



**Keya v Republic (Criminal Appeal E038 of 2021)
[2024] KEHC 7574 (KLR) (20 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7574 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL E038 OF 2021**

**HM NYAGA, J
JUNE 20, 2024**

BETWEEN

EMMANUEL WEKESA KEYA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence by Hon. E.S. Soita, Resident Magistrate in Molo Chief Magistrate's Court SO Case No. E025 of 2020 delivered on the 5th October, 2021)

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#) No. 3 of 2006. It was alleged that on 22nd and 23rd November, 2020 in Rongai Sub-County within Nakuru County he intentionally caused his penis to penetrate the Vagina of AN a child aged 15 years.
2. In the alternative, the Appellant was charged with committing an indecent Act with a child contrary to Section 11(1) of the [Sexual Offences Act](#), the Particulars being that on 22nd and 23rd November, 2020 in Salgaa Sub County within Nakuru County, he intentionally and unlawfully touched the vagina of FCR a child aged 15 years old with his penis.
3. The appellant was convicted on the main charge and sentenced to serve fifteen (15) years imprisonment.
4. Dissatisfied with the conviction and sentence, he has come to this court on appeal and relied on the following amended grounds of appeal: -
 - i. That the Learned Trial Magistrate erred in Law during this trial by relying on uncorroborated evidence adduced by four witnesses.



- ii. That the Learned Trial Magistrate erred in Law and fact by failing to consider that the Appellant was not examined to prove the allegation according to the trial procedure.
 - iii. That the Learned Trial Magistrate erred in Law and fact by convicting the Appellant without exact proof of the complainant's age.
 - iv. That the Learned Trial Magistrate erred in law and fact by failing to consider that the complainant was referred to as A.N and not FCR.
 - v. That the Learned Trial Magistrate erred in Law and fact by disregarding the Appellant's defence without giving cogent reasons.
5. The Appeal was argued through submissions.

Appellant's Submissions

6. The Appellant submitted that the evidence of PW1 was misleading, contradictory and should not be relied upon for the following reasons: -PW1 stated that she did not know him prior the incident yet she accompanied him to his house. According to him, there is no way a person can agree to go to a stranger's house. He also posited that PW1 contradicted herself during trial by stating that she used to know him and they were friends.PW1 said that she had decided to go to her friend's place but stated she did not know their home. He believes PW1 was not credible as there is no way she can decide to visit her friends whom she did not know where they lived.PW1 told court that she was forced to have sex yet she did not scream or report the incident either to the police or to her parents.
7. The Appellants posited that there was no evidence that could link him to the offence as he was not examined.
8. It was also his submissions that the exact age of the complainant was not given during trial for reasons that PW1 stated that she was 16 years which position was confirmed by PW2, that the doctor said the complainant was under 18 years old and the age assessment report indicated that the complainant was aged between 13-14 years.
9. Regarding his defence, he submitted that the trial magistrate did consider it and give any reason for disregarding the same.
10. In buttressing his submissions, he cited the cases of Mohamed Bin Allui vs Republic (1942) 9 EACA; Ramkrishan Pandya (1967) EACA 339 where court held that where there is glaring inconsistency in evidence, the court should acquit.; JOHN OTIENO OBWAR –VS- REPUBLIC HC. CR.A. No.34 'B' of 2010 where the court stated that Defilement is a strict offence whose sentence upon conviction is staggered depending on the age of the victim. The younger the victim the stiffer the sentence; Peter Maina Njeri vs Republic (2016) eKLR where the court stated that "Age is crucial and critical ingredient for the offence of defilement, the question of age is a fact requiring concrete and tangible proof". & Jane Nyamule Vs R [1953] EACA for the proposition that the court has to consider the entire evidence on record and give explanations for unacceptable evidence.

Respondent's Submissions

11. The Respondent submitted that the evidence of penetration was solid for reasons that the complainant's testimony that she engaged in sexual intercourse with the Appellant was corroborated by PW3 who examined her and noted that her hymen was broken. She also had a cut on the labia minora and vagina.



12. With respect to the complainant's age, the respondent submitted that based on the evidence of PW1, PW3 and the age assessment report, the complainant was 15 years old at the time of the incident. The respondent argued that age is not primarily proved through production of a birth certificate. To buttress this proposition, reliance was placed on the case of *Richard Wahome Chege Vs Republic* [2014] eKLR.
13. In regards to the identity of the accused, the respondent conceded that it was a bit shaky in that when the complainant first testified said the accused was her friend but when she was recalled to testify she said the accused was not known to her prior the incident. The respondent however posited that either way, there was sufficient time to identify the appellant since the complainant stated that she had stayed with the appellant for around two days before they were arrested. It was further submitted that PW4 testified that the accused and the complainant were arrested on 25th November 2020 and as such the evidence on identification was solid.
14. With regard to the Appellant's defence, the respondent argued that it was mere denial which was not strong enough to rebut the prosecution's case and therefore the trial court was right in disregarding the same.
15. On sentence, the Respondent submitted that the appellant abused the trust bestowed upon him by the society by taking advantage of a young girl aged 15 years at the time of the incident. It was submitted that the sentence meted against the appellant was sufficient and deterrent sentence. The respondent thus urged this court to uphold the same.

