



**Nyongesa v Republic (Criminal Appeal E031 of 2021)
[2024] KEHC 10627 (KLR) (2 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10627 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL APPEAL E031 OF 2021
CJ KENDAGOR, J
AUGUST 2, 2024**

BETWEEN

EVANS MATERE NYONGESA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against conviction and sentence arising in Nyeri Law Courts Criminal Case S.O No. 50 of 2020 delivered on 12th August, 2021 by Hon. N.W. Kariuki, P.M.)

JUDGMENT

1. The Appellant herein 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 31st August, 2020 at [Particulars Withheld], within Nyeri County, he intentionally and unlawfully caused his penis to penetrate the vagina of SNW, a child aged 13 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*. He was convicted on the main charge and sentenced to twenty (20) years' imprisonment.
2. In his amended grounds of appeal, the Appellant faulted the trial court's decision on the grounds that the primary elements of the offence, including penetration, were not established. He argued that the prosecution evidence was riddled with discrepancies and pleaded that the statutory defence provided for under Section 8(5) and (6) of the *Sexual Offences Act* applied in his favour.
3. At the appeal hearing, the parties relied on the written submissions filed in court. The Appellant submitted that the respondent failed to discharge its legal and evidential burden and that consequently, the conviction and sentence should be set aside. On the other hand, the Respondent submitted that the appeal ought to be dismissed and the conviction and sentence upheld on the basis that the prosecution's evidence was substantive and sufficient to prove the offence beyond reasonable doubt.



4. In determining this appeal, this court being a first appellate court is alive to and considers the principles laid down in the case of *Okeno vs Republic* (1972) EA 32 where the Court of Appeal for Eastern Africa stated that:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya V R* 1975) EA 336 and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M Ruwala VR* [1957] EA 570. It is not the junction 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* 1978) EA 424.”

5. The prosecution called 5 witnesses in support of its case. PW1 was the Assistant Chief, Gichira sub-location. She stated that on 1st September 2020, at about 5 a.m., she proceeded to the homestead of PW2’s brother after PW2 called her and complained of commotion in the said homestead. According to PW1, the Appellant was inside the house alongside the complainant and two others. The other two were identified as Collins, who was the caretaker and SM, a minor. PW1 narrated the subsequent report and investigations by the police. PW2 told the court that on the material date, he heard screams from his brother’s house, where Collins, the caretaker, lived while his brother was staying in a school compound. He testified that when he gained access, Collins, the Appellant, and a girl were sitting on the bed. After that, he locked the door from outside and called the assistant chief -PW1. According to PW2, the presence of an additional girl was noted after PW1 had arrived; he maintained that his action was out of concern for the presence of the minors in the house during the wee hours of 4.40 a.m.
6. PW3, a medical doctor, produced the P3 Form and post-rape care form that was prepared in respect of the complainant. He told the court that on examination, the hymen was broken and the minor’s private parts were inflamed.
7. The complainant testified as PW4 after a *voire dire* examination was conducted by the trial court. She told the court that she was born on 30th August, 2007 and was 13 years old. She testified that while in the company of SM, they met the Appellant and one Collins on a public road and accompanied them to the Appellant’s house, where they ate food and proceeded to Collin’s house at night. According to PW4, the Appellant, while undressed, ‘did bad manners’ to her as Collins and another girl (SM) left the room. She stated that later that night, the Appellant and Collins kept disturbing them through the window of the room they had placed a mattress on to lie down because they could not fit in one bed. According to PW4, a neighbour closed the door from outside before sunrise and thereafter, members of the public flocked to the homestead and assaulted them.
8. The Appellant in his defence, told the court that on the material date, he was working at the the farm where he is employed alongside Luke (DW2). He stated that his presence at Collin’s house early in the morning was to collect a sprayer which he had lent him and that he needed to use in spraying livestock. According to the Appellant, while at Collin’s place, the complainant, in the company of another young girl, asked to be let in, and shortly afterwards, PW2 showed up and locked all of them inside the house. DW2, Luke, told the court that the Appellant had requested him to assist with farm work during the day on 31st August, 2020 and that he slept at the Appellant’s house on that date. According to DW2, the Appellant woke up earlier than him on the said date. He stated that he was awakened by noise and found the Appellant and Collins being assaulted by a crowd.



