



REPUBLIC OF KENYA



KENYA LAW
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**Saida v Republic (Criminal Appeal E023 of 2023)
[2024] KEHC 7718 (KLR) (20 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7718 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E023 OF 2023
DO OGEMBO, J
JUNE 20, 2024**

BETWEEN

LEO JUMA SAIDA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence in Kakamega CM's Criminal Case No. E155/2021, by Hon. J. N. Maragia, PM, delivered on 13/4/2023 and sentence on 17/4/2023)

JUDGMENT

1. The appellant, Leo Juma Saida was charged before the lower court 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. That on 29/10/2021 in Kakamega County, he intentionally and unlawfully caused his penis to penetrate the vagina of MA, a child aged 13 years.
2. Upon hearing the evidence, the trial court convicted the appellant on the main charge and sentenced him to serve 20 years imprisonment. He has appealed to this court against the conviction and sentence. The petition of Appeal filed herein and dated 28/4/2023 lists the following grounds of appeal:-
 1. That the learned trial magistrate grossly erred in law and facts in convicting the appellant on evidence which did not meet the required standard.
 2. That the learned trial magistrate grossly erred and do misdirected himself in law and facts by failing to consider his defence.
 3. That the learned trial magistrate grossly erred in law and fails by failing to consider appellant and family of the victim.
 4. That the learned trial magistrate erred in both law and facts by not exercising judicial discretion in sentencing appellant to 20 years.



5. That the trial magistrate grossly erred in both law and facts by relying on irrelevant evidence.
 6. That the learned trial magistrate erred in laws and facts by assisting the prosecution in proving the case with a very weak evidence.
 7. That the learned trial magistrate erred in both law and facts by convicting the appellant with evidence that was contractor and inconsistent.
 8. The appellant prays that his appeal be allowed, conviction quashed, the sentence be set aside and he be set at liberty. The appeal of the appellant is opposed.
2. The jurisdiction of this court as a first appellate court is well settled. It is to re-evaluate, re-analyze and re-assess the evidence before the trial court and to come to its own conclusion. (See *Okeno – v- R*, [1972] EA 32). It is therefore imperative that this court fully considers the evidence given by the parties before the trial court.
 3. From the record of the proceedings of the lower court, the case of the prosecution commenced with the evidence of PW1 MA, a standard 6 pupil, that on 20/10/2021, she had been playing with her friends when appellant signaled her. That he wanted her to visit him in his house. That after her parents slept, she went to Juma’s house. He held her hand and caused her to sleep in his house. He did bad things to her. And when she woke up at about 5.00 am, he woke her up and did bad things to her before giving her 50/= and asking her to go home. On reaching home, she found the gate locked. She told her brother what had happened. She confirmed that the accused removed both her clothes and his clothes before inserting his thing in hers. That appellant gave her Ksh50/= to go and buy mandazi. She was taken to hospital. She identified her certificate of birth, PRC form, treatment notes and P3 form.
 4. Pangi Atira Mukabai was PW2. He recalled that on 30/10/2021 at about 4.00 am, he had woken up to check on his cows when he saw PW1 enter the compound. He sent his sons BM and GA to ask her where she had been and she reported that she had been defiled by appellant. Appellant had no questions to the witness, only saying sorry. And PW3 GAA testified that she interrogated PW1 who confessed that she had been defiled by appellant. He identified appellant as one who bought land from their father, and who lives about 100 metres away. The same evidence was given by PW4, another brother of PW1. And PW5, SK, assisted in taking PW1 to hospital.
 5. The investigating officer, PC Jenniffer Wafula was PW6. She recorded witness statements and also retained the clothes of the complainant which she produced. She also produced the birth certificate of the child as exhibit. The last witness was Christine Namaste, clinical officer, who had examined the complainant. She confirmed that on examination, she had bruises to the leg and right hand. Also bruises on her labia minora and missing hymen. She had formed the opinion that there was proof of penetration. She produced the PRC and P3 forms (Exh. 2, 3).
 6. When the appellant was put to his own defence, he gave sworn evidence and denied the charge, simply stating;
I did not commit the offence. That’s all.”
 7. He called no witness. I have considered the evidence on record in totality. This is a case of defilement. Section 8 (1) of the [Sexual Offences Act](#), provides:

A person commits an act which causes penetration with a child is guilty of an offence termed defilement.”



8. The above definition of the offence gives the ingredients that the prosecution must prove to prove the offence of defilement. The three (3) ingredient subject of proof by the prosecution are:-
 - a. Age of the victim
 - b. Prove of penetration
 - c. Identification of the penetration.
9. The court of appeal in the case of *JOO v R*, [2015] eKLR reaffirms the position that the above are the three ingredients tht the prosecution is bound to prove in a charge of defilement.
10. Regarding the issue of age of the complainant, evidence produced by the prosecution is that complainant is a young child in class 6 and aged 13 years. A P3 form was produced in evidence as exhibit (Exh.-1) confirming that she was born on 17/4/2008/ it is therefore clear that prosecution proved the age of the complainant and that she was a child aged 13 years at the time of the incident.
11. The 2nd ingredient subject of proof by the prosecution is the act of penetration. The *Sexual Offences Act* at Section 2 gives the definition of penetration as;
11. Penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person.
12. PW1 in her testimony testified as to how the appellant removed her and his own clothe before inserting his genital organs in her genital organs. She confirmed the same to her father, aunty and two brothers (PW2, 3, 4 and 5). And on being presented to hospital, she was examined by PW6 who noted the injuries on her body and formed the opinion that these was proof of penetration. The relevant P3 and PRC forms were produced as exhibits in court. With this evidence, I am convinced that the prosecution duly proved the element of penetration.
13. Lastly, on the identification of the perpetrator, there is no doubt the appellant is well known to the complainant. They are neighbours living barely 100 metres apart. The complainant testified that appellant had approached her first during the day as she played with her friends. She also confirmed that she had indeed spent the night in the house of the appellant. This court is in the circumstances, convinced beyond any doubt, that the appellant was positively and properly identified as the perpetrator of the offence.
14. Appellant had absolutely no defence to the evidence against him. His denial of not doing the offence was no defence as to challenge the case of the prosecution. I dismiss the same.
15. Lastly on the issue of sentence, Section 8 (3) of the *Act* states:

A person who commits an offence of defilement with a child between the age of 12 and 15 is liable upon conviction to imprisonment for a term of not less than 20 years imprisonment.
16. The appellant was sentenced to serve 20 years imprisonment and in sentencing the appellant, the trial magistrate duly considered the circumstances of the case and mitigation of the appellant. I accordingly find the sentence meted out both legal and proper.
17. In the circumstances, I am convinced that the prosecution proved this case against the appellant beyond any reasonable doubt as required by the law *Woolmington v DPP* [1935] AIIER 335. The appeal of the appellant lacks any merit. I dismiss it and order that the appellant serves out his sentence as ordered by the trial court.

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



D. O. OGEMBO

JUDGE

20/6/2024

