



REPUBLIC OF KENYA



**KENYA LAW**  
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**Moru v Republic (Criminal Appeal 32 of 2022)  
[2023] KEHC 4086 (KLR) (2 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 4086 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT LODWAR  
CRIMINAL APPEAL 32 OF 2022  
RN NYAKUNDI, J  
MAY 2, 2023**

**BETWEEN**

**GILBERT MORU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the sentence and conviction by Hon.  
M Muchiri in Lodwar law court cr. SO. No. 015 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 offences were that on the 08<sup>th</sup> Day of January 2021 at Kanamkemer in Turkana Central Sub- County within Turkana County, Gilbert Moru intentionally and unlawfully caused his penis to penetrate the vagina of M.A.E a child aged 15 years.
2. Alternatively, he was charged with an 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 08<sup>th</sup> Day of January 2021 at Kanamkemer in Turkana Central Sub- County within Turkana County, Gilbert Moru intentionally and unlawfully caused his penis to penetrate the vagina of M.A.E a child aged 15 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 as follows:
  1. The trial Court erred in law and in fact when convicting the accused person without observing the contradiction of PW1 (complainant) in this instant case.



2. The learned trial magistrate erred in law and fact when convicting the accused person without considering accused person defense.
  3. The learned trial magistrate erred in law and fact when convicting the accused person with single evidence of the victim.
  4. The learned trial magistrate erred in law and fact when convicting the accused person without observing that the prosecution did not prove the age of the victim.
  5. The learned trial magistrate erred in law and fact when convicting the accused person without taking into consideration the exhibit that the accused brought to court proving that the complainant was a wife to someone.
  6. The learned trial magistrate erred in law and fact when convicting the accused person without observing that no investigation was done in the instant case.
  7. The learned trial magistrate erred in law and fact when convicting the accused person without observing that the prosecution did not prove penetration.
4. A review of the fact of the case as adduced in the trial court is as follows: PW1; M.A.E the complainant in this matter testified that she was 15 years of age when the alleged offence was committed. She stated that she used to study at [Particulars Withheld] Girls School where she was in class 8. She stated that on the 20<sup>th</sup> of December, 2020 at around 8:00PM she was outside Pomaide club where she met the accused person who asked her to accompany him to Tobonglore where they stayed until 11:00PM after which the accused person took her to his friend's house near the Catholic church in KanamKemer and they slept there but did not have any sexual intercourse on that day.
  4. That on 08<sup>th</sup> January, 2021 at around 2:00PM, the accused person called her and went for her then took her to his place where they had unprotected sexual intercourse then she went back home and that in February she tested herself and found that she was pregnant.
  5. PW1 reiterated that the accused person was responsible for her pregnancy and that she had known the accused person since they met outside Pomaide club and also said that she was currently pregnant and it was the accused person who was still responsible for the other pregnancy.
  6. PW2; MLJ, stated that PW1 was her last born and that she was born on 4<sup>th</sup> January 2006, and that PW1 was in class 8 when she ran away from home.
  7. PW2 stated that at the time she was in Nairobi when she was informed that PW1 was missing and she reported the matter at Lodwar police station and later went to Kalokol where she had been informed that PW1 was and she found her there.
  8. She also testified that she brought PW1 to lodwar where PW1 told her that she had a husband and that PW1 took her and the police to the accused person's place where the accused person was arrested and also took PW1 to hospital where it was established that PW1 was pregnant.
  9. She went on to state that later the accused person was released on bond and PW1 disappeared again and she began looking for her but in vain until one day when she was in Eldoret she received a call from PC Okeyo who told her that PW1 had been found and was at Lodwar police station.
  10. JPW3; Kennedy Wasilwa, 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. He further stated that PW1 alleged to have been defiled on 08<sup>th</sup> January, 2021 and on 1<sup>st</sup> January, 2021 at around 4:00PM in the perpetrator's



house and on examination, he found that PW1 was 4 weeks pregnant at the time and she was in fair general condition save that her abdomen was slightly swollen due to the pregnancy

11. He testified that he gave her medication and that on genital examination he found that her external genitalia were okay but her hymen was not intact as it was torn and there was a whitish vaginal discharge. The Syphilis HIV test turned out negative and he concluded that from his examination that there was penetration of PW1.
12. PW4; PC Kennedy Okeyo, stated that he is the investigating officer of this case and that on 11<sup>th</sup> February 2021, he was approached by PW2 who had reported a case of PW1 who was missing.
13. He further testified that he issued PW1 with a P3 form and PW1 went to hospital where it was established that she was pregnant after which he said that he recorded witness statements and since the accused person had already been arrested by members of the public, he brought him to court. He also stated that according to PW1's birth certificate she was 15 years of age as she was born on 4<sup>th</sup> January 2021.
14. 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](#).

