



**Ndung'u v Republic (Criminal Appeal E003 of 2022)
[2023] KEHC 17813 (KLR) (18 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 17813 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL E003 OF 2022
LM NJUGUNA, J
JANUARY 18, 2023**

BETWEEN

FRANCIS KIMOLO NDUNG'U APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant herein filed a petition of appeal on 27.01.2022 and wherein he has challenged the conviction and sentence by the trial court in the Principal Magistrate's Court at Siakago (Sexual Offence Case No. 31 of 2020, in which he was convicted of the offence of defilement contrary to section 8(1) (4) of the Sexual Offences Act No. 3 of 2006.
2. The particulars of the offence were that on 15.07.2020 in Mbeere South sub-county in Embu County, intentionally and unlawfully committed an act which caused his genital organ namely penis to penetrate the genital organ namely vagina of AM, a girl child aged 10 years. He also faced an alternative count of indecent act with a child contrary to section 11 of the Sexual Offences Act No. 3 of 2006.
3. The appellant was tried and thereafter convicted of the offence of defilement contrary to section 8(1) (4) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve life imprisonment.
4. It is that conviction and sentence that necessitated the instant appeal wherein the appellant raised the grounds of appeal as enumerated on the face of the petition of appeal.
5. At the hearing of the appeal, the court directed that parties file their written submissions and wherein both parties failed to comply with the said order.
6. Having considered the petition herein and the evidence before the trial court, the issue for determination is whether the appellant has made a case for this court to interfere with the conviction and sentence imposed by the trial court.



7. The duty of this court while exercising its appellate jurisdiction was set out by the Court of Appeal in *Okeno v Republic* [1972] E.A. 32 and re-stated in *Kiilu and another v R* (2005) 1 KLR 174 where it was held that the evidence as a whole is to be exposed to a fresh and exhaustive examination by the court and thereby weigh conflicting evidence and thereafter draw its own conclusions. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. Further, the court should be alive to the principle that a finding of fact made by the trial court shall not be interfered with unless it is based on no evidence or on a misapprehension of the evidence or that the trial court acted on the wrong principles [See *Gunga Baya & another v Republic* [2015] eKLR].
8. It must be appreciated that under section 107(1) of the *Evidence Act*, the burden of proof is placed on the prosecution to establish every element in a criminal charge beyond reasonable doubt. This was well buttressed in the principle in the cases of *Woolmington v DPP* 1935 AC 462 and *Miller v Minister of Pensions* 2 ALL 372-273.
9. In the case before the trial court, the appellant was charged with the offence of defilement contrary to section 8(1) (4) of the *Sexual Offences Act* No. 3 of 2006. Section 8(1) of the *Sexual Offences Act* provides that “a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.” As it was correctly held in *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013,

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”
10. The question which needs to be answered is whether the above elements were proved to the required standards?
11. It is not in dispute that the complainant at the time of the commission of the offence, was eleven years old as the same could be determined from the evidence produced in the trial court (Birth Certificate); and further, from the testimony of the complainant, PW3 who is the mother of the complainant and PW5 who investigated the matter.
12. In the case of *Edwin Nyambaso Onsongo v Republic*(2002) eKLR, in which the court cited the case of *Mwolongo Chichoro Mwanyembe v Republic*, Mombasa Criminal Appeal No. 24 of 2015 (UR) the Court of Appeal held that:

....the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents, guardian or medical evidence among other forms of proof.....
13. As such, I am satisfied that the complainant was a minor which satisfies the legal requirement.
14. In regards to whether there was penetration, section 2 of the *Sexual Offences Act* defines penetration to mean the ‘partial’ or complete insertion of the genital organs of a person into the genital organs of another.
15. In this case, the complainant testified how the appellant defiled her. That he inserted his thing for urinating in her thing for urinating and that the act took some few minutes; she testified that the appellant thereafter gave her Kshs. 50.00. Further, PW4, also confirmed that indeed the complainant had been penetrated in that, the hymen was absent. She testified that there were no bruises, no lacerations nor discharge. It was PW4’s evidence that the contents in the PRC were similar to those



in the P3 and reiterated that the complainant was sexually assaulted. She produced the PRC and P3 Forms and Treatment Notes as P. Exh. 1-3. Therefore, penetration was not only proved by the oral evidence by the prosecution witnesses as already mentioned, the same was corroborated by the medical examination report.

