



**Oluoch v Republic (Criminal Appeal E047 of 2020)  
[2023] KEHC 104 (KLR) (Crim) (18 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 104 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL  
CRIMINAL APPEAL E047 OF 2020**

**JM BWONWONG'A, J**

**JANUARY 18, 2023**

**BETWEEN**

**WALTER OWINO OLUOCH ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence imposed by Hon. E. Boke, S.P.M, on 29th January 2020 in Kibera Sexual Offence Case No. 54 of 2018 Republic vs Walter Owino Oluoch)*

**JUDGMENT**

1. Although the prosecution had charged the appellant with defilement, the appellant was convicted for the offence of rape contrary to section 3 (3) of the [Sexual Offences Act](#) No 3 of 2006. He was sentenced to serve ten (10) years imprisonment.
2. Being dissatisfied with the conviction and sentence, he filed a petition of appeal raising 8 grounds. He also filed amended grounds of appeal together with his written submissions.
3. The main grounds raised are as follows. In a coalesced form the appellant has in grounds 1, 2, and 3 challenged the totality of the prosecution's evidence as insufficient to warrant a conviction. In ground 4 the appellant argued that his defense was rejected with no cogent reasons, which is in contravention of section 169 (2) of the [Criminal Procedure Code](#) (Cap 75) Laws of Kenya. In ground 5 the appellant has contended that the trial court failed to frame the points for determination and reasons for reaching the decision, which is in contravention of section 169 (1) of the [Criminal Procedure Code](#) (Cap 75) Laws of Kenya. In grounds 6 and 7 the appellant has challenged the sentence as being in contravention of section 333 (2) of the [Criminal Procedure Code](#) (Cap 75) Laws of Kenya and in contravention of the sentencing policy.



4. In response to the appeal, the respondent filed grounds of opposition dated October 25, 2022. The grounds raised are that the appeal lacks merit, is misconceived and is unsubstantiated. The appeal is an abuse of the court process. The appellant has not demonstrated special or unusual circumstances to warrant his appeal to be allowed.
5. As this is the appellant's first appeal, the role of this appellate court is well settled. It was held in the case of *Okeno vs Republic [1972] EA 32* and further in the Court of Appeal case of *Mark Oruri Mose vs R [2013] e-KLR* that this court is duty-bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.
6. PA (name withheld) (PW 1) testified that in December 2017 her mother travelled upcountry and left her with her step-father and her sibling in their residence in Nairobi. One day the appellant, who is her stepfather went to their home at night and found them asleep. He ate and went to sleep in their single room house. The appellant slept on the bed while the complainant and her siblings slept on a mattress which was on the floor.
7. In the middle of the night, the complainant woke up and found the appellant on top of her pulling off her skirt. He threatened her not to tell anyone or he would chase her away. On that day he had sex with her. He continued having sex with her until January 2018 when her mother came back. Due to the threats made by the appellant, she did not disclose to her mother what had transpired while she was away. On May 15, 2018, she opened up to her guidance and counseling teacher what had happened to her. The incident was also reported to the school director.
8. The complainant was taken to Nairobi Women's Hospital for tests and the incident reported at Muthangari Police Station. The appellant was arrested and the complainant was taken to a children's home.
9. BM (PW 2) testified that she is a teacher at [Particulars Withheld] Education Centre. She told the court that in May 2018, she discovered that the complainant was withdrawn and sad. Her breasts were also enlarged. After a consultative meeting, the teachers decided to take all pupils of class 7 to the hospital for pregnancy tests. The complainant was found to be about 4 months pregnant. She proceeded to inform the findings to the school directors. On talking to the complainant, she informed her that her stepfather had been defiling her during the December holiday. She also told her of the threats made to her. She proceeded to take the complainant to Nairobi Women's Hospital and reported the incident to the police station.
10. AMO (PW 3) testified that he is a director at [Particulars Withheld] Education Centre. He narrated that in May 2018, PW 2 told her that one of her pupils was withdrawn. After consultations, he decided that all class 7 pupils undergo pregnancy tests. The complainant was found to be pregnant. BM (PW 2) talked to her and she confessed that her stepfather had been having sex with her.
11. The complainant was taken to the hospital and the incident was reported at Muthangari Police Station. He also told the court that he did not know the appellant at the time of the incident.
12. Dr John Njuguna (PW 4) of Nairobi Women's Hospital gave evidence on behalf of his colleague Beldon, who was away on training. It was his evidence that the complainant had been examined at their facility on June 26, 2018 on a case of alleged defilement by a person known to her. She had been brought in the company of her teachers. Upon examination, the complainant was found to be pregnant. The other tests conducted were found to be negative. He produced the post rape care form, GBV form, and the P3 form which confirmed that the complainant was examined and found to be pregnant.



13. No xxxx PC Ruth Nanjala (PW 5) the investigating officer told the court that the complainant was brought to Muthangari Police station by PW 2 and PW 3 on June 27, 2018. She interviewed the complainant who narrated to her how the appellant had sex with her during the December 2017 holidays. She also told her about the threats she had made to her. She conducted her investigations and summoned the complainant's mother to the station. However, she failed to come to the station. She proceeded to the complainant's home and arrested the appellant.
14. She testified that at the station, the complainant's mother did not want anything to do with the complainant and sought the release of her husband, the appellant. The complainant was taken to the Children's court which placed the child in a children's home. She took the complainant for age assessment which indicated that the complainant was over the age of 18 years. She also told the court that she visited the Children's Home in February to inquire whether the complainant had delivered, but she was informed that she was not pregnant.
15. After the close of the prosecution's case, the trial court found the appellant had a case to answer and he was put on his defence. In his defence he gave sworn evidence and he did not call any witnesses. In his defence, he denied defiling or threatening the complainant. He admitted that indeed in December 2017, the complainant's mother left the complainant and her siblings in his care while she was away.

### **Analysis and determination**

16. From the record, although the appellant was charged with the offence of defilement, he was convicted of the offence of rape after finding that the complainant was above the age of 18 years.
17. I find that the trial court erred in law in convicting the appellant on a charge of rape, when he was not charged with it. Furthermore, the offence of rape is not a minor and cognate offence in relation to the offence of defilement. Therefore, the provisions of section 179 of the *Criminal Procedure Code* (Cap 75) Laws of Kenya which authorise a conviction to be entered for a minor and cognate offence are inapplicable in this case.
18. In the premises, the appellant's appeal succeeds with the result that the conviction and sentence are hereby set aside.
19. The only issue that falls for consideration is whether I should order for a re-trial. I find that the appellant has been in both pre-trial remand custody and in prison for over three years and six months.
20. In the circumstances, I find that the ends of justice have been met. I therefore decline to order for a re-trial of the appellant.
21. The appellant is to be set free unless he is held on other lawful warrants.

**Judgement signed, dated and delivered in open court at Nairobi this 18<sup>th</sup> day of January 2023.**

**J M BWONWONG'A**

**JUDGE**

**In the presence of-**

Mr. Kinyua: Court Assistant

The appellant in person

Mr. Kiragu for the Respondent

