



**Mugambi v Republic (Criminal Appeal E024 of 2023)
[2024] KEHC 11969 (KLR) (8 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11969 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E024 OF 2023
DR KAVEDZA, J
OCTOBER 8, 2024**

BETWEEN

RICHARD KIARIE MUGAMBI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered on 28th November 2023 by Hon. C.M Njagi at Kibera Chief Magistrate's Court Sexual Offences Case no. E007 of 2021 Republic vs Richard Kiarie Mugambi)

JUDGMENT

1. The appellant Richard Kiarie Mugambi 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 thirty (30) years imprisonment. Being aggrieved, he filed an appeal challenging his conviction and sentence.
2. In the petition of appeal and amended grounds of appeal, he raised the following main grounds: The appellant challenged the totality of the prosecution's evidence against which he was convicted; 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 itself 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.
 - (4) 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 EAO (name withheld) testified after voir dire examination that she was born on March 1, 2007. She told the court that on 10th January 2021, at around 7:50 pm, she was outside using the washroom when she encountered Baba Joy, the appellant herein. She became frightened and tried to flee but was cornered. He covered her mouth to silence her and took her to his house.
8. In his house, EAO recalled seeing a bed, TV, and utensils. She stated that he pushed her onto a chair and forcibly removed her clothes, including her tights and panty, despite her efforts to resist. He then overpowered her and engaged in inappropriate acts with her. She stated that the appellant had sex with her and at the time, she was on her monthly period.
9. Afterwards, the complainant dressed and noted that her aunt, J, was looking for her. Once the appellant released her, she left and was later taken to Nairobi Women's Hospital. She mentioned that the appellant had two children, J and K, who were not in the house at the time.
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 she was consistent and steadfast in her testimony. In addition, her evidence which was subjected to cross-examination remained consistent throughout. The appellant was well-known to the complainant whom she recognised. She could not have possibly pointed fingers at the wrong person for the act. I therefore hold that the appellant was properly identified.
11. To corroborate the evidence of the complainant, the complainant's mother, PW1, testified that on the day in question, her daughter returned 15 minutes after washing the dishes and collapsed, having soiled herself. Upon regaining consciousness, she revealed that the appellant had assaulted her and threatened to stab her if she told anyone. She was taken to hospital, and the incident was reported to the police. Neighbours arrested the appellant shortly afterwards.
12. PW4, Dr. John Njuguna, testified on behalf of his colleague, Diana Kerubo, who had examined the complainant but had since left the institution. He stated that the complainant was brought to the facility on 10th January 2021, reporting an alleged defilement. Upon examination, the complainant had perineal lacerations on the outer genitalia, tenderness, blood stains in the vaginal area, a torn hymen, and a tear at the posterior vaginal opening. The conclusion was that there had been penetration. He produced the P3 and PRC forms as evidence. It is my finding that the ingredient of penetration was adequately proved.



13. In his defence, the appellant denied committing the offence, asserting that he was a neighbour of the complainant and her mother at the time. He claimed that a dispute was the reason the charges against him had been fabricated. He maintained that he had lived in the area for two years without any incidents and consistently upheld his innocence.
14. 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.
15. On the age of PW1, the trial court considered the evidence of PW1 the complainant's mother, and the medical evidence (P3 form, PRC form, and medical laboratory results) which all indicated that the complainant was born on 1st March 2007. The evidence on age was not disputed. My opinion is guided by the decision the Ugandan Court of Appeal in the case of *Francis Omuroni v Uganda*, Criminal Appeal No. 2 of 2000 where it was held thus:

“ In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense...”
16. In the instant case, the birth certificate of the complainant was not produced. The medical evidence on record informed the court that the complainant was born on 1st March 2007, in addition to the mother's testimony. This is sufficient evidence as proof of age. She was therefore 13 years old at the time of the incident and a child within the law.
17. 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.
18. On sentence, the appellant was sentenced to serve thirty (30) years imprisonment. During sentencing, the court considered the pre-sentence report, the appellant's mitigation, the time spent in custody, and that he was a first offender. The court sentenced the appellant accordingly.
19. The *Sexual Offences Act*, provides for a mandatory minimum sentence of twenty (20) years imprisonment. Considering the principles of sentencing, including proportionality, rehabilitation, and the need to protect the public, I find that placing the sentence imposed was excessive under the circumstances.
20. For the above reasons, I hereby set aside the sentence of thirty (30) years imprisonment on the charge of defilement and substitute it with a sentence of twenty (20) years imprisonment. The sentence shall run from 28th November 2023, the date of the appellant's conviction before the trial court.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED THIS 8TH DAY OF OCTOBER 2024

D. KAVEDZA

JUDGE

In the presence of:

Ms. Wambua for the Appellant



Maroro for the Respondent
Achode Court Assistant.

