



**Kimeu v Republic (Criminal Appeal E009 of 2022)
[2024] KEHC 9665 (KLR) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9665 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CRIMINAL APPEAL E009 OF 2022
SN MUTUKU, J
JULY 24, 2024**

BETWEEN

JOHN KIMEU APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. John Kimeu, the Appellant, was tried for the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2016. The particulars of this offence are that on the 13th November 2021 at Loitotok Sub-county within Kajiado County, intentionally and unlawfully caused his penis to penetrate the vagina of DN a child aged 9 years.
2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. This was alleged to have been committed on the same date and at the same place as in the main charge. The victim is the same. The Appellant was alleged to have committed this offence by touching the vagina of the victim with his penis.
3. After the conclusion of the trial, the Appellant was found guilty of the offence of defilement and sentenced to life imprisonment.
4. The Appellant is aggrieved by the conviction and sentence and has approached this court on appeal. In his amended grounds of appeal, the Appellant has raised three grounds of appeal as follows:
 1. That the learned trial magistrate erred in law and in fact to admit the testimony of PW1 on the key ingredient of defilement yet her evidence was demonstrably incredible.
 2. That the learned trial magistrate erred in law and in fact by failing to conduct a *voire dire* examination according to laid down principles so as to make a determination on whether corroboration was required.



3. That the learned trial magistrate misdirected herself in law and fact by disregarding the plausible defence given on oath.

Submissions

5. The appeal was canvassed through written submissions. The Appellant has argued in his submissions filed on 5th May 2024 that the trial magistrate, after conducting the voir dire examination and concluding that the child was too young to understand what an oath was and therefore she would give unsworn testimony ought to have appreciated that the child's evidence required corroboration. The Appellant cited *Johnson Muiruri v Republic (1983) KLR 447* on the issue of voir dire examination.
6. He submitted that the evidence of the complainant created doubts as to when her hymen was broken. He submitted that he was not medically examined given that the findings of the doctor who examined the complainant found signs of infection.
7. He submitted that the elements of the offence of defilement were not established and that the evidence of witnesses was contradictory thereby creating doubts. He submitted that the trial magistrate disregarded the defence of the Appellant and that the sentence was harsh and inhuman. He urged the court to allow the appeal, quash the conviction and set aside the sentence.
8. The Respondent submitted that in a case of defilement, the prosecution must prove penetration occurred, age of the victim and identification of the perpetrator. It was submitted that the complainant identified the Appellant as the person who defiled her; that PW3, Kimanthi also confirmed that he saw the Appellant defiling the complainant.
9. It was submitted that the complainant testified that she had been defiled by the Appellant and that this was confirmed through the medical report that showed that the complainant's hymen was broken.
10. It was submitted that the age of the complainant was confirmed through age assessment that placed her age at 9 years. The Respondent urged that this Court upholds the conviction and confirm the sentence.

Analysis and determination

11. I have read the entire record of the lower court. I have reminded myself of my duty as the first appellant court, to analyze the evidence tendered, re-evaluate the same and arrive at an independent finding. I have also reminded myself that I did not have the advantage of observing the witnesses testify to gauge their demeanor. I will give allowance to those shortcomings.
12. The Appellant lived with CN, the mother of the complainant, as man and wife. CN, PW2, left her home to go to the market on 13th November 2021. She left the Appellant at home with the children. On returning home from the market at 4pm on the same day, she found her daughter DN, who is the complainant here, looking gloomy. She did not follow up to know the reason but she noticed that DN did not eat supper that day. The following day, CN noticed that DN did not participate in playing with the other children. CN asked her daughter what the matter was. DN did not speak to her mother.
13. CN told the court that after the Appellant left the house, DN narrated to her that the Appellant had bought wheat flour and told JK, PW3, brother to CN and uncle to DN, to make pancakes for the children; that after cooking, PW3 sent DN to tell the Appellant that food was ready; that the Appellant told DN to bring food to him in the bedroom which she did; that the Appellant told her to join him in eating the pancakes and tea, which she did; that when PW3 told DN and the other children to join him to go and collect firewood, the Appellant called DN to remain. He defiled her. CN reported the matter to the police leading to the arrest of the Appellant.



