



**Amatsuka v Republic (Criminal Appeal 64 of 2021)
[2023] KEHC 1806 (KLR) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1806 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL 64 OF 2021
JWW MONG'ARE, J
MARCH 9, 2023**

BETWEEN

FRANCIS JUMA AMATSUKA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence of Hon. D Milimu
in Eldoret MCSO 152 of 2017 delivered on 17th September 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 diverse dates between 1st February, 2017 and 30th February, 2017 in Eldoret East Sub County within Uasin Gishu County intentionally and unlawfully caused his genital organ (penis) to penetrate into the genital organ (vagina) of Z.I, a girl child aged 16 years.
2. In the alternative, he was charged with the offence 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 diverse dates between 1st February, 2017 and 30th February, 2017 in Eldoret East Sub County within Uasin Gishu County intentionally and unlawfully caused his genital organ (penis) to come into contact with the genital organ (vagina) of Z.I, a girl child aged 16 years.
3. The Appellant pleaded not guilty and the matter proceeded to full hearing. Upon consideration of the testimonies of the witnesses and the evidence adduced in court, the trial magistrate found that all the elements of the offence of defilement were proved and sentenced the Appellant to 15 years imprisonment.



4. Being aggrieved by the sentence and the conviction, the Appellant instituted the present appeal vide a petition of appeal dated 27th September, 2021. The appeal is premised on the following grounds;
 1. That the Learned Trial Magistrate erred in law and fact in holding that the prosecution had proved its case beyond reasonable doubt when in fact it had not.
 2. That the Learned Trial Magistrate erred in law and fact in failing to independently analyze and/or evaluate the evidence on record hence an erroneous determination.
 3. That the Learned Trial Magistrate erred in law and fact in convicting and sentencing the Appellant without taking into account the weight of the defence evidence adduced.
 4. That the Learned Trial Magistrate erred in failing to appreciate and find that the charge preferred against the Appellant had not been established and proved as required by law.
 5. That the Learned Trial Magistrate erred in shifting the burden of proof onto the Appellant and in convicting the Appellant based on speculative circumstantial evidence.
 6. That the Learned Trial Magistrate erred in law and fact in convicting and sentencing the Appellant when there was no proof of defilement.
 7. That the Learned Trial Magistrate erred in law and fact in taking into account and/or consideration extraneous matters which were not in the charge sheet and did not form part of evidence to sentence the Appellant.
 8. That the Learned Trial Magistrate erred in law and fact in convicting and sentencing the Appellant without sufficient evidence and in rejecting the Appellant's defence.
 9. That the Learned Trial Magistrate erred in law and fact in imposing a very harsh sentence without considering the Appellant's mitigation and the circumstance of the case.
 10. That the Learned Trial Magistrate erred in law and fact in failing to hold that the prosecution had not or did not link the appellant to the alleged crime.
 11. That the Learned Trial Magistrate erred in law and facts in not acquitting the Appellant of the charge against him for want of proof beyond reasonable doubt.
5. The parties filed submissions on the appeal.

Appellant's Case

6. Learned counsel for the Appellant submitted that the evidence of the prosecution was full of contradictions. He contended that the age of the complainant was not ascertained and the evidence on her age was choreographed. He argued that the clinical card was not authentic as it lacked a stamp and that the complainant was not sent for age assessment. Learned counsel stated that the trial magistrate failed by failing to find that there were material discrepancies as to the dates of the defilement. He urged that the discrepancies in remembering the dates of the defilement should have been exercised in favour of the Appellant.
7. Learned counsel submitted that the DNA tests were conducted but the prosecution failed to point out the conflicting dates on the report. Further, he stated that PW1 and 2 never stated that the Appellant defiled her severally. Counsel highlighted the fact that PW1 did not disclose that she was engaged in sex prior to 2017 and it is very probable that she was defiled by some other person(s).



8. Learned counsel for the Appellant submitted that the trial court failed to consider the demeanour of the complainant as an adult and to invoke the provisions of section 8(5) of the [Sexual offences Act](#). He stated that the trial court erred by convicting the Appellant under section 8(1) and 8(2) which provide stiffer sentences than section 8(4) and as such, the Appellant was prejudiced. He urged the court to allow the appeal.

