



**Otieno v Republic (Criminal Appeal 14 of 2023)  
[2024] KEHC 3800 (KLR) (18 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3800 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDAMA RAVINE  
CRIMINAL APPEAL 14 OF 2023**

**RB NGETICH, J  
APRIL 18, 2024**

**BETWEEN**

**CHARLES ONYANGO OTIENO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An Appeal against both conviction and sentence arising from the  
Judgement by Hon. Nthuku J.N-SRM delivered on the 17th January,  
2018 in Eldama Ravine Magistrates Court S/O No. 06 of 2016)*

**JUDGMENT**

**Background**

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](#). Particulars are that on 26<sup>th</sup> November, 2016 at [Particulars] village he intentionally and unlawfully caused his penis to penetrate the vagina of L.K a child aged 13 years.
2. In the alternative, the Appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#). Particulars are that on 26<sup>th</sup> November, 2016 at [Particulars] village he caused his penis to come into contact with the vagina of I.K a child aged 13 years.
3. The Appellant denied the charges and the prosecution availed 4 witnesses to prove their case and upon hearing, the trial court found the accused guilty of the main charge of the offence of defilement, convicted him and sentenced him to 20 years imprisonment.
4. The Appellant having been aggrieved and dissatisfied with the above mentioned judgment, appeals against the judgment on the following grounds:-



- i. That the learned trial magistrate erred in law and in fact by failing to appreciate that the prosecution had not proved the case to the required standard of beyond reasonable doubt.
  - ii. That the learned trial magistrate erred in law and in fact by failing to appreciate that the exhibits adduced in this case were suspicious as the birth certificate adduced though bearing a similar name bore different serial numbers.
  - iii. That the learned trial magistrate erred in law and in fact by failing to find that the witnesses' evidence was contradictory.
  - iv. That the learned trial magistrate erred in law and in fact by failing to appreciate that the appellant enjoyed the defense provided for by section 8(5) and (6) of the *sexual offences Act* number 3 of 2006.
  - v. That the learned trial magistrate erred in law and in fact by failing to appreciate that the Appellants defense was cogent and credible and raised substantial doubt against the prosecution's case.
5. The appellant prays for the total success of this Appeal, conviction quashed, sentence set aside and the Appellant set at liberty.

### **Appellant's Submissions**

6. The Appellant orally submitted in court that the evidence did not show that he was involved in defilement. That under section 124 of the *evidence Act*, proof is important. He submitted that the doctor testified that there was no hymen and later said that the complainant had fresh injuries.
7. He submitted that crucial witnesses were not availed by the state and in his defence, he stated that there was a conflict between the parents of the complainant and his sister. He urged the court to consider the mitigating factors. He further urged the court to look at the decision in Benard mbidy vs Republic, Mchakos HCCR.

### **Respondent's Submissions**

8. The Respondent submits that the case against the Appellant was proved beyond reasonable doubt; that there were no material contradictions in evidence adduced. That if at all there were contradictions then the same were minor and did not go to the core of the prosecution case. That in brief analysis, the entire evidence on record left no doubt that the prosecution proved its case against the appellant beyond reasonable doubt.
9. In submitting on whether the medical evidence in respect to age of the complainant was contradictory, the Respondent submits that Prove of age of the complainant in cases of defilement is critical as it guides the court on sentence to impose in the event the accused is found guilty. That from the findings of the trial learned magistrate, the charge indicates 13 years while her father said she was born on 13<sup>th</sup> August, 2003 and he produced her original birth certificate issued on 17<sup>th</sup> March, 2015 which meant that as at November 2016, the complainant was aged 13 years old hence her age was duly proved and no evidence was adduced to challenge that.
10. As to whether appellant's defence was considered, the Respondent argues that the general principle and procedure is for the trial court to consider defence raised by an accused person and in this case, the learned trial magistrate dismissed the appellant's defence as an afterthought.



## Analysis and Determination

11. This being the first appellate court, I have a duty to re-examine and re-analyze evidence adduced before the trial court and arrive at an independent determination. This I do with the knowledge that unlike the trial court, I did not have the privilege of hearing witnesses first hand and observe their demeanor. For this I give due allowance. The principles that guide the hearing of first appeal were set out in the case *Okeno Vs. Republic* [1972] E.A 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 Vs. Republic* [1957] 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. Rulwala Vs. Republic* [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.”

12. Further in the case of *Mark Oiruri Mose –Vs- Republic* [2013] e KLR Criminal Appeal No.295 of 2012 the Court of Appeal stated: -

“It has been said over and over again that the first appellate Court has the duty to revisit the evidence tendered before the trial Court afresh, analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that.”

13. In view of the above, I have perused and considered the record of appeal and submissions by parties herein and consider the following as issues for determination: -
- i. Whether the ingredients for the offence of defilement were proved beyond reasonable doubt.
  - ii. Whether the sentence imposed was harsh and excessive.

### **(i) Whether the ingredients for the offence of defilement were proved beyond reasonable doubt.**

14. The ingredients for the offence of defilement are proof of penetration, the age of the minor and the identity of the assailant (See *C.W.K v Republic* [2015] eKLR).

#### **a. Penetration**

15. Penetration is defined under Section 2 of the *Sexual Offences Act* as the partial or complete insertion of the genital organ of a person into the genital organs of another person.
16. Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred. Where the medical examination may not be available or conclusive, the court ought to weigh with thorough scrutiny and utmost caution, the evidence of the child, in order to determine whether there was penetration.



