



**Mbone v Republic (Criminal Appeal 102 of 2023)
[2024] KEHC 5616 (KLR) (22 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5616 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 102 OF 2023**

DR KAVEDZA, J

MAY 22, 2024

BETWEEN

DAVID JAIRO MBONE APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered by
Hon. Kitwaga (RM) on 31st January 2019 Kibera Chief Magistrate's Court
Sexual Offences Case no. 2756 of 2013 Republic vs David Jairo Mbone)*

JUDGMENT

1. The Appellant was charged and after full trial convicted for the offence of defilement contrary to section 8 (1) and (4) of the *Sexual Offences Act*. The particulars of the offence are that on the 13th day of August 2013 within Kajiado county intentionally caused his male genital organ (penis) to penetrate the female genital organ (vagina) of CWW a child aged 17 years. He was sentenced to serve fifteen (15) years imprisonment.
2. Being aggrieved, he filed the present appeal, challenging his conviction and sentence. The grounds of appeal are: He challenged the totality of the prosecution's evidence, against which he was convicted. That his defence was not taken into consideration. Finally, his sentence was harsh and excessive.
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 that was before the trial court to 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. With the above, I now proceed to determine the substance of the appeal.
4. 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, the prosecution must prove 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." The other ingredients are proof of the age of the victim and the positive identification of the assailant. The appellant and the respondent filed written submissions which have been duly considered.
5. The prosecution case was as follows: CWW testified that she was born on 19th October 1995. On 13th August 2013, when she was heading home from school, she was accosted by an unknown individual who was wielding a Maasai sword. He closed her eyes, constrained her by the neck, and then forced her to a banana plantation that was nearby. He threatened to kill her if she screamed. He undressed her and made several attempts of inserting his penis into her vagina. He then made her lie on her stomach and forcefully tried to sexually assault her.
 6. During the ordeal, the assailant removed his hat and she was able to recognise him as their neighbour. It was during the struggle that a boda boda operator was passing by which distracted the assailant. The complainant freed herself and ran away toward the motorbike screaming for help. When the assailant then escaped from the scene. She narrated to the boda boda operator what had happened. He escorted her home where she informed her mother. Her mother informed the area chief who searched for the appellant. The incident was reported to the Kiserian Police Station. She was referred to Nairobi Women's Hospital for examination and treatment. She identified the appellant as her assailant.
 7. In her testimony, PW 1 gave a clear and graphic testimony of her encounter with the appellant. She knew the appellant, who was their neighbour, and was able to identify him during the ordeal. His identification was therefore proper.
 8. The complainant's testimony did not require corroboration in accordance with the provision of Section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) if the trial magistrate recorded reasons why she believed the child was telling the truth. The trial magistrate noted that the complainant had no grudge against the appellant. In addition, her demeanour during the trial was well documented, and the trial court found that there was no reason why she would lie. The trial court was therefore satisfied that the victim was telling the truth.
 9. Regarding additional Dr. Kizzie Shako (PW4) examined the complainant on 14th August 2013 and made the following findings; the hymen was normal with a bruise on the left labia minora and tenderness. PW5 Dr. Kinuthia from Nairobi Women's Hospital gave evidence on behalf of Dr. Mureithi who had since left the facility. The complainant was examined on 13th August 2013 Upon examination, the findings were that the complainant had mucoïd vaginal discharge, laceration around the opening of the vagina, and the hymen was broken. PW5 opined that the evidence was consistent with penal penetration. I hold that the opinion of the medical expert is consistent with the evidence of penetration and corroborates PW1s testimony on penetration. It is important to note that penetration can either be partial or complete. In this case, it is my view that it was partial.
 10. On the age of the complainant, the trial court considered the complainant's birth certificate, which indicated that she was born on 19th October 1995. She was therefore 17 years old at the time the offence was committed. There is therefore no doubt that PW 1 was a child within the meaning of the *Sexual Offences Act*.
 11. In his defence, the appellant denied committing the offence and maintained his innocence. He asserted that he was not in the vicinity at the time the offence was committed. The trial court considered this defence and found it to be incredible. When weighed against the prosecution evidence, particularly the testimony PW 1, the evidence of the appellant amounted to a mere denial of the offence and was rightly dismissed.



12. From the totality of the evidence, the prosecution proved all the elements of the offence of defilement beyond reasonable doubt. I therefore affirm the conviction of the trial court.
13. On appeal against the sentence, the Appellant was sentenced to serve fifteen (15) years imprisonment. 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 have no doubt that the sentence imposed by the trial court, in this case, was lawful but considering that the appellant was a first offender, I am satisfied that the sentence was harsh and manifestly excessive.
14. For the above reason, I hereby set aside the sentence of fifteen (15) years imprisonment imposed by the trial court 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 August 2013 pursuant to the provisions of section 333(2) of the [Criminal Procedure Code](#).

It is so ordered.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 22ND DAY OF MAY 2024

D. KAVEDZA

JUDGE

In the presence of:

Appellant present

Mr. Mong'are for the Respondent

Joy Court Assistant

