



**BO v Republic (Criminal Appeal E041 of 2023)
[2024] KEHC 8454 (KLR) (20 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8454 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL APPEAL E041 OF 2023
WA OKWANY, J
JUNE 20, 2024**

BETWEEN

BO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgment and Sentence in the Chief Magistrate’s Court at Nyamira, Criminal (SO) Case No. 80 of 2019 delivered by the Hon. M. Nyigei, Principal Magistrate on 2nd December 2021)

JUDGMENT

1. The Appellant herein was charged, on the first count, with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that on the 27th day of September 2019 in Nyamira North Sub-County in Nyamira County intentionally and unlawfully caused his penis to penetrate the vagina of LKM (particulars withheld), a child aged 1 year and 11 months.
2. The Appellant also faced the alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that on 27th day of September 2019 in Nyamira North Sub-County in Nyamira County intentionally and unlawfully caused his penis to come into contact with the vagina of LKM (particulars withheld), a child aged 1 year and 11 months.
3. The Appellant was also charged with the second count of assault causing actual bodily harm contrary to Section 251 of the Penal Code. The particulars were that on 27th day of September 2019 in Nyamira North Sub-County in Nyamira County unlawfully assaulted LKM thereby occasioning her actual bodily harm. The Appellant pleaded guilty to the second count after and was accordingly convicted



on his own plea of guilty. It is however not clear if the Appellant was sentenced following the said conviction as the record shows that the court only called for the probation officer's report.

4. The Appellant however denied the charges in the first count and the matter proceeded for full trial in which the Prosecution called a total of 3 witnesses as follows: -
5. PW1, Nancy Kerubo, a Clinical Officer at Ekerenyo Sub-County Hospital testified that she examined the victim on 28th September 2019 and found that her hymen was not intact. She noted that the victim had an infection. She found that there was vaginal penetration.
6. PW1 also examined the Appellant and found that his penis was inflamed. She produced the victim's P3 Form (P.Exh1), PRC Form (P.Exh2), the Appellant's P3 Form and Treatment Notes as (P.Exh3a) and (P.Exh3b) respectively.
7. PW2, LK (particulars withheld) the victim's mother and the Appellant's wife testified that the Appellant was the victim's step-father. She testified that she had on 27th September 2019 taken coffee berries to the coffee factory leaving the victim, who was then still asleep, with the Appellant. She returned home only to find the victim in distress and with injuries on the left eye, swollen mouth and burn marks on the buttock. She explained that she was so horrified that she passed out but regained consciousness soon thereafter when she also noted that the victim was bleeding from her vagina which was swollen.
8. PW2 took the victim to the hospital and later reported the incident to the police. She testified that the victim was aged 1 year and 11 months at the time of the incident having been born on 3rd October 2017. She produced the victim's clinic card as (P.Exh4).
9. PW3, No. 237904 P.C. James Fredrick Owino, was the Investigations Officer. He received the defilement report on 28th September 2019 and accompanied the victim and her mother to hospital where the child was examined and treated. He later re-arrested the Appellant having been arrested by the Assistant Chief who reportedly rescued him from irate members of the public who had threatened to lynch him. He recorded the witness statements and noted that the Appellant was a repeat offender having been jailed for a similar offence in Kisii.
10. At the close of the prosecution's case, the Appellant was, placed on his defence after the trial court found that the prosecution had established a prima facie case against him. The Appellant opted to give a sworn statement and did not call any witnesses.
11. DW1, the Appellant, testified that the offence was fabricated and that he had faced a similar offence where he was sentenced to 20 years' imprisonment but was eventually released. He explained that he met PW2 and took her home as his wife but that their relationship soured after PW2 accused him of infidelity. He explained that he had differences with PW2 that ended in a physical confrontation and that the child got injured in the course of their fights. He denied the defilement allegation.
12. At the end of the case, the trial court found that the prosecution had proved its case against the Appellant to the required standard. The Appellant was consequently convicted and sentenced to serve 20 years' imprisonment.

The Appeal

13. Aggrieved by the trial court's decision, the Appellant filed the instant appeal and listed the following grounds of appeal in the Petition of Appeal: -



