



**Nyawanda alias Teacher v Republic (Criminal Appeal 86 of 2023)
[2024] KEHC 4956 (KLR) (15 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4956 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 86 OF 2023
DR KAVEDZA, J
MAY 15, 2024**

BETWEEN

JAMES NYAWANDA ALIAS TEACHER APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. A. Mwangi (C.M) on 11th October 2022 at Kibera Chief Magistrate's Court Sexual Offences Case No. 27 of 2019 Republic vs James Nyawanda alias Teacher)

JUDGMENT

1. The appellant was charged with one count of defilement contrary to section 8 (1) as read with section 8 (2) of the [Sexual Offences Act](#) and two counts of attempted defilement contrary to section 9 (1) as read with 9 (2) of the same [Act](#). He was acquitted of the two counts of attempted defilement. He was convicted for the offence of defilement and sentenced to life imprisonment.
2. Being aggrieved by his conviction and sentence, he filed a memorandum grounds of appeal challenging his conviction and sentence. In his appeal, and amended grounds of appeal, he challenged the totality of the prosecution's evidence against which he was convicted. He contended that the trial court failed to consider his defence. He also argued that the trial court violated his right to a fair trial contrary to section 50 (2) of the [Constitution](#) of Kenya and section 77 of the [Evidence Act](#). In addition, he argued that essential witnesses were not called to testify. Finally, the sentence was harsh and excessive. He urged the court to quash his conviction and set aside his sentence.
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, and 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. 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."
5. MA (name withheld) gave unsworn evidence after *voir dire* examination. She told the court that she knows the appellant as 'Teacher'. In November 2018, on a day she could not recall, the appellant asked her to go assist him in cleaning his house. Accompanied by two of her friends, they cleaned the appellant's house and then watched TV. The appellant asked her to come back the next day, which she did. On that day, she found the appellant inside the house. He proceeded to undress her and himself. He wore a condom and proceeded to insert his penis into her vagina. He covered her mouth using tissue paper and his hand. During the ordeal, she tried to escape but he was too strong for her. He also threatened her not to inform anyone.
6. PW1 told the court that the appellant defiled her again in December 2018. During this ordeal, the appellant forcefully pulled her into his house and defiled her when her parents were not around. He used a condom during the second encounter. He then gave her Kshs. 200. The incident happened again in February 2019. When PW1 tried to leave, she was forcefully pulled to his bed and defiled for a third time.
7. Subsequently, when her mother confronted her about her frequent visits to the appellant's house and her suspicions, she initially denied them. However, she eventually confessed to what had occurred after other children in the neighbourhood shared similar experiences. She informed the court that she underwent an examination and received treatment.
8. In her testimony, PW1 gave clear and graphic testimony of the ordeal. PW1 remained steadfast that it was the appellant who defiled her on three different occasions in 2018 and 2019. The victim maintained that she knew the appellant and the identification was by recognition. I therefore hold that the Appellant is the one who committed the act of sexual assault.
9. As discussed in the [Kenya Judiciary Criminal Procedure Bench Book 2018](#) paragraphs 94-96 no corroboration is necessary for the evidence of a child taken on oath although cross-examination is available for sworn or unsworn evidence of a child in the usual way:
 94. No corroboration is required if the evidence of the child is sworn (*Kibangeny arap Kolil v R* 1959 EA 92). Unsworn evidence of a victim who is a child of tender years must be corroborated by other material evidence implicating the accused person for a conviction to be secured (*Oloo v R* (2009) KLR).
 95. However, in cases involving sexual offences, if the victim's evidence is the only evidence available, the court can convict on the basis of that evidence provided that the court is satisfied that the victim is truthful (s. 124, [Evidence Act](#)). The reasons for the court's satisfaction must be recorded in the proceedings (*Isaac Nyoro Kimita v R* Court of Appeal at Nairobi Criminal Appeal No. 187 of 2009; *Julius Kiunga M'biritbia v R* High Court at Meru Criminal Appeal No. 111 of 2011).
 96. The evidence of a child, sworn or unsworn, received under section 19 of the [Oaths and Statutory Declarations Act](#) is subject to cross-examination pursuant to the right to fair trial, which encompasses the right to adduce and challenge the evidence produced against the accused (Art. 50(2)(k), CoK)



