



**Njuguini v Republic (Criminal Appeal 133 of 2023)
[2024] KEHC 7972 (KLR) (2 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 7972 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 133 OF 2023**

DR KAVEDZA, J

JULY 2, 2024

BETWEEN

EVAN GACHUHI NJUGUINI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered
by Esther Boke (SPM) on 13th April 2023 at Kibera Chief Magistrate's
Court Sexual offense No. 070 of 2021 Republic vs Evan Gachuhi Njuguini)*

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* No. 3 of 2006. The particulars were that on diverse dates between March 2021 and June 2021 within Nairobi County, he intentionally severally caused his Penis to penetrate the Vagina of MNM, a child aged thirteen (13) years. He was sentenced to serve nineteen (19) years and seven (7) months imprisonment. Being dissatisfied, he has filed an appeal against the conviction and sentence in line with his petition of appeal.
2. 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 that was before the trial court, and itself 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.
3. With the above, I now proceed to determine the substance of the appeal. In his Petition of Appeal, the Appellant has raised six grounds of appeal. He argues that the prosecution failed to prove its case beyond reasonable doubt and that the prosecution's case was riddled with circumstantial evidence. He also complained that the trial magistrate did not give reasons for believing the complainant's testimony.



He further complains that he was not properly identified as the perpetrator and that his defence was not considered by the trial court.

4. 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."
5. The prosecution called three witnesses to prove its case. M.N., the complainant (PW1), gave sworn evidence and recounted that in March 2021, he was staying with his brother since the parents had gone to their rural home. One day, at around 10pm while doing her assignments, her stepbrother went to their home and started disturbing her, making it impossible for her to do her assignment. She proceeded to sleep. At around 1 am in night, the stepbrother crawled into her bed, covered her mouth with his hand, undressed her, and in PW1's words, 'they had sex'. The following morning, the stepbrother went away.
6. PW1 proceeded to narrate that after two weeks, the stepbrother went back and they had sex again. From there, he kept on coming on Saturdays following which they had sex. It was not until PW1's father came back in June that the stepbrother stopped going to the house. Later, on 15th June 2021, she went to school but left since she did not have a mask. She went to the stepbrother's place, where he told her to remove her uniform and put on the wife's clothing. Soon thereafter, the father came knocking and the step-brother hid her in the bed, under the blanket. The father looked around and found her. She was later taken to the hospital.
7. PW1 gave a clear and graphic testimony on the series of events and remained steadfast that it was her step-brother, the appellant, who took advantage of the parent's absence and subjected her to continued sexual assault. The stepbrother was someone well known to her and his actions went on for some time that PW1 would be able to easily tell who the perpetrator was. I therefore hold that the appellant was the perpetrator in this case.
8. Regarding corroborating evidence, the prosecution called PW2, a teacher at PW1's school, who confirmed that PW1 had indeed gone to school on the morning of 15th June 2021, before she left since she did not have a mask. She also told the court that later when PW1's father brought her to school, she admitted that she had been having sex with the stepbrother since March. PW2's testimony is consistent with the narration of PW1 that indeed, she had engaged sexually with the appellant and I hold the opinion that the testimony corroborates PW1's narration.
9. The prosecution further called Laureen Mwendu, a clinician at Coptic Hospital (PW4), who produced a Post-Rape care (PRC) form on behalf of colleague, Petronilla. The prosecution also called DR. Erick Kanjama, a doctor at Mbagathi Hospital (PW5), who produced the P3 forms concerning both the complainant and the appellant. Both PW4 and PW5 confirmed that PW1 had old tears on her hymen at the time of the medical examination. This finding is consistent with PW1's evidence that the defilement had persisted for over two months. As correctly stated by the trial magistrate, in such a scenario, one would not expect to find signs of fresh penetration, unless violence or excessive force was applied. Therefore, given the history, it is my finding that penetration was sufficiently proven.
10. The foregoing notwithstanding, PW1's testimony did not require corroboration within the proviso of section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) if there are recorded reasons why the trial magistrate believed the minor was telling the truth. In this case, the trial magistrate recorded in her judgement that comparing the evidence of PW1, who narrated very clearly how the appellant used to have sex with her, and the defence of the appellant, she found that the victim was being truthful in her testimony. I have also thoroughly gone through the testimony of PW1 and found that she was consistent throughout, despite being subjected to rigorous cross-examination by the appellant.



11. The appellant in his defence does not mention anything regarding the charges levelled against him, he only states that he was away in Mombasa from November 2020, and when he came back six months later, he was arrested at his house. When weighed against the prosecution's case, the appellant's defence amounts to a mere denial and was rightly dismissed by the trial court.
12. On the age of PW1, the trial court considered the birth certificate produced in evidence by PW6, which indicated that she was born on 17th November 2007. Therefore, by March 2021, she was aged 13 years and four months. There is no doubt that PW2 was a minor. The conviction on the main count of defilement is therefore affirmed.
13. On the sentence, section 8(3) of the Act provides that a person who commits an offence of defilement with a child aged between twelve and fifteen years is liable upon conviction to imprisonment of not less than twenty years
14. The appellant herein was sentenced to serve twenty years' imprisonment, less five months which he had spent in custody before conviction. The appellant is therefore serving nineteen years and seven months imprisonment.
15. Sentences are intended, inter alia, to not only punish an offender for his wrongdoing but also aim to rehabilitate offenders to renounce their criminal tendencies and become law-abiding citizens. I have no doubt that the sentence imposed by the trial court, in this case, was lawful but considering that the appellant was a first offender, he needs rehabilitation. I am satisfied that the sentence was harsh and manifestly excessive.
16. For the above reasons, I hereby set aside the sentence of twenty (20) years imprisonment on the main charge and substitute it with a sentence of fifteen (15) years imprisonment. The period of five months spent in pre-trial custody shall be computed.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 2ND DAY OF JULY 2024

D. KAVEDZA

JUDGE

In the presence of:

Appellant present in person

Mr. Mutuma for the Respondent

Naomi Court Assistant

