



REPUBLIC OF KENYA



KENYA LAW
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**MO v Republic (Criminal Appeal E009 of 2022)
[2024] KEHC 8481 (KLR) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8481 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL E009 OF 2022
DO OGEMBO, J
JULY 11, 2024**

BETWEEN

MO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal against the conviction and sentence in Bondo Pm’s Court,
Sexual Offence No. 41 of 2020, Hon. S. W. Mathenge, RM, sentence on 28/2/2022)*

JUDGMENT

1. The appellant, MO, was charged before the lower court with the offence of Defilement contrary to Section 8 (1) as read with Section 8(4) of the [sexual Offences Act](#) 2006. That on diverse dates before 23/4/2017, and 27/7/2017, at (Particulars withheld) market, (Particulars withheld) location in (Particulars withheld) sub-county, within Siaya County, he unlawfully and intentionally caused his penis to penetrate the vagina of DSO, a child aged 8 years.
2. He also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the [Sexual Offences Act](#), No. 3 of 2006. That on diverse dated between 23/4/2017 and 27/7/2017 at (Particulars withheld) market, (Particulars withheld) location, Bondo Subcounty, he intentionally touched the vagina of DSO, a child aged 8 years with his penis.
3. The appellant went through a full trial and was eventually convicted on the main charge. On 28/2/2022, he was sentenced to serve life imprisonment. He has appealed to this court against the same. The memorandum of appeal filed herein on 9/3/2022, raises the following grounds of appeal:-
 1. That the trial court failed to observe that the sentence imposed was manifestly harsh and disproportionate.



2. That the court be pleased to consider that the ingredients forming the offence was not proved beyond reasonable doubt.
3. That the court be pleased to consider that the investigation tendered was shoddy.
4. That the court be pleased to consider any aspect or condition that shall not occasion injustice.
5. That the court be pleased to reduce the sentence proportionately.
4. He pleads that this appeal be allowed. This appeal is opposed by the respondent.
5. This court is seized of this matter as a first appellate court. It is therefore the duty of this court to fully reconsider the evidence on record and to come to its conclusion (okeno Vs- R).
6. From the record of proceedings, PW1, DSO, 13, gave evidence that she used to live at (Particulars withheld) with her mother MA and her father, the appellant, when her mother went to work in Nairobi, leaving her with the father. That during the nights, the father would take her to the bed, remove her panty as he also removed his underwear. He would then put oil in his penis before inserting the same in her vagina. He would then threaten to kill her if she told anyone.
7. She would feel pain and bleed. She however told her mother who proceeded to report the issue at the police station. Her evidence was that one Tot also defiled her, but she did not feel pain since the appellant had defiled her several times.
8. MA, PW2, is the mother of PW1. Her evidence was that PW1 was 13 years old. She recalled that on 8/2/2018, PW1 had been defiled by one Tot, but that on examination, it was discovered that it was not her first time to have sexual intercourse. That PW1 then confessed to her that appellant had been defiling her while she was away in Nairobi. Appellant was her husband for 4 years. On cross examination, she added that she even find some blood on the bedsheets which had been hidden.
9. The 3rd witness, PW3, Japheth Oduor, is a clinical officer. He examined PW1 on 9/2/2018 and noted that her hymen was broken and healed. He formed the opinion that there had been long standing penetration. He produced the P3 form (PEX – 2). And NA, PW4, grandmother of PW1, her evidence was that PW1 told her that appellant would defile her in the middle of the night using petroleum jelly. She was part of the group who reported the incident to the police.
10. Sergeant Erick Tongoch was PW5. He is the one who took the complainant's report and recorded witness statements. He produced the age assessment report of the complainant (EXH-1), showing she was 11 years at the time of the offence.
11. Appellant gave an unsworn evidence in defence in which he stated that the charges were false and that he only went to the police station believing he would record a statement, only to be arrested. He heaped blame on Tot. He called no witness.
12. This appeal was canvassed by way of written submissions. In the submissions of the appellant, the appellant submitted that whereas the charge sheet indicated age of the complainant as 8 years the age assessment report showed it at 10 years. On identification, he relied on George Opondo Olunga –vs- R (2016) eKLR that it was Tot who defiled the complainant. And there was no evidence of penetration.
13. On the Respondent's side, it was submitted, based on Daniel Wambugu Maina –vs- R (2018) eKLR, that the elements of age, penetration and identification of the perpetrator were proved.
14. I have considered this case and the submissions filed by the parties. This is a case of defilement. The appellant and respondent sides have referred this court to two authorities, i.e George Opondo Olunga



