into consideration that he is a first offender and the offence was based on probabilities and imposed a life sentence which is harsh and excessive.
 23. Further, that the mandatory nature of the sentence provided for under section 8 (2) of the Act prevents review of the sentence by a higher court as provided for in Article 50 (2) (q) of *the Constitution* of Kenya and therefore denies him access to justice in contravention of Article 48 of *the Constitution* of Kenya.
 24. Furthermore, the mandatory nature of the sentence prevents the court from considering mitigation provided for under section 216 and 329 of the Criminal Procedure Code (Cap 75) Laws of Kenya, and also deprives the courts of their legitimate exercise of discretion.
 25. Lastly, the appellant submitted that, despite being eighteen (18) years old at the time of the offence, he was not informed of his right to have an Advocate or have one assigned to him in contravention of Article 50 (2) (h) of *the Constitution* of Kenya and section 43 of the *Legal Aid Act* (No. 6 of 2016) Laws of Kenya which greatly prejudiced him as he had no legal knowledge and that the offence attracts a life sentence.
 26. However, the respondent in submissions dated; 19th April, 2023, argued that the elements of the offence of defilement being; age, penetration, and identification of the perpetrator were all proved beyond reasonable doubt. That, the age of complainant was proved by the age assessment report produced in court that indicated the complainant was ten (10) years old.
 27. That as regard identification, the evidence revealed that the appellant was well known to the complainant and her family as they lived in the same compound. Further, the complainant knew the appellant worked together with her mother picking and packing beans in crates. Additionally, (PW2) Brighton saw the appellant defiling the complainant.
 28. Further, penetration was proved by production of the P3 form by (PW4) Benjamin Kuria that showed the complainant had a missing hymen. Reliance was placed on the case of; Mark Oiruri Mose vs R 2013) eKLR where the Court of Appeal held that, the law does not require evidence of spermatozoa as long as there is penetration of the surface demonstrated.
 29. Finally, the respondent argued the trial court considered the appellant's mitigation before imposing the sentence, which is in accordance with the law.
 30. At the conclusion of the hearing of the appeal and in considering the appeal, I note that, the role of the first appellate court thereof is to re-evaluate the evidence afresh and arrive at its own conclusion, bearing in mind that the court did not have the benefit of the demeanour of the witnesses.



31. In that regard, the Court of Appeal in the case of; *Okeno vs. Republic* (1972) EA 32 thus observed: -

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya V R* 1975) 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] E.A. 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”

32. Be that as it were, the offence the appellant was charged with is provided for under section 8(1) of the Act, that states: -

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

33. The law is thus settled that, the ingredients of defilement as discussed in the case of; *Agaya Roberts vs. Uganda*, Criminal no. 18 of 2002, by the Court of Appeal are; (i) sexual intercourse (ii) victims age below 18 years (iii) the accused is the culprit.

34. Similarly, in *Bassita Hussein vs. Uganda Criminal Appeal No. 35 of 1995*, the Supreme Court of Uganda laid down the ingredients of the offence of defilement, which the prosecution must prove beyond reasonable doubt as; (i) the facts of the sexual intercourse or defilement (ii) the age of the victim being under 18 years (iii) participation by the accused in the alleged sexual intercourse or penetration.

35. In the instant matter, it is indicated in the charge sheet that when the offence was committed the complainant was eight (8) years old. The complainant testified that she was ten (10) years old and so did the father. However, they did not produce any birth certificate to prove the same.

36. To prove the complainant age, the prosecution produced the age assessment report which showed that the complainant was 10 years old. The law is settled by the court that the age of a child in a defilement case can be proved by any other evidence than the birth certificate. *Francis Omuroni vs Rep, Uganda Court of Appeal; Criminal Appeal No. 2 of 2000* it was 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 birth certificate, the victim’s parents or guardian and by observation and common sense...”

In that regard I hold that the age was well proved.

37. The question is whether two different ages stated in the particulars of the charge sheet and in evidence was prejudicial to the defence case. To answer this question one has to address the rationale of establishing age in defilement cases. In my opinion, it is first and foremost to prove the victim was a child. The definition of the child under the *Children Act* is “an individual who has not attained the age of eighteen years”. As such both the age of eight (8) and ten (10) years fall under that definition.



38. Secondly the age is important under section 8 of the Act to determine the sentence to be meted out upon conviction. In the case of; Kaingu Elias Kasomo vs R Criminal Appeal No. 504 of 2010 (unreported) the Court of Appeal stated that:

‘Age of the victim of the sexual assault under the *sexual offences act* is a critical component. It forms part of the charge which must be proved in the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed upon conviction will be dependent on the age of the victim.’

39. In this case the age of eight (8) and ten (10) years falls within the bracket of age eleven (11) years or less. In that case I find that, the discrepancy in the age did not prejudice the appellant.

40. The other issue is penetration and, in that regard, it was the evidence of the complainant that the appellant called him to his house and did bad manners to her by putting “his thing of urinating into hers” PW2 Brighton the complainant’s brother told the court that he saw appellant do “bad manners” to the complainant.

41. Indeed, the corroborative evidence was led by PW4 Benjamin Kuria who produced the P3 form which showed that, there were no injuries on the labia majora, minora and cervix however her hymen was broken. The witness clarified that, although the loss of hymen could be either through penal penetration or any other means, the history given by the victim confirmed penal penetration and/or defilement. I have considered the evidence afore and it is the considered opinion of the court that penetration was proved.

42. As regards the identity of the perpetrator, it is in evidence that, the complainant’s parents and the accused were staying in the same plot and the mothers of both the complainant and the appellant were working at the same place. In fact, the appellant is said to have gone to the complainant’s home after the incident to take a phone and that is when the complainant’s brother spilled the beans. Therefore, the issue of mistaken identity does not arise.

43. The accused did not adduce any plausible or adequate evidence to rebut the prosecution case. It is not possible that the complainant and the brother lied against the appellant as no reason has been advanced for the same. Furthermore, the doctor found the missing hymen could have been due penal penetration thus corroborating the evidence of the complainant and the brother.

44. Furthermore, the incident is alleged to have taken place during the daytime and the manner in which the complainant explained how the offence happened and who did it clearly indicates she knew the appellant well.

45. Even then the appellant did not cross examine the prosecution witness on these issues and advanced a story of money owing, but he only raised the issue of the debt owed in his defence and was recanted by his own defence witness and therefore an afterthought.

46. All in all, I find there is enough evidence to support the conviction and I uphold it. As regard the sentence I find that the same is lawful as stipulated under the law and I uphold it.

47. Consequently, the entire appeal is dismissed for lack of merits.

DATED, DELIVERED AND SIGNED ON THIS 22ND DAY OF APRIL 2024.

GRACE L. NZIOKA

JUDGE



In the presence of:

Applicant present virtually

Mr Abwajo for the Respondent

Ms Ogutu: Court Assistant

