



**DOA v Republic (Criminal Appeal E029 of 2022)
[2023] KEHC 3018 (KLR) (4 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3018 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL E029 OF 2022
RE ABURILI, J
APRIL 4, 2023**

BETWEEN

DOA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence of Hon S. Mathenge S.R.M in original Bondo Principal Magistrates’ Court S.O Case No. E001 of 2022 delivered on 9/9/2022)

JUDGMENT

1. The appellant herein DOA was charged with the offence of defilement contrary to Section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on 28/12/2020, in Bondo Sub County within Siaya County, the appellant herein intentionally and unlawfully caused his penis to penetrate the vagina of MAD, a child aged 5 years.
2. The appellant also faced an alternative count of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, 2006, the particulars being that on the aforesaid date and time, he intentionally touched the vagina of MAD., a child aged 5 years.
3. The appellant denied the charges and the case proceeded to full trial. Sammy Luzuvi, a Clinical Officer from Bondo Sub-County Hospital testified as PW-1. He stated that the minor was presented to the facility on 31/12/2020 complaining of abdominal pain and pain during urination. On genital examination, she had tenderness on labia minora and redness on the vaginal opening. The hymen was broken with no vaginal discharge. The urine test showed presence of pus cells and the HIV status was positive. He stated that his findings were consistent with forced vaginal penetration.
4. PW-2 was SA, the victim’s mother who testified that she was home when she heard the victim tell M not to tell PW2 anything. Thereafter, M asked PW2 that she wanted to talk to PW2 from the main house whereupon they went to the Trading Centre and that is when M told PW2 that MAD had been



defiled by Mzee at Ja Yimbo's house. They reported to the village elder of what had happened and they proceeded to the house of Hannah, the appellant's mother and told her what the appellant herein had done to the complainant. That the said Hannah refuted the report so they waited for the appellant to return but he never returned. PW2 then confronted the victim who narrated to PW2 what had happened. She stated that the minor walked with her feet apart. She escorted the minor to Uyawu Sub County Hospital the following day.

5. PW-3 was the victim. She stated that she was herding goats when the appellant told her to meet him in the usual place behind the house of Nyar Imbo from where the appellant asked her to suck his genitalia (dudu). She stated that he then hurt her using the said dudu and that he applied saliva on her private parts where he inserted his dudu which came from his underwear and warned her not tell her mother. The victim reported the incident to Milly and informed Maureen what had happened. She stated that she was later taken to hospital where she was treated and given an injection.
6. The prosecution's case was then closed and the appellant was placed on his defence. His testimony on oath was that his brother had alleged that he had defiled his child after they disagreed after they had sold a parcel of land.
7. After reviewing the evidence, the trial magistrate found the appellant herein guilty of the offence as charged, convicted him and sentenced him to serve seventy (70) years imprisonment thus the instant appeal which is anchored on the following grounds:
 - a. That he pleaded not guilty to the charge.
 - b. That he was convicted after full trial.
 - c. That the potential witness who was supposed to support the minor's evidence did not testify.
 - d. That the medical officer did not specify whether the injury caused was as a result of penetration or something else.
 - e. That the case was a frame up due to long outstanding land dispute between himself and the complainant's father.
 - f. That in the year 2017, the complainant's father and his family demolished the appellant's house claiming he was not the legitimate child of his father.
 - g. That the court does look at the matter with a view of detecting any injustice meted out.
8. The appeal was canvassed by way of written submissions. Only the appellant filed his submissions.
9. On the element of age, the appellant submitted that the victim's exact age was not captured in that the charge sheet and witnesses' evidence indicates her age as 5 years while in reality her age was 6 years 2 months. That this element was not therefore proved to the required standard.
10. On medical evidence, the appellant submitted that since the victim was taken to hospital 3 days later, the credibility of the evidence was doubtful. That the clinician could not see blood stains and that he failed to state whether the penetration had been taking place severally due to absence of serious injuries coupled with the fact that the minor was in stable condition.
11. On inconsistencies, it was submitted that the appellant was convicted on the basis of the evidence of a single identifying witness (the minor) and that the trial court ought to have warned itself of the evidence before conviction. That the minor mixed up on whether it was M or M and the prosecution did not avail any of them to testify on what they saw or heard.



12. On the failure by the investigating officer to testify, it was submitted that the only remedy available was to acquit the appellant as was held in *Burunyi v Uganda* [1968] EACA 223.
13. On sentence, it was submitted that 70 years is a long time to serve where the issues are not clear and that a sentence which is excessive does not serve the interest of justice or society and therefore this court should set the appellant free.

Analysis and determination

14. This being a first appeal, I am guided by the principles laid out by the Court of Appeal in *Kiilu & Another v Republic* [2005]1 KLR 174, where it was stated that:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.”

