



**Chubenzi v Republic (Criminal Appeal E049 of 2022)
[2023] KEHC 2413 (KLR) (22 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2413 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E049 OF 2022
REA OUGO, J
MARCH 22, 2023**

BETWEEN

STEPHEN MUNIALO CHUBENZI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against conviction and sentence of Hon. P.Y. Kulecho
(S.R.M) in Webuye SPMCR No. E004 of 2020 on 19th May 2022)*

JUDGMENT

1. The appellant, Stephen Munialo Chubenzi, was charged and convicted of the offence of defilement contrary to section 8(1) as read with Section 8(4) of the *Sexual Offences Act, 2006*. The particulars of the offence were that on May 5, 2018 in Bungoma East sub-county within Bungoma County intentionally and unlawfully caused his penis to penetrate the vagina of SNJ a child aged 8 years. He was also charged with an alternative count of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.
2. The Appellant pleaded not guilty to both the main and the alternative charge. A full hearing was conducted in which the prosecution called five (5) witnesses.
3. It is the duty of the first Appellate court to carefully examine and analyze afresh the evidence presented from the trial court and draw its own conclusion bearing in mind that it never had the opportunity to hear the witnesses and observe their demeanour. (See *Okeno v Republic* [1972] EA 32).
4. SJ (PW1) testified that she was heading to her grandmother's house to play when the appellant called her. The appellant asked if he could send her to the shop, but first she had to accompany him to the house to get money. The appellant entered his house through the door, went to the window opened it and lifted Pw1 allowing her to access the house through the window. Pw1 fell on to the bed from the window. The appellant closed the window and the bedroom door. He removed Pw1's dress and panty



then proceeded to strip naked. She testified that the appellant was on top of her and did bad manners to her. She explained that he took his organ for urinating and placed it into the hole she uses to urinate. She did not make any noise as the appellant covered her mouth and nose with his hands. Pw1 told the subordinate court that she felt pain. When the appellant finished he dressed up, opened the door to check if there was anyone then asked her to leave. Pw1 dressed up and exited the house from the door. She went home and found her mother but did not immediately tell her what had transpired. However, when her mother began washing her she told him that the appellant had defiled her.

5. PW1's mother, CJ (PW2), testified that in 2018 the complainant was 8 years old. On the material day she recalled that PW1 came back home and was so dirty. She noticed that the child was unhappy and in a lousy mood. She also had difficulties in walking. Before she could bathe her, PW1 told her that the appellant did bad manners to her. PW1 narrated to her how the appellant took her to his house and had sex with her. She noticed a white discharge on her panties and checked her private parts. She went to Masikhu police station and reported the incident. She took PW1 to Webuye District Hospital for treatment.
6. PJS (PW3) testified that he is the complainant's father and works as a driver. On the material day he received a phone call from PW2 asking him to urgently go home. PW3 went home, found people in his home and talked to PW1 who told her that the appellant had raped her. They reported the incident. He went to the appellant's home to confront him but he denied defiling PW1. He then fled his home from 2018 till 2020.
7. The medical doctor, Dr Edward Vilembwa (PW5) testified that he worked with Erick Cheteka who filled the P3 form and that he recognized his handwriting. He testified that the child was examined and it was noted that the labia minora was bruised, the hymen broken and she had a yellow discharge. PW1 was given antibiotics to treat the infection. On cross examination he testified that the infection was as a result of a likely penetration and that defilement leads to broken hymen.
8. The investigating officer, Noxxxxx PC Peninah Mwangi (PW4) testified that on May 6, 2018 PW2 and PW3 reported the incident of defilement and that the appellant was well known to the child. She recorded statements and issued them with a P3 form. The doctor who examined the child confirmed that she had been defiled. PW4 made plans to arrest the appellant but was informed that he had fled. She visited his house and ascertained that the appellant was the occupant and also saw the window mentioned by the complainant. On October 4, 2020 she received information that the appellant was back and she had him arrested and charged with the offence of defilement.
9. When placed on his defence the appellant denied committing the offence. He testified that he works in a slaughter house and in 2020 Pw2 threatened her with unspecified action. Later his child died a sudden death.
10. The trial magistrate in its judgment found that the age of the complainant was proved and that there was sufficient evidence of penetration. The court also found that the accused person was sufficiently identified as the person who committed the offence.
11. The appellant dissatisfied with the finding of the court has preferred this instant appeal raising the following grounds:
 1. That the learned trial magistrate erred in law and in fact by considering inconsistent and uncorroborated evidence.
 2. That the circumstances surrounding the crime scene were not properly distinguished by the prosecution.



