



**Ouma v Republic (Criminal Appeal E070 of 2022)  
[2023] KEHC 17385 (KLR) (Crim) (9 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17385 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL**

**CRIMINAL APPEAL E070 OF 2022**

**DR KAVEDZA, J**

**MAY 9, 2023**

**BETWEEN**

**KELVIN OKELLO OUMA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence delivered by Hon. J. Kibosia, SRM, on 6th February, 2020 in Makadara Chief Magistrate's Court in Sexual Offences Case No. 152 of 2016 Republic v Kelvin Okello Ouma)*

**JUDGMENT**

1. The appellant was charged and convicted of the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*, No. 3 of 2006. The particulars were that on 28<sup>th</sup> October, 2016 in Starehe Sub-County intentionally and unlawfully cause his penis to penetrate the vagina of TWM, a child aged 12 years old. In the alternative, he was charged with committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. He was found guilty on the main count and consequently sentenced to serve life imprisonment.
2. Being dissatisfied with his conviction and sentence, he filed a petition of appeal, in which he raised four (4) grounds. The main grounds raised are as follows. The appellant averred that the trial magistrate erred in law and fact for failing to find that he was not properly identified as the perpetrator of the offence charged. Further, that the trial magistrate erred in law and fact for failing to find that the complainant (PW 1) was an incredible person who cannot be trusted to have made an error free complaint. The appellant further argues that the trial court erred by not finding that there was a variance between the evidence given to the police and that adduced in court. Lastly, the appellant argues that the trial court erred in law and fact by not giving weight to his defence.



3. In response to the appeal, the respondent filed grounds of opposition dated 7<sup>th</sup> March, 2023. The grounds raised are that the appeal is misconceived and unsubstantiated. Other grounds are that the appeal is an abuse of court process since the appellant was properly convicted before the trial court and that the prosecution discharged its burden of proof beyond reasonable doubt. It is further averred that the appeal lacks merit and the same should be dismissed in its entirety.
4. The prosecution called four (4) witnesses. TWM (name withheld) (PW1) tendered unsworn evidence after a *voire dire* examination. She told the court that on the date of the incident (28/10/2016) she was playing with one Toto inside their plot when the appellant called her to his home, hid her slippers and told her to lie on the bed. She stated that the appellant touched her private parts, removed her clothes and inserted his penis inside her vagina. She informed her mother (SW) of the incident in the evening when she returned home as she was in pain. Lastly, she stated that she was then taken to hospital for treatment (Blue House- Mathare).
5. SW (PW2) testified on oath that she is the mother of the complainant. She told the court that on 28/10/2016 at 8:00pm she was at home when the complainant told her that she was in pain. She told the court that the complainant showed her her private parts and she found that her vagina had puss (*usaa*). She then told the complainant to sleep and that she would take her to hospital the following day. According to her evidence, the appellant allegedly defiled the complainant. She further told the court that she tried to examine the complainant but she resisted. She took her to hospital (Mathare Clinic) where she was treated and the doctor told her that the complainant had been bruised ("*kwaruzwa*"). PW2 stated that she reported the matter at the police station and on her way back, she met the appellant who was beaten up and arrested by the mob after she raised alarm.
6. Emmy Kosgei (PW3), a clinician at Medecins Sans Frontiers (MSF) tendered sworn evidence. It was her evidence that she examined the complainant on 31/10/2016 at 8:00pm having been accompanied by her mother, after a case of alleged defilement. Upon physical examination, no physical injuries were noted. On genital examination, the finding was that: the external genitalia was normal, there was reddening of vulva walls, the vagina had a whitish non-foul smelling discharge, and the hymen was hyperemic but intact. On vaginal swab and urinalysis, no spermatozoa were seen. The PRC form was filled and a medical certificate issued. The same were produced as exhibits 1 and 3 respectively in the trial court.
7. No. 73xxx PC Ann Macharia (PW4), the investigating officer testified on oath that on 2/12/2016 at 9:00am, a case of sexual assault was reported at Pangani Police Station. She told the court that the appellant was arrested by members of the public. She produced the complainant's birth certificate as an exhibit.
8. When put to his defence, the appellant (DW1) tendered sworn evidence. He told the court that on 1/11/2016 at 9:00am while at his kiosk, five (5) people accosted him including the complainant's father, his wife and three (3) others. He told the court that he was assaulted and taken to the police station for allegedly defiling the complainant. He stated that the complainant's evidence was not sufficient to incriminate him and that the police demanded Kenya Shillings Fifty Thousand (Kshs. 50,000) which he was unable to raise. He maintained that he was framed following a grudge he had with the complainant's mother over a debt of Kenya Shillings Four Thousand and Five Hundred (Kshs. 4,500) that she owed him at the shop. On cross-examination, he maintained that he did not remember his whereabouts on 28/10/2016.
9. The appeal was canvassed through written submissions. The Appellant's submissions are undated but filed on 7<sup>th</sup> February, 2023 while the respondent's submissions are dated 7<sup>th</sup> March, 2023 and filed on the same date.



