



**Kilingat v Republic (Criminal Appeal E017 of 2023)
[2024] KEHC 5694 (KLR) (20 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5694 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KILGORIS
CRIMINAL APPEAL E017 OF 2023**

F GIKONYO, J

MAY 20, 2024

BETWEEN

ANTHONY LETEIPA KILINGAT APPELLANT

AND

REPUBLIC RESPONDENT

*(From the conviction and sentence of Hon. H. Maritim (S.R.M)
in Kilgoris SPM SOA Case No. E038 of 2022 on 12.07.2023)*

JUDGMENT

1. This appeal is against the appellant's conviction, and sentence of 7 years imprisonment imposed on 12.07.2023 for the defilement of the complainant- a girl aged 15 years.
2. Being dissatisfied with the said conviction and sentence he preferred an appeal *vide* memorandum of appeal dated 24.07.2023. The grounds of appeal are as follows;
 - i. That the learned trial magistrate erred in fact and law in finding and holding that the case against the appellant had been proved beyond reasonable doubt, without taking into account and/ or reconciling the discrepancies that were discerned in the prosecution's evidence.
 - ii. The conviction and sentence by the court was/ is irregular, illegal, null, and void. There was no proof of any defilement whatsoever. The P3 form that was produced in court did not prove any defilement of the said minor.
 - iii. The learned trial magistrate erred in fact and law in disregarding the evidence of the appellant herein. The evidence adduced in court by the prosecution was not enough to be the basis for the conviction and sentence of the appellant herein.



- iv. The learned trial magistrate erred in fact and law in disregarding, ignoring, and/or failing to answer the appellant's defence which was dismissed without being properly analyzed and/or appreciated.
 - v. The learned trial magistrate erred in fact and law in being engrossed and/ or concerned with the truth of the appellant's defence contrary to the principles of criminal law that emphasized the reasonableness of the defence.
 - vi. The learned trial magistrate in the process of ascertaining the truth ended up shifting and placing the burden of proof upon the appellant contrary to the principles of criminal law and practice.
 - vii. The learned trial magistrate erred in fact and law in failing to correctly evaluate the evidence on record. The judgment herein has occasioned a miscarriage of justice.
 - viii. The sentence meted out by the trial court was excessive in obtaining circumstances.
3. The appellant prayed that the appeal herein be allowed and the conviction and sentence quashed, varied, and /or set aside.

Directions of the court

4. The appeal was canvassed by way of written submissions. Both parties have filed.

Appellant's submissions.

5. The appellant submitted that the minor did not scream when she was defiled, the minor's clothes were not soaked in blood and the clinical officer did not find any spermatozoa when he examined the minor. Therefore, the minor was not defiled at all. The appellant argued that the clinical officer testified that the minor was not defiled. Further, the minor was alleged to have been defiled on 28.08.2022 and the clinical officer examined her on the same date but failed to establish that the minor was defiled. The appellant relied on the cases of [Republic Versus Safari Katana Lugo](#) [2021] eKLR, and [Gordon Omondi Ochieng Versus Republic](#) [2021] eKLR.
6. The appellant submitted that the prosecution did not prove the charges presented against the appellant. The appellant relied on the cases of [MM Versus Republic](#) [2020] eKLR, and [Titus Karani Versus Republic](#) [2021] eKLR

Respondent's submissions.

7. The respondent submitted that this court as the first appellate court is mandated to look at the evidence presented before it to determine whether the appellant was properly convicted. The respondent relied on section 107(1) of the [Evidence Act](#), [Okeno v Republic](#) [1972] EA 32, [Woolmington v DPP](#) [1935] AC 462, [Miller v Minister of Pensions](#) [1947] 2 ALL ER 372, and [Japheth Gituma Joseph & 2 Others v R](#) [2016] eKLR.
8. The respondent submitted that the appellant has not placed any material before the court to dispute the age of the victim. The respondent relied on the case of [Mwalango Chichoro Mwanjembe V Republic](#) [2016] eKLR.
9. The respondent submitted that the ingredient of penetration was proved to the required standards. The respondent relied on section 2 of the [Sexual Offences Act](#).



10. The respondent submitted that the victim and the appellant had spent considerable time together hence there is no room for mistaken identity.
11. The respondent submitted that the trial court sentenced the appellant commensurate to the offence committed.
12. The respondent submitted that the prosecution discharged its burden and the evidence tendered by the prosecution was not discredited by the defense during cross-examination. The conviction of the appellant was therefore proper.

