



**Emuria v Republic (Criminal Appeal 22 of 2022)  
[2023] KEHC 4124 (KLR) (2 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 4124 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT LODWAR  
CRIMINAL APPEAL 22 OF 2022  
RN NYAKUNDI, J  
MAY 2, 2023**

**BETWEEN**

**MONTI EMURIA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the sentence and conviction by Hon.  
M Muchiri in Lodwar law court cr. SO. No. 35 of 2021)*

**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 offence were that on the diverse dates between August 4, 2021 and August 8, 2021 in Turkana Central Sub-County within Turkana County, the accused unlawfully and intentionally caused his penis to penetrate the vagina of VA a child aged 16 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 diverse dates between August 4, 2021 and August 8, 2021 in Turkana Central Sub- County within Turkana County, the accused unlawfully and intentionally caused his penis to penetrate the vagina of VA a child aged 16 years
3. The Appellant was found guilty as charged, convicted and sentenced to serve 15 years imprisonment. He was aggrieved with both conviction and sentencing after which he timeously instituted the present appeal.

Parties filed written submissions in support of their arguments.



### **Appellant's submissions**

4. The appellant submitted that he committed the offence in question and this was corroborated by PW1. The appellant did not challenge the penetration and age of the victim. He further submitted that he was a minor at the time of the offence but that was not put into consideration. He, therefore, prayed that the sentence be set aside.

### **Respondent's submissions**

5. Mr Edward Kakoi, prosecution counsel in opposing the appeal submitted that given the factors surrounding this case, the court can review the sentence downwards. Counsel further submitted that if the court reviews the sentence downwards, it should not be more than five years imprisonment.

### **Analysis and determination**

6. I have considered the appeal and submissions by both parties. I have also read the record of the trial court and the judgment. As a first appellate court, this court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See *Okeno vs. Republic* [1972] EA 32.
7. It is clear to me that although PW1 was a young lady aged 16 years, she was behaving like a fully grown-up woman who was already engaging and enjoying sex. She seems not to have been complaining about the incident. She had only gone to the appellant's house to have sex and go back home.
8. It is trite law that under the *Sexual Offences Act*, a child below 18 years old cannot give consent to sexual intercourse. However, when the child behaves like an adult and willingly goes into men's houses for the purpose of having sex, the court ought to treat such a child as a grown-up who knows what she is doing. It would be unfair to have the appellant serve 15 years behind bars. The evidence does not show that the appellant knew that PW1 was a student or that the appellant took advantage of PW1 being a young girl.
9. The circumstances of this case are that the complainant had known the appellant for some time. When she testified, the complainant stated as follows: -

“I went with him to my grandmother's place and later went with him to his place. We slept together till morning and I left.”
10. That is the testimony given by the complainant. It then begs the question, given the circumstances of the case, does the complainant appear as someone who was defiled? Can we say that the appellant took advantage of a young girl and defiled her?
11. At this point, I agree with the sentiments of Justice Chitembwe in *Martin Charo v Republic* [2016] eKLR.

He stated as follows:

“The offence of defilement should not be limited to age and penetration. If those were to be taken as conclusive proof of defilement, then young girls would freely engage in sex and then opt to report to the police whenever they disagree with their boyfriends. The conduct of the complainant plays a fundamental role in a defilement case.”



12. PW1 testified that she went to the appellant's place they had sex and then went back home. Those cannot be the circumstances of a victim of defilement. Even if the appellant did not give evidence as to the steps he took to ascertain the age of the complainant, the circumstances are that the complainant behaved like an adult.
13. The upshot is that I do find the appeal merited and is hereby allowed.
14. The appellant shall be set at liberty unless otherwise lawfully held.

**DATED AND SIGNED AT ELDORET THIS 2<sup>ND</sup> DAY OF MAY, 2023**

.....

**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

Mr. Edward Kakoi for the State

Appellant present

Coram: Before Hon. Justice R. Nyakundi

Mr. Edward Kakoi for the State

