



REPUBLIC OF KENYA



KENYA LAW
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**Mutali v Republic (Criminal Appeal E014 of 2023)
[2024] KEHC 7459 (KLR) (21 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7459 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E014 OF 2023
DR KAVEDZA, J
JUNE 21, 2024**

BETWEEN

DOMINIC MUTORO MUTALI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered by
Hon. E. Boke (SPM) on 20th April 2023 at Kibera Chief Magistrate's Court
Sexual Offences No. E018 of 2022 Republic vs Dominic Mutoro Mutali)*

JUDGMENT

1. The Appellant was charged with two counts of offences. In count I, he was charged with defilement contrary to section 8(1) as read with 8(4) of the *Sexual Offences Act*. The particulars were that on diverse dates between 27th March 2021 and 11th January 2022 at [particulars withheld] Area in Lang'ata sub-county, he intentionally and unlawfully caused his penis to penetrate the vagina of P.C.A a child aged 17. In count II, he was charged with the offence of causing grievous harm contrary to section 234 of the Penal Code. The particulars of the offence on 10th January 2022, at [particulars withheld] Area in Kibera Langata Sub County, unlawfully did grievous harm to P.C.A. After a full trial, the appellant was convicted on both counts. He was sentenced to serve 15 years in count I, and 25 years imprisonment in count II.
2. Being aggrieved, he filed an appeal challenging his conviction and sentence. In his petition of appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted. He contended that the trial court failed to consider his alibi defence. He urged the court to quash his conviction and set aside the 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 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. The prosecution case was as follows: The complainant (PW1) provided a sworn testimony after voir dire examination, stating that she was born on 28th December 2004. She testified that she met the appellant in March 2021 as she was walking from school. The appellant had an interest in her and they developed a friendship. At the time, the appellant was working at a construction site near her school. During this time, they met regularly. The appellant later asked her to visit his house in Kibera. She agreed, and the appellant sent her bus fare.
5. The complainant recounted that on 27th March 2021, she packed her clothes and told her mother she was going to tuition after finishing her Kenya Certificate of Primary Education exams. Instead, she went to the appellant's place and lived with him as husband and wife for several months. When she became pregnant, the appellant's attitude changed, and he started locking her in the house all day.
6. The complainant also testified that on 10th January 2022, she asked the appellant for money to buy baby clothes. He became aggressive and struck her on the head with a metal bar. She lost consciousness and woke up at Kenyatta National Hospital, where she discovered she had delivered a child. The head injury affected her hearing and memory. After a month in the hospital, she reported the incident to the police.
7. PW2, JAA, the complainant's mother, testified that the complainant was born on December 27, 2004. She explained that the complainant was in a program that assisted needy children from single-parent families by paying their school fees. She recounted that the complainant disappeared from home on 27th March 2021, and did not attend school as expected. After searching for her, she reported her missing at Korogocho Police Station. On 11th January 2022, she received a call from an unknown number informing her that the complainant was at Mbagathi Hospital. She rushed there and found her daughter with blood on her mouth, nose, and ears.
8. The doctors referred her to Kenyatta National Hospital (KNH), where she delivered via cesarean section and was placed in the Intensive Care Unit until her recovery. After she was discharged, she and the complainant reported the assault and defilement to the police. The complainant identified the appellant, who was then arrested.
9. PW3 Dr. Sarah Adanje and PW4 Dr. Martin Maturi, both from Mbagathi Hospital, testified that they examined the complainant on 9th February 2021, after she was allegedly defiled. She was brought in by her mother and a police officer and was conscious at the time. They noted a healing scar on the left parietal region of her head, while her genitalia was normal. They filled out the PRC and P3 forms, which were presented as evidence. They concluded that her injuries were caused by blunt force trauma.
10. PW5 Dr. Grace Nangila from Kenyatta National Hospital testified that the complainant was referred to their facility in January 2022, around the time she had given birth. She was in the intensive care unit for two weeks. Upon examination, the complainant had swelling in the brain and heart muscle. Her uterus was recovering well after delivery, and her vagina was normal. PW5 presented the complainant's discharge summary.
11. PW6, AB, testified that she was the neighbor of both the appellant and the complainant. She confirmed that the two lived together as husband and wife. On January 11, 2022, the complainant came to her house complaining that she could not see. Agnes gave her tea and mandazi. Shortly after leaving, the complainant fell. Agnes found her convulsing and bleeding from the mouth. Along with other neighbors, she took the complainant to the hospital.



