



REPUBLIC OF KENYA



**Kisoi v Republic (Criminal Appeal 142 of 2023)
[2024] KEHC 5617 (KLR) (21 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5617 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 142 OF 2023**

DR KAVEDZA, J

MAY 21, 2024

BETWEEN

ALBANUS MUTISYA KISOI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered
by Hon. E. Riany (SRM) on 17th July 2018 at Kibera Chief Magistrate's
Court Sexual Offences No. 052 of 2023 Republic vs Albanus Mutisya Kisoi)*

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 (4) of the *Sexual Offences Act* (the Act). The particulars were that on 13th September 2022 within Nairobi County, he intentionally and unlawfully caused his Penis to penetrate the Vagina of QA, a child aged 16 years old. He was sentenced to serve 20 years' imprisonment.
2. Being dissatisfied, he filed an appeal against the conviction and sentence in line with his petition of appeal. Both parties have filed written submissions, which I have considered.
3. 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.
4. With the above, I now proceed to determine the substance of the appeal. In his amended grounds and submissions, the Appellant has raised three grounds of appeal. He complains that the ingredient of penetration was not sufficiently proven and that the victim's credibility was questionable. He also



contended that his defence was improperly rejected by the trial court. He also argued that the sentence meted upon him was harsh and excessive.

5. The thrust of the grounds of appeal is that the prosecution failed to prove its case beyond reasonable doubt. 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 a sworn testimony stating that she was 16 years old, having been born on 19.08.2006. She testified that on 13.09.2022 at around 6 pm, the appellant asked her mother whether he could send PW1 on an errand, and her mother agreed. PW1 completed the errand and returned to find that her mother had left. When she took the items to the appellant, he asked her to place them on the table. Suddenly, the appellant locked the door and forced her into having sex with him. In her words, the appellant inserted his penis into her vagina. When he got off and PW1 wanted to leave, he pushed her back, threw her on the bed, and again, in PW1's words, 'he raped her'. After the act, he threw her outside. PW1 went home and took a shower.
7. Later, on 03.03.2023, while in school, PW1 and other students were tested for pregnancy, and she was found to be pregnant. On a different day, a Friday, the appellant gave her tea and cake. After finishing the tea, she discovered four tablets at the bottom of the cup. When she asked the appellant about them, he claimed they were ugali and threw them away. The following day, Saturday, she felt unwell and took painkillers. On Sunday, while she was relieving herself, water came out of her vagina. Her younger sister called their mother, who asked PW1 if she was pregnant. PW1 denied it. The mother then called a friend, who asked PW1 if she had had intercourse with a man, and she admitted to it. PW1 was taken to a chemist, where she provided a urine sample for a pregnancy test. Suddenly, water came out of her vagina, accompanied by a child. She was then taken to Coptic Hospital for treatment. Later, she was expelled from school as a result of the pregnancy.
8. PW1 detailed gave a clear and graphic description of the events that transpired in the appellant's house. She remained steadfast that it was the Appellant, who subjected her to the act of sexual assault. The appellant was someone well known to her as a neighbour, a fact that was corroborated by PW4, the investigating officer, who confirmed that indeed, the appellant was a neighbour. Besides, she added in her testimony that at the material time of the incident, the appellant's house had electricity, so she was able to recognise him. 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 she believed the child was telling the truth. In this case, the trial magistrate in her judgement believed the testimony of PW1 to be truthful and found it to be sufficient evidence to prove that she was penetrated by the appellant. I have also thoroughly gone through the testimony of PW1 and noted that she was consistent all through, and her evidence was unshaken on cross-examination by the appellant.
10. Regarding additional corroborating evidence, the prosecution called PW1's mother, PW2, who testified that on 05.03.2023, PW1 complained that she had a stomach ache. She asked whether she was pregnant but PW1 denied it. PW2 called a friend who spoke to PW1 and informed her that she had been defiled. She took PW1 for treatment. Later, PW1 revealed that it was the appellant who had defiled her. PW2 corroborated the evidence of PW1 that the appellant was indeed their neighbour and well-known to them.
11. Additionally, the prosecution called Lureen Mwendu, a clinical officer at Coptic Hospital (PW3), who produced the Post rape care (PRC) form on behalf of Jacob Sirah, her colleague who was at the time



attending a training and hence was not available. She stated that PW1 underwent an examination on 15.03.2023 after giving a history of being sexually assaulted by a neighbour. Upon examination, no physical injuries were noted and the external genitalia was normal. However, remnants of a hymen tear were noted and the urinary test revealed that she was pregnant. She explained that even after a miscarriage, a pregnancy test would still be positive for up to fourteen days. Given that PW1 was examined way after the incident, it is my finding that medical evidence as adduced by PW3 is consistent with PW1's testimony on penetration and it well corroborates it.

12. On the age of PW1, the trial court considered the birth certificate, which revealed that she was born on 19.08.2006 meaning that she was 16 years old at the time of the incident. There is therefore no doubt that PW1 was a child within the meaning of the law.
13. In his defence, the appellant denied committing the offence and alleged that the victim's parents framed him. He also alluded to the fact that when he sent PW1, she came back after an hour and when he asked, she said she went to see her boyfriend. He also claimed that previously, he provided financial assistance to the victim's family but stopped, which is why they framed him with the present charges. I have considered this defence and I find it to be mere denial and a sham. The prosecution proved their case against the appellant beyond reasonable doubt. The conviction on the charge of defilement is therefore affirmed.
14. On the sentence, the appellant submitted that whereas section 8(4) provides for a sentence of 15 years, the trial magistrate imposed a sentence of 20 years. Suffice to note that the provisions of section 8(4) provide for a minimum mandatory, and in line with the present jurisprudence, a court is not necessarily bound by the mandatory minimums but has the discretion to determine the most appropriate sentence depending on the circumstances of each case. During sentencing, the trial magistrate considered the pre-sentence report, which revealed that the appellant had previously been convicted for stealing and served 2 years imprisonment.
15. It is trite that sentencing is at the discretion of the trial court, that discretion must be exercised judiciously in accordance with the law considering the facts and circumstances of each case. The punishment prescribed by the law for the offence of defilement is fifteen years imprisonment for a child between the age of 16 and 18 years.
16. Although sentences are intended, inter alia, to punish an offender for his wrongdoing, they also aim to rehabilitate offenders to renounce their criminal tendencies and become law-abiding citizens. I do not doubt that the sentence imposed by the trial court was lawful but was harsh and manifestly excessive.
17. For the above reason, I hereby set aside the sentence of twenty years and substitute it with a sentence of ten (10) years imprisonment. The sentence shall take effect from the date of the appellant's arrest 14th April 2023 pursuant to section 333(2) of the *Criminal Procedure Code*.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 21ST DAY OF MAY 2024

D. KAVEDZA

JUDGE

In the presence of:

Appellant present

Mr. Mong'are for the Respondent



