



**EL v Republic (Criminal Appeal E036 of 2023)
[2024] KEHC 9085 (KLR) (23 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9085 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KILGORIS
CRIMINAL APPEAL E036 OF 2023
F GIKONYO, J
JULY 23, 2024**

BETWEEN

EL APPELLANT

AND

REPUBLIC RESPONDENT

*(From the conviction and sentence of Hon. M.I.G Moranga
(S.P.M) in Kilgoris SOA No. E028 of 2021 on 01.09.2022)*

JUDGMENT

1. The appellant is challenging his conviction and sentence to serve life imprisonment for the defilement of a 3-year-old girl.
2. He cited the following grounds of appeal in undated petition of appeal filed on 15.12.2023;
 - i. That the trial magistrate erred in both law and fact by convicting the appellant without observing that the investigation report was shoddy, shaky, and scanty which would not have been used to secure conviction.
 - ii. That the learned trial magistrate erred in both law and facts by convicting the appellant using malice and shambolic medical report which would not have been used to secure conviction.
 - iii. That the learned magistrate erred in both fact and law by convicting the appellant without considering the circumstances of the case.
 - iv. The trial magistrate further erred in both law and fact by convicting the appellant relying on the weakness of his defence.



Brief facts

3. On 24/06/2021 at around 1600hrs at Narok county, Intentionally and unlawfully caused his penis to penetrate the vagina of C.L. a girl aged 3 years.
4. The victim testified as PW1; according to her unsworn evidence, she is the daughter of the appellant; and it is the appellant who defiled her.
5. Her mother, who is the wife of the appellant also testified; PW2: MN(N), inter alia, that, when she returned home on the material day, her daughter came towards her while crying. The girl was not walking well-upon enquiry, she told her that her father had defiled her.
6. Medical evidence by PW3, Doris Maina a clinical officer at Transmara West Sub-county hospital, established penetration of the minor.

Directions of the court.

7. The appeal was canvassed by way of written submissions.

Appellant's submissions.

8. The appellant submitted that the police conducted shoddy investigations which if relied upon will be sending an innocent person to jail. The appellant relied on [JOO Vs Rep](#) [2015] eKLR.
9. The appellant submitted that the testimonies of the prosecution witnesses were contradictory, inconsistent, and uncorroborated. The medical evidence did not prove penetration. The appellant relied on *Ramkrishana Denkerai Pandya Vs Rep* App No. 06 Of 1990 Eaca 93, [John Mutual Musyoka V Republic](#) [2017] eKLR Ca 11/2016
10. The appellant submitted that this was purely a domestic issue and a case of 'frame-up' charges. The appellant relied on *Waithegeini And Another Vs Urep* (2018) eKLR

The respondent's submissions.

11. The respondent submitted that all ingredients of the offence of defilement-age of victim, penetration and the perpetrator- were proved beyond reasonable doubt. The appellant relied on *MMI vs Republic*, (2022) eKLR, *Mokela vs. The State* (135/11) [2011] ZASCA 166, the Supreme Court of South Africa, *Ogolla s/o Owuor vs. Republic*, [1954] EACA 270, *Shadrack Kipkoech Kogo-vs- R. Eldoret Criminal Appeal No.253 of 2003*, [Bernard Kimani Gacheru vs. Republic](#) [2002] eKLR.

Analysis And Determination.

Court's duty

12. First appellate court is obligated to re-evaluate the evidence 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
13. The court has considered the grounds of appeal, the evidence adduced in the lower court, and the respective parties' submissions. The broad issues for determination are;
 - i. Whether the prosecution proved its case beyond a reasonable doubt.
 - ii. Whether the sentence was manifestly harsh and excessive



