



**Matingae v Republic (Criminal Appeal E006 of 2023)  
[2024] KEHC 8004 (KLR) (2 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8004 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL E006 OF 2023**

**DR KAVEDZA, J**

**JULY 2, 2024**

**BETWEEN**

**NYAKUNDI MATINGAE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered by  
Hon. W. Lopokoiyit (SRM) on 26th October 2023 at Kibera Chief Magistrate's  
Court Sexual Offences No. 66 of 2022 Republic vs Nyakundi Matingae)*

**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 particulars were that on 25<sup>th</sup> June 2022 at Dagoretti sub-county within Nairobi County, intentionally and unlawfully caused his penis to penetrate the vagina of M.M. a child aged 14 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 contended that the trial court failed to consider his alibi 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 born on 16<sup>th</sup> May 2008 and in class 7. She told the court she knew the appellant and his wife as they lived in the same premises. She would regularly visit their house to assist in household chores. On the material day, the appellant called her to assist in washing utensils. He asked her if she had a boyfriend which she denied. He then proceeded to kiss her and she left. The next day, he called her again to the house. He put her on the bed, removed her trousers and panty, and also removed his. She tried to resist but the appellant slapped her and threatened her. He then had sex with her and thereafter left.
7. When her sister inquired about her whereabouts, she recounted what had happened. She mentioned that she intended to inform her father. Later, when her father confronted her, she explained the events to him as well. Subsequently, her father reported the incident to the local chief, and the complainant was taken to Nairobi Women's Hospital for medical examination and treatment. The incident was also reported to the police station. It was her evidence that the incident took place on 25<sup>th</sup> June 2022.
8. In her testimony, PW1 gave clear and graphic testimony of how the appellant who was a neighbour lured her to his house, pushed her to the bed, threatened her, and then defiled her. Despite being subjected to rigorous cross-examination, PW1 remained steadfast that it was the appellant, who committed this act against her. The appellant was well-known to PW1 as her neighbour whom she had known for a while. 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 DK (PW2), the complainant's mother, who testified that she noticed her child had money. When she confronted her about where she got the money, the child refused to disclose its source. Her older child informed her that the money came from a neighbour. She then informed the complainant's father, who warned the appellant against letting his children into his house. Later, she learnt that the complainant had been defiled and that the appellant had threatened to kill her and her family if she disclosed what had happened. The incident was reported to the police, and the complainant was taken to the hospital for examination and treatment.
11. Dr. John Njuguna of Nairobi Women's Hospital testified that the complainant was examined by Robert Sibeiwet on 6<sup>th</sup> July 2022. He was not available to testify as he was on unpaid leave. Upon examination, there were no physical injuries, her genitalia was normal, there was swelling and pain on the labia minora and the hymen which was broken had old tears. The conclusion was that there



was vaginal penetration. This medical evidence corroborates the complainant's testimony regarding penetration.

12. On the age of the complainant, it was her testimony that she was born on 16<sup>th</sup> May 2008. The birth certificate was produced as a prosecution exhibit. The complainant was therefore fourteen (14) years old. The complainant was therefore a child within the meaning of the law.
13. In his defence, the appellant acknowledged being a neighbour to the complainant and her parents at the time of the incident. He stated that he had disagreements with the complainant's parents because they did not want their children visiting his home. He claimed that on the day in question, he was at work and not at home as alleged. He asserted that he was falsely accused and maintained his innocence throughout the proceedings.
14. DW2, the appellant's wife, testified that on 25<sup>th</sup> June 2022, she travelled from Ntulele to Kangemi to visit her husband. Upon arriving around 10 am, her husband picked her up at Kangemi. She took her home where she went and cleaned the house. At the time, children were playing outside. She stated that she had no prior issues with the complainant.
15. DW3, Dr. Joel Munene, testified that he is a medical doctor experienced in handling cases of gender-based violence (GBV). He emphasized that P3 forms, which document medical findings in such cases, should be properly signed and stamped according to standard procedure.
16. The trial court considered this defence and found it to be baseless. The trial court stated that medical evidence which was presented in the unstamped P3 form was only used to corroborate the evidence on penetration. The fact that it was not stamped did not affect the authenticity of the evidence taken as a whole. In addition, the evidence of DW2 that she only arrived in Kangemi at 10.30 am confirmed that the appellant was at home alone at the time the offence was committed. The trial court considered the alibi 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 case, 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 14 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 was remorseful. Therefore, the sentence was excessive.
20. For the above reasons, I set aside the sentence of twenty (20) years imprisonment imposed on the charge of defilement and substitute it with a sentence of fifteen (15) years imprisonment. The sentence shall run from the date of conviction.

Orders accordingly.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 2<sup>ND</sup> DAY OF JULY 2024**



**D. KAVEDZA**

**JUDGE**

In the presence of:

Appellant present in person

Mr. Mutuma for the Respondent

Naomi Court Assistant