15. To sustain a charge of defilement, the following ingredients have to be proved beyond reasonable doubt: age of the complainant, the act of penetration and the positive identity of the perpetrator.
16. On the issue of age, PW-2 produced an acknowledgement of birth notification which showed that the complainant was born on 29/10/2014, although there are some hand alterations on the year with overwriting over 2015 but the stamp on the said notification shows that the notification of acknowledgment of birth was issued on 30th October, 2014. The charge sheet on the other hand showed that the minor was aged 5 years and so was the P3 form report.
17. In this appeal, the appellant argued that the exact age of the minor was not proved because in his own calculation, the minor was 6 years 2 months.
18. It is true that a proper calculation of the age of the complainant from the notification of birth would yield 6 years and 2 months. The question then is whether in light of the slight variation, the minor’s age was not proved beyond reasonable doubt. It is trite law that age would be proved by the production of a birth certificate or medically by way of age assessment as well as other means such as baptismal card and or by way of observation by the trial Court.
19. In the Ugandan case of Ugandan Court of Appeal case of *Francis Omuroni v Uganda*, Criminal Appeal No. 2 of 2000 it was held that:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim’s parents or guardian and by observation and common sense...”
20. In *Fappyton Mutuku Ngui v Republic* [2012] eKLR Joel Ngugi J stated and I agree that:

“...that “conclusive” proof of age in cases under *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.”
21. In the instant case, I find that the acknowledgement of birth notification sufficiently proved the minor’s age and the indication of 5 years instead of 6 years 2 months was a mathematical error which



did not go to invalidate the finding by the court. The margin is small and falls within the ranges of Section 8(2) of the *Sexual Offences Act*.

22. This however does not mean that the court is not cognizant of the fact that age in a defilement case should be proved to the levels required of criminal cases. This was the finding of the Court of Appeal in *Hadson Ali Mwachongo v Republic* [2016] eKLR that:

“The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim. In *Alfayo Gombe Okello v Republic Cr. App. No. 203 of 2009 (Kisumu)*. This Court stated as follows;

In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1).”

23. In the circumstances, I find the minor’s age to have been proved beyond reasonable doubt.

24. The next limb of the charge is proof of penetration. The trial magistrate found that the element of penetration had been proved beyond reasonable doubt. The trial court record shows the evidence of the Clinical officer who found that the minor had tenderness on the labia minora and redness on the vaginal opening. His conclusion was consistent with forced vaginal penetration.

25. The minor’s evidence was that the appellant asked her to suck his thing (dudu) which came from his underwear. That the Mzee hurt her pointing to her vaginal area which she uses to urinate.

26. In *Dominic Kibet Mwareng v Republic* (2013) eKLR it was held that:

“The other ingredient in a charge of defilement is penetration by a particular assailant at a particular time...In cases of defilement, the Court will rely mainly on the evidence of the Complainant which must be corroborated by medical evidence.”

27. The minor used the word dudu in describing the appellant’s genitalia and the question is whether that description was sufficient to identify the appellant’s penis. The Court of Appeal in *Muganga Chilejo Saha v Republic* [2017] eKLR discussed the use of various terms used in description of genital organs and reviewed various cases where the terms had been used and held that:

“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 H.C 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 HC.CR.A. NO. 48 of 2015*), “he used his thing for peeing”, (*David Otieno Alex v R, Homa Bay H.C Cr Ap. No. 44 of 2015*), “he inserted his “dudu” into my “mapaja”, (*Jose Kaburu v R, Meru H.C Cr. Case No. 196 of 2016*), “he used his munyunyu”, (*Thomas Alugha Ndegwa, Nbi H.C. Cr. Appeal No. 116 of 2011*), as apt description of acts of defilement.”

28. In this case, I find the description by the minor of the ordeal consistent with the finding by the Court of Appeal in the above case and therefore inclined to find that the minor’s narration coupled with



- the medical evidence shows that the minor was defiled notwithstanding the fact that the minor was availed in hospital 3 days after the ordeal. The minor's narrative was cogent and not shaken on cross examination.
29. The last limb is that of identity of the perpetrator. The minor narrated how the appellant called her to meet him in the usual place behind Nyar Imbo's house from where he defiled her. She could identify him in the dock and even stated that the accused was named after her father. She said that she could see him when he is going to take a shower.
 30. PW-2 on her part stated that the appellant was her half-brother-in law. The appellant stated that the minor's father was his brother. The offence took place on 28/12/2020 before 6pm meaning the minor had the opportunity to see her defiler well as he spoke to her and took her to a place that she knew. Her vivid description of how the incident and her denial that she had been coached to say what she was telling the court shows that she could not have been mistaken in any way in recognizing her defiler who was her paternal uncle who was well known to the minor and I therefore find the issue of identity was proved to the required standard beyond reasonable doubt.
 31. The other issue raised by the appellant is that crucial witnesses were not called to testify in support of the minor's case. This is in reference to the person named Maureen who the minor allegedly confided in after the ordeal. I also note the Investigating officer did not testify. It is however important to note that Neither M nor M were eye witnesses to the incident and neither was the investigating officer. The minor is said to have simply confided in them and as a result, PW2 overheard the conversation then she inquired further and the minor upon being interrogated, she revealed what the appellant herein had done to her. The question is whether failure to call these persons as witnesses was fatal to the prosecution's case.
 32. This issue of whether the failure to call the two witnesses is fatal to the prosecution case. The courts have over the years held that whereas it is important to call the Investigation Officer or Arresting Officers, failure to call them is not fatal to the prosecution case but it depends on the circumstances of each case. In *Kiriungi v Republic* [2009] KLR 638, the court stated as follows:

