



**XE v Republic (Criminal Appeal 26 of 2019)  
[2023] KEHC 2664 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2664 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
CRIMINAL APPEAL 26 OF 2019  
HPG WAWERU, J  
MARCH 23, 2023**

**BETWEEN**

**XE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From original Conviction and Sentence in Nanyuki CM  
Sexual Offences Case No 45 of 2017– W J Gichimu, PM)*

**JUDGMENT**

1. The Appellant herein, XE, was convicted after trial of defilement contrary to section 8(1) & (2) of the [Sexual Offences Act, 2006](#) (the Act). Particulars of the offence were that on diverse dates between the months of January and March, 2017 in Nanyuki Township of Laikipia County, he intentionally and unlawfully caused his penis to penetrate the vagina of one EN, a child aged 6 years. On July 20, 2018, the appellant was sentenced to life imprisonment.
2. The Appellant was also convicted, (unlawfully!), of the alternative charge of committing an indecent act with a child contrary to section 11(1) of the same Act. That conviction, along with the sentence of ten (10) years imprisonment, must be set aside.
3. The Appellant has appealed against both conviction and sentence. His amended grounds of appeal challenge the conviction upon the following complaints -
  - i. That the *voire dire* examination that was done was improper for it failed to capture the purpose and intention of the oath.
  - ii. That penetration and identity of the perpetrator were not proved beyond reasonable doubt.
  - iii. That the learned magistrate failed to appreciate the fact that there existed a grudge between the appellant and the victim over strict discipline.



- iv. That the investigations were inconclusive and the prosecution evidence contradictory.
  - v. That the charge was not proved to the required standard.
  - vi. That the sentence was manifestly harsh and excessive.
4. The Appellant filed written submissions. The learned counsel for the Respondent in his oral submissions supports the conviction and the sentence in the main count. He submitted that all the ingredients of defilement were proved beyond reasonable doubt; and that the Appellant's allegation of fabrication of the case was an afterthought as the same was not raised during cross-examination of PW2. On the sentence, counsel argued that the sentence was lawful and mandatory.
  5. I have read through the record of the trial court in order to evaluate all the evidence placed there and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have borne in mind however, that I neither saw nor heard the witnesses myself, and I have given due allowance for that fact.
  6. On the issue of the *voire dire* examination of the complainant, the child (PW2) gave unsworn evidence after the court found that though she was intelligent, she did not understand the nature of the oath. This court therefore does not understand the Appellant's complaint in this regard. The complaint would have been germane had such a young child been permitted to testify under oath. The Appellant was accorded a chance to cross-examine the complainant.
  7. In a charge of defilement there are three main ingredients that the prosecution must prove beyond reasonable doubt. These are -
    - i. Age of the complainant.
    - i. Penetration.
    - ii. Identity of the perpetrator.The age of the complainant is not in dispute. She was a child well below the age of 18 years. Her birth certificate, Exhibit P5, shows that she was born on October 22, 2010. She was therefore 6 years and 2 months old at the time the offence was committed.
  8. Regarding penetration, the evidence on record was as follows. PW1, the mother of the complainant testified that on March 10, 2017, she woke up the complainant to prepare her to go to school and she noted that the child had worn her underpants inside out. When she inquired, the complainant said it was her father. The child then narrated to her that her father had been "defiling" her. The Appellant was PW1's husband and step-father to the complainant.
  9. PW1 further testified that she remembered that 4 months earlier the complainant had complained of pain while urinating and she had bought medicine for her. She then called the complainant's teacher and asked her to talk to the child to see whether she was telling the truth; the child told the teacher the same thing. She then picked her from school and took her to hospital. She further testified that she would leave for work at 5.00 pm and come back home at 11.00 pm and would leave the Appellant with the child as he normally reported to work at 8.30 pm.
  10. The complainant (PW2) testified that on the material date she was playing outside with her friend when her father, the Appellant, called her in. He directed her to accompany him to the bed where he removed her trouser and pant and removed his trouser as well. The Appellant then did "*tabia mbaya*" to her using his thing for urinating. When she told him that she was feeling pain, he smacked her on the thighs. She further testified that the Appellant had defiled her severally at [particulars withheld]



and at [particulars withheld] and would do so when her mother was at work. She said that when he was through, he would ask her to bring a bathing cloth with which he would wipe her and then smear jelly on her private parts. She did not report the matter to anyone as the Appellant threatened to beat her up if she did so. She informed her mother that morning when she found that she had worn her pant inside out.

11. The Appellant cross-examined the complainant at some length. She was not shaken at all in her testimony. She said that the Appellant had never locked her in the house so as to beat her or prevent her from playing with her friends, and that it was the Appellant who would lock her inside the house as he went to work. Her mother went to work before her father.
12. The clinical officer (PW3) who examined the complainant testified that he observed a yellowish foul-smelling discharge; that the external genitalia were otherwise normal though there was tenderness around the vagina; and that the hymen was broken. A urine analysis showed some infection. PW3 concluded that there was evidence of forceful penetration. He produced in evidence the P3 and PRC forms of the complainant as Exhibits P1 and P2 respectively. In cross-examination he testified that the discharge and tenderness of the vulva were indications of infection.
13. PW4 was the investigating officer who testified on what was reported to her by the witnesses.
14. The Appellant gave sworn evidence in his own defence. He denied the offence. He testified that in fact he always left home for work before his wife (PW1) and would leave her there with the child. He further testified that the charge was trumped up by PW1 because he refused to open up a business for her and chose instead to start building a house. He also testified about fleeing to Malaba in Western Kenya when there was a first attempt to arrest him, and how PW1 enticed him to come back home with a story of the child being defiled, leading to his arrest.
15. That then is the totality of the evidence placed before the trial court. The Appellant in his submissions first claimed that the term used by the complainant to describe the act of penetration, which were '*tabia mbaya*' were too vague to be construed to mean penile penetration. The complainant explained as follows before the trial court -

“Accused then removed his pair of trousers. The accused did '*tabia mbaya*' to me. He did it here (points to her private parts). He used his thing to do '*tabia mbaya*' to me. The thing is used by him to urinate.”