14. DN, testifying through Esther Munyalo who translated the evidence into English, confirmed that she took chapati and tea to the Appellant in the bedroom he shared with their mother and he told her to sit and join him in eating; that he joined him in eating; that before they left to collect firewood, the Appellant called her to go to the bedroom; that the Appellant undressed her and removed his trousers; that he lay on her and raped her. The complainant referred to the act as “kukindwa” which is loosely translated as rape. She also testified that the Appellant has defiled her two times before this day and threatened her that if she told anybody she would be arrested.
15. JK, PW3, confirmed the evidence of the DN that he cooked chapatis; that he gave DN food to take to the Appellant; that DN ate the food with the Appellant inside the bedroom and that they went to collect firewood but the Appellant called her back on the pretext that he wanted to send her to the shop. PW3 testified that he decided to go back and see what the Appellant was doing. He entered his room and through the holes in the iron sheets, he saw the Appellant, whom he called Kimeu, put DN on the bed and remove his trousers; that he saw him lie on DN who was sobbing and that DN did not want to eat that day.
16. DN was examined at Loitoktok Sub County Hospital on 14th November 2021 at 3.20pm. According to the evidence of Martha Maiyo, PW5, a Clinical Officer at Loitoktok Sub County Hospital, DN was in a depressed mood. PW5 found bruises on DN’s labia minora extending to her vaginal opening. Her hymen was broken. She concluded that the child had been defiled.
17. The Appellant gave a sworn defence. He testified that he had disagreement with CN, his wife because she was in an affair with another man and that her mother supported that affair. That CN’s mother wanted him to leave because he had not paid dowry for CN. He testified that he was arrested one night by police officers who alleged that he was a thief and that he was later charged with this offence.
18. I have considered this evidence. The Appellant has raised three grounds of appeal challenging the evidence of PW1, claiming that the voire dire examination was not conducted as the law provides and claiming that the trial magistrate had disregarded his defence.
19. The trial magistrate narrated the evidence tendered by all the witnesses including the defence of the Appellant. I have noted that on pages 4 and 5 of the judgment, the trial court narrated in detail the evidence of the Appellant. On page 7 of the judgment, the learned trial magistrate analyzed the defence evidence and noted that the Appellant was claiming that he was being framed by his wife, CN, and her mother but the Appellant did not raise questions to CN in cross examination about the alleged framing. The learned trial magistrate noted that the Appellant did not cross examine his wife, JK and DN about the allegations he was making against CN, his mother in law and the man CN was accused of associating with.
20. I find that it is not true as claimed by the Appellant that the trial court disregarded his evidence. In my considered view, the learned trial magistrate considered the defence evidence and found it does not create any doubts in her mind that the offence of defilement was committed.
21. On the issue of evidence against the Appellant, I have noted the evidence of DN that she was defiled by the Appellant was corroborated by that of JK who witnesses the defilement. It is also corroborated by medical evidence that DN had bruises in her genitalia and that her hymen had been broken.
22. The learned trial magistrate conducted a voire dire examination on DN and found that she did not understand the nature of oath. She made a determination that DN testifies without taking oath. In Johnson Muiruri vs Republic [1983] KLR 445, cited by the Appellant, the Court stated, inter alia, as follows:



1. “Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a *voire dire* examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.
23. I have explained above that there is evidence corroborating that of the complainant in this case. I find no fault in the manner the learned trial magistrate conducted the *voire dire* examination.
24. On my own analysis and consideration of the evidence tendered before the lower, I find no contradictions of the prosecution evidence. I find that the evidence of the complainant, DN, is convincing that the Appellant, who was known to her as her step father, defiled her. JK also witnessed the act, thereby corroborating the evidence of DN that she was defiled by the Appellant. Medical report further confirmed bruised genitalia and broken hymen.
25. The defence of the Appellant is an afterthought. He did not cross examine witnesses, especially, PW1, PW2 and PW3 who lived with him in the same house about the allegations that he was being framed by his wife CN in company with her mother and the man she is alleged to be having an affair with. This evidence, coming late in his defence and with no indication through cross examination of the witnesses is incredible.
26. After careful analysis of the evidence tendered in the lower court; the grounds of appeal and the submissions of the Appellant and the Respondent, it is my finding that the case of defilement was proved beyond reasonable doubt. I find that all the ingredients of the offence of defilement were proved and that the learned trial magistrate properly directed herself in finding that the offence was proved to the required standard. The grounds of appeal are not merited.
27. I have considered the issue that the sentence is excessive. The penalty for defilement under section 8 of the *Sexual Offences Act* is pegged on the age of the victim. The penalty for the offence of defilement where the victim is aged 11 years and below is prescribed under section 8(2) of the *Sexual Offences Act* as life imprisonment. It is a legal sentence. Courts have exercised discretion to mete out lower sentences than life imprisonment for similar offences.
28. In conclusion of this matter, it is my finding that the Appeal herein lacks merit except for the ground of sentence. I hereby dismiss the Appeal save for reducing the sentence from life imprisonment to 30 years imprisonment. For avoidance of doubt, the Appellant shall serve 30 years imprisonment for the offence of defilement to run from 1st August 2022 when he was sentenced by the trial court.
29. Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 24TH JULY 2024.

S. N. MUTUKU

JUDGE

