



REPUBLIC OF KENYA



KENYA LAW
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**Bitamoi v Republic (Criminal Appeal 21 of 2021)
[2023] KEHC 4085 (KLR) (2 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 4085 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CRIMINAL APPEAL 21 OF 2021
RN NYAKUNDI, J
MAY 2, 2023**

BETWEEN

JOSPHAT EROT BITAMOI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgment of Hon. M. Muchiri in Lodwar law court Being an appeal from the judgment of Hon. M. Muchiri in Lodwar law court cr. SO. NO. 47a of 2018)

JUDGMENT

1. The Appellant was charged with the offence of Defilement contrary to section 8(3) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offences were that on the 28th Day of August 2018 at [Particulars Withheld] Location in Turkana South Sub-County within Turkana County, Josphat Erot Bitamoi intentionally and unlawfully caused his penis to penetrate the vagina of VSA a child aged 13 years.
2. Alternatively, 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 offences were that on the 28th Day of August 2018 at [Particulars Withheld] Location in Turkana South Sub-County within Turkana County, Josphat Erot Bitamoi intentionally and unlawfully caused his penis to penetrate the vagina of VSA. a child aged 13 years.
3. The Appellant was found guilty as charged, convicted and sentenced to serve 20 years imprisonment. He was aggrieved with both conviction and sentencing after which he timeously instituted the present appeal. The appeal is based on two grounds which are couched as follows:
 1. The trial Court erred in law and in fact by failing to find that the offence of defilement was not proved beyond reasonable doubt.



2. The Trial learned magistrate erred in law and fact by sentencing the appellant to serve 20 years in jail.
4. A review of the fact of the case as adduced in the trial court is as follows: PW1; VSA the complainant in this matter testified that she was 13 years of age when the alleged offence was committed. She stated that on the 28th of August, 2018 at around 1:00AM she was asleep in the house when the accused person went there and uncovered her then choked her and raped her. She also stated that at the time she was alone in the house and when she screamed no one went to her rescue and that the accused person had sexual intercourse with her for about an hour after which she went and told her auntie whereupon the matter was reported at Kainuk police station and afterwards went to the hospital where a P3 form was filled.
5. The minor gave evidence to the effect that she knew the accused person prior to this incident and emphasized that she had known him for several years and was able to identify him on the material night as the accused person had a torch with him which was on as at the time of the incident
6. PW2; PC George Amulabu Salleh, stated that on August 30, 2018 he was at Kainuk Police station and was ordered by the OCS Aaron Odhiambo to go arrest the accused person in the company of PW1 who had reported a case of defilement.
7. He further testified that they went together with his Colleague Gitau and they found the accused person at a pool table room. PW1 confirmed that he was the one and they arrested him and took him to the OCS after which the accused person was charged. He also testified that he had known the accused person prior to this incident.
8. PW3; Andrew Emuria, stated that he is a clinical officer at Lodwar County and Referral Hospital and that he was the one who filled the P3 form in respect of PW1 on August 31, 2018.
9. He testified that PW1 alleged to have been sexually assaulted by a person known to her as the perpetrator had sexual intercourse with her without a condom. On genital examination, PW3 stated that PW1 had bruises on her vagina and that her Hymen was perforated. The HIV test turned out negative and he concluded that from his examination that there was penetration of PW1. He also testified that PW1 was 13 years old and also relied on treatment notes from Kainuk Health center where PW1 had been given antibiotics and psychological counselling by Dr Otara.
10. He further testified that the age assessment was conducted by the dental department at the hospital and in particular it was done by Boaz Korir who concluded that PW1 was about 12 years.
11. PW4; PC Anthony Omito, stated that he is based at Kainuk Police Station and that he is the current investigating officer of this case after the initial investigating officer was transferred. He testified that on perusing the file, he established that PW1 was defiled on August 28, 2018.
12. He further testified that PW1 knew the accused person prior to this incident and was able to recognize him. He then produced PW1's age assessment report.
13. From the above prosecution evidence, the court found that the prosecution established a *prima facie* case and proceeded to put the Appellant on his defense. Further, the court complied with section 211 of the *Criminal Procedure Code*.
14. The defence case is based on a single witness, the Appellant. He denied having committed the offence. He testified that on the 11th of September 2014, he was at his home in Kainuk where a land dispute arose between him and his mother-in-law. He testified that he was at the pool table when two men



who identified themselves as policemen arrested him, took his fingerprints and gave him no reason for his arrest.