12. PW7, the investigating officer summarized the prosecution's evidence and produced the complainant's birth certificate.
13. After the close of the prosecution's case, the appellant was found to have a case to answer and was put to his defence. He gave sworn evidence and denied the charge. He admitted knowing the complainant and living with her during the relevant period. He claimed that the complainant had told him she was an orphan, over 18 years old, and attending university. He also denied assaulting her. He stated that he left the complainant in the house and later learned she had given birth, after which he was arrested.
14. DW2, the appellant's father, testified that he had met the appellant and the complainant several times. He had asked for the complainant's parents' phone number, but she insisted she was an orphan. He asserted that she always presented herself as an adult.
15. In his submissions, the appellant challenged the totality of the prosecution's evidence, against which he was convicted. He maintained that the prosecution's evidence was marred by contradictions and inconsistencies. In addition, the prosecution witnesses were unreliable. In rebuttal, the respondent argued that the appellant was properly charged and convicted as the prosecution proved their case beyond reasonable doubt.
16. I have re-evaluated the evidence on record and considered the written submissions and the applicable law. 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."
17. Further, sections 8(1) and (4) of the [Sexual Offences Act](#), No. 3 of 2006 provide:
 8. Defilement
 - (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.
18. Bearing in mind the above provisions, I will now analyse the evidence on record to ascertain whether the essential ingredients of the offence preferred against the appellant were established to the required standard of proof. Regarding proof of age, I wish to state at the outset that the importance of proving the age of a victim, proof of penetration, and positive identification of the assailant in sexual offences is paramount.
19. The complainant's mother, PW2 indicated that the complainant was 17 years old at the time of the alleged incident. The trial court considered the birth certificate produced in evidence by the investigating officer PW6, which indicated PW1's date of birth as 24th December 2004, confirming that indeed the child was seventeen years old at the diverse dates of the alleged incident. There is no doubt that PW1 was a child within the meaning of the law.
20. On the issue of penetration, it was the victim's case that she ran away from home and went to live with the appellant as husband and wife. This was until the appellant attacked her, and she needed medical assistance. During this time, she also got pregnant and delivered. The appellant submitted that while working, he and the complainant developed a relationship and they moved in and were staying together as husband and wife. He maintained that he did not know that the complainant was a minor and that she conducted herself as an adult. He did not dispute that he was the father of the child born



- by the complainant. The evidence by the prosecution leaves no doubt that there was penetration by the appellant.
21. On the issue of identification, the complaint told the trial court that the assailant was the appellant and they had lived together. The evidence was corroborated by PW6, who was their neighbour at the material time, and the appellant's father, DW2. The appellant was well known to the victim, and they lived together. The appellant did not object to the identification by the victim.
 22. The defence by the appellant was that the victim conducted herself as an adult. At the material time, the complainant was 17 years old, while the appellant was 20 years old. The appellant claimed the complainant misled him about her age, stating she was over 18 and attending university. When the complainant left home, her mother reported her missing to the police. Testimony from the appellant's father indicated the complainant misrepresented herself as an orphan when he attempted to contact her family. The complainant acknowledged deceiving her mother to live with the appellant. However, from the record, the complainant met the appellant while dressed in a school uniform. There is therefore no doubt that he knew the complainant was a minor. In addition, despite the appellant's relative youth, his actions with a minor were acknowledged, and these circumstances should be taken into account in sentencing.
 23. The upshot of the above analysis is that I make a similar finding to that of the trial court that the prosecution proved their case beyond reasonable doubt on the charge of defilement. The conviction is affirmed.
 24. In count II, the appellant was convicted of the offence of causing grievous harm. Section 234 of the [Penal Code](#) provides for the offence of Grievous Harm as follows:

Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.
 25. Section 4 of the [Penal Code](#) defines grievous harm as follows: -

“grievous harm” means any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense;
 26. The complainant, PW1 led evidence to the effect that on the material day, she was in the house with the appellant and asked him about baby clothes. He got aggressive and hit him with a metal rod on the head. This resulted in her losing consciousness until she found herself at the hospital.
 27. The Court considers that both the appellant and the complainant confirmed to have known each other very well and could therefore not have been mistaken for their respective identities.
 28. Although the appellant urges that the injuries sustained by the complainant were a result of her convulsing or otherwise, this Court considers that there is medical evidence to confirm that the injuries were a result of blunt force trauma. Notwithstanding that the Appellant may have sustained other injuries as a result of her falling over and having convulsions, as testified by PW6, the specific injuries to the head were the result of an attack by the appellant.
 29. The issue for consideration is whether specific injuries sustained by the complainant constitute grievous harm. The medical evidence presented by PW5 was that the complainant had swelling in her heart and brain. PW3 and PW4, who examined the complainant a month later, told the court that the complainant had a healing scar on the left parietal region of her head.



- 30. It was the complainant's testimony that she had trouble hearing and memory loss as a result of the injury sustained. The internal injuries may have resulted in permanent damage, and the scar was still noticeable when she came to court during the appellant's trial. The injuries occasioned were therefore very serious.
- 31. The weapon used was a metal rod, as evinced by the complainant. Medical evidence confirmed that the injuries were a result of blunt force trauma. Section 231(b) of the Penal Code on acts intended to cause grievous harm refers to the use of a dangerous or offensive weapon. The term used by the medical practitioner who filled the P3 form indicated that the weapon that inflicted the harm was blunt, and the injuries sustained were classified as grievous harm
- 32. On mens rea, there is no question that it is unlawful to strike, cut, or otherwise wound another person. The offence of grievous harm is, therefore, complete when the appellant intentionally assaults the complainant and causes her grievous harm. The mens rea may only be taken away in the circumstances described under Section 9 of the Penal Code. Mens rea can only be taken away if it can be shown that the appellant was by reason of insanity (Section 12 of the Penal Code) or intoxication induced by the complainant (Section 13 of the Penal Code) not aware of what he was doing, or that it was unlawful. None of these factors were argued by the appellant.
- 33. In the end, I find that all the ingredients for the offence of grievous harm were proved against the appellant beyond reasonable doubt. The conviction on count II is sustained.
- 34. On conviction for the offence of defilement, the appellant was sentenced to serve 15 years, while on conviction for the offence of grievous harm, he was sentenced to serve 25 years. The sentences are to run concurrently.
- 35. In count I, Section 8(4) of the Sexual Offences Act provides that a person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years. The prosecution proved that the child was 17 years old; hence, the trial court, sentenced the appellant to 15 years imprisonment.
- 36. In count II, section 234 of the Penal Code provides that any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.
- 37. 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, being a first-time offender still has a chance for rehabilitation, his age (20 years), and a full life ahead. I therefore find that the sentence imposed was manifestly harsh.
- 38. For the above reasons, I hereby set aside the sentence of fifteen (15) years imprisonment imposed in count I, and substitute it with a sentence of ten (10) years imprisonment. In count II, I substitute the sentence of twenty-five (25) years imprisonment imposed with a sentence of fifteen (15) years imprisonment. The sentence shall run from the date of conviction.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 21ST DAY OF JUNE 2024

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D. KAVEDZA

JUDGE



In the presence of:
Appellant Present
Joy Court Assistant