Analysis And Determination.

Court's duty

13. As a first appellate court, this court will re-evaluate the evidence and make its own conclusions; except, bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See *Okeno v. Republic* [1972] E.A 32

Issues

14. Borne out of the grounds of appeal, the evidence adduced in the lower court, and the respective parties' submissions are two main issues for determination, which are;
 - i. Whether the prosecution proved its case beyond reasonable doubt. Claims that the court shifted burden of proof to the appellant will also be discussed under this broad issue.
 - ii. Whether the sentence was manifestly harsh and excessive

The charge and particulars

15. 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](#) No. 3 of 2006.
16. It was alleged that on 28.08.2022 at around 1730 hours in (particulars withheld) within Narok county, the appellant intentionally caused his penis to penetrate the Vagina of ENM a girl aged 15 years.
17. In the alternative charge, the appellant was charged with the offence of committing an indecent act contrary to Section 11 (1) of the [Sexual Offences Act](#) No. 3 of 2006.
18. It was alleged that on 28.08.2022 at around 1730 hours in (particulars withheld) within Narok county intentionally touched the vagina of ENM a girl aged 15 years with his penis.

Elements of offence of defilement

19. Section 8 (1) as read with Section 8 (3) of the [Sexual Offences Act](#) establishes the offence of defilement as follows:

“8

- (1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- (3) A person who commits an offence of defilement with a child between the age of Sixteen and eighteen years is liable upon



conviction to imprisonment for a term of not less than twenty years.”

20. The specific elements of the offence defilement arising from Section 8 (1) of the *Sexual Offences Act* which the prosecution must prove beyond a reasonable doubt are:
- 1) Age of the complainant;
 - 2) Proof of penetration in accordance with Section 2(1) of the *Sexual Offences Act*; and
 - 3) Positive identification of the assailant.

Age of the complainant

21. The age of the victim of defilement is an essential element because; defilement is a sexual offence committed against a child- a person below the age of 18 years (*Children Act*). Notably, also, the age of the child is an aggravating factor for purposes of determining the sentence to be imposed; the younger the child the more severe the sentence. See penalty clauses in SOA.
22. Was the age of the victim proven?
23. PW1 testified that she was 15 years old and in class 8 at [Particulars Withheld] school. She produced a certificate of birth as P Exh 1 which showed that PW1 was born on 21.04.2007 and she was 15 years old at the time of the offence.
24. Based on evidence adduced by the prosecution, this court finds the victim was 15 years old at the time of the offence.

Penetration

25. Penetration is defined in Section 2(1) of the *Sexual Offences Act* as:
- “The partial or complete insertion of the genital organs of a person into the genital organ of another person.”
26. Penetration was explained further by the Court of Appeal in the case of *Mark Oiruri Mose v R* [2013] eKLR thus:
- “Many times, the attacker does not fully complete the sexual act during the 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. PW1 testified that on 28. 08.2022 the appellant went to their shop and called her to take maize to grind at the mills. She went to his house. The appellant closed the door and removed all her clothes and his clothes. They then had sex. The appellant removed all her clothes, her skirt, and her bra. The appellant started with the t-shirt, bra, skirt, panty then her shoes, and placed her on his bed. He inserted his penis inside her vagina.
28. PW4 a clinical officer examined PW1. On vaginal examination foul smell noted, normal labia both minora and majora, no bruises, no discharge, and no hymen. Foul-smelling discharge indicates infection. He concluded that the girl was defiled. He produced a P3 form, treatment notes, Lab request form, and PRC form dated 28.08.2022 as P Exh 2, 3,4, and 5 respectively.



29. On cross-examination he stated that he noted her hymen was broken but fresh. There were no spermatozoa. Emergency pills were not given as she was pregnant. On request for clarification by the court, he stated that it takes about two weeks for pregnancy to show not immediately after intercourse. Therefore, it meant that the complainant had had sexual intercourse before 28.08.2022.

30. The analysis of the evidence yields penetration of PW1- a child. But was it by the appellant?

Was the appellant the perpetrator?

31. PW1 testified that on 28.08.2022 the appellant went to their shop. He called her to take maize to grind at the mills. She went to his house and they had sex. She further testified that she knew the appellant on the 22nd when he had requested her to go to his house but on that particular date he did nothing to her but later after 6 days is when he defiled her.

