



**Hezekiah & 2 others v Republic & 2 others (Criminal Appeal
E056 of 2021) [2023] KEHC 688 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 688 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL E056 OF 2021
JWW MONG'ARE, J
FEBRUARY 9, 2023**

BETWEEN

SOLOMON MBAYA HEZEKIAH 1ST APPELLANT

SOLOMON MBAYA HEZEKIAH 2ND APPELLANT

SOLOMON MBAYA HEZEKIAH 3RD APPELLANT

AND

REPUBLIC 1ST RESPONDENT

REPUBLIC 2ND RESPONDENT

REPUBLIC 3RD RESPONDENT

*(Being an appeal from the conviction and sentence of Hon. R. Odenyo in Eldoret
Chief Magistrate's Court Case No. 228 of 2018 delivered on 18th August, 2021)*

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on the 2nd day of October, 2018 at [Particulars Withheld] area in Likuyani Sub County within Kakamega County, he caused his genital organ (penis) to penetrate the genital organ (vagina) of SM, a child aged 6 years.
2. The appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on the 2nd day of October, 2018 at [Particulars Withheld] area in Likuyani Sub County within Kakamega County, he unlawfully caused his genital organ (penis) to come into contact with the genital organ (vagina) of SM, a child aged 6 years.



3. The appellant pleaded not guilty and the matter proceeded to full trial. Upon considering the testimony of the witnesses and the evidence adduced in court, the trial court found the appellant guilty of the main count and sentenced him to 30 years imprisonment.
4. Being aggrieved with the conviction and sentence, the appellant instituted this appeal vide a petition of appeal filed on August 24, 2021. The appeal is premised on the following grounds;
 - 1) That (I) am aggrieved the trial court erred in law and in fact as it failed to hold that the charge sheet was fatally defective.
 - 2) That the trial court erred in law and in fact as it failed to observe that the witness evidence was inconsistent and uncorroborated.
 - 3) That (I) am aggrieved the trial court erred in law and facts as it failed to hold that the evidence of identification and recognition was not conclusive.
 - 4) That, the learned trial magistrate erred in law and facts by shifting the burden of proof from the prosecution backyard to the appellant when the evidence failed to link him to the offence.
 - 5) That other grounds will be raised during the hearing.

The parties filed submissions on the appeal.

Appellant's Case

5. The appellant submitted that the charge sheet was defective as the prosecution produced two separate charge sheets in order to prove the age of the complainant. He pointed out that the two charge sheets had different O.B numbers and court file numbers. Further, that the address and the names of the complainant differed as well. The appellant contended that the names of the witnesses in the charge sheet were different and the inconsistencies showed that the prosecution implicated him, infringing him of his rights under article 50 of the Constitution.
6. The appellant stated that the evidence of the prosecution was inconsistent and conflicting. He highlighted that both CPL Dorcas Kimuge and CPL Dancun Kimuge claimed to be the investigating officers. Further, that PW5 claimed to be a clinical officer but she had no work number and as such, the evidence they gave was inadmissible. He urged the court to allow the appeal.

Respondent's Case

7. Learned counsel for the respondent submitted that the Charge Sheet was not defective as it met all the requirements of a charge sheet under the law. Further, that all the elements of the offence of defilement were proved. The age was determined by production of a birth certificate and the complainant testified after a *voire dire* examination to determine the truthfulness of the complainant was conducted. Counsel further submitted that the prosecution tendered Medical evidence to prove the element of penetration and that the identification of the appellant was by recognition and due to the time the incident took place, there was nothing to impair visibility. The respondent urged the court to dismiss the appeal for lack of merit.

Analysis And Determination

8. It is the duty of this court as a first appellate court is to re-examine the evidence (facts and exhibits) presented before the trial court and re-evaluate the same in order to determine whether the trial court



erred in law and fact in the extent raised in the petition of appeal. (See *Okeno v Republic* [1972] EA 32), *Kiilu & another v Republic* [2005] 1 KLR 174) and *David Njuguna Wairimu v Republic* [2010] eKLR).

9. Upon considering the appeal and the submissions of the parties, the following issues arise for determination;
 - 1) Whether the charge sheet was defective
 - 2) Whether the prosecution proved its case to the required standard

Whether the charge sheet was defective

10. Section 134 of the [Criminal Procedure Code](#) provides;

Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

11. In the matter of [Isaac Omambia v Republic](#), [1995] eKLR The court in has reinforced the law as contained under section 134 of the [Criminal Procedure Code](#).
12. From the court record I note on examination of the same the presence of two charge sheets, both dated October 18, 2018. A reading of either charge sheet reveals the statement of the offence and the nature of the offence the appellant was charged with. The appellant was able to understand the nature of the offence and also conduct his defence to the same. To my mind I find that the purported errors the appellant pointed out did not in any way meet the threshold for a charge sheet to be considered defective and neither did they impair the appellant from understanding the nature of offence for which he was charged.

Whether the prosecution proved its case to the required standard

13. Section 8 of the [Sexual Offences Act](#) defines defilement as follows;

- (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.

14. The elements necessary to prove the offence of defilement are;PenetrationAgeIdentification
15. Medical evidence was produced by PW5, the clinical officer. He produced the P3 form which corroborated the evidence of the complainant and confirmed there was penetration. I note that the appellant contended that the clinical officer did not have a work number. To my mind I am not aware of a requirement of a medical personnel to provide a work number in order to testify. The appellant being present in court is however at liberty to examine the witness on his qualifications and if not satisfied raise his objection before the trial court. This, it appears, was not done. I find that since there was no requirement for a work number to be provided, it follows therefore that the evidence produced by the medical officer was of probative value to the case.



16. To prove the age of the complainant the prosecution produced the birth certificate. The complainant was put through a voire dire examination to determine her ability to tell the truth and the court was satisfied that she was indeed a truthful witness and was able to explain what had transpired.
17. Further, on the element of identification of the appellant, Identification of the appellant was by way of recognition. I am persuaded that all the three elements of the offence of defilement were proved to the required standard. I am therefore persuaded that the conviction is proper and I shall not disturb the same.
18. The Appeal before me is challenging both conviction and sentence. However, I note that the appellant did not submit on the sentence. On conviction, the law has set a minimum life sentence for the offence of defilement for a child below the age of 11 but in this case the trial court sentenced the appellant to 30 years imprisonment. Having satisfied myself that from evaluation of the evidence on record that the charges preferred against the appellant were proper and in accordance with the law, I find no reason to disturb the sentence as it is commensurate to the offence committed. This court therefore holds that the Appeal lacks merit and is hereby dismissed. The appellant will serve the term as set out by the trial court.

DATED, DELIVERED AND SIGNED AT ELDORET ON THIS 9TH DAY OF FEBRUARY 2023

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J.W.W.MONGARE

JUDGE

Judgment delivered virtually in the presence of;

1. Appellant present
2. Ms okok –Prosecution Counsel
- 3.Loyanae - Court Assistant**

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J.W.W.MONGARE

JUDGE

