



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kefa v Republic (Criminal Appeal E014 of 2022)  
[2023] KEHC 522 (KLR) (2 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 522 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL E014 OF 2022  
TW CHERERE, J  
FEBRUARY 2, 2023**

**BETWEEN**

**ELIAS KEFA ALIAS KAAI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An Appeal from conviction and sentence in Githongo Criminal Case  
S. O No. 36 of 2019 by Hon.S. Ndegwa (SPM) on 31st January, 2022)*

**JUDGMENT**

1. Elias Kefa alias Kaai (appellant) was charged with defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No 3 of 2006 (the Act). appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No 3 of 2006. The offences were allegedly committed October 19, 2019 against BN a child aged 9 years.
2. Complainant stated she was 10 years old. She that on the material day, Appellant who was a distant neighbour went to their home twice and inquired if their father was around and when they said he wasn't, Appellant went away. That in the night as she was sleeping on the same bed with her brother M, she was defiled. That when she screamed, her brother woke up and the perpetrator ran out of the house but fell outside the door and she recognized him as the Appellant because there was security lighting outside. Complainant's brother a minor aged 13 years who was with Complainant on the material night state that stated he was sleeping with Complainant who is his sister when he heard her screaming. That he woke up to see a man running out of the house and he fell outside the door and he was able to recognize him because he was known to him and he had that day come to their house about 07.00 pm and confirmed that their father was not at home. He reported the incident to his uncle LG who finding the complainant in pain called the chief who reported the matter to police and Appellant was arrested and complainant was taken to hospital. Complainant's father returned home the day after the incident.



3. Complainant was examined by Dr Adan on October 30, 2019 and was found with a tear of the vagina and hymen was torn as shown on the P3 form PEXH. 6.
4. Appellant in his sworn defence conceded he passed by Complainant's parents' house on the material date and after being informed their father was away went away. He denied that he went back to that house in the night or defiling the Complainant.
5. After considering both the Prosecution and defence cases, the learned trial magistrate found the Prosecution case proved and on January 31, 2022 convicted and sentenced Appellant to serve life imprisonment
6. Dissatisfied with both the conviction and sentence, Appellant lodged the instant Appeal and raised 4 grounds which I have summarized into three grounds:
  1. Identification of the perpetrator was not foolproof
  2. The sentence was manifestly harsh and excessive
  3. Defence was not given due consideration
7. This being a first appeal, the court is expected to analyze and evaluated afresh all the evidence adduced before the lower court and draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See *Okeno v Republic* [1972] EA 32, *Pandya v Republic* [1957] EA 336 and *Kiilu & another v Republic* [2005]1 KLR 174.
8. In considering whether the Prosecution case was proved beyond any reasonable doubt, I will be guided by the elements constituting the offence of defilement which are proof of penetration, the age of the minor and the identity of the assailant (See *CWK v Republic* [2015] eKLR), the evidence on record and the grounds of appeal.
9. It is trite that the age of a minor is a critical component of a defilement charge and that it is an element which must be proved by the prosecution beyond reasonable doubt. (See *Kaingu Kasomo v Republic* Criminal Appeal No 504 of 2010).
10. Proof of the age of a victim of defilement is crucial because the prescribed sentence is dependent on the age of victim. (See *Hadson Ali Mwachongo v Republic* Criminal Appeal No 65 of 2015 [2016] eKLR & *Alfayo Gombe Okello v Republic* Cr App No 203 of 2009[2010] eKLR.
11. Complainant was born on July 11, 2010 as shown on the certificate of birth and the trial magistrate's finding that she was 11 years at the material time was well founded.
12. Upon examination, Complainant was found with was found a tear of the vagina and hymen was torn as shown on the P3 form PEXH. 6 and the learned trial magistrate's determination that defilement was proved was equally well founded.
13. Concerning identification of the perpetrator, it is trite that visual identification in criminal cases can cause miscarriage of justice and should be carefully tested. The court in *Wamunga v Republic* (1989) KLR 424 at 426 had this to say:

“Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”



14. In the case of *R v Turnbull*, (1976) 3 All ER 551 Lord Widgery CJ observed as follows on identification:

“ the quality of identification evidence is critical; if the quality is good and remains good at the close of the defence case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger”.

15. The difference in approach between identification and recognition was expressed thus by Madan, JA in *Anjononi & others v The Republic* [1980] KLR;

“ .....This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant 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 other.”

16. The Court of Appeal in the case of *Joseph Muchangi Nyaga & another v Republic* [2013] eKLR stated that before acting on evidence of visual recognition, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him subsequently.

17. Whereas the trial magistrate appreciated the offence was committed at night, she failed to make inquiries as to the intensity of such light, the location of the source of light in relation to the Appellant and time taken by the witnesses to observe the Appellant so as to be able to identify him.

18. In the case of *Daxwell v Uganda* [1978] it was held:-

A conviction cannot stand in the evidence of a witness who had a fleeting glance of the suspect.

19. Accused denied the offence. Since the evidence of his identification cannot be said to have been free from error, Appellant ought to have been given the benefit of doubt. Mativo, J (as he then was) in *Elizabeth Waitiegeni Gatimu v Republic* [2015] eKLR stated as follows:

“ The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him .....”

20. From the foregoing analysis, I find and hold that the conviction and sentence imposed on Appellant were unsafe. Accordingly, the conviction is quashed and sentence set aside. Unless otherwise lawfully held, it is hereby ordered that Appellant shall be set at liberty forthwith.

**DELIVERED AT MERU THIS 2<sup>ND</sup> DAY OF FEBRUARY 2023.**

**WAMAE. T. W. CHERERE**

**JUDGE**

**Appearances**

**Court Assistant - Kinoti**

Appellant - Present

For the State - Ms. Kitoto (PPC)