**The defence case is based on three witnesses.**

15. DW1; the accused person, testified that he is a DJ and a boda boda rider and disputed meeting the victim as he claimed that there was a curfew. He denied having committed the offence. He testified that on the 07<sup>th</sup> January 2021, he went to Lokichar for a funeral and that they buried him on 08<sup>th</sup> January, 2021 and returned to Lodwar on 11<sup>th</sup> January, 2021. He also testified that on 10<sup>th</sup> February, 2021 he received a call from someone who informed him that the police were looking for him and he came back from Kitale.
16. He castigated the P3 form as being erroneous as at paragraph 2 in section A it showed that the pregnancy was 4 weeks and the age of the injury is 5 weeks in section B and claimed that the pregnancy test was edited.

**DW1 denied being responsible for PW1's pregnancy.**

17. DW2; Abraham Alacha, stated that sometime in December, 2020, he was working with his friend at Dukes bar when he called DW1 as curfew hours were about to begin and DW1 went for them then on 31<sup>st</sup> December, 2020 there was a party and that on the following day they went to Eliye in the Evening. He further stated that on 08<sup>th</sup> January, 2021 they went for a funeral in Lokichar and returned on 11<sup>th</sup> January, 2021 and then he went back to school on 20<sup>th</sup> January 2021.
18. DW3; Dismas Ekai alias OG, testified that he does not know PW1. He also testified that he has lived with the accused person but he never saw PW1 and that on 20<sup>th</sup> December, 2020 he was with DW2 and they called DW1 to get them and they stayed together. On 31<sup>st</sup> December, 2020, he said there was a party at their friend's house and that on 1<sup>st</sup> January, 2021 they went to Eliye to party with DW1 and others.
19. On 8<sup>th</sup> January, 2021 he said, they attended a funeral of their friend's father in Lokichar and on 18<sup>th</sup> January, 2021 he went back to school.



20. 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.**

21. In this context the principles in *Ruwala V R*(1957) EA – 570 provides the yardstick upon which to evaluate the memorandum of appeal, the record and the impugned judgement subject matter of this appeal. Thus:
22. 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.
23. 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 of magistrate even on a question of fact turning on the credibility of witnesses which the appellant court had not seen.”
24. 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 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:
- i. Whether the prosecution proved its case to the desired threshold;
  - ii. Whether or not the sentence was excessive.

### **Elements of offence of defilement**

25. 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:
- 8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- 8(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.”
26. 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.



27. In the case of *Charles Wamukoya Karani v 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**

28. The age of the complainant is one of the critical ingredients of the offence of defilement which must be proved by the prosecution beyond 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.

29. 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 v 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.”

30. A similar position was taken in *Kaingu Elias Kasomo v 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.

31. 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.

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

32. PW1 testified that she was a minor as she was aged 15 years old as at the time and in this respect, her evidence was corroborated by PW2 that PW1 was born on 4<sup>th</sup> January, 2006. PW4, the investigating officer then produced PW1’s birth certificate. The trial court rightly found that the complainant was 15 years old at the time the charges were being leveled against the accused person.

33. I find the age of the victim was 15 years old.

#### **Penetration**

34. 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.”

35. In dealing with this issue, I shall revert to the record. The complainant in her testimony took the court through the events leading to the incident. She stated that on 08<sup>th</sup> January 2021 at around 2:00 PM, the accused person called her and went for her then took her to his place where they had unprotected sexual



intercourse then she went back home and that in February she tested herself and found that she was pregnant. The findings of the clinical officer who testified as PW3 support the complainant's testimony that she was defiled. On examination, he found that PW1 was 4 weeks pregnant at the time and she was in fair general condition save that her abdomen was slightly swollen due to the pregnancy. 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?**

36. The courts have set out what constitutes favorable circumstances for correct identification by a sole testifying witness. The same was established in *Maitanyi v 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”

37. 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.

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

39. 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**

40. 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.”

In the case of *R v Scoot* (2005) NSWCCA 152 Howie, Grove and Barr JJ stated:

“There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed.... One of the purposes of punishment is to ensure that an offender is adequately punished ...a further purpose of punishment is to denounce the conduct of the offender.”

41. I consider this case of such a gravity that the trial magistrate took into account and entitled the appellant to serve 20 years' imprisonment given the statutory minimum sentence. There is no evidence as to



weight attached to such factors like mitigation. Thus on appeal the applicant has urged this court to take into account some mitigations factors to render the sentence punitive and harsh. In the balance that the court has to make between the mitigating factors and public interest in marking this approval for the appellant conduct is to yield to the aspect on mitigation by minimally interfering with the 20-year custodial sentence towards a substitution with a measure of 15 years' imprisonment. The personal antecedents and age of the appellant are some of the key factors for consideration in exercising discretion on sentence.

42. The offence is serious. In the circumstances, 15 years' imprisonment is an appropriate sentence. In a nutshell the main appeal on conviction fails for lack of merit save for review of sentence as captioned above. It is so ordered.

**DATED AND SIGNED AT ELDORET THIS 02<sup>ND</sup> DAY OF MAY, 2023**

.....

**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

**Mr. Kakoi for the DPP**