### **Appellant's submissions**

10. The appellant submitted that the trial magistrate erred in both law and fact by finding that the key ingredients of the offence were established against him while in fact they were not. Secondly, he submitted that the medical evidence that was relied upon by the trial court to convict him was not corroborative of the charges as a whole. Additionally, he submitted that the prosecution failed to discharge the burden of proof as was mandated of them. Finally, it was his submission that the trial court failed to comprehensively weigh and consider his strong defence which would have exonerated him of any wrong doing.

### **Respondent's submissions**

11. On the other hand, the respondent submitted that the offence of defilement had three main ingredients namely; age, identification and penetration. On the issue of penetration, the respondent maintained that it was sufficiently proved. It was submitted that the evidence of the complainant was cogent as it was further supported by the evidence of PW3 who examined her and confirmed that she was subjected to penetration.
12. Secondly, the respondent submitted that the age of the complainant was evidenced by her Certificate of Birth which indicated that she was born on 23<sup>rd</sup> December, 2004 proving that she was a minor at the time of the alleged offence. Further, the respondent submitted that the appellant's identification was free from error as he was a neighbor to the complainant and he was also positively identified in court.
13. Lastly, the respondent denied the appellant's submission that his defence was not taken into consideration. It was submitted that the alleged grudge between the appellant and the complainant's mother was not sufficiently proved and hence it was a mere allegation. The respondent urged the court to dismiss the appeal and find that the prosecution sufficiently proved the offence of defilement.

### **Issues for determination**

14. Having reviewed the Record, the grounds of appeal and the respective submissions of the parties, I find that the main issues for consideration are whether the offence of defilement was proven to the required standard and whether the conviction was safe, and whether the appeal herein has merit.

### **Analysis and determination**

15. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify. (see *Okeno v Republic* [1972] EA 32, *Kiilu and another v Republic* [2005] 1 KLR 174).
16. It is trite that for the charge of defilement to stand, the Prosecution must prove three main ingredients as provided for under section 8(1) of the *Sexual Offences Act* No. 3 of 2006 being the age of the victim (must be a minor), that there must be penetration and proper identification of the perpetrator (see *George Opondo Olunga v Republic* [2016] eKLR).



## Age

17. The first element of the offence of defilement is age of the complainant. The age of a child is a question of fact. In the case of *Mwalongo Chichoro Mwajembe v Republic* MSA Cr. App. No. 24 of 2015 (UR), the Court of Appeal stated as follows concerning proof of age:

[T]he question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense.

18. The prosecution produced the complainant's birth certificate which indicated that she was born on 23<sup>rd</sup> December, 2004 meaning that she was 11 years and 10 months at the time the offence took place. The same has not been controverted by the appellant and I find that her age was adequately proven.

## Identification/ Recognition

19. As in any criminal offence, the positive identification of an accused person is an essential element as it connects the person to the offence. It is therefore extremely important that any evidence on identification must be thoroughly and carefully scrutinized to avoid any miscarriage of justice. It is now settled law that the evidence of recognition is stronger than that of identification because recognition of someone known to one is more reliable than identification of a stranger (see *Anjononi & Others v Republic* [1980] KLR 59).
20. In this case, the complainant testified that she was defiled by the appellant in his house and that he was their neighbor as they resided within the same plot. Furthermore, she recognized and identified him by the name "Kevo". In her evidence, the complainant vividly described the incident and told the court how the appellant hid her slippers before asking her to lie on the bed. The complainant could not have imagined all these facts and created a fictitious scenario. Secondly, the appellant conceded that he owns a kiosk and that the complainant's mother was his customer. There is therefore no doubt in my mind that the Appellant was well known to the complainant.