1. That the learned trial magistrate erred in both points of law and fact when he convicted the Appellant for an allegation of defilement where the Prosecution failed to prove any specific intent.
 2. That the learned trial magistrate erred in both points of law and fact by convicting him without considering that there was no evidence to prove the allegations of the offence of defilement to the required standard in law and beyond reasonable doubt.
 3. That the learned trial magistrate erred in both points of law and fact in failing to observe the Prosecution case was full of contradictions and inconsistencies which rendered their case unbelievable.
 4. That the learned trial magistrate erred in law and fact when she convicted and sentenced him without regard to his basic right of disclosure on the Prosecution evidence which was intended to be brought against him as laid out in Articles 50(2) (j) of *the Constitution*.
 5. That the trial magistrate erred in both points of law and fact by convicting him without observing that he was prejudiced when substantial injustice occurred in his case as he was not represented by a lawyer as stipulated in *the Constitution* under Article 50 (2) (b).
14. The Appeal was canvassed by way of written submissions which I have considered. I find that the main issue for determination is whether the prosecution proved its case against the Appellant to the required standard.
15. It is trite that on a first appeal, the appellate court is called upon to reconsider the entire evidence and arrive at its own conclusions. In *Dinkerrai Remkrishan Pandya vs. Republic (1957) EACA 336*, the Eastern Africa Court of Appeal held thus: -

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.”

16. Section 8(1) and (2) of the *Sexual Offences Act* (the Act) stipulates as follows: -

8. Defilement

- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
- (3)



17. In order to prove the charge of defilement, the Prosecution must establish beyond reasonable doubt the following elements; - age of the minor, proof of penetration and positive identification of the perpetrator. (See Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013).

Age

18. PW2 testified that the victim was born on 3rd October 2017. She produced the victim's Clinic (Immunization) Card (P.Exh4) to confirm the victim's date of birth. The victim's minority age was not contested. I find that the prosecution established that the victim was a minor aged 1 year 11 months at the time she was assaulted.

Penetration

19. Section 2 of the Act stipulates as follows: -

“penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

20. PW1, the Clinical Officer, examined the victim and noted that her labia minora was inflamed and the hymen was broken. PW1 noted that the victim's vagina was inflamed and bleeding. She concluded that there was vaginal penetration. I have perused the victim's P3 and PRC forms (P.Exh 1 and 2) and I note that they confirm the Clinical Officer's findings. The testimony of PW1 was not shaken even under intense cross examination by the Appellant's advocate. I find that the ingredient of penetration was proved to the required standard.

Identification

21. PW2, the victim's mother, testified as follows on the state in which he found the victim upon returning home from the coffee factory: -

“When I came back, I found the child had blood in her mouth and her left eye was swollen. I went to the house of my mother in law The mother told me to undress the baby...I saw the marks like burn marks on the baby's buttocks. I was shocked and fell down.....The mother called B to ask him what he had done to the baby. The baby was bleeding from her vagina which was swollen... When I came back from the factory, the child was in bed crying while B was repairing his radio...”

22. PW2 was categorical that she left her child asleep under the Appellant's care only to return home and find that she had been assaulted. It is instructive to note that the Appellant pleaded guilty to the charge of assaulting the victim. The Clinical Officer examined the Appellant and found that his penis had bruises which were consistent with forceful penetration. I find that the prosecution proved, beyond reasonable doubt, that the Appellant defiled the victim.
23. I have considered the evidence presented by the Appellant in his defence. The Appellant claimed that he had been framed by his wife (PW2) as they had domestic differences. He also claimed that his wife used the victim as a shield during the fight that he had with PW2.
24. I find that the Appellant was not truthful in his defence as he did not explain how the victim sustained burn wounds on her buttocks. I further find that, having pleaded guilty to the offence of assaulting the victim, he cannot turn around and claim that he was framed up by his wife. I find that the Appellant's



defence was hollow and amounted to mere denial which did not impeach the watertight evidence from the prosecution.

Sentence

25. It is trite that an appellate court will not ordinarily interfere with the sentence passed by the trial court unless the sentence is illegal, manifestly low or excessive or where the court misapprehended facts of the case. In *R vs. Mohamedali Jamal* (1948) 15 E A C A 126, the Court of Appeal for Eastern Africa deemed:-

“It is well established that an appellate Court should not interfere with the discretion exercised by a trial Judge or Magistrate except in such cases where it appears that in assessing sentence the Judge has acted upon some wrong principle or has imposed a sentence which is either patently inadequate or manifestly excessive.”

26. In the present case, I note that the Appellant faced the charge of defilement which attracts a mandatory life sentence. The trial court however considered the pre-sentence report and sentence the Appellant to serve 20 years' imprisonment.

27. This court is of the view that the sentence of 20 years imprisonment was lenient considering the grave and heinous nature of the Appellant's actions on an innocent baby who had been left in his care by none other than his wife. It is quite unfortunate that the minor was a victim of the brutal and inhuman actions of a person who was supposed to be her protector. It is my view that the sentence passed on the Appellant was not only legal but extremely lenient. I therefore find no reason to interfere with the sentence.

28. In conclusion, I find that this appeal is not merited and I therefore dismiss it.

29. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS AT NYAMIRA THIS 20TH JUNE 2024.

W. A. OKWANY

JUDGE

