



**Daud v Republic (Criminal Appeal E005 of 2023)  
[2024] KEHC 5628 (KLR) (21 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5628 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CRIMINAL APPEAL E005 OF 2023**

**JN ONYIEGO, J**

**MAY 21, 2024**

**BETWEEN**

**ISSACK ADAN DAUD ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence of Hon. Kimani S.R.M. and delivered on 05.02.2022 in Sexual Offences Case No. E003 of 2022 SPM's Court at Mandera)*

**JUDGMENT**

1. The appellant herein was arraigned before Mandera PM's court 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.
2. Particulars of the offence were that, on 21.02.2022 in Mandera Central Sub County within Mandera County, he intentionally caused his genital organ to penetrate to the genital organ of HYI, a girl aged 14 years.
3. He was also charged with an alternative count of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) No 3 of 2006. Particulars were that on 22.02.2022 at around 0828 hrs in Mandera Central Sub County within Mandera County, in the republic of Kenya he intentionally touched the genital organs of HYI a child aged 14 years with his genital organs.
4. In respect to Count II, he was charged with the offence of being unlawfully present in Kenya contrary to section 53(1)(j) as read with section 53(2) of the [Immigration Act](#) No 12 of 2011. Particulars were that on 22.02.2022 at around 0828 hrs in Mandera Central Sub County within Mandera County, in the republic of Kenya, while being a Somali Citizen was found unlawfully present in Kenya without a valid permit or document authorizing him to stay in Kenya



5. Upon conclusion of the trial, the court found the appellant guilty of the alternative count of indecent act and count two. Consequently, he sentenced him to serve a term of ten years imprisonment on the alternative count and one year in respect of the second count. The appellant being aggrieved by the said conviction and the sentence, filed a petition of appeal dated 15.02.2024 citing the following grounds:
  - i. That the trial court erred in law and fact by holding and finding that the prosecution had proved its case.
  - ii. That the trial court erred in law and fact by failing to consider his defence and mitigation.
  - iii. That the trial court erred in law and fact by convicting the appellant on evidence that was contradictory and inconsistent.
  - iv. That the learned trial magistrate erred in law and fact by meting out an excessive and harsh sentence in the circumstances.
6. To dispose the appeal, parties filed written submissions.
7. The appellant submitted that the prosecution did not prove its case to the required standards. That it is critical that in defilement cases, the prosecution ought to lead evidence to show that the key ingredients of the offence are established. He urged that the prosecution evidence was not only contradictory but also inconsistent and insufficient to return a conviction.
8. He further urged that the evidence of PW1 and PW2 was contradictory in regards to the time when the alleged offence happened. That PW1 testified that the appellant was arrested by her brother J while PW2 testified that he was arrested by the KPR officers in the bush. He argued that such contradictions were material to the case thus denting the prosecution's case.
9. He contended that the medical officer's medical evidence that the complainant's hymen was intact was a clear confirmation that there was no penetration. It was therefore his submission that the complainant was not defiled as alleged in the charges herein. He urged this court to quash his conviction and set aside the sentence by the trial magistrate.
10. The prosecution did not file their submission despite being given an opportunity to do so.
11. This being a first appeal, I am mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of *Odhiambo v Republic* Cr App No 280 of 2004 (2005) 1 KLR where the Court of Appeal held that:

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”. [See *Pandya v Pandya* (1957) EA (336)].
12. PW1, HYI stated that on 21.02.2022 she was herding goats together with her mother at [Particulars Withheld] area. At around 1200 noon, she went back home and while there, an intruder came over and entered their house. That the intruder was Issack, the appellant herein a person she knew as a herder. It was her testimony that the appellant pushed her to the floor, removed her trouser and then penetrated her vagina. It was her further evidence that the appellant threatened her of dire consequences should she reveal the incident to anyone. She stated that when she screamed for help, her mother showed up and found the appellant on top of her. The incident was later reported to El Wak Police station and thereafter, she was taken to the hospital for medical treatment.



