



REPUBLIC OF KENYA



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**Nderitu v Republic (Criminal Appeal E113 of 2019)
[2023] KEHC 2474 (KLR) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2474 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL E113 OF 2019
JM CHIGITI, J
MARCH 9, 2023**

BETWEEN

BERNARD MBUGUA MWANGI NDERITU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment the honourable I. F. Koome in Limuru
SMCC criminal case no. 654 of 2017 delivered on 18th March 2019)*

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to section 8(1) (2) of the *Sexual Offences Act* no. 3 of 2006. The particulars were that on 17th September 2017, in Limuru Sub- County within Kiambu County intentionally caused his penis to penetrate the anus of BN, a child aged 11 years.
2. The Appellant was arraigned in court for plea taking on 9th October 2017, the charges and particulars were read out to him, he pleaded not guilty. The matter proceeded for trial and the prosecution called a total of 5 (five) witnesses to prove its case.
3. The trial court, in its judgment, convicted the Appellant and sentenced him to life imprisonment.
4. Aggrieved by the trial court's judgment, the Appellant on both conviction and sentence, filed the Memorandum of Appeal on 5th December 2019, citing the following grounds;
 - a. The learned trial magistrate erred both in law and in fact by convicting and sentencing the appellant on charges that were not proved to the required standard.



- b. The learned trial magistrate erred in law by lowering the standard of proof in criminal cases thus convicting and sentencing the appellant on flimsy grounds and on basis of uncorroborated and doubtful one witness testimony.
- c. The learned trial magistrate erred both in law and in fact by shifting the burden of proof from the prosecution to the accused against well settled principles of criminal law.
- d. The learned trial magistrate erred both in law and in fact by convicting and sentencing the appellant when the evidence adduced could not sustain a conviction.
- e. The learned trial magistrate erred both in law and in facts in failing to find that the prosecution did not prove their case beyond any reasonable doubt.
- f. The learned trial magistrate erred both in law and in fact in failing to find that there were reasonable doubts in the evidence tendered by the prosecution which doubts ought to have been resolved in favour of the Appellant.
- g. The learned trial magistrate erred both in law and in fact in giving superficial or no consideration to the evidence tendered by the appellant while giving orders and disproportionate weight and significance to the evidence tendered by the prosecution contrary to the law.
- h. The learned trial magistrate erred both in law and in fact in imposing a harsh sentence and ignoring the mitigation tendered by the Appellant.
- i. The learned trial magistrate erred both in law and in fact imposing a harsh sentence and ignoring the probation officer's report.

It was proposed to ask the court to;

Allow the appeal and quash the conviction and sentence. Disturb the trial court judgment and find the period served as sufficient. Any other reliefs deemed fit by this honourable court.

5. The Appeal was heard by way of written submissions. Only the Respondent filed written submissions.

Respondent's Submissions

6. The Respondent opposed the Appeal in its entirety, it was submitted that the prosecution proved the ingredients of age, penetration, and identification of the Appellant to the required standard. Counsel submitted that documentary evidence was adduced to prove the age of the complainant (as 11 years 8 months), that the issue of penetration was proved by the P3 form from Ndeiya Health Centre. The P3 corroborated the evidence of the Complainant.
7. The Appellant was properly identified as he was well known to the complainant. Counsel urged the court to dismiss the Appeal and uphold the trial court's conviction and sentence.

Analysis and determination:

8. During the *voir dire*, PW1, who was the complainant, was able to tell why he was in court, he understood oath taking, he told the court that those who lie go to hell, he understood that the reason why he was in court was to tell the truth without fear. The trial court observed that he was articulate, and understood what oath taking is, and spoke with confidence. The court opined that he will take oath and be cross examined.