15. This being a first appeal, this court is obligated to consider the evidence afresh in order to reach its own independent conclusion. In doing so, I must bear in mind that, unlike the trial court, I did not have the opportunity of observing the demeanor of the witnesses as they testified.

Findings and Determination.

16. First and foremost on appeal this court draws its jurisdiction from the guidelines in the case of *Ruwala V R*(1957) EA – 570 where the court held;-

"On first appeal, a conviction or an acquittal by a judge or magistrate sitting without a jury, the appellant is entitled to have the appellate court's own consideration and views of the evidence as whole and its own decision thereon.

It has the duty to rehear the case and reconsider the material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgement appealed from but carefully weighing and considering it. when the question arises which witness is to be believed rather than another, and that question turn on manner and demeanor, the appellate court must be guided by the impression made on the judge or magistrate who saw the witnesses, but there may be other circumstances, quite apart from the manner and demeanor which may show whether a statement is credible or not which may warrant a court in differing from the judge or magistrate even on a question of fact turning on the credibility of witnesses which the appellate court had not seen."

17. I will adopt as clearly expressive of the proper approach to be taken by the appeals court, in dealing with issues out of the court below.
18. It is true that as the court evaluates the record and impugned judgement it will have to bear in mind whether, the doctrine of beyond reasonable doubt was properly conceptualized by the trial court for my purposes I reiterate the words of Whitman, *The Origins of Reasonable Doubt; Theological Roots of Criminal Trial*, (2008) at 53, 126-127 Dookeha (31) in which is observed as follows: -

In an age of strong Christian belief and adherence, it was understood that to convict an accused despite lingering doubts was a violation of the juror's oath, and that to convict an innocent man was a mortal sin that would result in damnation."¹⁷

19. This concept of doubt has been traced to Pope Gregory the Great who stated "(I) It is a serious and unseemly business to go giving certain judgement in doubtful cases.' This was picked up by lawyer-popes in the twelfth and thirteenth centuries, including Innocent III who state, "when there are doubts, one must choose the safer path," Ivo of Charters, in the late eleventh century explained "God was only judge who could always judge with certainty. For humans it was different. What humans confronted "incerta" uncertain allegation they could not condemn an accused person unless it was by "indiciis certis", evidence sufficient to create certainty. ¹⁸ Britton observed in the 13 century that. "if the jurors are in doubt the matter and no certain, the judgement out always in such case to be for the defendant."
20. It is also a principle in Blackstone's precept "that is better that ten guilty person escape, than that one innocent suffer" may find its roots in these considerations. What circumstances may amount to a finding of beyond reasonable doubt is not normally a matter of general application but it is individualized to the aspects of the facts before an independent tribunal or court. This question is the



primary framework which flows throughout the grounds of appeal by the various appellant pursuing their appeals for a second bite of the cherry.

21. In determining this appeal this court shall satisfy itself that the ingredients of the offence of defilement were proved as so required in law; beyond a reasonable doubt. I have carefully perused through the proceedings and the elaborate judgement of the trial court as well as the evidence on record before this court and the written submissions. The issues for determination in this appeal are couched as follow:
- i. Whether the prosecution proved its case to the desired threshold;
 - ii. Whether or not the sentence was excessive.

Elements of offence of defilement

22. The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the [Sexual Offences Act](#) which provides:

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- (1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

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- (4) “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.”

23. The specific elements of the offence defilement arising from Section 8 (1) of the [Sexual Offences Act](#) which the prosecution must prove beyond reasonable doubt are:

- 1) Age of the complainant;
- 2) Proof of penetration in accordance with section 2(1) of the [Sexual Offences Act](#); and
- 3) Positive identification of the assailant.

24. In the case of [Charles Wamukoya Karani Vs. Republic](#), Criminal Appeal No 72 of 2013 it was stated that:

The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

What does the evidence portend?

Age of the complainant

25. The age of the complainant is one of the critical ingredients of the offence of defilement which must be proved by the prosecution beyond a reasonable doubt. Under section 8(1) of the [Sexual Offences Act](#), a person is deemed to have committed defilement if he or she does an act which causes penetration with a child. Under Section 2 (1) of the [Sexual Offences Act](#), the definition of a child is the one assigned in the [Children Act](#). This entails any human being of less than eighteen (18) years. The onus of proving age resides with the prosecution.