13. PW2, FEAH testified that PW1 was her daughter and that she was aged 14 years at the material time. She produced her birth certificate which was marked as MFI 1. She stated that on 21.02.2022 at 6.00 p.m., she went to graze their cattle leaving the complainant at home. On arriving back home, she heard someone making noise. Upon checking out, she found the appellant on top of the complainant having sex. That the appellant had his shirt on while the complainant had removed her dera.
14. She further stated that upon the appellant seeing her, he ran away. She reported the matter to her husband and thereafter went searching for the appellant. It was her case that she reported the incident to Elwak Police station where the complainant was referred to El Wak sub County Hospital. On cross examination, she reiterated that she recognized the appellant as he eked a living within that area as a herder. She also stated that she knew the assailant's country of origin as Somalia.
15. PW3, Mohamed Sheikh Ahmed testified that on 22.02.2022 at 6.00 a.m., she was on duty along Takaba when a certain man by the name of Y approached him. That the man told him that someone had defiled his daughter and therefore, he needed to go arrest the said person. Accompanied by Cpl. Abdullahi Haka Kala, a KPR officer, they went to the scene where they found the appellant had been arrested by members of the public. That he re-arrested him and thereafter took him to El Wak Police station. On cross examination, he stated that he arrested the appellant near the homestead where the complainant hailed from.
16. PW4, Ibrahim Alio Omar, a clinical officer who attended the complainant testified that upon physical examination, the complainant was in good fair condition but nervous. Generally, there was no harm upon physical examination. He examined her genitalia and found that; the hymen was intact except for minor lacerations and that there was a whitish discharge, indicative of a fungal infection which is common with females.
17. He also examined the appellant but found no abnormalities in him. The complainant was sent for high vaginal swab, urinalysis and STI tests which were all found to be normal. Due to the minor lacerations in the complainant's genitalia, he reached a conclusion that the complainant was indeed defiled. He subsequently signed a P3 Form which he produced as Pex 1. On cross examination, he stated that in as much as the complainant did not bleed, her hymen had minor lacerations.
18. PW5, No 100432 PC Peter Mwangi, the investigating officer stated that he was assigned the case herein by the OCS to investigate. That the reportee, YI accompanied by his daughter had reported that a person known to him had defiled his daughter. He recorded the statements, issued them a P3 form and then escorted the girl to El Wak Sub County Hospital. That the accused who was a known person to the reportee had been arrested by the KPR and members of the public. He interrogated the appellant herein and found that he was a Somali citizen and that he did not have the legal documents to be in this country. The appellant confirmed that he was a herder but denied committing the offence alleged. He produced the complainants birth certificate as Pex 2.
19. DW1, in his sworn testimony denied committing the offence alleged but conceded that he was taken for medical examination and further, that he is a Somali national without any formal document or permit to be in the country. On cross examination, he stated that he hailed from Bidawa in Somalia and he ekes a living by herding goats.
20. Having read and understood the record of appeal herein, I find that the main issue for determination is whether the prosecution proved its case beyond reasonable doubt and whether the sentence meted out was excessive.
21. As already noted above, the appellant was charged with the offence of defilement contrary to section 8(1) (2) of the [Sexual Offences Act](#) No 3 of 2006. Section 8(1) of the [Sexual Offences Act](#) provides that



- “a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.” [ See *George Opondo Olunga v Republic* [2016] eKLR].
22. On the age of the complainant, the *Sexual Offences Act* defines “Child” within the meaning of the *Children’s Act* No 8 of 2001 as “...any human being under the age of eighteen years.”
23. The importance of proving age in a Sexual Offence case cannot be gainsaid. In the case of *Kaingu Kasomo v Republic*, Criminal Appeal No 504 of 2010, the Court of Appeal stated as follows:
- “Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved 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 will be dependent on the age of the victim.”
24. In the instant case, PW5 produced the complainant’s birth certificate which showed that she was born on 01.01.2008. The offence herein was alleged to have been perpetrated on 21.02.2022 thus denoting that the complainant was aged fourteen years at the time when the incident herein happened. In the given circumstances therefore, I am in agreement with the trial court’s finding that the complainant was a minor.
25. In regards to whether there was penetration, Section 2 of the Sexual Offences Act defines penetration to mean the ‘partial’ or complete insertion of the genital organs of a person into the genital organs of another.
26. In the case of *Alex Chemwotei Sakong v Republic* [2018] eKLR the court went to a great extent in expressing what penetration entails in a sexual offence as follows;
- “Penetration is defined under section 2 of the Sexual Offences Act to mean the partial or complete insertion of the genital organ of a person into the genital organs of another person. This position was explained by the court of appeal (Onyango Otieno, Azangalala & Kantai JJ A) in the case of *Mark Oiruri v Republic* Criminal Appeal 295 of 2012 [2013] eKLR in which they opined thus:
- “...Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl’s organ...”
27. PW2 testified that when she arrived home, she found the appellant on top of the complainant having sex. PW1 also testified on how the appellant confronted and pushed her to the floor, removed her trouser and then penetrated her vagina using his penis. The evidence of PW1 and PW2 were corroborated by the evidence of PW4 who testified that he examined the complainant and found that; her hymen was intact except for minor lacerations; there was whitish discharge which gave the indication of a fungal infection. Due to the minor lacerations in the complainant’s genitalia, he reached a conclusion that the complainant was indeed defiled.
28. As already noted above, penetration means partial’ or complete insertion of the genital organs of a person into the genital organs of another. In this case, it was noted that in as much as the complainant’s hymen was intact, there were minor lacerations in her vagina denoting that there was a partial penetration. As such, it is my finding that the complainant was penetrated.