Analysis and Determination

16. I have considered the appeal and submissions by both parties. I have also read the record of the trial court and the impugned judgment.
17. As a first appellate court, this court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See *Okeno vs Republic* [1972] E.A 32.
18. I will summarize the evidence on record.

Prosecution's Case

19. The hearing of the prosecution's case commenced on 2nd March, 2021. PW1 testified on this day. It was her testimony that she was born on 14th February, 2005. She said on 22nd November, 2020 she left home to visit her friend and she met the Appellant on the road at Salgaa. She said the appellant used to be her friend. She asked the Appellant for his phone to call her mother as she was getting late and the Appellant offered to assist her look for her friend. She said when it became dark, the Appellant told her to accompany him to his home and she agreed. She said upon reaching the Appellant's house, the Appellant asked her if they could do bad manners. She agreed and they had sex. She said the Appellant touched her vagina using his hands and had sex with her using his penis. It was her testimony that she stayed at the Appellant's house for four days.
20. Thereafter the complainant was stood down. On 27th April, 2021 she was recalled to testify. She testified that she had left home on 22nd November, 2020 to go look for her friend called Crispus. She met with the appellant at around 1600hours. That she did not know the Appellant. She said the appellant told her that he will help her look for her friend. They looked for her friend at Salgaa and at around 18:00 hours, the appellant told her to go to his place since it was getting dark. They reached the Appellant's place at around 19:00 hours. She said the Appellant asked her if they could have sex and she agreed



though she never wanted it because she didn't know the Appellant. She said the Appellant removed her clothes, wore a condom and they had sex. She said they had sex for around 30 minutes. It was her further testimony that she was forced to have sex. On 23rd November 2020 she stayed at the Appellant's house because the appellant locked the house and left for work. She said at 16:00hours the Appellant returned and they did not do anything. She did not go home on that day because she was afraid of her parents. She said on 24th November,2020 the Appellant went to work and he did not lock the house. She went to unfinished house and slept there and later she returned to the Appellant's house and that is when her father, mother and brother found them in the house. She said they were arrested and taken to the police station. She said later she was taken to Rongai Police Hospital where she was examined. She positively identified the Appellant before court.

21. In cross examination, she urged the court to consider her second testimony. She reiterated that she did not know the Appellant prior the incident.
22. PW2 was LW, the Complainant's mother. She testified that PW1 was born on 14th February,2005 and that her birth certificate was burnt down during Molo Clashes. That on 22nd November,2020 at 11.00 am she went to church and left her children at home. When she came back at around 14:00 hours the complainant was not at home and her other children did not know her whereabouts. At 17:00 hours they started looking for the complainant. She said the complainant called her father and informed him that she was safe and they should not look for him. Her father sent her money via mpesa and they noted the registered name of the number used to call them was one Emily Epidom. They went to DCI, Salgaa for tracking of the number and they were advised to go back after one week. She said on Thursday, they spotted someone who looked like the complainant and they requested someone to follow her to where she was going. They saw the plot where the complainant went to and the particular house. In the evening, she, the complainant's father and her son went there and they found the complainant and the Appellant. They locked the door then called the police officer who visited the scene and arrested PW1 and the Appellant. Both were taken to the police station and later to Rongai Health Centre where the Complainant was examined. She positively identified the accused person before court.
23. In cross examination, she stated that the phone that was used to call them was found in the Appellant's house and they gave it to police. She confirmed that was the first time he met the Appellant.
24. PW3 was Rose Cheptoo Rotich, a clinical officer from Rongai Health centre. She said on 26th November,2020, PW1 was taken to their facility for examination. She said upon examining the complainant, she had cut on labia minora and vagina and her hymen was broken. She produced the P3 and PRC form as P. Exhibit No.1 & 2 respectively.
25. In cross examination, she stated that the victim had bruises on her genitalia which were not more than three days old. She confirmed there was penile penetration and that the Appellant was not examined.
26. PW4 was the PCW Faith Githome attached to Salgaa Police station. She stated that on 23rd November 2020 the incident herein was reported to the station by PW2 and the complainant's father. She said on 25th November,2020, in the evening, PW2 and the complainant's father went back to the police station and reported that they had seen PW1 going to the Appellant's house. She said two police officers accompanied them to the scene and they found PW1 and the Appellant in the house. She said they were arrested and taken to Salgaa Police Station. She stated that upon interrogating the Appellant, he confirmed he had sex with the complainant. She testified that age assessment on PW1 was conducted at Provincial General Hospital and it was found that she was aged between 13-14 years. She produced the complainant's age assessment report as P. Exhibit No. 4.