26. The significance of proving the ingredient of age in defilement cases was clearly spelt out by Mwilu J (as she then was) in the case of *Hillary Nyongesa Vs Republic* (Eldoret Criminal Appeal No 123 of 2000) stated that:

"Age is such a critical aspect in Sexual Offences that it has to be conclusively proved....And this becomes more important because punishment (sentence) under the *Sexual Offences Act* is determined by the age of the victim."

27. A similar position was taken in *Kaingu Elias Kasomo Vs Republic*; Malindi Court of Appeal Criminal Case No 504 of 2010, the court emphasized on the importance of proving the age of the victim of defilement as the sentence imposed upon conviction depend on the victim's age.

28. Therefore, in a charge of defilement, the age of the victim is important for two reasons: i) defilement is a sexual offence against a child, and ii) the age of the child has also been used as an aggravating factor for purposes of determining the sentence to be imposed; the younger the child the more severe the sentence.

29. A child is defined as a person under the age of eighteen years. Is the victim herein a child?

30. PW3 testified that an age assessment was conducted by the dental department and the report established that the victim was about 12 years of age. The trial court rightly found that the complainant was 12 years old at the time the charges were being levelled against the accused person.

31. I find the age of the victim was 12 years old.

Penetration

32. Section 2(1) of the *Sexual Offences Act* defines penetration as:

The partial or complete insertion of the genital organs of a person into the genital organ of another person."

33. In the case of *Mark Oiruri Mose v R* [2013] eKLR the Court of Appeal stated that:

Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ."

34. In dealing with this issue, I shall revert to the record. The complainant in her testimony took the court through how the accused defiled her. She stated that she was asleep in the house when the accused person went there and uncovered her then choked her and raped her. She also stated that at the time she was alone in the house and when she screamed no one went to her rescue and that the accused person had sexual intercourse with her for about an hour. The findings of the clinical officer who testified as PW3 support the complaint's testimony that she was defiled. Upon examining the complainant, he found that the victim had bruises on her vagina and that her hymen was perforated. This is *prima facie* evidence of penetration hence there can be no doubt that penetration was occasioned on the complainant.



Was the appellant the perpetrator?

35. The courts have set out what constitutes favourable circumstances for correct identification by a sole testifying witness. The same was established in *Maitanyi vs Republic*, (1986) eKLR 196 where it was stated that: -

"subject to well-known exceptions it is trite law that a fact maybe proved by the testimony of a single witness but his rule does not lessen the need for testing with the greatest care the evidence of the single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error"

36. The Appellant was a person known to the complainant. There was no element of mistaken identity of the Appellant as the person who penetrated her genitalia.

37. The evidence by the prosecution leaves no doubt that the appellant caused the penetration of the complainant. Accordingly, I find that the elements of defilement namely, penetration, and the minority age of the victim were proved beyond doubt. The conviction was therefore proper.

38. In the upshot, I find that the Appellant was positively identified as the assailant herein; there was no mistaken identity or error. Accordingly, I find that the prosecution proved their case beyond reasonable doubt and that the trial court did not error in convicting the appellant for defilement. The appeal on conviction, therefore, lacks merit and is hereby dismissed.

On sentence

39. The appellant argued that in the absence of a case proven to the required standard, this court should set aside the sentence. Section 8 (3) of the *Sexual Offences Act* to convict provides as follows:

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."

40. It is trite that sentencing of an offender by the session judge/magistrate fall within the domain of discretion.

41. The court of the appeal in *Thomas Mwamba Wenyi Vs Republic* (2017) eKLR cited the decision of the Supreme Court India in *Alister Anthony Pereira Vs State of Maharesbtra* held as follows that:-

"Sentencing is an important task in the matter of crime. one of the prime objectives of the criminal law is imposition of commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula from sentencing an accused person on proof of crime. the courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence circumstances of each case and the court must keep in mind the gravity of the crime, motive of the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entranced in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination



of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.”

42. On the whole of the material before me I can safely find that the appellant grievance on sentence lacks merit. As the offence is serious. In the circumstances, 20 years’ imprisonment is an appropriate sentence. I see no reason of interfering with the sentence imposed by the trial court. His appeal on sentence fails.

43. In the upshot, the appeal on both conviction and sentence is dismissed.

DATED AND SIGNED AT ELDORET THIS 02ND DAY OF MAY, 2023

.....

R. NYAKUNDI

JUDGE

In the presence of:

Appellant in person

Mr. Kakoi for the DPP