29. On identification, the complainant described in detail all that happened. She stated that it was the appellant a person she knew very well as a herder who defiled her. The same was corroborated by PW2 who stated that the appellant was a herder of Somali origin and that he was a person known to them. Further, that she found the appellant in the act and that he was half naked. The appellant on his side denied the charges but only admitted that he was of Somali origin and that he herded goats for one Zainab, his employer.
30. The two competing evidence by the appellant and the prosecution put together, the prosecution evidence looked more probable as identification was by way of recognition given that the appellant was a person who was well known to the complainant and her mother. See *Anjononi & others v Republic* [1989] KLR where it was held that identification through recognition was more credible and reliable.
31. In my humble view therefore, the appellant was positively identified by PW1 and PW2 as he was a person well known to them. In the same breadth, the incident happened during the day implying that there was enough light to enable identification. It therefore follows that the prosecution did prove its case to the required standard hence the conviction by the trial court is hereby confirmed to be safe. The issues in relation to the persons who effected arrest in my view did not go into the core of the matter herein. In my view, minor omissions or contradictions which do not go to the core of substantive evidence does not vitiate the otherwise strong prosecution case. See the case of *Twehangane Alfred v Uganda* Criminal Appeal No 139 of 2001, [2003] UGCA, 6].
32. Of importance to note is that the appellant was charged with the offence of defilement and the requirements which the prosecution was charged to prove were indeed proved to the required standards. See the case of *Charles Wamukoya Karani v Republic*, Criminal Appeal No 72 of 2013, where it was held that “The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”.
33. On the ground that his defence and mitigation was not considered, the trial court noted that the prosecution’s evidence was cogent, concise and corroborated as opposed to the evidence by the appellant. Apart from the appellant admitting that he was in the country illegally, there was nothing more offered to controvert the strong evidence by the prosecution. It is against that backdrop that I disagree with the appellant that his evidence was disregarded by the trial magistrate.
34. In reference to the fact that his mitigation was not considered, the trial court at the time of sentencing as guided by the presentencing report noted that the complainant still suffered psychological trauma as a result of the incident herein. It was further noted that it took into consideration the mitigation by the accused as stated that he was only aged 20 years and further, he had suffered while in remand. It therefore follows that the trial magistrate in meting out the sentence considered not only the defence but also the mitigation by the appellant.
35. Whether the sentence meted out was severe in the given circumstances, the same was stated succinctly by the Court of Appeal for East Africa in the case of *Ogola s/o Owoura v Reginum* (1954) 21 270 as follows: -

“The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a



somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in *James v R.*, (1950) 18 EACA 147:

"It is evident that the Judge has acted upon some wrong principle or overlooked some material factor."

To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case.

36. The appellant contended that the sentence was excessive given the circumstances of the case herein. 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* 2006 which provides that upon conviction the offender shall be imprisoned for a term of not less than twenty years. In the case herein, the appellant was sentenced to serve a period of ten years' imprisonment.
37. On Count II, the appellant conceded to the fact that he was in the country without any official document or permit. It therefore follows that the said offence was not denied. The sentence provided for under section 53(2) of the Kenya Citizenship and Immigration Act is that; any person convicted of an offence under this section shall be liable upon conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding three years or to both.
38. The trial magistrate sentenced him to serve a term of one year and that the said sentences were to run concurrently and that they were to start from 23.02.2022 when the appellant took plea. In addition, that at the completion of the custodial sentences, the appellant be repatriated back to Somali.
39. In my view, the trial magistrate in the given circumstances reached a fair determination having in mind the circumstances of the case. It is against that backdrop that I uphold the conviction and sentence by the trial court noting that the same were founded on sound legal principles. However, I have noted that the appellant was in remand from 22-02.22 when he was arrested up to 05-12-22 when he was sentenced translating to 9 months and 13 days. To that extent, I do direct that the said period be taken into account when computing sentence.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 21<sup>ST</sup> DAY OF MAY 2024**

**J. N. ONYIEGO**  
**JUDGE**

