



REPUBLIC OF KENYA



**Kasili v Republic (Criminal Appeal E017 of 2023)
[2024] KEHC 10608 (KLR) (2 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10608 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL E017 OF 2023
CJ KENDAGOR, J
AUGUST 2, 2024**

BETWEEN

EMMANUEL WANJALA KASILI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against conviction and sentence arising in Kandara Law Courts Criminal Case S.O No. 41 of 2018 delivered on 26th September, 2019 by Hon. M. Kinyanjui, P.M.)

JUDGMENT

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the [Sexual Offences Act](#) No 3 of 2006.

The particulars of the offence are that; on 01st June, 2018 at [Particulars Withheld], within Murang'a County, he intentionally and unlawfully caused his penis to penetrate the vagina of L.M.W, a child aged 16 years. He was also charged with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#).

2. He was tried, convicted, and sentenced to serve ten (10) years' imprisonment on the main charge. It is that conviction and sentence that necessitated the instant appeal wherein the Appellant raised the grounds of appeal enumerated as follows;
 - I. That, the learned trial magistrate erred in matters of law and fact by failing to consider that the voire dire was conducted contrary to the laid-out stages for determining whether the minor should be sworn.
 - II. That the learned trial magistrate erred in matters of law and fact by failing to establish paternity through a DNA test so that the contradictions in the evidence would have been resolved.



- III. That the learned trial magistrate erred in points of law and facts by failing to find that the elements of the offence of defilement were not conclusively proved to warrant a conviction.
 - IV. That the learned trial magistrate erred in points of law and facts by failing to find that there was no direct or circumstantial link between the alleged commission of the offence and the arrest of the Appellant.
 - V. That the learned trial magistrate erred in matters of law and fact for failure to procure the evidence of an informer who was a very crucial witness in the matter beforehand.
 - VI. That the learned trial magistrate erred in matters of law and fact by convicting on a matter that was not proved beyond all reasonable shadow of doubt.
3. The Court directed that the parties file written submissions at the appeal hearing. The Appellant submitted that the evidence of PW1 was not correctly received and faulted the quality of investigations conducted. He submitted that the prosecution had not proved the case beyond reasonable doubt and that the trial court convicted him based on suspicion.
 4. On the other hand, the Respondent submitted that the ingredients of the offence of defilement had been proved and urged the court to uphold the conviction and sentence.
 5. I have considered the appeal before me and the written submissions by both parties. The duty of this court while exercising its appellate jurisdiction was set out in the case of *Mark Oiruri Mose v R* (2013) eKLR thus: -

“This Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze 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 give allowance for that.”

6. The prosecution called five witnesses in support of their case. PW1 was the complainant; she testified that she was 17 years old and was born on November 18, 2001. Her evidence was that she was defiled by the Appellant in his house during a visit that she had made in the company of a friend referred to as Magdaline. She stated that the Appellant was her friend and neighbour and further about the escort to the police station and subsequent hospital visit, where she found out that she was pregnant. PW2, the complainant’s mother, testified that the chief caused the arrest of the Appellant and the complainant, who informed her that the Appellant was her boyfriend.
7. PW3 was a Senior Assistant Chief of Kigio Sub Location. He testified that his involvement in the case resulted from the headteacher of Kigio Secondary School’s communication that the complainant had run away from school. He told the court that the Appellant, a casual laborer in the area, went to his office following communication for him to do so and the discussions that took place on the relationship between the appellant and the complainant. He stated that the complainant was rescued from her grandmother’s house at Gitegi, the location disclosed by the Appellant, and escorted to the police station alongside the Appellant.
8. PW4 was the investigating officer; she testified that the complainant reported that the appellant had defiled her against her will during a visit and further told the court about the subsequent referral to the hospital. PW5, a Clinical Officer at Kandara Level 4 Hospital, produced the medical notes and P3 form for the complainant herein. He stated that on examination, the hymen was broken, and the complainant was pregnant.