32. PW1 denied having had sex with someone else prior to having sex with the appellant. She further stated that the appellant broke her virginity

33. PW2 testified that he is the father of PW1. He stated that he received a call that her daughter was found at the appellant's house by a security guard.

34. In his defence the appellant testified that he went to the shop and requested the minor to assist in taking his maize to the posho mill. She came at 5:30 p.m. and knocked at his door. He told her it was almost raining so he didn't need her to mill the maize so she left. At around 8 p.m. the parents arrived with one guard and said he had defiled her. He argued that she framed him.

35. The appellant stated that he inquired and found that the father of the complainant usually does this to extort money from people. He stated that the girl did not have a grudge with him.

36. DW2 the security guard testified that he was on duty on the material date when the PW2 the father of PW1 came with PW1 requesting to be let in as the girl had been defiled. The girl took them to the appellant's house.

37. On cross-examination, DW2 stated that he did not see PW1 that day unless she went there before 6 p.m.

38. Section 124 of the *Evidence Act* provides;

“Notwithstanding the provision of Section 15 of the *Oaths and Statutory Declaration Act* (Cap 15) where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving sexual offence, the only evidence is that of an alleged victim of the offence the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

39. The alleged victim was a child of 15 years. Secondly, there were no eyewitnesses to any of the alleged offences as those who testified relied on information received from the child.

40. Is the evidence such that the court is satisfied that the girl is telling the truth?



41. This court finds the evidence of the victim to be shaky. The offences against the accused were serious and indeed attracted a heavy penalty and as observed by the trial court the said offences are rampant in this region. But, a verdict of guilt is returned upon proof beyond reasonable doubt.
42. There are notable concerns that, the victim's evidence and that of her witnesses is not consistent in material respects, and any possibility of reconciliation of the inconsistencies is thwarted by the fact that credibility of the witnesses as well as the victim is not properly grounded. The victim stated that she had not had sex before the encounter with the appellant. In plain language, she claimed the first time ever to have sex was with the appellant on the material date. Medical evidence revealed that she was already pregnant by the time she had an encounter with the appellant. She made yet another claim; that, it was the appellant who broke her virginity. This claim too was discounted by the medical evidence. PW1 lied to the court on these important matters especially that the alleged sexual intercourse with the appellant was her very first time to engage in sexual intercourse. PW1 was not truthful.
43. By not being honest with such important matters completely obscured and removes any basis on which to believe that she was telling the truth as to enable the court to rely on section 124 of the Evidence Act and convict on the sole evidence of the victim.
44. PW1 stated that a guard put her in his house and called her parents. That guard was not called to testify. On another occasion, a security guard was said to have seen her getting out of the appellant's house. The said guard was not also called to testify.
45. The evidence on record, therefore, leaves a lot to be desired.
46. It appears that the girl had been defiled as she was already pregnant at the time of examination herein. And, the Investigation officer should have been interested in that revelation and seek justice for the minor. Cases like this one could become useful sources of information for law enforcement.
47. Whereas the appellant admitted that he met the victim herein, this court finds glaring contradictions and unanswered issues in the prosecution evidence which create a reasonable doubt as to whether the appellant defiled the girl herein. And, in law, such doubt is resolved in favour of the appellant.
48. Based on the glaring contradictions in the evidence and lack of sufficient evidence, the prosecution did not prove the case against the appellant beyond reasonable doubt.
49. But, before closing, it is worth noting that, the claim that the trial court shifted the burden of proof is not proved.
50. The trial court relied on the uncorroborated evidence of the minor to convict the appellant, but did not give reasons why it was satisfied that the victim is telling the truth as required in section 124 of the Evidence Act.
51. Accordingly, the trial court erred in convicting the appellant for defilement on shaky evidence which was not proof beyond reasonable doubt. The appeal wholly succeeds.
52. The conviction and sentence are hereby quashed. The appellant shall be set free unless otherwise lawfully held.
53. The appellant is, however, reminded that his appeal succeeds on the basis of reasonable doubt emerging from the nature of evidence adduced. Reality will be revealed at eternity; and he should not tempt luck by inviting 'next time' escapades. He may not be so lucky!
54. It is so ordered



**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE
APPLICATION THIS 20TH DAY OF MAY, 2024.**

F. GIKONYO M

JUDGE

In the presence of:

Okeyo for DPP

Appellant

Leken C/A

