



**Agweye v Republic (Criminal Appeal 136 of 2023)
[2024] KEHC 11414 (KLR) (1 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11414 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 136 OF 2023
DR KAVEDZA, J
OCTOBER 1, 2024**

BETWEEN

MARVIN LIBOI AGWEYE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered on 17th August 2023 by Hon. E. Riany (SRM) at Kibera Chief Magistrate's Court Sexual Offences Case no. E088 of 2022)

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(4) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the 6th day of September 2022 at around 1600 hours within Nairobi County unlawfully and intentionally defiled DM a child aged 8 years. He was sentenced to serve fifteen years imprisonment.
2. In the petition of appeal and amended grounds of appeal, he raised the following main grounds: that the particulars of the offence were insufficient to lead to the appellant's sentence and conviction, and that the learned trial magistrate erred in law and fact by convicting the appellant on a defective charge sheet.
3. This being the first appellate court, we are guided by the ruling in *Okeno v. R* [1972] EA 32. In this case, the court opined that a court of first appeal ought to re-examine all the evidence afresh and in an exhaustive manner, so as to come up with its own conclusions without overlooking the conclusions of the trial court, 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 (2) 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.
 - (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
6. The complainant testified as PW4. He provided unsworn testimony following voir dire examination. He recounted that while playing with his cousin and friend, K, the appellant invited them to his house. The appellant instructed him to go to the kitchen to get a mandazi, and then followed him. There he removed his trouser and inserted a finger in his anus. The appellant proceeded to hold his penis.
7. The following day, the appellant called the complainant, his cousin, and K to his house again. He gave the children money and when the complainant wanted to leave, the appellant refused. He then proceeded to insert his penis into his anus. This happened again on the following day. The appellant also asked the complainant to suck his penis, and when he refused and started crying he threatened to kill him. After the incident, he told his mother who reported the incident to the police and he was taken to hospital.
8. On cross-examination, the complainant was steadfast that it was the appellant who inserted his fingers and penis into his 'behind' meaning anus. The victim also maintained he knew the appellant who was a neighbour and the identification was by recognition. He could not have possibly pointed fingers at the wrong person for the act. I therefore hold that the appellant was properly identified.
9. As discussed in the [Kenya Judiciary Criminal Procedure Bench Book 2018](#) paragraphs 94-96 no corroboration is necessary for the evidence of a child taken on oath although cross-examination is available for sworn or unsworn evidence of a child in the usual way:
 - “ 94. No corroboration is required if the evidence of the child is sworn (*Kibangeny arap Kolil v R* 1959 EA 92). Unsworn evidence of a victim who is a child of tender years must be corroborated by other material evidence implicating the accused person for a conviction to be secured (*Oloo v R* (2009) KLR).
 95. However, in cases involving sexual offences, if the victim's evidence is the only evidence available, the court can convict on the basis of that evidence provided that the court is satisfied that the victim is truthful (s. 124, [Evidence Act](#)). The reasons for the court's satisfaction must be recorded in the proceedings (*Isaac Nyoro Kimita v R* Court of Appeal at Nairobi Criminal Appeal No. 187 of 2009; *Julius Kiunga M'biritbia v R* High Court at Meru Criminal Appeal No. 111 of 2011).
 96. The evidence of a child, sworn or unsworn, received under section 19 of the [Oaths and Statutory Declarations Act](#) is subject to cross-examination pursuant to the right to fair trial, which encompasses the right to adduce and challenge the evidence produced against the accused (art. 50(2)(k), CoK”
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 are reasons to believe that the child was telling the truth. In this regard, the trial magistrate noted that the complainant was consistent



and steadfast in his. In addition, their evidence which was subjected to cross-examination remained consistent throughout.

11. To corroborate the evidence adduced by the complainants' PW3AKM (name withheld), gave unsworn testimony after voir dire examination. He stated that while playing, he, the complainant and the complainant's cousin were called to the appellant's house. The appellant gave them ten shillings each and sent them to buy sweets, except for the complainant, who stayed behind. Upon returning, they found the complainant with the appellant. The complainant stated that the appellant had given him ten shillings and told him not to disclose what happened. The next day, the appellant gave them a phone and a mandazi, then took the complainant to his bedroom. Suspecting indecency, they later reported the incident his parents.
12. PW1, the complainant's mother testified that one day, her son, requested to speak with her privately and revealed that someone had been acting inappropriately towards him. She asked the complainant to show her the person, and they went to a nearby apartment. After knocking, the appellant's wife answered, and the complainant identified the appellant as the perpetrator. The appellant denied the accusations, but a neighbour confirmed that the complainant had been at the house with other boys the previous day, where one boy left crying. She reported the incident to the police and was referred to Nairobi Women's Hospital.
13. PW2, Dr. John Njuguna, testified on behalf of Dr. Job, who had examined the complainant on 6th September 2022. He reported that a known individual had inserted his finger and penis into his anal region on 4th September 2022. The examination revealed healing anal bruises and signs consistent with anal penetration by a blunt object. He tested negative for STDs, was treated. Therefore, given the evidence of the complainants, it is my finding that penetration was sufficiently proven.
14. The appellant gave sworn testimony, denying the charge and claiming he never invited the boys to his house or defiled the complainant. He suggested the boys could be trained to lie. He recounted an incident where the complainant ran off with his wife's phone. DW2, his wife, and DW2, his mother, corroborated his account, with both denying any wrongdoing and asserting that the defilement claim was false.
15. The court considered his defence and found it to be incredible. Given 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.
16. On the age of the complainant the trial court considered the birth certificates produced by his mother. The birth certificate of indicated that he was born on 4th April 2014. He was therefore 8 years at the time of the offence. There is therefore no doubt that the complainant was a child.
17. In his submissions, the appellant argued that the charge sheet was defective. I have re-analysed the charge sheet and the particulars thereto. There same is not defective.
18. The upshot of the above analysis is that the prosecution proved their case beyond reasonable doubt. The conviction is hereby affirmed.
19. On sentence, the appellant was sentenced to serve fifteen years imprisonment. During sentencing, the court considered the pre-sentence report and exercised discretion. In the premises, I see no reason to interfere with the sentence.
20. 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 1ST DAY OF OCTOBER 2024

D. KAVEDZA

JUDGE

In the presence of:

Appellant present

Maroro for the Respondent

Achode Court Assistant

