



**NGOLEI v Republic (Criminal Appeal E013 of 2023)
[2024] KEHC 9071 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9071 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL APPEAL E013 OF 2023
RB NGETICH, J
JULY 25, 2024**

BETWEEN

NELSON NGOLEI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against both conviction and sentence of 20 years imprisonment vide a judgement delivered on the 17th March, 2023 at Kabarnet Law court by Honourable C.R.T Ateya (SRM))

JUDGMENT

1. The appellant Nelson Ngolei was charged with the offence of defilement contrary to section 8(2) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the charge were that the accused on the 30th day of September, 2021 at [Particulars Withheld] within Baringo County intentionally caused his genital organ (penis) to penetrate through the genital organ (vagina) of a female juvenile named M.C aged 11 years.
2. The Appellant faced an alternative charge of committing indecent with a child contrary to section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars were that the appellant on the 30th day of September, 2021 at [Particulars Withheld] within Baringo County intentionally caused his genital organ (penis) to come in contact with the genital organ(vagina) of a female juvenile named M.C aged 11 years.
3. The appellant denied the charge and the case proceeded for hearing and by judgment delivered on 7th March, 2023 the trial court found the appellant guilty of the of defilement contrary to section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#), convicted and sentenced him to serve 20 years imprisonment.



4. Dissatisfied and aggrieved by the decision of the trial court, the Appellant filed this appeal on the following grounds:-
 - i. That the learned trial magistrate erred in both law and fact by not considering that the prosecution evidence were contradictory, questionable, doubtful and untrustworthy to warrant a conviction.
 - ii. That the learned trial magistrate erred in both law and facts by admitting and basing its judgement on medical evidence that was not conclusive and unreliable document.
 - iii. That the learned trial magistrate erred in both law and facts by failing to find that the identification of the assailant under the prevailing circumstances at the scene of the crime was not free from possibility of error.
 - iv. That the trial magistrate erred in law and facts by failing to evaluate and analyze the evidence on record and arriving at the erroneous conclusion that the Appellant committed the offence.
5. The Appellant prays for the total success of this appeal, conviction be quashed, sentence be set aside and he be set at liberty.
6. The Appeal proceeded by way of both written and oral submissions, the Appellant filed written submissions.

Appellant's Submissions

7. On identification of the assailant the appellant submit that the complainant said she saw him near the door and he entered the house and had carnal knowledge of her yet it was at night and therefore dark. That after having carnal knowledge of her, the person went to his house then he went back again wearing bedsheet. That the second person was identified by use of a torch light. He questions how the first person identified as Lomerii was identified yet it was dark. That from the evidence adduced, the first person had clothes while the second person came in putting on a sheet and submit that it cannot be conclusively concluded that they were one and the same person.
8. The appellant submit that the second person did not have sexual intercourse with the complainant and that the time of the alleged offence is not indicated in the charge sheet and also the difference in time between the coming of the first person and the coming of the second person.
9. He submits that in cross examination, the complainant states that she heard the Appellant's voice the second time but she used the torch light to point at the Appellant and argue that the complainant could not have identified the first person without using a light. He further argues that the trial magistrate went on to tighten the complainant's evidence by introducing the presence of moonlight which was never mentioned in trial and submit that the court was biased and determined to send the Appellant to prison.
10. The appellant further submit that the complainant's testimony is unclear, uncorroborated and cannot be relied upon independently and relied on Section 124 of the *Evidence act* (Cap 80, Laws of Kenya) as amended by *Act No. 5 of 2003*.
11. Further that the Clinical Officer did not corroborate the minor's evidence as complainant's pubic hair and a high vaginal swab, urine and blood were collected and examined though the same was never presented before the Government Chemist for further forensic examination.
12. Further that the clinical officer testified that there were normal external genitalia. No tears or abrasions seen. Hymen intact and there was infection; presence of white mucoid discharge noted; and submit



that scientifically clear vaginal discharge is normal with women; that a whitish discharge seeming thicker than usual or causes itching it may be a yeast infection.