Respondent's Case

9. The Respondent opposed the appeal. Counsel contended that all the elements of the offence were proved to the required standard. The complainant stated her age as 16 years old in court, which was corroborated by her clinical card which shows that she was born on 8th October, 2000. PW2, her father, reiterated the evidence on age. He urged that the complainant testified that the accused, after undressing her, removed his penis and inserted it into her vagina. The complainant realized she was pregnant and after a DNA test on the child, the accused was confirmed as the child's father. There was evidence of penetration from the injuries that were observed and the same was corroborated by the pregnancy, indicative that this was not an isolated incident but a regular occurrence. Identification of the Appellant was by recognition. It was his case that the offence was proved beyond reasonable doubt.
10. On the sentence, counsel submitted that the same was within the law. He urged the court to uphold the conviction and sentence.

Analysis And Determination

11. This being an appellate court, it has a duty as was set out in *Okeno V. Republic* [1972] EA 32 where the court stated as follows:

“The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala -V- R. (1975) EA 57). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

12. Upon considering the petition of appeal and the submissions of the parties, the following issues emerge for determination;
 - a. Whether the prosecution proved its case beyond reasonable doubt
 - b. Whether the sentence was harsh/excessive
 - c. Whether the trial court erred in failing to consider the appellant's defence under section 8(5) of the [Sexual Offences Act](#)

Whether the trial court erred in failing to consider the appellant's defence under section 8(5) of the [Sexual Offences Act](#)

13. Section 8(5) of the [Sexual Offences Act](#) states;
It is a defence to a charge under this section if-
 - a. it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and



(b) the accused reasonably believed that the child was over the age of eighteen years.

The appellant was a neighbour to the deceased for 7 years and therefore he cannot claim that his neighbour, who he saw grow up, deceived him into believing she was 2 years older than her actual age. He did not prove the same. This ground fails in its entirety.

14. Section 8(1) as read with section 8(2) of the *Sexual Offences Act* states;

(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.

15. The ingredients of the offence of defilement were set out in the case of *George Opondo Olunga v Republic* [2016] eKLR, as; identification or recognition of the offender, penetration and the age of the victim.

Whether the age of the complainant was proved

16. The complainant testified that at the time of the defilement she was 16 years. Further proof of the age of the complainant was by production of a clinical health card by PW5, the investigating officer. In addition, Pw2, being her father of the complainant corroborated the evidence that indeed she was a minor. I am therefore satisfied that this element of the offence was proved to the required standard.

Whether penetration was proved

17. PW3, Dr. Dalmas Kibet Kipsang, produced the medical evidence in the matter. He testified that he conducted a DNA test on samples from the complainant, accused person and the child of the complainant and the paternity results revealed that the appellant is the father to the complainant's child. It was his testimony that the pregnancy occurred earlier than the alleged date of defilement as she was already pregnant three months prior to the said date. In the examination report, she established that the complainant had lacerations in her genitalia, hymeneal tears and redness. To my mind and upon evaluating this evidence, it is my considered view that penetration was proved, first by the pregnancy and the DNA results that the child was indeed that of the Appellant and hence a correlation to the element of penetration. I agree with the findings of the trial court that penetration was proved.

Identification

18. The appellant was identified as being a neighbour to the complainants and the witnesses also knew him. It is clear from the testimonies and the evidence that the appellant was identified by recognition. As such, this ingredient was satisfied.

19. In the premises, I agree with the findings of the trial court that the offence of defilement was proved beyond reasonable doubt and therefore, I find no reason to interfere with the conviction.

Whether the sentence was harsh/excessive

20. The grounds of appeal do not disclose upon which grounds the appellant appeals against the sentence. The prescribed sentence for the offence of defilement under section 8(3) of the *Sexual Offences act* is a mandatory minimum of twenty years imprisonment. The trial court sentenced the appellant to fifteen years imprisonment which was lenient in the circumstances. In the premises I find no reason to interfere with the sentence. The appeal is dismissed and the sentence and conviction upheld.



DELIVERED, DATED AND SIGNED ON THIS 9TH DAY OF MARCH 2023

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J.W.W.MONGARE

JUDGE

Delivered virtually in the presence of

1. Appellant-absent
2. Mr. Rop holding brief for Ms. Okok for the Respondent
3. Brian Kimathi – court assistant

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J.W.W.MONGARE

JUDGE