16. I do not find any fault in what the complainant told the trial court. Use of terms like '*tabia mbaya*' has been held to mean sexual intercourse when a child testifies in defilement cases. This was elaborated by the Court of Appeal in *Muganga Chilejo Saba v Republic* [2017] eKLR where the court stated -

“Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a court room. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms like, “*alinifanyia tabia mbaya*”, (IE V R, Kapenguria HC Cr Case No 11 of 2016), “he pricked me with a thorn from the front part of this body.”, (Samuel Mwangi Kinyati v R, Nanyuki HCCRA No 48 of 2015), “he used his thing for peeing”, (David Otieno Alex v R, Homa Bay HC Cr Ap No 44 of 2015), “he inserted his "*dudu*" into my "*mapaja*", (Jones Kaburu v R, Meru HC Cr Case No 196 of 2016), “he used his *munyunyu*”, (Thomas Alugha Ndegwa, Nbi HC Cr. Appeal No 116 of 2011), as apt descriptions of acts of defilement. We, however, need to remind trial courts that the use of certain words and phrases like “he defiled me”, which are sometimes attributed to child victims, are inappropriate, technical and unlikely to



be used by them in their testimony. See *A M M v R Voi* HC Cr App No 35 of 2014, *EMM V R Mombasa* HC Cr Case No 110 of 2015, among several others. Trial courts should record as nearly as possible what the child says happened to him or her.”

17. There was thus nothing wrong with the complainant using the term “tabia mbaya” to describe what was done to her. That description clearly discloses defilement.
18. The Appellant further submitted that penetration was not proved to the required standard and that he was convicted only upon the ground that the complainant’s hymen was broken. He relied on several cases to show that a broken hymen is not conclusive proof of penetration. As seen earlier, the clinical officer testified that on examination of the child there was a yellowish discharge, the hymen was broken and there was tenderness on the vulva. He attributed the tenderness to forceful penetration. A urine analysis revealed that there was an infection. These findings were captured in the P3 form as well. There was also the testimony of the child herself, which the trial court believed. The judgment of the trial court shows clearly that the conviction of the Appellant was not based only on the one fact of the broken hymen. There was other evidence.
19. I have carefully read the complainant’s testimony and, despite her tender age, she was able to explain in graphic detail the act that the Appellant subjected her to. Her evidence was clear and cogent and was not shaken when the Appellant cross-examined her. It was also corroborated by the evidence of the clinical officer who found various indications of penetrative sex.
20. On the identity of the perpetrator, the record revealed that the Appellant was not a stranger to the complainant. He was her step-father and was living in the same house with the complainant and her mother. The complainant did not mention anyone else but the Appellant. The Appellant contended that the charges were fabricated which is an afterthought for he did not raise this issue during the prosecution case.
21. The Appellant also submitted that there were material contradictions in the prosecution case. This court noted only minor contradictions that were not material. It is trite law that minor contradictions and inconsistencies will not affect the totality of the evidence. There were not such contradictions and inconsistencies as would make the conviction unsafe.
22. The Appellant’s sworn evidence did not establish any material fact that affected or displaced the strong evidence presented by the prosecution. Upon my own evaluation of the evidence placed before the trial court, I am satisfied that the Appellant was convicted upon good and sound evidence. His conviction is safe; there is no merit in the appeal against conviction.
23. As for the sentence, the same was indeed lawful and mandatory under section 8(1) & (2) of the *Sexual Offences Act*. However, following the declaration by the Supreme Court of Kenya in the now notorious case known as the *Muruatetu* Cases, that the mandatory nature of the death sentence in murder cases is unconstitutional for interfering with the courts’ discretion in sentencing, there is absolutely no reason why that ratio decidendi should not apply to all cases where there are mandatory sentences imposed by law. So, the courts retain their discretion in sentencing even where a mandatory sentence has been imposed by law.
24. The Appellant was sentenced to life imprisonment. He defiled a child aged six (6) years apparently on a number of occasions, a child who was his own stepdaughter. He certainly deserved very severe punishment. However, life imprisonment is, without doubt, manifestly harsh and excessive in the circumstances of this case, bearing in mind the age and antecedents of the Appellant. Everyone deserves a second chance. I will therefore set aside the sentence imposed and substitute therefor a definite term of imprisonment.



25. To summarize, the appeal against the conviction and sentence in respect to the alternative charge is allowed on the ground of illegality, the trial court having already convicted the Appellant on the main charge. That conviction and the sentence imposed for it are hereby set aside.
26. The appeal against conviction in the main count is hereby dismissed and the conviction affirmed. The appeal against sentence for that count is partially allowed by setting aside life imprisonment and substituting therefor imprisonment for twenty-five (25) years. As the Appellant appears to have been in custody throughout his trial, that sentence shall run from the date of his arraignment in court, September 12, 2017. It is so ordered.

**DATED AND SIGNED AT NANYUKI THIS 14<sup>TH</sup> DAY OF MARCH 2023**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT NANYUKI THIS 23<sup>RD</sup> DAY OF MARCH 2023**