13. That the Clinical Officer further testified that the accused was found to have urinary tract infection, the complainant was found to have trichomoniasis vaginal candidiasis and red blood cells and the accused name was not given; and the accused's medical history and examination were not produced.
14. That no treatment notes were produced to prove that the appellant suffered similar disease as the complainant and concluding that defilement was proved is misguided; that the judgment was based on assumptions and the threshold for criminal proof beyond reasonable doubt was never attained; further that the clinical officer's conclusion that spermatozoa was also seen is a fallacy since the same were not subjected to any medical examination.
15. Further that the cause of the dry blood that was allegedly seen on the pant was not explained as there was no injury on the labias and inside the vagina. That the approximate age of the injuries was 2 hours and a thorough medical examination would have given detailed findings not based on assumptions. That if the dry blood came from the complainant's vagina then the labias must have had injury.
16. The appellant further submit that the complainant's treatment chit indicates normal external genitalia, no obvious evidence of forceful penetration, no tears and abrasions seen, hymen is not intact, Presence of little mucoid discharge in the vagina and submit that the trial magistrate erred by finding that the Clinical Officer corroborated the complainant's evidence.
17. That presence of thorn pricks on the patient's body does not proof an act of defilement and that absence of hymen is not an indication or proof that the girl was engaged in a sexual activity and submit that hymen breakage was not fresh.
18. Further that the spermatozoa was not ascertained that it was indeed spermatozoa and belonged to the Appellant and Appellant's urinary tract infection was not linked to the complainant but based on PW4's evidence, the court agreed that there was defilement; that there were inconsistencies in the medical chits produced and the complainant's testimony and complainant's unsworn testimony was not corroborated as required in the law of evidence and the trial court's conclusion was erroneous.

Submission's By Prosecution

19. The prosecution counsel Ms. Ratemo submitted orally. She submitted that the appellant was charged with the offence of defilement of a girl aged 11 years which was amended to read 13 years and the prosecution was required to prove penetration, identification and age.
20. On penetration, she submits that the child PW1 testified that on a night she did not recall the date, she was woken by sounds and upon waking up she saw a person she identified as LI lying on the floor. She then heard the sound of a belt and she woke up. That Lomerii removed the child who was sleeping next to her and proceeded to remove her trouser and when she tried to stop him from removing her trouser, Lomerii told her that he did not want the trouser of the minor. She testified that she proceeded to pull the trouser off and inserted his thing in her thing while pointing at her private parts and the accused went back to his home after finishing.
21. She submits that the complainant's evidence was corroborated by the doctor PW 4 who indicated that she received the complainant on the night of 1st October, 2021 at 2 a.m. and on examination her, she had a pant which had dried blood and was smelly. He also noted injuries on her neck and head and dried tears on the cheek. On the thorax, abdomen and upper limbs, he saw what appeared as thorn pricks.



22. She submitted that on Section C of the report, on examination of her genitalia, he noticed that the hymen was not intact and although there were no abrasions and tears, he noted presence of infections and white discharge. That in his conclusion, he noted that there was spermatozoa and red blood cells and he noted that the minor has had a sexual act and there was element of penetration. That he also noted approximate age was about 2 hours after the act. She submits that the prosecution sufficiently proved there was penetration.
23. On identification, she submits that the complainant testified that she knew L prior to the incident and she was able to identify him because she had a torch light and she pointed the light towards his eyes and recognized him clearly as Lomerii and he snatched the torch from her after she had seen him.
24. That prior to that, she said she asked Lomerii if she could go outside to urinate and she used the opportunity to reach to her uncle who was sleeping in another house by the name K. She submits that when the uncle went there, he found L in the house the child was sleeping. That during the hearing, the minor pointed at the Appellant as the said LI and she said she used to see Lomerii at the centre playing pool. That the evidence of the identification of the appellant was not disputed. She submits that identification was well proven during the hearing.
25. On the issue of age, she submits that though the birth certificate was not produced before court, an age assessment was done prior to the charge sheet being amended and the complainant's age was assessed at 13 years old and the court noted during hearing that the complainant appeared to be a child and at the time of examination, the age apparent was indicated as 11 years old. She submits that the age does not necessarily mean age as per the birth certificate but it can also mean age apparent and submit that prosecution proved the three ingredients of defilement.
26. In respect to sentence, the prosecution counsel submits that the Appellant was sentenced to serve 20 years imprisonment which is the mandatory minimum sentence under the *Sexual Offences Act* where the child is below 15 years old and above 11 years old. That the trial court also considered the time spent in custody since the court indicated that the sentence was to run from 1st October, 2021 when the Appellant was arrested, therefore there is no reason for the court to interfere with the sentence imposed. She submits that the appeal lacks merit and urged this court to dismiss this appeal.

