



**Lochapan v Republic (Criminal Appeal E028 of 2023)
[2024] KEHC 10027 (KLR) (8 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10027 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CRIMINAL APPEAL E028 OF 2023
RN NYAKUNDI, J
AUGUST 8, 2024**

BETWEEN

ALEX EKIRU LOCHAPAN APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of Hon. C.A.
Mayamba in Kakuma cr. SO. NO. E019 of 2022)*

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on 6th August, 2022 at (Particulars withheld) forest in (Particulars withheld) Sub-County within Turkana County, the appellant intentionally caused his penis to penetrate the vagina of A.A a child aged 16 years.
2. The appellant was convicted of the charge and sentenced to 15 years imprisonment.
3. Being dissatisfied with the said judgment the appellant lodged the present appeal relying on grounds that have been expressed in his written submissions.

Appellant's Submissions

4. The appellant submitted that the prosecution' case was full of irregularities. That the complainant showed the court how she framed the appellant right from the start. It was the appellant's view that she never chased the complainant but she had illusions of being in danger. That none on of the prosecution witnesses alleged the accused was a brutal savage in the community.



5. According to the appellant, the complainant never came out clear why she was in the forest. That the incident could not have transpired in the village and go unnoticed. He concluded that he was framed up in this case.
6. He further questioned the element of penetration. He submitted that the medical doctor's examination had a wrong conclusion for reasons that the doctor was not aware that the complainant had a child. That if the doctor had such information, he could have come to a different conclusion. He stated that if the complainant had a child, her hymen could not be intact.
7. The Appellant concluded that the evidence was a sham and that he was being implicated in the case. Unfortunately, the Respondent never filed his submissions in opposition of the appeal. I shall nonetheless proceed to make a determination based on the evidence and the record.

Analysis And Determination

8. I have considered the appeal and submissions by the appellant. I have also read the record of the trial court and the judgment. As a first appellate court, this court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses.
9. The Supreme Court of India explained the duty of a first appellate court in [*K. Anbazhagan v State of Karnataka and Others*](#) Criminal Appeal No. 637 of 2015 as follows: -

“The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely...The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind – sans passion and sans prejudice. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test.”

10. The issues that arise for determination in this appeal are;
 - i. Whether the prosecution proved its case to the desired threshold;
 - ii. Whether the sentence meted upon the appellant was lawful.

Elements of offence of defilement

11. The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the [*Sexual Offences Act*](#) which provides:

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- (1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement



- (3) “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.”

12. The ingredients that ought to be established in an offence of defilement are: the age of the complainant, proof of penetration and the positive identification of the assailant. See *Charles Wamukoya Karani Vs. Republic*, Criminal Appeal No. 72 of 2013

What does the evidence portend?

Age of the complainant

13. In a charge of defilement, the age of the victim is important for two reasons:
- i) defilement is a sexual offence against a child; and
 - ii) age of the child has also been used as an aggravating factor for purposes of determining the sentence to be imposed; the younger the child the more severe the sentence. An age assessment was conducted and the minor’s age was established at 16 years old. The appellant did not raise any concerns towards that and as such the complainant herein was 16 years old.

Penetration

14. Section 2(1) of the *Sexual Offences Act* defines penetration as:
- “The partial or complete insertion of the genital organs of a person into the genital organ of another person.”
15. The appellant argued that the results from the medical report would have come out different if the medical doctor was aware that the complainant had a child.
16. PW2 testified that on genital examination, the hymen was absent. She had a torn blouse which was as a result of trying to defend herself. That the same findings were noted in the PRC from with diagram. The witness concluded that the complainant had been defiled owing to her age. The hymen could be missing but it does not negate the fact that the Complainant could be defiled.
17. Having considered and analyzed the evidence adduced, I come to the conclusion that there is ample evidence that penetration did occur. The medical evidence produced supports penetration of the minor.

Was the appellant the perpetrator?

18. The question of identity was not in contention. The appellant and the complainant testified to the effect that they are neighbors. It therefore cannot be a question of mistaken identity.
19. I find that the Appellant was positively identified as the assailant herein; there was no mistaken identity or error. Accordingly, I find that the prosecution proved their case beyond reasonable doubt and that the trial court did not error in convicting the appellant for defilement. The appeal on conviction therefore lacks merit and is hereby dismissed.



On sentence

20. The appellant prayed that the sentence meted be set aside. Section 8 (3) of the Sexual Offences Act to convict provides as follows:

8(3) “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.”

21. The trial court in sentencing the appellant considered the mitigation advanced and sentenced the appellant to 15 years imprisonment. I am conscious of the fact that I should not interfere with the decision of the trial court unless he/she acted on wrong principles. Just because I could have arrived at a different decision does not mean that I should review the sentence. In *S v RO and Another* 2000(2) SACR 248 (SCA) the court in a nut shell pronounced itself on how the court should strike a balance in any given circumstances to arrive at a fair and proportionate sentence. “ Sentencing is about achieving the right balance or in more high-flown terms, proportionality. The elements at play are the crime, the offender the interest of society with different nuance, prevention, retribution and deterrence. Invariably there are overlaps that render the process unscientific, even a proper exercise of the judicial function allows reasonable people to arrive at different conclusions.

22. For those reasons, and the principles enunciated in the above case law, I find no reason to exercise discretion to review the trial court decision on sentence. It is therefore affirmed and the Appeal on both conviction and sentence is lost.

DATED AND SIGNED AT ELDORET THIS 8TH DAY OF AUGST 2024

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R. NYAKUNDI
JUDGE