10. 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 reasons to believe that the child was telling the truth. In this regard, the trial magistrate noted that PW1 was consistent and steadfast in her testimony. In addition, her evidence which was subjected to cross-examination remained consistent throughout.
11. PW5, the mother of PW1, testified in court that she became aware of the appellant's attempted assault on another neighbour's daughter. Having observed her daughter visiting the appellant's house, she questioned her about it. Her daughter then disclosed the ordeal she had faced at the hands of the appellant. PW5 promptly took PW1 to the hospital and reported the incident to the police. She asserted that she harboured no ill feelings toward the appellant, despite having known him for over eight years. Additionally, she informed the court that PW1 was 10 years old.
12. Additionally, the prosecution called Alice Gori a Nursing Officer at Kibera South Health Centre. She testified that the complainant was brought to the facility after it was reported that she had been sexually assaulted by a person known to her. She was examined on 22nd March 2019. Upon examination, she made the following findings: her hymen was completely broken, with whitish vaginal discharge, and her external genitalia was normal. She concluded that the PW 1 had been defiled. She produced the P3 and PRC forms which had been signed by her colleague Sammy under her supervision.
13. The medical evidence of PW1 corroborated with the testimony of PW5 and the complainant regarding the incident and conclusively proved defilement.
14. On the age of PW1, the trial court considered the age assessment report produced by the investigating officer PW8. The report dated 9th April 2019 indicated that the victim was 10 years old at the time of the offence. There is therefore no doubt that PW3 was a child.
15. In his defence, the appellant gave sworn evidence and did not call any witnesses. He testified that on the material date, he was not in Nairobi and as such could not have committed the crime he was charged with. His alibi, who was his brother had since passed on and could not be called as a witness. He maintained his innocence, narrating how he was arrested. In addition, he contended that he was framed for the offence convicted.
16. From the record, the issue was considered by the trial court and found to be baseless.
17. The appellant argued that the trial court violated his right to a fair trial, as outlined in Section 50(2) of the Constitution of Kenya and Section 77 of the Evidence Act. Article 50(2) of the Constitution states that every accused person is presumed innocent. Section 77 of the Evidence Act pertains to reports by government analysts and geologists. However, the appellant did not provide any submissions regarding this claim, thus it is dismissed.
18. Furthermore, the appellant claimed that key prosecution witnesses were not called to testify. Yet, similarly, no submissions were made in relation to this argument. Consequently, this claim also fails.
19. For the foregoing reasons, I have come to the same conclusion as the learned trial magistrate that in this case, the prosecution proved its case against the appellant beyond any reasonable doubt. I am thus satisfied that the appellant was properly convicted. The conviction on the charge of defilement is therefore affirmed.
20. 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 child was 10 years old. Regarding the sentence imposed by the trial court, the appellant



submitted that the mandatory nature of the sentence imposed was unconstitutional. He maintained that the sentence was harsh and excessive.

21. From the record of the sentencing proceedings, the trial court noted the mandatory nature of the sentences under the *Sexual Offences Act*, No. 3 of 2006. She then proceeded to sentence the appellant to life imprisonment.
22. It is trite that although 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 a minimum is life imprisonment for a child below the age of 11 years. The court record shows that the appellant was a first offender.
23. 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 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.
24. For the above reason, I hereby set aside the sentence of life imprisonment passed by the trial court and substitute it with a sentence of twenty (20) years imprisonment. The sentence shall take effect from the date of the appellant's conviction being 11th October 2022.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 15TH DAY OF MAY 2024

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D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Ms. Tumaini for the Respondent

Joy Court Assistant