- vs- R, (2016) eKLR And Samwel Wambugu Maina –vs- R, (2018) eKLR which stipulate on the essential elements of the offence of defilement i.e age of the complainant, proof of penetration and identification of the accused (appellant as the perpetrator of the offence).
15. The age of the complainant herein was proved by the age assessment report produced by PW3, the clinical officer and also her mother, PW2 that she was ten years at the time of the offence. This is the same age stated in the charge sheet, PW1, in her statement in court, stated she was 13 years old. Of course this is not correct in view of the evidence of her mother and the clinical officer.
 16. The important thing however, is that the complainant was a minor aged between 10 or 11 years old. She remains a minor notwithstanding that her certificate of birth was not produced to conclusively prove the exact date of her birth.
 17. Under Section 2 (1) (d) of the *Sexual Offences Act*, penetration means:-

“Partial or complete insertion of genital organs of a person into the genital organs of another person.”
 18. This court has considered the detailed evidence of PW1 of how the appellant defiled her over several nights. That he would undress her and also undress himself before inserting his penis in her vagina. That she would feel pain and bleed. And on being examined by PW3 in hospital, proof of penetration was confirmed. Her hymen was found to be long broken and healed. This evidence of PW3 corroborated the evidence of PW1 that appellant defiled her severally in the past.
 19. The case of the appellant is based on the fact that the complainant was also allegedly defiled by one Tot who was never arrested. I have considered the relevant sections of the proceedings. The said Tot was a young boy aged 10 years old. And had he been the one who had sexual intercourse with the complainant, PW3 who examined the complainant on the same date that the issue was reported to the police and to hospital, would have detected evidence of recent penetration. No such evidence was detected. All that was found upon examination was evidence of penetration on earlier dates.
 20. I am therefore convinced that the element of penetration was similarly proved by the prosecution.
 21. On the last ingredient of the offence, ie the identification of the perpetrator, there is absolutely no doubt that the complainant knows the appellant well. Appellant is her father and stayed with her mother for 4 years. And in her testimony, during the period of this incident, PW1, and the appellant lived alone in their house in Usenge while their mother was away for work in Nairobi. And the evidence of the complainant (PW1) was very consistent on how the appellant would get her from the couch and take her to the bed where he would defile her.
 22. The evidence of this witness, though not corroborated by another witness, was consistent and remained totally unshaken even in the face of cross examination by the appellant and his advocate. Having warned myself of the dangers of conviction based on the evidence of a single witness on this score, I am convinced that this witness was truthful and her evidence leaves no doubt that it is the appellant who defiled her. I so find.
 23. When put to his defence, the appellant gave a denial. It was a general denial lacking any specifics in view of the enormous evidence that the prosecution witnesses gave against appellant. His defence based on one Tot as the one who defiled the complainant also holds no water as already observed above. I sincerely do not find any merit in the defence of the appellant and I dismiss the same.



24. The appeal of the appellant seems to be more on the sentence meted out by the trial court. Section 8 (2) of the *Sexual Offences Act*, under which the appellant was convicted states;

“ Any person who commits an offence of defilement with a child aged 11 years or less shall upon conviction be sentenced to imprisonment for life.”

25. The appellant was sentenced to serve life imprisonment. The sentence is therefore legal and proper. However guided by the Court of Appeal authority in Jared Koita Injiri –vs- R (2019) eKLR, that minimal mandatory sentence are unconstitutional, I find it just and proper to exercise my discretion and sentence the appellant to determinate sentence. I accordingly therefore revise and set aside the sentence of the appellant. I order that the appellant shall serve 30 years imprisonment. Since the appellant was out on bond during his trial, I order that this sentence shall run from 28/2/2022, the date of his sentence before the trial court. Right of appeal explained.

DATED, SIGNED AND DELIVERED THIS 11TH DAY OF JULY, 2024.

D. O. OGEMBO

JUDGE

11/7/2024

Court

Judgment read out in presence of Appellant (Kisumu) and Ms. Kerubo for State.

D. O. OGEMBO

JUDGE

11/7/2024

