



**GKN v Republic (Criminal Appeal E004 of 2022)
[2023] KEHC 902 (KLR) (10 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 902 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CRIMINAL APPEAL E004 OF 2022
AN ONGERI, J
FEBRUARY 10, 2023**

BETWEEN

GKN APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the conviction and sentence by Hon. B.R.
Kipyegon (P.M) in Kericho S.O No. 29 of 2020 delivered on 15/2/2022)*

JUDGMENT

1. The appellant was convicted with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* (SOA) No 3 of 2006 and he was sentenced to 20 years imprisonment.
2. The particulars of the charge were that on March 22, 2020 within Kericho county the appellant intentionally and unlawfully caused his penis to penetrate the vagina of SC,a girl aged 13 years old.
3. The prosecution evidence in summary was that the appellant on the material day grabbed the complainant's hand, led her into the house and undressed her and defiled her. The appellant who was married to the complainant's mother had disagreed with her. PW2 GK also a minor and biological brother to the complainant said the appellant kept touching the complainant.
4. PW3 FC, the mother of the complainant said she had left the children with the appellant after domestic differences. She said the children told her about the incident using a neighbor's phone.
5. PW4 Kenneth Laboso a clinical officer who examined the complainant said her labia walls were reddened. He did not see blood or spermatozoa.
6. The appellant in his defence said he did not do anything wrong in this case and he had nothing to say. The trial court found him guilty as charged and convicted him and sentenced him to 20 years imprisonment.



7. The appellant has appealed to this court on the following grounds: -
 - i. That the learned trial magistrate erred in law and fact by not observing that due process of the law was not followed and that section 211 of *Criminal Procedure Code* was violated.
 - ii. That the learned trial magistrate erred in law and fact by failing to observe that the prosecution case was out of domestic problem and the sentence of 20 years jail was too excessive and circumstance of the prosecution case did not qualify for such sentence.
8. The parties filed written submissions as follows:-

The appellant submitted that due process was not followed and the prosecution case did not meet the threshold required by the law. It was submitted further that the trial court failed to explain the substance of the charge to the appellant at the close of evidence in support of the charge in violation of section 211(1) of the *Criminal Procedure Code*.
9. The appellant submitted that the said error and omission occasioned a failure of justice as the trial court failed to advise the appellant to file his submission and that the said predicament could not be cured by section 382 of the *Criminal Procedure Code*.
10. It was submitted further that the prosecution case came after a domestic problem occurred and therefore PW3 framed the charges against the appellant since the appellant is the complainant step father and at no time had PW3 raised such allegations.
11. The appellant submitted that the sentence meted upon him was too excessive and urged the court to consider the sentencing policy. He further submitted that he was a first offender who had a family that depended on him and that he had learnt the painful part of life during the period of incarceration hence he should be released from custody.
12. The respondent reiterated that the elements and/or ingredients of the offence of defilement under section 8(1) as read with section 8(3) of the *Sexual Offences Act* were proven without any contradiction as the victim was 13 years old therefore a child within the meaning of *Children's Act* as was proved by the birth certificate, that there was penetration as the complainant narrated how the appellant dragged her inside the house, undressed her and proceeded to defile her, the evidence that was corroborated by PW2 who was present during the incident and further corroborated by PW 4 a clinical officer who observed that there were sexual activities which had taken place.
13. The prosecution submitted further that there was overwhelming evidence that the appellant was the perpetrator as he was married to the mother of PW1, though he was not the biological father.
14. It was submitted by the respondent that the prosecution case was water tight and the appellant's defence was nothing more than a mere denial and the court was urged to find that the appellant's appeal lacked merits, therefore it should be dismissed and conviction and sentence upheld.
15. This being a first appeal, the duty of the 1st appellate court is to re-evaluating the evidence adduced before the trial court and to arrive at its own conclusion whether or not to support the findings of the trial court while bearing in mind that the trial court had the opportunity to observe the witnesses.
16. The Court of Appeal in *Solomon Mwangi Kinyua v Republic* (2006) eKLR, stated the duty of the first appellate court as follows: - "We reiterate that it is, indeed, the duty of the first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusion in deciding whether the judgment of the trial court should be upheld."



17. In *Gabriel Kamau Njoroge v Republic* (1987) eKLR, the court of appeal stated as follows:- “As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect.”
18. The issue for determination are as follows
 - i. Whether the prosecution proved the offence of defilement to the required standard.
 - ii. Whether section 211 was complied with.
 - iii. Whether the sentence was excessive.
19. On the issue as to whether the prosecution proved the offence of defilement, there are three elements the prosecution has to prove as follows;
 - i. Penetration
 - ii. Identity of the appellant
 - iii. The age of the complainant
20. On the issue of penetration, the *Sexual Offences Act*, section 2 (1) defines penetration as follows: - “the partial or complete insertion of the genital organs of a person into the genital organs of another person.”
21. The Court of Appeal in *Mark Oiruri Mose v Republic* (2013) eKLR, stated as follows regarding what constitutes penetration: - “In any event the offence is against penetration of a minor and penetration does not necessarily end in release of sperms into the victim. Many times, the attacker does not fully complete sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl’s organ.”
22. The court in *Benjamin Liburu Matwi v Republic* (2015) eKLR, stated as follows: - “It is significant to point out that penetration need not be complete for it to constitute the offence of defilement. According to section 2 of the Act, partial penetration would also suffice to establish the offence of defilement.”
23. I find that there was penetration. The law does not require that penetration should be complete.
24. On the issue of identification, I find that the complainant knew the appellant as her father. The appellant was the husband of the complainant’s mother and not the biological father of the complainant.
25. I find that the identification was proper. PW2 the complainant’s biological brother also identified the appellant and he said he witnessed the appellant touching the complainant inappropriately.
26. On the issue of age, the birth certificate of the complainant was produced. She was born on February 20, 2007 and therefore on the date of the incident on March 22, 2020 she was 13 years and one month.



27. The definition of child is the one assigned in the *Children Act* – any human being aged under 18 years. Section 2 of the *Children Act* defines a child as “an individual who has not attained the age of eighteen years.”
28. On the issue as to whether section 211 was complied with, although the record did not state, at page 11 of the proceedings the court placed the accused person on his defence and recorded the options available to the accused person.
29. On the issue as to whether the sentence was appropriate, I find that the same is lawful and deserved considering that the appellant was married to the complainant’s mother at the time of the incident.
30. I find that the conviction herein is secure and the sentence lawful.
31. I dismiss the appeal for lack of merit.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 10TH DAY OF FEBRUARY, 2023.

A. N. ONGERI

JUDGE