17. The complainant in this case who testified as Pw 1 stated that on 26<sup>th</sup> September, 2016 at 3:30pm she had gone to a saloon and while outside the salon, she saw accused who lived near the salon sleeping as his door was open. She said the accused beckoned her with signs to enter his house. She said she had promised accused that she would have sex with him as they were friends and when she entered the house, accused asked her to do what she had promised to do. She said they had promised to have sex before accused goes to Nairobi.
18. Complainant said she personally removed her skirt and pant. The accused removed his trouser, boxer, t-shirt and remained with vest and they had sex on the mattress on the floor after accused putting on a condom which she saw him put on. She said her brother went to call and peeped through a hole on the wall which prompted accused to throw a sandal at him. The brother went to inform her mother who went to accused's house but the accused told her the complainant was not there. As the complainant's mother went to call AP, the accused went with complainant to his friend's house at Koisamu where the police and her father found them and took them to Police station then to Mogotio Health Centre. She said the appellant was a neighbor and they started talking since September, 2016 and had agreed to have sex at a later date.
19. Pw 3 Winrose Kigen a clinical officer Mogotio Reg.No.4473. confirmed that the complainant was treated at Mogotio Sub-County Hospital on 29<sup>th</sup> November, 2016 vide outpatient No.5664/16. She said the child was 13 years old and had history of disappearing on 26<sup>th</sup> November, 2016 and going to live with a man known to her. She found whitish vaginal discharge and an old broken hymen, inflamed labia minora on both sides and a thick yellow discharge on speculum examination. That Laboratory tests showed pus cells in urine and epithelial cells, VDRL – negative, Pregnancy test – negative and High Vaginal Swab showed epithelial cells. She concluded that she had been defiled and she gave her STI treatment. She approximated age of injury as 84 hours. She filled and signed the P3 form on 29<sup>th</sup> November, 2016. She produced it as an exhibit - exb 2, the treatment card as exhibit (MFI 1 - exb 1).
20. From the foregoing the evidence of the complainant was corroborated by evidence of clinical officer who confirmed that there was penetration.

#### **(ii) Proof of Age**

21. In respect to age of the victim, in the case of Edwin Nyambogo Onsongo vs. Republic (2016) eKLR, the court had this to say in respect of proof of age of victim in cases under [sexual offences Act](#): -

“... 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 documents, 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. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.”
22. Pw2, the father of the complainant identified in court birth certificate showing that she was born on the 13<sup>th</sup> August, 2013. He produced original birth certificate Serial No.3996120 in court as an exhibit as exb3. Even though the appellant submits that there is variance on serial numbers on the birth certificate, the issue was not raised during trial and cannot therefore be raised at appeal stage. I therefore find that the birth certificate was not challenge and age of victim was therefore proved beyond reasonable doubt.



### **(iii) Identification of Perpetrator**

23. On identification of perpetrator, the complainant said appellant was a neighbor and had known him since 2016. She said they were friends and had agreed earlier that they would have sex. They were also found together in a friend's house and arrested. The Appellant did not adduce any contrary evidence on issue of identification. From the foregoing, I find that the three ingredients for the offence of defilement were proved beyond reasonable doubt.
24. On argument that the prosecution's case was marred with contradictions, I have considered evidence adduced and do not see any material contradiction that cast doubt on credibility of the witnesses. In the case of Philip Nzaka Watu v. Republic [2016] e KLR 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”.
25. I agree with the above holding to the effect that trivial or minor contradictions do not call for rejection of evidence adduced.
26. On whether appellant's defence was considered, the appellant stated that he was framed up because his sister had conflict with the complainant's father. He however did not explain why he was found in his house with the minor the third day after disappearing from home. At the time they were found, a police officer was present. He also never raised issue of any grudge while cross examining the complainant and her father.
27. Record show that the trial magistrate was not persuaded to believe that the complainant's father could subject his child to traumatic legal process to settle scores with the appellant. There is no doubt that the trial magistrate considered the totality of evidence adduced by prosecution together with appellant's defence and in my view rightfully rejected appellant's defence which was not credible in her view.

### **(ii) Whether the sentence imposed was harsh and excessive.**

28. On whether the sentence meted on the appellant by the trial court was harsh and excessive, it is trite law that this court has supervisory jurisdiction over subordinate courts. The enabling law for revision is Article 165(6) and (7) of *the Constitution* and section 362 as read together with section 364 of the Criminal Procedure Code. Sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. In the case of Shadrack Kipchoge Kogo vs. Republic Criminal Appeal No. 253 of 2003(Eldoret), the Court of Appeal stated as follows;
- “Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred”



29. Further, the Court of Appeal while dealing with the issue of sentence in the case of Bernard Kimani Gacheru vs. 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.”

30. I take note of the fact that the complainant was 13 years old and in my view sentence of 20 years imprisonment was appropriate in the circumstances. From the foregoing, I see no merit in the appeal on both conviction and sentence.

**Final Orders: -**

31.

1. The appeal on both conviction and sentence is hereby dismissed.
2. Period served in remand to be commuted in sentence imposed by trial court.

**JUDGMENT DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET THIS 18<sup>TH</sup> DAY OF APRIL 2024.**

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**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

CA Karanja.

Ms. Ratemo for state.

Appellant present.

