



REPUBLIC OF KENYA



**Ngeywa v Republic (Criminal Appeal 23 of 2022)
[2023] KEHC 4123 (KLR) (2 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 4123 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CRIMINAL APPEAL 23 OF 2022
RN NYAKUNDI, J
MAY 2, 2023**

BETWEEN

BRIAN NGEYWA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgment of Hon. C. Wekesa in Lodwar court Cr. SO. No 26 of 2021)

JUDGMENT

Coram: Before Hon. Justice R. Nyakundi

Mr. Edward Kakoi

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 diverse dates between April 2021 and May 2021 at Lodwar town in Turkana Central Sub-County within Turkana County, the accused intentionally and unlawfully caused his penis to penetrate the vagina of the vagina of WL a child aged 14 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 diverse dates between April 2021 and May 2021 at Lodwar town in Turkana Central Sub-County within Turkana County, the accused intentionally and unlawfully caused his penis to penetrate the vagina of WL a child aged 14 years.
3. The Appellant was found guilty as charged, convicted and sentenced to serve twenty years imprisonment. He was aggrieved with both conviction and sentencing after which he 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 court erred in law and fact by sentencing the appellant to serve 20 years in jail.
4. A review of the facts of the case as adduced in the trial court is as follows:

PW1; WL the complainant in this matter testified that she was 14 years of age when the alleged offence was committed. She stated that in the month of April 2021, while on their way with her friend to visit her sister, they decided to ask for water at the nearest homestead when they met the accused. The accused person asked for her number and she obliged. They went back the following day with her friend when she slept there for the night. She testified that she consented to have sex with the accused person and that it is the accused person who introduced the sex topic. She further testified that the accused person promised to marry her, pay her school fees and cater for her needs."
5. PW2; is the complainant's mother who testified that sometime in the month of March 2021, she realized that PW1 was missing and with the help of her friends PW1 was traced to the accused's house. The accused escaped and PW1 was taken back home and later to her grandmother's home. She however disappeared again and it was later established that the accused had hidden her at Loyo in his friend's house, where he used to go and see her.
6. She further testified that the minor was taken to hospital for age assessment and her approximate age was stated to be 14 years.
7. PW3; Eipa Emmanuel Kamais is the clinical officer, he made reference to the P3 form which he had filled upon examining PW1. He observed that her Labia majora and minora had a whitish discharge together with numerous epithelial cells. On cross-examination, he said that PW1 had been defiled but it was not a recent penetration.
8. PW4; PC Kennedy Okello testified that he is currently attached at Lodwar police station and does crime investigations. He recalls on June 09, 2021 at around 5:00 PM when he was at the station, the OCS called him to deal with the matter.
9. 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*.
10. The defence case is based on a single witness, the Appellant. He gave his testimony on the events leading up to the incident. He testified that it was the complainant who lured him to committing the offence. In his mitigation he stated that he had learned his lessons and he would not repeat it again. This is essentially the substratum of the appeal.

Findings and Determination.

11. In considering this appeal, I apply the laid down principles in *Okeno v Republic* [1972] EA 32 and *Eric Onyango Odeng v Republic* [2014] eKLR.
12. It is the duty of the court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded, while bearing in mind that the court did not have the benefit of seeing or hearing the witnesses. Having stated the aforesaid principles, it is the mandate of this court to establish whether the trial court in making a finding on conviction and sentence took into account relevant



factors or further in doing so applied wrong principles or factored irrelevant evidence leading to an erroneous decision subject matter of this appeal.

13. The stating point therefore, in determining this appeal is for this court to evaluate the record and final judgement so as to 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 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.
14. At the back of my mind in scrutinizing the impugned judgement the following principles in the case of *S v Chabalaba* [2003] ISACR 134 would illuminate the decision making process. Thus, “The trial court’s approach to the case ought to be in line with the following guiding principles “the correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides, and, having done so to decide whether the balance weighs so heavily in favour of the state as to exclude any reasonable doubt about accused guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an expose facto, determination and trial court (and counsel) should avoid the temptation to hatch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence.”
15. The misdirection may take the following model as explained in the case of *State of U.P v M.K. Anthony* AIR 1985 SC 48 the court held.

“Appreciation of evidence, the approach must be whether the evidence of the witness read as a whole, appears to have a ring of the truth. Once that impression is formed, the court should scrutinize the evidence keeping in view, the deficiencies draw backs and infirmities and evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matter not touching the core of the case, hyper technical approach by taking sentences turn out of context, or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.”

Elements of offence of defilement

16. 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.”
17. 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.
18. 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

20. 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.
21. 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.”
22. 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.
23. 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) 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.
24. A child is defined as a person under the age of eighteen years. Is the victim herein a child? The complainant’s age was said to be 14 years. There was an age assessment report to that effect. The trial court rightly found that the complainant was fourteen years old at the time.

I find the age of the victim was 14 years old.

Penetration

25. 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.”
26. 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 in the month of April 2021, while on their way with her friend to visit her sister, they decided to ask for water at the nearest homestead when they met



the accused. The accused person asked for her number and she obliged. They went back the following day with her friend when she slept there for the night. She testified that she consented to have sex with the accused person and that it is the accused person who introduced the sex topic. The findings of the clinical officer who testified as PW3 support the complainant's testimony that she was defiled. He observed that her Labia majora and minora had a whitish discharge together with numerous epithelial cells. 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?

27. 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 may be 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”

28. 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.

29. 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 minority age of the victim were proved beyond doubt. The conviction was therefore proper.

30. In the upshot, I find that the Appellant was positively identified; 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 err in convicting the appellant for defilement. The appeal on conviction therefore lacks merit and is hereby dismissed.

On sentence

31. The appellant argued that in the absence of a case proven to the required standard, this court should find that the sentence is unlawful. 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.”

The principle upon which an appellant court will act in exercising its jurisdiction to review sentences are firmly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless, as was said in *James, v Republic* [1950], 18 E.A.C.A 147 it is evident that the judge has acted upon some wrong principle or over looked some material factor. To



this we would also add a third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case R. v Shershewsky [1912], C.C.A 28 T.L.R 364.

32. In considering sentence, I have looked at the rule on mitigation, the appellant has no previous conviction for a similar offence or for another crime. The appellant was relatively of young age as at the time he committed the offence. Though the offence is serious however, in the circumstances I am persuaded to review the sentence giving due weight to the mitigation factors of the appellant. I therefore substitute it with a term of 15 years custodial sentence. As a consequence, the appeal on conviction is dismissed save for a small variation on sentence.

14 days right to appeal.

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

.....

R. NYAKUNDI

JUDGE

In the presence:

Mr. Edward Kakoi for the State

Appellant present in person

