



**Amara v Republic (Criminal Appeal 1 of 2024)
[2024] KEHC 12704 (KLR) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12704 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 1 OF 2024
DR KAVEDZA, J
OCTOBER 24, 2024**

BETWEEN

SAMSON AMARA APPELLANT

AND

REPUBLIC RESPONDENT

*((Being an appeal against the original conviction and sentence delivered by
Hon. S. Temu (S.P.M) on 9th August 2023 at Kibera Chief Magistrate's
Court Sexual offences case no. E060 of 2022 Republic vs Samson Amara))*

JUDGMENT

1. The appellant Samson Amara was charged and after a full trial convicted for the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*, no 3 of 2006. He was sentenced to serve fifteen (15) years imprisonment. Being aggrieved, he filed an appeal challenging his conviction and sentence.
2. In the petition of appeal, he raised the following main grounds: The appellant challenged the totality of the prosecution's evidence against which he was convicted; he complained that the charge sheet was defective; he argued that essential witnesses were not called to testify; he challenged the sentence imposed as being excessive and urged the court to quash his conviction and set aside the sentence.
3. 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 before the trial court, and 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.
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. Further, section 8(1) and (3) of the *Sexual Offences Act*, no 3 of 2006 provides thus: -
 8. Defilement
 - (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.
6. Bearing in mind the above provisions, I will now analyse the evidence on record to ascertain whether the essential ingredients of the offence preferred against the appellant were established to the required standard of proof. Regarding proof of age, I wish to state at the outset that the importance of proving the age of a victim, proof of penetration, and positive identification of the assailant in sexual offences is paramount.
7. The complainant EA (name withheld) testified after voir dire examination. On 15th May 2022, the complainant stated that the appellant had moved her from Lindi to Raila for convenience and picked her up from Caro's house at 7 AM, claiming they were going to pray for her stomach issues. They arrived at a distant hill around noon, where they prayed together with three other women. The appellant then took her through a forest, leaving the others behind. In the forest, he undressed her and sexually assaulted her. Afterward, they remained for about an hour before he returned her to Caro's place. The complainant testified that this pattern continued for the next three days, with the appellant taking her to the forest each time and defiling her.
8. On the third day, the complainant noticed that Caro was following them and he witnessed the act. After the appellant sexually assaulted her, he applied her vagina with soap. He then gave her ksh 50 shillings and threatened her with a knife, warning her not to tell anyone. He subsequently returned her home as usual.
9. When she got home, Caro took her to Nairobi Women's Hospital, where she was examined and treated. The incident was also reported to the police and the complainant was taken to a SHOFCO safe house. During cross-examination, she identified the appellant as the only pastor she knew and confirmed the incidents occurred three times, with Caro witnessing the third. She recalled the appellant's outfit and explained she did not scream due to threats of violence. On re-examination, she noted that the appellant had visited their home for two weeks prior to the incident.
10. The complainant's testimony did not require corroboration in accordance with the proviso to Section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) if there were recorded reasons why she believed the child was telling the truth. In his judgement, the trial magistrate recorded that his observation of the demeanour of the minor as she testified was satisfactory and that she was truthful and credible.
11. In addition, I have also thoroughly gone through the testimony of PW1 and noted that she was consistent all through, and her evidence was unshaken on cross-examination by the appellant. The complainant provided clear and detailed testimony, asserting that the appellant, her pastor, lured her to the forest and defiled her three times on consecutive days. She knew the appellant well, which eliminated any possibility of mistaken identity. Her steadfast identification and the context of the events led me to conclude that the appellant was indeed the perpetrator in this case.
12. Regarding additional corroborating evidence, PW2, PO, of Lindi Kibera, is the complainant's aunt. On 1st June 2022, she was called by her brother about the complainant's distress. At the time, the