Elements of the offence of defilement

14. The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* which provides:
 - “8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - 8(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.”
15. The prosecution must prove beyond reasonable doubt specific elements of the offence of defilement arising from Section 8 (1) of the *Sexual Offences Act* which are:
 - 1) Age of the complainant;
 - 2) Penetration in accordance with Section 2(1) of the *Sexual Offences Act*, see *Mark Oiruri Mose v R* [2013] eKLR; and
 - 3) The accused was the assailant.
16. See the case of *Charles Wamukoya Karani Vs: Republic*, Criminal Appeal No. 72 of 2013.
17. The trial court noted that CL was of tender age. She therefore gave unsworn evidence.
18. PW2, the complainant’s mother testified that the complainant was 4 years old at the time she was testifying.
19. PW5 Kiplangat Alfred, a community oral health officer at Transmara sub county hospital testified that on 28/1/2022 the complainant Caren Lemushen was brought to the medical facility. Upon examination he found her to be aged approximately 5 years of age. He produced an age assessment report as P Exh 4.
20. This age assessment was conducted in the year 2022. Therefore, at the time of the commission of the offence she was aged 3 years.
21. Based on the evidence adduced, the age of the victim was 3 years old at the time of the commission of the offence.
22. PW1 in her unsworn evidence during the trial was that she was the daughter of the appellant who had defiled her. She claimed the injury on the vaginal region was with the use of his penis. She testified that her father lifted her clothes, and removed his trousers, then inserted something like a stick into her groin area between her legs.
23. PW2: MN(N) a mother to the complainant and wife to the appellant testified that on 24/06/2021, she had gone to the river at 2 pm and came back at 3 pm. She then left for a neighbour and then came back. The child PW1 came towards her while crying. She was not walking well-when inquired she told her that her father had defiled her. She examined her private parts and noted what looked like sperms on the vagina orifice of the child. The child was in pain in her lower abdomen. She reported to the village elders who advised her to take the child to hospital.
24. PW3Doris Maina a clinical officer at Transmara West Sub County Hospital examined PW1 and found Oedema on the perineum afflicting both labia majora and labia minora. She also had bruises and rashes. Her hymen was broken. She had a yellow discharge that had a foul smell. A high vaginal swab revealed



- blood and pus cell so they concluded she had been defiled. She produced the P3 form dated 25/06/2021 as a P.Exhibit 2 treatment notes/booklet dated 24/06/2021 as P.Exhibit 3
25. The evidence by PW1 and PW2 was corroborated by the medical evidence by PW3.
 26. In particular, the medical evidence proves penetration of the child.
 27. The analysis of the evidence, therefore, yields the conclusion that the prosecution proved to the required standard that penetration did occur of C.L.
 28. But by whom?
 29. PW1 and PW2 confirmed knowing the appellant as the father of PW1. The appellant in his defence did not dispute this fact. The trial court noted that PW1 sobbed uncontrollably at the site of the appellant. Her evidence was that, the father inserted something into her vagina and she felt pain. The evidence by PW2 and PW3 was categorical that; it was sexual penetration of the innocent angel by her own father.
 30. Based on the evidence adduced, the appellant caused the penetration of C.L.
 31. The appellant stated having differences with his wife. She had left home for her parents' home. Her brother compelled her to return home which she did. However, when he came home at 8 pm she was not at home. She called to say she was not coming back. She went on to threaten she would poison him. On 24/06/06/2021 he stated that he had woken up at 6 am taken out his cow and left to see a sick man after his brother called him. When he came back, he did not find his wife. It is later after he attended a funeral near home that the wife PW2 accused him of defiling the daughter PW1. He later followed her to the hospital where the child was being treated. He had to leave after the lab was closed due to curfew hours in place then.
 32. Later he was informed she was drinking at a "changaa" den. In 2018 he recalled the wife PW2 had delivered and thrown away the baby who upon recovery has had chest problems since. He termed the charges as a frame up. DW2 the accused mother Mark Nameyio alias Chepanadi Oloinyeyie. She denied her son committing the offence. She instead claimed her daughter in law was only interested in enjoyment of life. She had been married elsewhere after her son's arrest and after she got pregnant, she left the child in her compound. He had to plead with the police not to arrest her for the offence. She complained about her lack of concern for the children after she moved to town. She noted that on the day PW2 claimed her son had defiled PW1, she had come home drunk. She found PW1 dirty which led her to scratch her private parts which led her to lacerations. She denied she had been defiled. Instead of washing her up when told PW2, instead took her to hospital. She claimed her grandchild PW1 was being incited by the mother. She maintained that on the date the day her son was in town and was on examination PW1, he found her to be intact (normal).
 33. The defense put forth by the appellant is a serious one; of trump-up charges, making it absolutely necessary that the defense should be given a serious treatment which includes, laying a proper basis for it especially during cross-examination. The appellant did not cross-examine the prosecution witnesses, especially PW2, on this aspect. The defense did not arise at all. Leaving the defense by the appellant an afterthought and incapable of dislodging or creating any doubt in the prosecution's case.
 34. On that basis, this court does not find any credibility in the alibi defense.
 35. The court does not find anything that shows that there was a grudge between the complainant's mother and the appellant.
 36. Thus, the court does not also find anything which shows any collusion between CL, and PW2 to frame the appellant for the offence herein.