27. In cross examination, she reiterated that the victim was found at the Appellant's house. She disputed asking the Appellant for Ksh. 20,000/= as a bribe.

Defence Case

28. The Appellant gave sworn evidence.
29. He testified that he worked at Simba Cement at Salгаа. It was his testimony that on 25th November 2020 he was at work until 17:00 hours. Thereafter he went home. He said on his way home he met with the complainant who stopped him and enquired whether he knew Brayo who worked at Simba Cement. He told her there were many and they didn't talk much. He stated that he saw a man and another lady standing in front of them and the man instructed him to lift up his hands or he handcuffs him but he refused. He said he told them he was from work but they couldn't listen and they sent him to Salгаа Police Station. He said at the said station he was booked and placed in the cells. The following day, the Investigating officer took him to the crime office and asked for Ksh. 20,000/= so that he could not be taken to court. He said he was given a phone to call his people but he did not reach them. He enquired what offence he had committed and he was not informed. He said he did not know either the victim or her mother. He said he was later taken to Molo Law courts and charged with the instant offence. He denied committing the offence.
30. In cross examination, he said the investigating officer who asked for money was one Lucy Kinuthia. He confirmed he did not report the issue to the OCS. He said he was assaulted and forced to write statement by the police.
31. Having summarized the evidence, I will now determine whether the trial court erred in convicting and sentencing the appellant for the aforesaid offence.
32. This being a case for defilement, the prosecution was duty bound to prove its ingredients. In the case of George Opondo Olunga vs Republic [2016] eKLR, it was established that the ingredients of an offence of defilement are; the age of the victim, penetration and identification or recognition of the offender.
33. In this case, the complainant testified that she was born on 14th February, 2005. This position was corroborated by her mother. Age assessment report of the Complainant that was produced in evidence indicates that she is aged between 13-14 years.
34. Rule 4 of the Sexual Offences Rules of Court 2014 provides that:
- “When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document.”
35. Contrary to the Appellant's assertion that age could only be proved through a birth certificate, the age of a minor could be proved through several ways as discussed by the Court of Appeal in Malindi in *Mwalengo Chichoro Mwachembe vs Republic, Msa. App. No. 24 of 2015* (UR) where it held: -
- “..... the question of proof of age has finally been settled by decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See *Denis Kinywa vs Republic, Criminal Appeal No. 19 of 2014* and Omar *Uche Vs Republic, Criminal Appeal No. 11 of 2015*. We doubt if the courts are possessed of



the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in Francis Omuroni is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable.....”

36. The Court of Appeal in Richard Wahome Chege vs Republic [2014] eKLR, also addressed this issue. It held as follows: -

“On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth?....”

37. Guided by the above authorities and the entire evidence on record on the complainants age, I am satisfied that the prosecution proved beyond reasonable doubt that the minor was 15 years old at the time the offence was committed.

38. In regard to identification, it is imperative to note that the same has not been challenged in this appeal. The minor testified that she stayed with the Appellant for four days before their arrest. PW2 stated that the minor was found in the Appellant's house. The Appellant on his part confirmed that he met and conversed with the complainant on the day he was arrested. Both PW1 and 2 positively identified the Appellant before the trial court. In the prevailing circumstances, the identification of the Appellant is not in doubt.

39. The next element is proving of penetration. 'Penetration' is a term of art and is defined under section 2 of the Act to mean;

“the partial or complete insertion of the genital organs of a person into the genital organs of another person’.

40. The main evidence ordinarily relied by the courts in defilement matters in order to prove penetration is the complainant's own testimony which is usually corroborated by the medical report presented by the medical officer. In this case, the complainant was categorical that the appellant had sexual intercourse with her. Under Section 124 of the [Evidence Act](#), the evidence of a child victim to a sexual offence does not require corroboration. All that the court is required to do is satisfy itself that the victim is telling the truth.

41. PW3 testified that examination conducted revealed that the victim had injuries on her labia Minora and Majora. She also confirmed that her hymen was broken and that there was penile penetration. This evidence served to buttress the victim's testimony that the appellant had sexual intercourse with her. I am thus of the view that the evidence to prove penetration was watertight.