9. PW1 told the court that he lives in [Particulars Withheld] and schools at [Particulars Withheld] primary in grade 6, his birthday is on 8th January 2006, he adduced a copy of his birth certificate. He told the court on 17th September, 2017 he went to Mbugua together with his friend KA at noon. PW1 told the court that the Appellant offered them water to drink which was bitter, and he passed out. When waking up he did not have his trouser on, his friend was awake, but he did not ask him if he had slept. He felt pain in the anus, and he went home at around 2.10 p.m. According to PW1 he did not tell his mother on the fateful day, he failed to attend school the next day and run away from home and hide in a nearby building. The complainant told the court he told his class teacher and later the Deputy Head teacher who advised him to be taken to Tigoni Hospital for treatment.
10. According to PW1, the Appellant caused the pain in his anus. PW1 told the court that the Appellant was his neighbor and he had known the Appellant for a very long time, he visited the Appellant at his home, but he had never eaten anything at the accused home.
11. PW2 ZNW told the court that his son (PW1) failed to attend school on 18th September 2017, and went into hiding; she went looking for him, but could not find him. She testified that PW1 told her of his ordeal with the Appellant. She took PW1 to hospital, but due to the doctor's strike he was treated the next day; and the doctor confirmed he had been sodomized and had wounds in his anus.
12. PW3 Pius Njenga, stated that he received an arrest note to arrest the Appellant on 5th October 2017, and that he proceeded to arrest the Appellant at Rironi. He interrogated the Appellant before the arrest, and confirmed that the Appellant knew the complainant.
13. PW4 Naomi Nderitu testified that she received the complainant at Tigoni Police station, when he came to report about offence. She filed the OB and referred the complainant to Tigoni hospital. Pw4 issued a warrant of arrest against the Appellant.
14. PW5 James Kabue testified he was the clinical officer based at Tigoni Hospital. He produced a P3 form filled by Angeline Thigia, a former colleague at the Facility, who examined the complainant and found wounds in his anus, the muscles were loose, but there was no bleeding. According, to her the complainant was defiled. The P3 form is dated 26th September 2017.
15. At the close of the prosecution case, the trial court found the Appellant had a case to answer; and he was put on his defence.

Defence oral evidence

16. DW1, Bernard Mbugua Mwangi gave an unsworn statement and stated that on 17th September 2017, he was at his home till 11 a.m., left and only came back at around 9.45pm. He denied being with the complainant on that day. He said he was later arrested on 5th October 2017, at the chief's office when he went to seek advice from the chief.

Determination

17. Section 8(1)(2) (3)(4) of the [Sexual Offences Act](#) provides as follows:

“ 8.

- (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.
 - (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
 - (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.
18. According to Section 2 of the [Sexual Offences Act](#), genital organ includes the whole or part of male or female genital organs, and for purposes of this Act includes the anus.
 19. In defilement cases, prove of age is a critical element. The complainant adduced a copy of his birth certificate, which confirms his age (the complainant) as 11 years. The complainant was born on 8th January 2006; at the time of commission of the offence the complainant was 11 years.
 20. In the case of *Kaingu Kasomo vs. Republic*, Criminal Appeal No. 504 of 2010, the Court of Appeal stated as follows:

“Age of the victim of sexual assault under the [Sexual Offences Act](#) is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.”
 21. The prosecution adduced the birth certificate of the minor which is proper prove. I thus find that the prosecution proved this element of age to the required standard.
 22. The other element that must be proved in defilement is penetration. Penetration is defined under Section 2 of the [Sexual Offences Act](#) as “the partial or complete insertion of the genital organ of a person into the genital organs of another person.”
 23. The complainant PW1 informed the trial court that together with his friend who visited the Appellant in his home, the Appellant offered him (the complainant) with his friend some water to drink, which water was very bitter, then the complainant blackout. The complainant on waking up, only had his inner wear and his trouser was down to the ankle. He felt pain in the anus, this information was corroborated by PW2 and PW5. PW5 adduced a copy of the P3 Form filed on 26th September 2017, which confirmed the Complainant had his anus penetrated (sodomized).
 24. I find the trial court did not error in finding that the prosecution had proved penetration.
 25. Next is the issue of identification. The complainant was said to have known the Appellant for a very long time. According to PW1, he visited the Appellant often in his house. They were friends. PW2 also confirmed that the Appellant was a friend to the complainant. According PW2 when the complainant went missing, she inquired from the Appellant if he had seen the complainant, as they were friends.



Disposition:

26. In my view the prosecution proved all the ingredients of defilement, in the circumstances therefore, I find the offence of defilement was proved beyond reasonable doubt.
27. The Court of Appeal case of *Bernard Kimani Gacheru vs. Republic* [2002] eKLR stated as follows:
- “It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”
28. The provision of Section 8 (2) is clear on the sentence to be meted on persons who defile children of eleven years or under. The Appellant has urged the court to take into account the time spent in custody as sufficient time served before the sentence.
29. From the above I do not find the trial court misapprehended the law in arriving at the verdict, I will therefore not disturb the trial courts finding.

Order:

30. I dismiss the Appeal and uphold the conviction by the trial court.

DELIVERED AT KIAMBU THIS 9TH DAY OF MARCH, 2023.

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JUSTICE CHIGITI, SC

JUDGE

In the Presence of;