“...the effect of failure to call police officers involved in a criminal trial, including the investigating officer, is not fatal to the prosecution unless the circumstances of each particular case so demonstrate. We have examined the circumstances of this case and we are satisfied that the evidence of the investigating officer and the arresting officer would not have been prejudicial to the prosecution's case as it was established beyond doubt that the appellant was involved in the crime with which he was charged.”
 33. In *Joseph Kiptum Keter v Republic* [2007] eKLR the Court of Appeal held that:

“... the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt.”
 34. Albeit the arresting officer and the investigating officer were not called to testify, upon considering the totality of the evidence adduced in this case, I find the testimonies of PW1,2 and P.W.3 to be believable that the appellant committed the offence. In my view, no adverse inference can be drawn from the prosecution's failure to call the arresting officer and/or the investigating officer. In fact, there is nothing helpful they would have informed the court that it was not informed by the few prosecution witnesses. (see the words of Wendo J in *Kenneth Kimngetich Soi v Republic* [2014] eKLR which I fully adopt.
 35. In the instant case, my finding is that there is no obligation on the prosecution to call all the witnesses named by the witnesses who testified as long as the witnesses called to testify go to establish the



ingredients of the charge facing the appellant. I find that what the other witnesses would have said is what they were told by the complainant and which information she relayed to her mother PW2 and the Clinician who attended to her, PW1. The witnesses who testified in this matter sufficiently proved the offence of defilement against the appellant and there is no gap left by the witnesses presented in the trial court for this court to make an adverse inference.

36. On the sentence imposed, the penalty for defilement provided for under Section 8(2) of the [Sexual Offences Act](#) which provides that:

“(2) (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.”

37. The appellant herein was sentenced to serve 70 years imprisonment while the penalty provided for under section 8(2) is life imprisonment. It is common ground that sentencing is within the trial court’s discretion as was stated by the Court of Appeal in *Bernard Kimani Gacheru v Republic* [2002] eKLR where it was stated that:

“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 states is shown to exist.”

38. In *Wanjema v Republic* [1971] EA 494 it was stated that:

“An appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on the wrong principle or the sentence is manifestly excessive in the circumstances of the case.”

39. The Judiciary Sentencing Policy Guidelines 2015 at page 15 provide the objectives of sentencing thus:

- “1. Retribution: To punish the offender for his/her criminal conduct in a just manner.
2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.
4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims’, communities’ and offenders’ needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender’s contribution towards meeting the victims’ needs.



5. Community protection: To protect the community by incapacitating the offender.
6. Denunciation: To communicate the community's condemnation of the criminal conduct.”

40. The appellant laments that the sentence is harsh though the issues were not clear and does not serve the interest of justice and society.
41. Going by the above legal authorities, I am alive to the fact that sentencing is in the discretion of the trial court and this court can only interfere under very exceptional circumstances.
42. The trial court after convicting the appellant herein accorded the appellant an opportunity to mitigate to which he pleaded for court's help and that he has a wife and children who depend on him. That his brother had faked the whole case.
43. I have considered the fact that the appellant is related to the minor and therefore exercises a father figure over her which he exploited by abusing the minor. I have equally considered the minor's age which is such a tender age and therefore she deserves protection from the immediate relatives and the law. There was no evidence that the appellant was framed for such a heinous offence against a very young child. The appellant had a wife and children. Did he stop to think before defiling his own brother's child? Did he use what he calls a land dispute to revenge against an innocent child who was even found to be HIV positive and although he was found to be HIV negative, it is possible that the child could have been born with the virus and through his defiling her, he was going to infect his wife. In my view, the sentence imposed on the appellant was commensurate with the offence committed.
44. Considering the penalty provided for by law which is life imprisonment, I am inclined to affirm the prison term sentence imposed on the appellant by the trial court as no exceptional circumstances exist to warrant the interference sought by the appellant.
45. For the foregoing reasons, I find no merit in this appeal which is hereby dismissed. The conviction and sentence is hereby upheld.
46. This file is hereby closed.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 4TH DAY OF APRIL, 2023

R.E. ABURILI

JUDGE