16. The complainant clearly identified the appellant as the person responsible for defiling her in that, the appellant was her neighbour. PW3 testified that at times, she used to leave the children with him. In the circumstances therefore, I find that identification was favourable. The complainant narrated how the appellant called her after she was done with watering the plants and on going to where the appellant was, the appellant told her that she wanted her to be his wife; he asked her to remove her clothes and lie down and thereafter lay on her and then defiled her. In my view, the time spent before the alleged defilement took place was sufficient for the complainant to see and identify the appellant; that notwithstanding, the appellant herein was a person well known to the complainant and her family in that he was a neighbour, as such this was a case of recognition and not identification. In the case of *Anjononi & Others v Republic* [1989] KLR the court held;

Recognition is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another.

17. The appellant contended that his defence was never considered. A perusal of the record informs me that the trial magistrate in her judgment considered the defence by the appellant in its totality and in the end, she was satisfied that the prosecution proved its case beyond any reasonable doubt. The court noted the demeanor of the complainant and formed the view that she was telling the truth; further, the trial court noted that it was convinced that the appellant herein committed the offence and even if there was a grudge between the two families as alleged by the appellant, the complainant did not have a grudge against the appellant and that explains why when the appellant called her, she simply obliged. As such, the appellant cannot be heard to say that this case was motivated by the alleged grudge that existed between them and therefore, judgement was pronounced based on all the facts and evidence presented before the trial court.
18. On the ground that the evidence adduced by the prosecution witnesses was contradictory thus leading to miscarriage of justice; I rely on the case of *John Mutua Musyoki v Republic*, (2017) Criminal Appeal No. 11 of 2016 where the court was of the view that it must consider such contradictions to determine if they go to the root of the case. In the case of *Joseph Maina Mwangi v Republic* (2000) eKLR, the court considered this issue and held that:

“in any trial, there are bound to be discrepancies. An appellate court in considering these discrepancies must be guided by the wording of section 382 of the *Criminal Procedure Code* whether such discrepancies are such as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence”.

19. In effect, the court is under duty to consider if indeed such inconsistencies, if at all, are material to affect the conviction. In the instant case, having perused the record, I find no evidence to impeach credibility of any of the prosecution witnesses. As such, I find that the ground of appeal is unsupported by any evidence. [See *Joseph Maina Mwangi v Republic* (2000) eKLR]. Therefore, it is my view that the said ground is of no relevance in the obtaining circumstances.



20. The appellant did submit that the sentence meted by the trial court was unlawful for the reason that the same was indefinite. The legal position on sentencing was stated succinctly by the Court of Appeal for East Africa in the case of *Ogola s/o Owoura v Reginum* (1954) 21 270 as follows: -

“The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in *James v R.*, (1950) 18 E.A.C.A 147:

“It is evident that the Judge has acted upon some wrong principle or overlooked some material factor.”

To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: *R v Shershewky*, (1912) C.C.A. 28 T.L.R. 364.”

21. In the instant case, the sentence under section 8(1) (4) of the *Sexual Offences Act* states that:

- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed as defilement
- (4) 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.

22. From the record herein, the complainant was aged eleven years and as such, the right section that the charge herein ought to have been brought ought to be section 8(1) as read with (2). But in reference to Second Schedule of the SOA, the same stipulates that:

Where a person is charged with rape and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under one of the sections of the *Sexual Offences Act*, he may be convicted of that offence although he was not charged with it.”

23. In my view, the sentence imposed despite being viewed as harsh according to the appellant, was within the law and within the discretionary powers of the court. This court cannot interfere with the exercise of discretion by the trial court as the appellant did not justify the interference. He did not prove that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle.

24. In the end, this court has subjected the evidence adduced before the trial court to a fresh scrutiny and in honest belief, it is not persuaded that the appellant’s conviction and sentence was unsafe. It is for that reason that I dismiss his appeal and uphold the determination by the trial court.

25. It is so ordered.

Delivered, dated and signed at Embu this 18th day of January, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent

