



**SON v Republic (Criminal Appeal 126 of 2023)
[2024] KEHC 7457 (KLR) (21 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7457 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 126 OF 2023
DR KAVEDZA, J
JUNE 21, 2024**

BETWEEN

SON APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered
by Hon. E. Boke (SPM) on 24th February 2022 at Kibera Chief
Magistrate's Court Sexual Offences No. 40 of 2021 Republic vs SMK)*

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 7th May 2020 in Kibra Sub County within Nairobi County, intentionally and unlawfully caused his penis to penetrate the vagina of LAO a child aged 12 years. He was sentenced to serve twenty (20) years' imprisonment.
2. Being dissatisfied, the appellant filed an appeal against the conviction and sentence in line with his petition of appeal. He submitted written submissions, which I have considered, and there is no need to rehash them here.
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. He further contented that the trial court failed to consider his defence resulting in an unjust conviction.

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 after voir dire examination stating that she was 12 years old and in class 4. She told the court she was living with her step-father, the appellant herein after her mother died in 2019. On 7th May 2020, she was cooking while the appellant was present. The appellant approached her and told her she had grown 'umemea'. He then knocked her to the ground and forcefully undressed her and undressed himself. He inserted his penis into her vagina. The complainant tried to scream but the appellant covered her mouth with his hand. When he finished, defiling her, the complainant noticed that she was bleeding from the vagina. The appellant directed her to shower and threatened her against telling anyone what had happened. She testified she came back and slept on the floor where the appellant had defiled her while the appellant slept on the bed.
7. Two days later the appellant took her to her aunt (Mama L) where he reported that the Complainant had bad manners. She stayed there for a few days and her aunt Mama L sent her back to the appellant to collect her clothes. When she arrived home, the appellant was absent and the door was closed. As she waited for the appellant by the doorstep, a stranger inquired why she was crying. Moments later, a lady from an organization known as SHOFKO narrated her ordeal at the hands of the appellant. She was taken to Kibra South Hospital for examination and treatment.
8. In her testimony, PW1 gave clear and graphic testimony of how the appellant, whom they lived with, pushed her to the floor and defiled her. Despite being subjected to rigorous cross-examination, PW1 remained steadfast that it was the appellant, her stepfather, who committed this act against her. The appellant was well-known to PW1 as her stepfather, with whom they had been living together. She could not have possibly pointed fingers at the wrong person for the act. I therefore hold that the appellant was properly identified.
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 were recorded reasons why she believed the child was telling the truth. In her 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. In addition, she had no reason to point an accusing finger at the appellant if indeed he did not defile her. 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 Diana Akinyi (PW2), a gender-based worker. She testified that on May 15, 2020, she was informed by a community member that a child needed rescuing. Since it was late, she did not go that day. The next day, she found that the complainant had already been brought to a safe house. She tried to interrogate the complainant, but the child did not open up. When she finally opened up, the complainant told her that her stepfather had been denying her food and had defiled her. She took the Complainant to the hospital on 18th May 2020. After examination and treatment, she took the complainant to the Kibera Children's Office, and the child was taken to a children's home.
11. PW4 Collins Opondo testified that on 13th May 2020, he was informed by PW5 Abdul Ali Hussein about a child victim who had allegedly defiled and needed rescuing. Together, they were directed to the premises and found the complainant outside the house. At the time, she did not want to talk to



- them. They took her to SHOFCO. Two days later, she opened up about her ordeal at the hands of the appellant. Later on, they went with police officers to arrest the appellant, who was booked at Kilimani Police Station.
12. Alice Gori (PW3), a nursing officer at Tumaini Center, examined the complainant on 18th May 2020. Upon examination, the complaint was HIV Positive and was on medication, her hymen was broken with her vagina gapping with notches at 7 o'clock, and with irregular margins. She also had fresh, painful lacerations at 2 o'clock in the vestibular area. She concluded that the cause of the injuries was penile penetration. This medical evidence corroborates the complainant's testimony regarding penetration.
 13. On the age of the complainant, it was her testimony that she could not remember her birth date. PW6, the investigating officer, produced an age assessment report. The report concluded that the complainant was thirteen (13) years old. The complainant was therefore a child within the meaning of the law.
 14. In his defence, the appellant admitted living with the complainant during the relevant period. He claimed that the complainant started rebelling, prompting him to seek the intervention of MA ('Mama L'), the complainant's aunt. The complainant later disappeared from MA's house and was reported missing at Olympic Police Station. The appellant learnt that the complainant had been taken to SHOFCO, but when he tried to visit her there, he was denied access and subsequently arrested and charged. He maintained his innocence.
 15. DW2, the complainant's aunt, testified that the complainant's mother had informed her before she died that the appellant could not sustain an erection due to diabetes. The appellant had also told DW2 that the complainant had changed and was disappearing during the day without revealing her whereabouts. DW2 confirmed that the appellant brought the complainant to her house, but she disappeared after two days. They reported this to the police and later learnt that the complainant had been taken to SHOFCO.
 16. The trial court considered this defence and found it to be baseless. The trial court stated that having erectile dysfunction as alleged is not a defence against a charge of defilement. In addition, DW2 was not staying with the appellant and the Complainant at the material time so she had no idea whether the defilement took place or not. The trial court considered the defence and found it to be baseless. In addition, PW1 had no reason to falsely accuse the appellant of defiling her. I have already found above that her testimony was truthful and consistent all through. When weighed against the prosecution case, the appellant's defence did not raise any doubts thereof and it was rightly dismissed by the trial court. I therefore find that penetration was proved to the required legal standard.
 17. Having analysed the totality of the prosecution's, I find that the prosecution proved their case beyond reasonable doubt. The conviction on the charge of defilement is thus 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 13 years old; hence, the trial court, upon exercising discretion, imposed the sentence of 20 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 and considering his advanced age. Therefore, the sentence was manifestly harsh and excessive.



20. For the above reasons, I hereby set aside the sentence of twenty (20) years imprisonment imposed on the charge of defilement and substitute it with a sentence of ten (10) years imprisonment. The sentence shall run from the date of conviction.

Orders accordingly.

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

D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Joy Court Assistant

