



REPUBLIC OF KENYA



**Nzioka v Republic (Criminal Appeal 123 of 2023)
[2024] KEHC 5614 (KLR) (21 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5614 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 123 OF 2023**

DR KAVEDZA, J

MAY 21, 2024

BETWEEN

KIOKO NZIOKA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered
by Hon. C. Mwaniki (SRM) on 17th November 2022 at Kibera Chief
Magistrate's Court Sexual offense No. 61 of 2020 Republic vs Kioko Nzioko)*

JUDGMENT

1. The Appellant was charged with two counts of defilement contrary to section 8(1) as read with 8(2) of the sexual and after a full trial convicted on both counts by the Subordinate Court of the offence of defilement contrary to section 8(1) and (2) of the *Sexual Offences Act*. He was sentenced to serve 20 years' imprisonment. Being dissatisfied, he has filed an appeal against the conviction and sentence in line with his petition of appeal.
2. 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, 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.
3. With the above, I now proceed to determine the substance of the appeal. In his undated Memorandum of Appeal, the Appellant has raised four grounds of appeal. In a condensed form, the appellant complains that the prosecution failed to prove its case beyond reasonable doubt and that the prosecution's case was riddled with contradictions and inconsistencies.



4. In response, the respondent filed grounds of opposition dated March 9, 2024. The grounds raised were that the appeal was misconceived and unsubstantiated, The prosecution discharged their burden of proof beyond reasonable doubt. The appeal lacks merit and should be dismissed.
5. 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 facts as brought out by the prosecution witnesses are that AR (PW2) and RZ (PW3) are sister and brother respectively. At the time of the events material to this case, they were living with their mother, JIO (PW1) within Kibera. According to PW2, on the day of the incident, she was playing with other children along the corridor when their neighbour, Kioko, called her into his house. While in the house, he undressed her and inserted his penis into her vagina, causing her to feel pain. After the act, he cleaned her private parts using hot water and later warned her to report to her mother. PW2 nonetheless went home and reported the incident to her mother. PW2 added that this was not the first time that he had done that to her.
7. Similarly, PW3 in his unworn testimony testified that he was playing with his friend along the corridor when the said Kioko pulled him into his house, undressed him, and made him lie on his stomach. Kioko then removed his penis and inserted it into his anus. After the act, he took PW2 outside and warned him not to tell anyone, or else he would kill him. PW2 added that during the act, Kioko also kissed him and touched his penis. He concluded by also stating that this was not the first time that this happened.
8. In their testimonies, both PW2 and PW3 gave clear and graphic testimony of the ordeals. They remained steadfast that it was Kioko, the appellant, who took them to his house on different occasions and subjected them to the act of sexual assault. Besides, both minors knew the appellant as their neighbor. He has been their neighbour for about three years. Additionally, the incidents happened in broad daylight and this was sufficient for both PW2 and PW3 to identify him as the perpetrator. I therefore hold that the Appellant is the one who committed the act of sexual assault.
9. The testimonies of PW2 and PW3 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 the trial magistrate believed the children were telling the truth. In this case, the trial magistrate recorded in his judgement that the demeanour of both minors as they testified satisfied him that both were truthful and credible. He added that their accounts were consistent and that their evidence was not shaken in cross-examination. I have also thoroughly gone through the testimonies of PW2 and PW3 and noted that they were consistent all through.
10. Regarding additional corroborating evidence, the prosecution called PW1, the mother of both complainants. She recounted that on 07.06.2020, she was at her house with her son PW3 when she noticed that he was scratching his penis and anal area. She inquired and PW3 told her that the appellant had been calling him and forcibly inserting his penis into his anus. She took him to the clinic for examination.
11. Similarly, PW1 recounted that on 16.06.2020 at around 6.00 pm, her daughter, PW2 came into the house walking abnormally and with difficulty. PW1 inquired and PW3 narrated that the appellant had inserted his penis into her vagina. She also took PW2 for examination. PW1's narration of the events corroborated the complainants' testimonies of being sexually assaulted by the appellant.
12. The prosecution also called Alice Gori, a Nursing Officer in charge of Gender-Based Violence at Amref Clinic (PW5), who produced the P3 form and Post Rape Care (PRC) form on behalf of her colleague, Gladys Nyabera, who was at the time on maternity leave. She stated that on 18.06.2020, PW2 was



examined after giving a history of being sexually assaulted. Upon examination, there were visible tears on her vagina and a clear discharge was observed from the vaginal orifice. Additionally, the hymen was broken, gaping, and painful on touch. The conclusion was that there had been penetration. The medical evidence of PW5 corroborates with PW2's testimony regarding the incident and conclusively proves penetration.

13. Additionally, the prosecution called John Njuguna, a Clinical Officer at Nairobi Women's Hospital (PW4), who produced the P3 form and Post Rape Care (PRC) form on behalf of his colleague, Belden Nyasodi, who was at the time on unpaid leave. He stated that when PW3 was examined on 09.06.2024, he had no visible injuries upon genital examination, including anal examination.
14. That notwithstanding, it is trite law that a defilement case is not dependent exclusively on medical evidence. A court may still convict in the absence of medical evidence so long as it is persuaded by the testimony of the victim (See *HO v Republic* [2020] eKLR). I have already found above that PW3 was truthful and consistent throughout his testimony, despite being subjected to cross-examination by the appellant. He was emphatic on his ordeal at the hands of the appellant. His testimony did not require corroboration as per the provisions of Section 124 of the *Evidence Act*. It is therefore my finding that penetration was proved for the case of PW3.
15. On the age of PW2, the trial court considered the age assessment report produced in evidence by PW6, which concluded that PW2 was aged 6 years old at the time of the offence. There is no doubt that PW2 was a child. The conviction on the charge of defilement in count 1 is therefore affirmed.
16. Regarding PW3, no evidence of age was produced thereof. However, in the case of *Edwin Nyambaso Onsongo v Republic* [2002] eKLR, the Court of Appeal held that age can be proven by 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, guardian or medical evidence.
17. In this case, PW3's mother, PW1, testified that PW3 was born on 27.07.2013 and was 7 years old at the time of the offence. This was further corroborated by the PRC and P3 forms, which indicated PW3's date of birth as 27.07.2013. There is therefore no doubt that PW3 was a child within the meaning of the law. The conviction on the charge of defilement in count 2 is thus affirmed.
18. On the sentence, section 8(2) provides that a person who commits an offence of defilement with a child below the age of eleven years is liable upon conviction to life imprisonment. The prosecution proved that the minors were aged 6 and 7 years old respectively; hence, the court ought to have imposed the sentence of life imprisonment. However, the court exercised discretion and imposed a sentence of 20 years imprisonment.
19. However, trial magistrate failed to indicate whether the 20 years imprisonment was a cumulative sentence on each count or it was a separate sentence on each count. On that aspect the court was in err. I have considered the severity of the offense committed against a 7-year-old child, who sustained injuries at such a tender age. She will carry both emotional and physical scars for life.
20. Consequently, I uphold the sentence of twenty (20) years imprisonment imposed in count I. Given that PW3 did not sustain any injuries, I sentence the appellant to serve ten (10) years imprisonment for Count II. Since the offences were committed on different dates, the sentences shall run consecutively from the date of the appellant's arrest on June 18, 2020.

Orders accordingly.

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

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D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Mr. Mong'are for the Respondent

Joy Court Assistant