Analysis And Determination

27. This being the first appellate court, I am expected to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis. This I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demeanour. The principles that apply in the first appellate court are set out in the case of *Okeno Vs Republic* [1972] EA 32 where it was stated as follows:-

“The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala v. Republic* [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (*See Peters v. Sunday Post*, [1958] EA 424.)”



28. Further in *Mark Oiruri Mose –Vs- Republic* [2013] e KLR Criminal Appeal No.295 of 2012 the Court of Appeal stated:

“It has been said over and over again that the first appellate Court has the duty to revisit the evidence tendered before the trial Court afresh, analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that.”

29. Similarly the duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya -vs- Republic* [1957] EA 336 is as follows:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

30. The elements constituting the offence of defilement are proof of penetration, the age of the minor and the identity of the assailant (See *C.W.K v Republic* [2015] eKLR).

Penetration

31. Penetration is defined under Section 2 of the *Sexual Offences Act* as follows:

“The partial or complete insertion of the genital organ of a person into the genital organs of another person.”

32. Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred. Where the medical examination may not be available or conclusive, the court ought to weigh with thorough scrutiny and utmost caution, the evidence of the child, in order to determine whether there was penetration.

33. The complainant testified that she was sleeping in her uncle’s house when the appellant when the door was broken into and she saw a person who she identified as L as she had seen him many times at the centre. She said that she was lying on the floor when L entered the house and removed their child who was sleeping with her and L lay between her and the child and did bad manners to her. She stated that he inserted his thing after pulling her long trouser. she tried to resist but he threatened to tear the trouser then pulled it hard and got it off and did bad manners to her and explained that he inserted his thing to her thing pointing at her private parts.

34. The complainant testified that the appellant went to his house after defiling her and shortly after, he went back to where the complainant was sleeping. She flushed a torch on him which angered him.



He snatched the torch from complainant. Complainant used excuse of wanting to urinate outside to escape and the appellant took her out. She managed to escape and run to where her uncle slept and informed him what had transpired. She said that her uncle went to look for L from where the complainant was sleeping and found him leaving. He chased him and the accused went to his house and pretended to sleep. She said she used to see the appellant at the centre playing pool.

35. Pw4 Dr. Barasa Peter Makokha a clinical officer from Kolowa Health Centre testified that the complainant was taken to kolowa hospital by police officer on 1st October 2021 at 2 a.m. He said the complainant was wearing only a pant and the pant had a smelly dried blood stain on the lower part. He said the complainant patient appeared terrified and in shock, there was marks of dried tears noted on the cheeks, there was presence of what appeared to be thorn pricks on the thorax and abdomen and upper limbs and lower limbs and the approximate age of the injury was two hours and the probable type of weapon causing injury was cactus thorns.
36. On part C, he stated that the patient had normal external genitalia, no tears and abrasions seen and the hymen was not intact. She had white mucoid discharge and had trichomoniasis vaginal candidiasis and red blood cells and also spermatozoa cells were seen. He confirmed that the complainant had a sexual act and he concluded that there was defilement.
37. Record shows the minor herein narrated how the Appellants accosted her and defiled her, PW 4 the Clinical Officer produced the P3 Form which indicated that on examination of the complainant the hymen was broken and lab tests confirmed that there was trichonomiasis vaginal candidiasis, red blood cells and spermatozoa cells which indicated that the complainant had sexual act. The victim was candid on how the appellant defiled her and her evidence was corroborated by the evidence of PW 2, PW 3, PW 4 and PW 5. From evidence adduced, there is no doubt that the prosecution proved penetration beyond reasonable doubt.