## Penetration

21. Penetration is defined under section 2 of the *Sexual Offences Act* as the partial or complete insertion of the genital organ of a person into the genital organ of another person. As an important ingredient of the offence, it must be proved beyond reasonable doubt. This may be through the evidence of the child corroborated by medical evidence or in other circumstances, through the sole evidence of a child as governed by section 124 of the *Evidence Act* Cap 80 provided that the court must warn itself that the child is truthful.
22. The complainant testified that the appellant called her to his house, removed her clothes, touched her private parts and inserted his penis inside her vagina. However, Emmy Kosgei (PW3), the clinician who examined the complainant told the court that upon physical examination of the complainant, no physical injuries were noted. On genital examination; the external genitalia was normal, there was reddening of vulva walls, the vagina had a whitish non-foul smelling discharge, and the hymen was hyperemic but intact. These findings were replicated in the report by Medicins Sans Frontieres (MSF) dated 31/10/2016. It is important to note from the medical report that the said medical examination was done four (4) days after the incident which allegedly happened on 28/10/2016.



23. Secondly, PW3 told the court that the complainant was afraid to tell her mother (PW2) what had transpired. However, PW2 told the court that in fact the complainant informed her of the alleged incident on the same day it occurred. It is therefore not true that the complainant was scared of informing PW2 about the incident. Furthermore, on cross-examination, PW2 conceded to having examined the complainant on the material day. PW2 confirmed that she saw puss (*usaa*) on the complainant's private parts. It is my view that a child who removes her underwear and exposes her private parts to her mother is a confident child. PW2 therefore contradicted herself when she told the court that her attempt to examine the child was met with resistance.
24. There appears to be a mix-up of the evidence of PW2. On the one hand, she told the Court that after examining the child she advised the child to sleep and promised to take her to hospital the following day. In her evidence she told the court that indeed she took the child to hospital. However, the only medical documents produced in evidence are those from Medicins Sans Frontieres (MSF) which show that the child was treated four (4) days later (31/10/2016). No attempt was made by the prosecutor to clarify whether the child was treated "the following day" as stated by the mother, and also four (4) days later at MSF.
25. I have carefully perused the record and I failed to see any evidence alluding to the production of the P3 form as an exhibit. I have also gone through the list of exhibits prepared by the court assistant and the said P3 form is not listed as one of the exhibits so produced. I can only conclude that the P3 form was sneaked into the file hence the reason why the magistrate has not made any reference to it both in the proceedings as well as the judgment.
26. It therefore follows that the trial magistrate relied only on the PRC form to convict the appellant. The nature of the injuries as per the PRC form was that;
- "the external genitalia was normal, there was reddening of vulva walls, the vagina had a whitish non-foul smelling discharge, and the hymen was hyperemic but intact."
- There was no conclusion as to whether the child had been defiled, neither, did PW3 make it clear to the court that the nature of the injuries were consistent with defilement. She merely regurgitated the content of the PRC form.
27. The failure to produce the P3 form was fatal to the prosecution case in that, it is the P3 form that guides the court as to the nature of the injuries sustained by a victim. The upshot is that the ingredient of penetration was not proved beyond reasonable doubt.
28. Having so stated I shall proceed to interrogate whether the alternative charge of committing an indecent act with a child contrary to section 11 of the *Sexual Offences Act* was proved against the appellant. Section 11 (1) states as follows: -
- "(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."
29. The *Sexual Offences Act*, section 2 defines an indecent act as follows: -
- "indecent act" means an unlawful intentional act which causes-
- (a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.



(b) Exposure or display of any pornographic material to any person against his or her will.”

30. The evidence on record as analyzed in this judgment clearly shows two things. One, that the complainant was about 12 years old at the time the offence was committed. Secondly, the complainant and the appellant were neighbors. Hence, the elements of age and identification are settled in my analysis above.
31. The only question for determination is whether the appellant indecently assaulted the complainant. The complainant testified that the appellant lured her into his house, removed her panty and biker and touched her private parts. The complainant was a child slightly below the age of twelve (12) years, whereas, the appellant was twenty-five (25) years old. The appellant did not give any reasons as to why a twelve (12) year old child would fabricate such evidence against him. I find no reason to doubt the evidence of the complainant.
32. The upshot is that the prosecution has proved the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act and order as follows:
- i. The appellant’s conviction for the offence of defilement contrary to section 8 (1) and (3) of the Sexual Offences Act and the sentence of imprisonment for life are quashed and set aside.
  - ii. In the alternative, the appellant is convicted for the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act.
  - iii. He is sentenced to 7 years’ imprisonment to run from the date of arrest.
33. It is so ordered.

**JUDGMENT DATED AND DELIVERED THIS 9<sup>TH</sup> DAY OF MAY 2023.**

.....

**D. KAVEDZA**

**JUDGE**