9. In his defence, the Appellant told the court that he went to the Chief's Office with his wife, Magdaline, after his employer told him that the Chief had summoned him. He denied the offence, stating that the complainant was his wife's friend, not his own.
10. I will first address the issue of *voire dire*. On 4th December 2018, the trial court conducted a *voire dire* examination. The witness told the court she was 17 years' old and would speak the truth. The learned trial magistrate was satisfied that the minor understood the nature of the oath and the duty of telling the truth. The complainant was not a child of tender years as to require *voire dire*. I am satisfied that the trial court employed the correct procedure in ascertaining the child's competence to give evidence.
11. In *Charles Wamukoya Karani Vs Republic*, Criminal Appeal No. 72 of 2013, the Court highlighted the ingredients forming the offence of defilement;

“The critical ingredients forming the offence of defilement are the age of the complainant, proof of penetration, and positive identification of the assailant.”
12. The burden of proof rests with the prosecution to prove its case against the Appellant beyond reasonable doubt. In *Stephen Nguli Mulili vs Republic* [2014] eKLR, it was held that: -

“It is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of *DPP v Woolmington*, (1935) UKHL 1 where the court eloquently stated that the “golden thread” in the “web of English common law” is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See *Festus Mukati Murwa vs. R*, [2013] eKLR.”
13. The complainant and her mother testified about her age, which can be ascertained further from the evidence produced before the trial court (P.Exh. 3—Birth Certificate). I am satisfied that the first ingredient of the complainant's minority age was proved to the required standard.
14. Turning to penetration, Section 2 of the *Sexual Offences Act* defines penetration as follows:

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

Penetration can be proved through the victim's sole testimony or the victim's testimony corroborated by medical evidence.
15. The complainant explained how she ended up at the Appellant's house and what had transpired. She stated that she had sex with the Appellant after her friend, Magdaline, went home, and she was left behind. In observing the complainant's demeanour, the trial court recorded that the complainant was clear in her evidence and believable and found no reason for the complainant to frame the Appellant. There was no mention of anyone else being involved, and the evidence before the court was that the Appellant had sex with the complainant; there is no doubt about what was under reference. The complainant was a minor and lacked the capacity to consent to sexual intercourse.
16. The events preceding the Appellant's arrest, as narrated by the Assistant Chief, provided the nexus between the Appellant's arrest and the commission of the offence and proved that there was no malice.
17. The prosecution and the defence mentioned Magdaline in their testimonies. The Appellant claimed that Magdaline was his wife, and the Assistant Chief testified that the Appellant stated this while at the Chief's Office. This is a valid reason for failure to call the witness, as the witness is under the Appellant's exclusive control.



18. It is well established that a single witness's oral evidence is sufficient to warrant a conviction. See *George Kioji Vs R Nyeri* Criminal Appeal No. 270 of 2012 (unreported)]. The court held as follows:

“Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”

19. The clinical officer testified that upon examination of the complainant, the hymen was broken, and she was pregnant. This corroborates the complainant's testimony, and I am satisfied that the learned trial court's conclusion on penetration was sound.

20. The Appellant, in his defence raised the issue of DNA not having been conducted. In considering the absence of DNA results in a defilement case, the court stated in the case of *Aml v Republic* [2012] eKLR:

“The fact of rape or defilement is not proved by way of a DNA test but by way of evidence.”

21. In view of the foregoing, the Appellant's conviction was proper, given that the ingredients forming the offence of defilement were proved. The case was proved beyond reasonable doubt.

22. I will now turn to the sentence. The trial court considered the Appellant's mitigation and the social inquiry report dated 2nd October, 2019 and sentenced the Appellant to 10 years' imprisonment. Sentencing is the discretion of the trial court, and I find no basis upon which to interfere with the trial court's decision on sentence. However, I note that the learned trial magistrate did not take into account the period the Appellant had been in custody during sentencing, as provided for under Section 333(2) of the *Criminal Procedure Code*. The Appellant could not raise bond and remained in custody during the trial. The prison authorities shall take into account the period spent in custody, from his arrest on 9th July, 2018 up to the date of his sentence on 9th October, 2019, in computing the sentence imposed on the Appellant.

23. The upshot is that the appeal on conviction is hereby dismissed. The sentence is set aside and substituted with the sentence outlined in paragraph 22 of this Judgment.

24. It is so ordered.

DELIVERED, DATED, AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 02ND DAY OF AUGUST 2024.

C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

ODPP: Ms. Oduor

Appellant: Emmanuel Wanjala Kisilu