Proof of Age

38. In respect to proof of age of victim in cases of defilement, the court of appeal in the case of Edwin Nyambogo Onsongo vs. Republic (2016) eKLR stated as follows: -

“... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim’s age, it has to be credible and reliable.”

39. The complainant testified that she was aged 11 years, the treatment documents indicate the age of the minor as 11 years, the charge sheet reads 13 years. The trial court observed the minor while testifying and she appeared to be a child. I come to the conclusion that the complainant was a minor at the time of the incident. From the foregoing, the age of the minor is between 11 and 13 years old.

Identification of assailant

40. The complainant testified that the appellant was known to her. She flushed a torch on him and saw his face. She also said she also identified his voice. She knew the assailant as L. She was candid that she identified the appellant and after calling help from his uncle she followed his uncle and he chased the appellant who entered his house. From the foregoing, there is no doubt that the appellant was positively recognized by the complainant.



41. On argument that his defence was not considered, I have perused the judgment and note that the appellant's defence was considered but it did not shake evidence adduced by the prosecution.

Whether the sentence imposed was harsh and excessive

42. On whether the sentence meted on the appellant by the trial court was harsh and excessive, it is trite law that this court has supervisory jurisdiction over subordinate courts. The enabling law for revision is Article 165(6) and (7) of *the Constitution* and section 362 as read together with section 364 of the Criminal Procedure Code.

43. Sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. In the case of Shadrack Kipchoge Kogo vs. Republic Criminal Appeal No. 253 of 2003(Eldoret), the Court of Appeal stated as follows;

“Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred.”

44. Further, the Court of Appeal while dealing with the issue of sentence in the case of Bernard Kimani Gacheru vs. Republic [2002] eKLR restated as hereunder: -

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”

45. In this case, the offence in which the Appellant was convicted of is the offence of defilement contrary to section 8(1) as read with Section 8(3) of the *Sexual offences Act* No. 3 of 2006. Section 8(3) of the *Sexual offences Act* 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.”

46. The appellant was sentenced to the minimum sentence of 20 years imprisonment. In this case, the complainant was of the age of 13 years at the time of the offence. Thus, the appropriate penalty clause is Section 8(3) of the Act which prescribes the mandatory minimum sentence of 20 years imprisonment where the victim is 15 years and below.

47. I also take note of the fact that the appellant took an unfair advantage to secure and satisfy his sexual desires on the minor, a child of only 13 years. It bears repeating that the penalties enacted in the SOA reflect a deliberate intention by the legislature; (1) to protect the rights of the child; and (2) to signify the seriousness of the offence of defilement.



48. Seriousness of the offence is a relevant factor in sentencing in sexual offences. Generally, it is worth to noting that, the assault leaves the innocent victim dramatized for the rest of her life time thus affecting her quality of life. To say the least, her self-worth and innocence is irreparably damaged by the beastly act which will affect her psychologically, emotionally and physically for the rest of her life. Deterrent sentence serves to deter other would be offenders.
49. Considering the circumstances surrounding the offence herein and the age of the victim, I am of the view that the sentence imposed against the appellant was appropriate and I have no reason to interfere. From the foregoing, I hereby uphold conviction and sentence.
50. Final Orders: -
1. Appeal on conviction and sentence is hereby dismissed.
 2. The period served in remand from the date of arrest to be computed in the sentence imposed by trial court.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 25TH DAY OF JULY 2024.

RACHEL NGETICH

JUDGE

In the presence of:

Elvis & Komen – Court Assistants.

Ms. Ratemo for State.

Appellant Present.