42. The Appellant argued that no examination was conducted on him that could link him to the commission of the offence herein. This argument is misplaced since in defilement matters, examination of the perpetrator is not mandatory. On this, I'm guided by the Court of Appeal decision in [Mubendu vs Republic \(Criminal Appeal 60 of 2018\)](#) [2024] KECA 322 (KLR) (22 March 2024) (Judgment) where the court held that: -

“Medical examination of a perpetrator is not a requirement to prove defilement, and is only necessary depending on the circumstances of a particular case, say, when for instance, upon the medical examination of the victim it is established that she was infected with a



sexually transmitted disease. Such medical examination of the perpetrator may either prove or disprove whether the perpetrator infected the victim with the disease....”

43. The Appellant also argued that his defence was not considered. I have perused the judgement and I concur with him. The trial magistrate did not consider the defence case alongside that of the prosecution and did not give any reason for disregarding the same. The court in *Mkirani vs Republic* (Criminal Appeal E010 of 2021) [2021] KEHC 377 (KLR) (17 December 2021) (Judgment) held as follows: -

“It is imperative for a trial court to evaluate all the evidence and not to be selective in determining what evidence to consider. The conclusion which is reached (whether to convict or to acquit) must account for all the evidence. At times, some of the evidence might be found to be false, unreliable, possibly false or unreliable, but none of it may be ignored. The facts found to be proven and the reasons for the verdict must appear in the judgment of the trial court. If there was evidence led during the trial, but such evidence is not referred to in any way in the judgment, it is safe for a court of appeal to assume that such evidence was either disregarded or not properly weighed or even forgotten about at the time of delivering the judgment. The best indication that a court has applied its mind in the proper manner is to be found in its reasons for the judgment including its reasons for the acceptance and the rejection of the respective witnesses.”

44. Persuaded by the above authority, I hold and find that the trial court erred by not considering the Appellant’s defence and giving any solid reasons for the same.

45. This court however as stated above, has a duty to analyse the evidence afresh. I have considered the Appellant’s defence and it is my view that it did not rise to the level where it could in any way raise doubt in the prosecution’s case or shake the credibility of the prosecution witnesses. This is because the Appellant clearly stated that he did not know the complainant or her mother prior the offence. There was no evidence of bad blood between them. It was highly implausible therefore that they could conspire to frame the Appellant with the offence herein.

46. The Appellant also purported that the investigating officer asked him for Ksh. 20,000/= so that he could not be charged in court. He did not report the matter to any authority and as such his evidence on this issue was doubtful. In any case that evidence does not rebut the overwhelming case against him.

47. In sum, I find that the prosecution proved beyond reasonable doubt that the appellant penetrated PW1, a child aged 15years. Therefore, I find that the Appeal on conviction lacks merit and is hereby dismissed. The conviction is upheld.

48. The Appellant also prayed that his sentence be set aside. He neither advanced any reasons for the same nor submitted on it. Despite this, the court has a duty to consider the issue.

49. Sentencing is exercise of discretion by the trial court. Such discretion should ordinarily not be interfered with unless it is shown that the trial court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle (See *Shadrack Kipkoech Kogo vs R.*, and *Wilson Waitegei vs Republic* [2021] eKLR).

50. The appellant was sentenced to 15 years’ imprisonment.



51. During the trial, the prosecutor did not inform court whether or not the Appellant was a first time offender or not. Therefore, there is no evidence that he was a repeat offender. In mitigation the appellant stated that: -

“I am a bread winner of the family. I have a family at home and very sick mother with a heart problem. I seek a non-custodial sentence. I am the bread winner.”

52. The trial court in sentencing the Appellant stated as follows: -

“Mitigation is considered. Accused person is hereby sentenced to 15 years in jail from 27.11.2020.”

53. Section 8(3) of the *Sexual Offences Act* provides: -

“A person who commits an offence of defilement with child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

54. The Appellant was not sentenced to 20 years as provided by the Act. Although not stated, the court appears to have been guided by the recent development in the jurisprudence regarding mandatory minimum sentences, as a consequence of the decision in *Francis Karioko Muruatetu & others vs Republic* (2017) eKLR.

55. From the lower court record, it is evident the trial court duly considered his mitigation.

56. There is nothing provided to show that the trial court imposed an excessive sentence or erred in sentencing the Appellant. Given the circumstances of the case, I find that the sentence was appropriate. The application of *Muruatetu* is not equivalent to ignoring the nature of the crime committed by the offender. The court has a duty to impose an appropriate sentence where it deems it necessary. In this case, the accused, a married man, took advantage of a 15-year-old girl. He should not have expected any mercy. Thus, I am reluctant to disturb the sentence.

57. In conclusion I find that the appeal lacks merit and is dismissed.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 20TH DAY OF JUNE, 2024.

H. M. NYAGA,

JUDGE.

In the presence of;

C/A Jeniffer

Nancy for state

Appellant present