- complainant was crying and not eating, mentioning a pastor praying for her. PW2 learnt that a woman had taken the complainant and dated her in the forest. After the incident, she took the complainant to the hospital where she was examined and treated. Thereafter she took the complainant to SHOFKO, where she was advised to stay. They then contacted the appellant, informing him that someone needed prayers, which led to his arrest upon arrival.
13. During cross-examination, PW2 admitted she neither knew the appellant nor his church. She confirmed that the complainant was 16 years old at the time of the incident.
 14. Dr. John Njuguna from Nairobi Women's Hospital provided testimony regarding the medical examination of the complainant. He testified that the complainant presented on 3rd June 2022, reporting an incident on 26th May 2022 involving the appellant. Upon examination, no physical injuries were noted. A genital examination revealed discharge containing bacteria and a healed tear at the 6 o'clock position of the hymen. She tested negative for STDs, including HIV, Syphilis, and Hepatitis B. He produced the medical reports as evidence concluding there was evidence of healed penetrative trauma. It is my finding that the ingredient of penetration was adequately proved.
 15. In his defence, the appellant denied the allegations, asserting that he was on his way to work when he realised he had not been assigned any duties that day. On his way home, he encountered two police officers in plain clothes who inquired about Pastor Samson. He was accused of being rude and subsequently arrested, claiming he had no knowledge of the charges against him and maintaining his innocence throughout the proceedings.
 16. The court considered his defence and found it to be uncredible. In view of the foregoing, I find that the appellant's defence did not dislodge the cogent evidence adduced by the prosecution. In my view, the appellant's defence was properly dismissed by the trial court as an afterthought aimed at exonerating himself from the offence.
 17. On the age of the complainant, the trial court considered the birth certificate that was produced and indicated that the complainant was born on 6th December 2006. This was sufficient evidence as proof of age. She was therefore 16 years old at the time of the incident and a child within the law.
 18. In his submissions, the appellant contended that the charge sheet was defective. He contended that the charge sheet indicated that the complainant was 14 years and yet the prosecution led evidence that proved that the complainant was 16 years. It was his view, that the conviction ought to be quashed.
 19. I have perused the charge sheet on record. From the record, the trial magistrate correctly held that the proper section in which the appellant ought to have been charged with is Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act* because age is crucial in sexual offences as it will determine the sentence to be meted upon a convicted person. In this case, the appellant was charged with a wrong penalty clause but this was not fatal to the prosecution's case. The error is curable under Section 382 of the *Criminal Procedure Code*; that no prejudice or miscarriage of justice was occasioned to the appellant due to the wrong penalty clause cited in the charge sheet. As such the ground of appeal fails.
 20. The appellant also contends that crucial prosecution witnesses were not called to testify. In particular, the said Caro who allegedly witnessed the third incident and was a crucial witness to the prosecution's case.
 21. It is trite law that the prosecution need not call a multiplicity of witnesses to establish a fact. Section 143 of the *Evidence Act* provides that, in the absence of any requirement by the provision of law, no particular number of witnesses shall be required to prove a fact. However, it has been held that where the prosecution fails to call a particular witness who may appear essential, then the court may make an



adverse inference as a result of failure to call that witness. (see *Bukenya and Others v Uganda* [1972] EA 549 and *Erick Onyango Odeng' v Republic* [2014] eKLR).

22. It is my finding that given the totality of the evidence, the prosecution evidence presented was sufficient to convict the appellant. Therefore, it was not necessary and would neither add nor subtract anything from the prosecution case in line with the provision of section 124 of the *Evidence Act*.
23. From the evidence of the prosecution witnesses, which was well corroborated, there is no doubt in my mind that the prosecution proved beyond reasonable doubt the offence charged. The conviction is therefore affirmed.
24. On sentence, the appellant was sentenced to serve fifteen (15) years imprisonment. During sentencing, the court considered the pre-sentence report, the appellant's mitigation, and that he was a first offender. The court sentenced the appellant accordingly.
25. The *Sexual Offences Act* provides for a mandatory minimum sentence of fifteen (15) years imprisonment for the offence the appellant is convicted of. The court sentenced the appellant to the minimum sentence provided under the law.
26. As such, I find that the sentence was proper in light of the supreme court decision in Petition E018 of 2023 *Republic v Joshua Gichuki Mwangi*. In the end, the appeal is found to be lacking in merit and is dismissed in its entirety.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 24TH DAY OF OCTOBER 2024

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D. KAVEDZA

JUDGE

In the presence of:

Appellant present.

Ms. Maina h/b for Omurokha for the Respondent

Achode Court Assistant