37. The evidence by the prosecution places the appellant at the scene and identifies the appellant as the person who defiled CL. In totality, the evidence adduced by the prosecution unravels the appellant's defense of alibi and that he was framed for the offence by PW2. The defense was a red herring and an afterthought. It is dismissed.
38. The court, therefore, finds that the appellant was properly convicted based on evidence that proved the case against him beyond reasonable doubt.
39. In the upshot, the appeal on conviction is dismissed.

On sentence.

40. The relevant penalty clause under which the appellant was sentenced is Section 8 (2) of the *Sexual Offences Act* which section provides that:
 - 8(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."
41. The prosecution submitted that the sentence was within the law.
42. This appeal relates to section 8(2) of SOA. This court has held before in proper cases that, section 8(2) of *SOA* prescribes a mandatory sentence, thereby, denying the court discretion in sentencing. And, within the constitutional framework on construction of exiting law provided in section 7 of the Transitional provisions of the Sixth Schedule of *the Constitution*, section 8(2) of *SOA* should be interpreted to prescribe life sentence as the maximum sentence.
43. This constitutional philosophy and approach were enunciated by the Court of Appeal in *Dismas Wafula Kilwake vs. Republic* [2018] eKLR that: -
 - "We hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter the commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing."
44. This court has considered the fact that the accused is a first offender; but, he was not remorseful. He also has a family.
45. Nevertheless, the court has also considered that the offence is serious. The victim was a child of tender age- she was 3 years old. And, is his daughter. Similarly, the manner the offence was committed was brutality causing her injuries. From the recording by the trial court, the child was crying uncontrollably when she faced her father. Victims of such sexual predation especially by their kin results into severe post-traumatic effects; completely detracting from their personal worth and integrity of person apart from agonizing memories of the incident. In addition, the prevalence of these offences, despite him being a first offender, justifies a life sentence or long incarceration in this case. Therefore, a deterrent sentence is necessary.



46. Be that as it may, whereas punishing the offence as well as deterring others from committing similar serious offences is important, a sentence should also give a person an opportunity for rehabilitation and reintegration into society and eke a living as a free man at some point.
47. In the circumstances, the life sentence is set aside. The appellant is sentenced to 30 years imprisonment.

Of Section 333(2) CPC.

48. Except, the court has perused the trial court record and found that the appellant was first arraigned in court on 21.07.2021. He was released on bond but his bond was cancelled on 17.08.2021. The appellant thereafter remained in custody through the trial.
49. Therefore, the sentence shall commence from 21.07.2021.

Conclusion and orders

51. The appeal on conviction is dismissed.
52. The appeal on sentence succeeds to the extent expressly stated herein. More specifically, that: -
- i. The life sentence is set aside; and
 - ii. The appellant is sentenced to 30 years imprisonment.
 - iii. The said sentence shall commence from 21.07.2021.
 - iv. It is so ordered.

**DATED, SIGNED, AND DELIVERED AT KILGORIS THROUGH MICROSOFT TEAMS
ONLINE APPLICATION THIS 23RD DAY OF JULY , 2024.**

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HON. F. GIKONYO M.

JUDGE

In the presence of:

C/A – Mr. Leken

Mr. Okeyo for ODPP - Present

Appellant in person - Present