9. In *George Opondo Olunga v Republic* [2016] eKLR, it was stated that the ingredients of an offence of defilement are identification or recognition of the offender, penetration, and proof of the victim's age.
10. The prosecution witnesses gave an account of the Appellant's arrest, and the Appellant does not dispute that he was arrested at the house occupied by Collins'. It is not contested that the complainant was also in the same house at that time. The question is whether the complainant was defiled while in that house and by who.
11. The proximity of the houses was given as so close that it is believable that PW2 was able to hear the movements in the house occupied by Collins. I have carefully examined the complainant's testimony. The commotion stated by PW2 can be related to that stated by the complainant in her examination in chief. PW2 told the court that he sighted only one girl when he gained entry to the house, which corroborates the testimony of the complainant that she hid under the bed when a neighbour knocked at the door. The complainant gave an elaborate testimony of what had transpired during the day and how she ended up at that house. The sequence of events is believable and was not displaced in cross-examination.
12. The trial court made an observation of the complainant's demeanour in the judgment. I agree with the findings that the circumstances surrounding the presence of the complainant and SM in the house are as tendered by the prosecution. The trial court rightly rejected the defence that the Appellant had gone to the house that morning, as the evidence shows that his presence was earlier in the night and the alibi defence raised by DW2 at his house is an afterthought.
13. As to what transpired in the house, the complainant used euphemisms to describe the sexual encounter. She explained that the person who defiled her removed his clothes and did bad manners to her. She testified in Kiswahili, translated to Kiswahili is 'tabia mbaya'. Terms like 'tabia mbaya' have been interpreted to mean sexual intercourse when a child testifies in defilement cases. The proceedings before the trial court show that the trial magistrate observed that the complainant, when narrating the ordeal, became withdrawn, and the court had to prompt her to be audible.
14. In *Muganga Chilejo Saha v Republic* [2017] eKLR the Court of Appeal stated as follows-

“Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a court room. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms like, “alinifanyia tabia mbaya”, (IE V R, Kapenguria HC Cr Case No 11 of 2016), “he pricked me with a thorn from the front part of this body.”, (Samuel Mwangi Kinyati v R , Nanyuki HCCRA No 48 of 2015), “he used his thing for peeing”, (David Otieno Alex v R, Homa Bay HC Cr App No 44 of 2015), “he inserted his "dudu" into my "mapaja", (Jose Kaburu v R, Meru HC Cr Case No 196 of 2016), “he used his munyunyu”, (Thomas Alugha Ndegwa, Nbi HC Cr. Appeal No 116 of 2011), as apt descriptions of acts of defilement. We, however, need to remind trial courts that the use of certain words and phrases like “he defiled me”, which are sometimes attributed to child victims, are inappropriate, technical and unlikely to be used by them in their testimony. See A M M v R Voi HC Cr App No 35 of 2014, EMM V R Mombasa HC Cr Case No 110 of 2015, among several others. Trial courts should record as nearly as possible what the child says happened to him or her.”
15. 'Penetration' is defined under Section 2 of the act to mean 'the partial or complete insertion of the genital organs of a person into the genital organs of another person'. I am persuaded that the reference to bad manners by the complainant meant penetration into her vagina by a penis.



16. In the case of George Kioji vs. R - Nyeri Criminal Appeal No. 270 of 2012 (unreported) the court held that:-

“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.”

17. The first medical examination was done on 1st September 2020, a day after the incident, and the second medical examination, when filling in the P3 form on 7th September 2020, was within a week. The fact that no spermatozoa were seen does not mean that there was no penetration. In the present case, the medical records produced corroborated the testimony of the complainant that there was penetration.

18. The trial magistrate observed that the complainant gave a clear account of the incident on how the appellant had sexual intercourse with her. The complainant’s evidence of the person who defiled her was that of recognition. There was only one other man in the house besides the appellant, Collins. There is no doubt about who the complainant referred to as between the Appellant and Collins. She told the court that they took turns using the bed and that Collins and SM. also had sexual intercourse.

19. Regarding the complainant’s age, a birth certificate was produced in court indicating that she was born on 30th August 2007. Thus, the complainant was 13 years old at the time of the commission of the offence.

20. The Appellant, in his submissions, raised the issue of the complainant’s age, raising a defence under Section 8 (5) and (6) of the *Sexual Offences Act*, which provides as follows;

(5) “It is a defence to a charge under this section if—

(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) the accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.”

21. This defence was not raised in the proceedings before the trial court. If the Appellant relied on the defence of age under Section 8(5), then the evidential burden of proof would shift to him to prove that there was deception and that he took the necessary steps to ascertain the complainant’s age. In his defence, the appellant referred to the complainant and SM. as young girls. There was no evidence of deceit or steps taken to ascertain the complainant’s age.

22. I am persuaded that the trial court correctly addressed the issue of the standard and burden of proof in this case. The learned magistrate arrived at the correct findings, and the conviction was proper and supported by the law and the evidence.



23. On sentence, under Section 8 (3) of the *Sexual Offences Act*, 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 trial court considered the Appellant's mitigation and the social inquiry report dated 23rd September, 2021 and sentenced the Appellant to 20 years' imprisonment. 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 consider the period the Appellant had been in custody during sentencing as stipulated under Section 333 (2) of the Criminal Procedure Code. The Appellant could not raise bond and remained in custody through the trial. The prison authorities shall take into account the period spent in custody, from his arrest on 2nd September, 2020 up to the date of his sentence on 23rd September, 2021 in computing the sentence imposed on the Appellant.
24. The upshot is that the appeal on conviction is hereby dismissed. The sentence is set aside and substituted with the sentence outlined in paragraph 23 of this Judgment.
25. It is so ordered.

DELIVERED, DATED, AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 2ND DAY OF AUGUST 2024.

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

ODPP: Mr. Mwakio

Appellant: Evans Nyongesa Matere