3. That the sentence imposed was too harsh given that the appellant is a first time offender.
 4. That the doctor who is a key witness denied if the complainant was really defiled casting doubts on the actual truth about (sic) the defilement was established.
 5. That the learned trial magistrate grossly erred in law and in fact by applying wrong principal by convicting the appellant on the weakness of his defence thus rejecting his alibi defence that sufficiently created a reasonable amount of doubt to the strength of the prosecution side.
12. The appellant in his submissions supporting his appeal argued that there were no blood stains found at the complainant's genitalia and that it was not possible for her to play for 5 hours before disclosing what had happened. Although PW2 testified that the child had difficulties in walking, the appellant submits that the complainant did not lead such evidence. PW2 and PW3 were contradictory to the extent that PW3 was informed of the incident one day after the incident as opposed to the day of the incident. He submitted that the evidence point to co-existing disputes and that the sentence meted was too harsh.
13. The respondent in their submissions submitted that the age of the child was established as 8 years of age. The appellant was a person well known to Pw1 and was positively identified. The evidence of the doctor established that there was penetration. They also submitted that there were no glaring contradictions as asserted by the appellant. They supported the trial court's sentence arguing that there is need for deterrent given the complainant's age. He took advantage that Pw1 trusted him by virtue of him being her grandfather and therefore the penalty imposed was commensurate to the sentence.

Analysis And Determination

14. The ingredients of an offence of defilement are; identification or recognition of the offender, penetration and the age of the victim (see *George Opondo Olunga v Republic* [2016] eKLR). There was sufficient evidence to prove the age of the complainant. The age of the complainant may be proved through the birth certificate or evidence from a parent/guardian regarding her age. It may also be determined by medical evidence (see *Joseph Kiet Seet v Republic* (2014) eKLR). PW2 testified that the child was 8 years at the time of the offence. This was confirmed by Pexh1 which indicted the Pw1 was born on January 1, 2010.
15. In order to establish penetration, the prosecution relied on the complainant's testimony which was supported by the findings of the medical report. PW5 testified that the complainant had bruises on her genitalia. The P3 form noted that the complainant had abrasions in both labia and that there was tenderness on palpation. The hymen was broken. PW2 also testified that the child had difficulties in walking after the incident. The evidence of PW1 was also clear and remained unshaken during cross examination on the aspect of penetration. PW1 testified as follows:

“...I was lying on the bed facing up. He then came right on top of me as he faced me on the ground. Munialo started doing bad manners on me using his thing that he uses to urinate. He placed it into the hole that I use to urinate. I did not make noise or cry as Munialo closed my mouth and nose using his hand.”



16. The complaint following the incident narrated to her mother, PW2, they way the appellant defiled her. After her father PW3 came home she told him that it was the appellant, 'guka', who had defiled her. The prosecution therefore established that the complainant had been defiled.
17. In addition to age and penetration, the prosecution was required to prove that it was the appellant who was responsible. They were required to lead evidence pointing to the appellant as the person responsible for the offence. Pw1 testified that the incident took place on May 5, 2018 at 10:00 a.m. in broad day light. Pw1 testified that the appellant is her grandfather ('guka') and that she has known him all her life. This was corroborated by the evidence of PW2 and Pw3. Pw2 testified that the appellant was her father in law. Pw3 testified that the appellant is his uncle, that is, brother to his father. He told the court that Pw1 refers to him as 'guka'. The appellant was therefore positively identified as the perpetrator.
18. The appellant in his appeal also challenged the sequence of events from the testimony of PW1, Pw2 and PW3. Pw1 testified that she was defiled on May 5, 2018. Pw4 testified that it was reported on May 6, 2018. Her investigation revealed that PW2 on the said May 6, 2018 realized that PW1 had difficulties in walking. As she bathed her she noticed signs of pain around her buttocks. She asked Pw1 what happened and she told her what transpired. PW3 testified that Pw2 called him on May 6, 2018 to go home. When he learnt of the defilement of Pw1 they went to the police station. Pw4 testified that he gave them a P3 form. The same was filled on May 7, 2018 and on the same date the complainant received treatment at Webuye District Hospital. There are therefore no contradictions on the prosecution evidence as to the chronology of events.
19. The evidence of the prosecution proves beyond reasonable doubt that the appellant was responsible for defiling PW1. The appellant did not present any evidence that could counter the evidence put forward by the prosecution. Further, I find that the action of the appellant after the incident, i.e. fleeing his home for 2 years, is compatible with guilt.
20. I now turn to consider whether the sentence meted was excessive in the circumstances as submitted by the appellant. The appellant and the complainant are closely related by blood. He was expected to care and support his grandchild and keep her from harm's way. The complainant trusted him because he was her 'guka'. She did not hesitate to go with him to his home to get the money out of the respect she had for the appellant. The evidence is clear that the granddaughter bestowed trust upon her grandfather, but he took advantage of it and committed the heinous act of defiling her. This betrayal by a close relative will likely result in severe physical, mental, and psychological trauma for the young victim. I have taken into account that PW1 was only 8 years at the time of the offence and that the appellant while defiling her put his hand on her mouth and nose to stop her from screaming for help. I have further considered that the appellant was a first offender and has family to take care of. Taking into account the circumstance of the offence as well as the relationship the appellant had with the complainant and the manner in which the crime was committed, I am satisfied that the sentence by the trial court cannot be faulted or described as excessive.
21. In the end, I find that the appeal herein lacks merit and the same is dismissed.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 22ND DAY OF MARCH 2023

R.E. OUGO

JUDGE

In the presence of:

Appellant in person



Ayekha For the Respondent

Wilkister: C/A

