



REPUBLIC OF KENYA



**SMK v Republic (Criminal Appeal 98 of 2023)
[2024] KEHC 5090 (KLR) (15 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5090 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 98 OF 2023
DR KAVEDZA, J
MAY 15, 2024**

BETWEEN

SMK APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered by
Hon. C. K. Mwaniki (PM) on 24th May 2023 at Kibera Chief Magistrate's
Court Sexual Offences No. E100 of 2021 Republic vs Samuel Mutua Kasaku)*

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) as read with 8(3) of the *Sexual Offences Act* (the Act). The particulars were that on diverse dates between February 2021 and August 2021 within Nairobi County, he intentionally caused his Penis to penetrate the Vagina of PN, a child aged 16 years old. He was sentenced to serve 25 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 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 four grounds of appeal. The thrust of the grounds of appeal is that the prosecution failed to prove its case beyond reasonable doubt. It was further the appellant's contention that the trial court was biased towards the prosecution thus vitiating his trial.



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 prosecution case was as follows. The Complainant (PW1) provided a sworn testimony stating that she was 13 years old. She testified that sometime in December 2017, her mother took her from her rural home to Nairobi. While in Nairobi, they were introduced to the appellant as their stepfather. One night, when the mother was away, the appellant asked PW1 whether she knew about sex. She pretended to not have heard and stood up to go relieve herself. She came back and went to sleep. On that night, the appellant crawled into her bed and undressed her. He then spread her legs and inserted his penis into her vagina. In the words of PW1, the appellant had sex with her. The appellant sexually assaulted her every night during this period. He warned her not to tell her mother and threatened to kill her if she did.
7. Later on, her mother called her to her friend's house. Both the mother and the friend asked her whether she knew that the appellant had sexual relations with her cousin. The mother convinced her to open up to her. She then narrated her ordeal at the hands of the appellant. The incident was reported to the police station and she was referred to hospital for examination and treatment. She was later confirmed to be pregnant. The appellant was eventually arrested.
8. In her testimony, PW1 gave clear and graphic testimony of how the appellant had made the habit of crawling into her bed at night and subjecting her to sexual assault. Despite being subjected to rigorous cross-examination, PW1 remained steadfast that it was the appellant, her stepfather, who committed these acts against her. The appellant was well known to PW1 as her stepfather, with whom they started living together in 2017. She could not have possibly pointed fingers at the wrong person for acts that lasted for a very long time. 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 his judgement, the trial magistrate recorded that his observation of the demeanour of the minor as she testified was satisfactory and that she was truthful and credible. 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 JWM (PW2), who is PW1's mother. She recounted that sometime in August 2021, she noticed changes in her daughter, PW1, and became apprehensive that she may be pregnant. On 16.09.2021, she bought a pregnancy kit and secretly obtained her urine. The test came out positive. On the morning of 17.09.2021, she noticed PW1 vomiting, and when she inquired, her husband, the appellant quickly intervened and told her that PW1 added too much sugar in her tea. Later, she called PW1 to her friend's house, where PW1 reported that the appellant had been having sex with her ever since she came to Nairobi. Upon inquiring why she never reported, she stated that she was afraid of being punished. She took her to the hospital where it was confirmed to be pregnant.
11. Additionally, the prosecution called John Njuguna, a clinical officer at Nairobi Women's Hospital, PW4, who produced the GVRC form, Post rape care (PRC) form, and P3 form on behalf of his colleague, Anne Mutheu, who no longer worked at the hospital. He stated that PW1 underwent an examination on 18.09.2021 after giving a history of being sexually assaulted by her stepfather. Upon examination, there were no outward physical injuries noted. However, the pregnancy test came out positive. The hymen also had a healed tear at the 8 o'clock region. The findings were consistent with



- blunt penetration in the vagina. During cross-examination, he clarified that the hymen could be broken by other factors. However, in the present case, the conclusion was that it was broken as a result of sexual assault since she was pregnant.
12. Considering that PW1 was examined long after her first sexual encounter with the appellant, and considering the repetitive nature of their sexual activity, these medical findings corroborate PW1's testimony regarding penetration.
 13. The other issue for determination is whether the Appellant is the one who impregnated the complainant. The Appellant denied having sexual relations with the complainant and faulted the prosecution's failure to conduct a DNA test linking him to the offence. It is a well-established principle of law that a DNA test is not necessary to establish the offence of defilement or rape. (See *AML v Republic* [2012] eKLR)
 14. Faced with a similar argument, in *Williamson Sowa Mbwanga v Republic* [2016] eKLR, the Court of Appeal pronounced itself thus:

“...it is patently clear to us that whilst paternity of PM's child may prove that the father of the child had defiled PM, that is not the only evidence by which defilement of PM can be proved. The fact, as happens in many cases, that a pregnancy does not result from conduct that would otherwise constitute a sexual offence does not mean that the sexual offence has not been committed. In this case, there does not have to be a pregnancy to prove defilement. A DNA test of the appellant would at most determine whether he was the father of PM's child, which is a different question from whether the appellant had defiled PM.”
 15. I am guided by the above authority to find that it was not necessary in this case for the court to order a DNA test as the same was not necessary to prove penetration. The Appellant's contention in this regard therefore fails.
 16. On the age of PW1, a birth notification was produced in evidence by PW4. She was born on 26.10.2008 meaning that she was 12 years old on the diverse dates indicated in the charge sheet, almost turning 13 years old. There is therefore no doubt that PW1 was a child.
 17. In his defence, the appellant denied knowing the complainant her mother and all the prosecution witnesses. He maintained his innocence elaborating how he was arrested. From the record, the appellant did not raise these issue on cross-examination that he was a stranger to his accuser. The trial court considered this defence and found it to be mere denial and a sham. I make as similar finding that the prosecution proved their case against the appellant beyond reasonable doubt. The conviction on the charge of defilement is therefore affirmed.
 18. On the sentence, section 8(3) provides that a person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years. The prosecution proved that the child was almost turning 13 years old; hence, the trial court, upon exercising discretion, imposed the sentence of 25 years' imprisonment.
 19. The primary purpose of a sentence in a criminal case is to punish an offender for their wrongdoing, while also aiming to rehabilitate them and discourage future criminal behaviour, turning them into law-abiding citizens. Although the trial court's sentence in this case was lawful, as the sentence of 20 years provided in the Act is only a mandatory minimum, the appellant, being a first-time offender still has a chance for rehabilitation and a full life ahead. Therefore, the sentence was manifestly harsh and excessive.



20. For the above reasons, I hereby set aside the sentence of twenty-five (25) years imprisonment imposed on the charge of defilement and substitute it with a sentence of fifteen (15) years imprisonment. The sentence shall run from the date of arrest being 18th September 2021.

Orders accordingly.

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

D. KAVEDZA

JUDGE

In the presence of:

Appellant present

Ms. Tumaini for the Respondent

Joy Court Court Assistant

