



REPUBLIC OF KENYA



KENYA LAW
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**AAM v Republic (Criminal Appeal E105 of 2021)
[2023] KEHC 18884 (KLR) (Crim) (16 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18884 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E105 OF 2021
DR KAVEDZA, J
JUNE 16, 2023**

BETWEEN

AAM APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the conviction and sentence delivered by Hon.
Z. Abdul, SRM on 30th July 2021 in Milimani Chief Magistrate's
Court Sexual Offences case no. 13 of 2019 Republic vs AAM)*

JUDGMENT

1. The appellant was charged and after a full trial convicted for the offence of defilement contrary to section 8 (1) as read with 8 (2) of the *Sexual Offences Act*, No. 3 of 2006. He was sentenced to serve life imprisonment. Being aggrieved, he filed an appeal challenging his conviction and sentence.
2. In his appeal, he challenged the totality of the prosecution's evidence against which he was convicted. The appellant argued that the trial magistrate erred by failing to consider the defence case. He also challenged the sentence arguing that it's excessive.
3. As this is the appellant's first appeal, the role of this appellate court of first instance is well settled. It was held in the case of *Okeno vs Republic* [1972] EA 32 and further in the Court of Appeal case of *Mark Oruri Mose vs R* [2013] eKLR that this court is duty-bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.



4. The prosecution called six (6) witnesses in support of their case. MQM (name withheld) the complainant herein gave unsworn evidence after voir dire examination. She told the court that she lived with her aunt and father, the appellant herein. On the material day, her aunt went to church and left her with her father. That her father took his penis and inserted it into her anus. She was in pain. The following she went to school and her teacher(P) noticed that she was smelling faeces. She was referred to another teacher and later taken to hospital. The matter was also reported to the police station. It was her evidence that it was the first time the appellant was defiling her.
5. RNM (PW 2) told the court that the appellant is her brother. On May 26, 2019 she went to church leaving behind the complainant and her two daughters in her house. That she left them in the company of the appellant. At the time the appellant was leaving nearby. She came back home in the evening and found the children in the house. The following day, she prepared them and escorted them to school. In the evening, the complainant did not come back home. Upon inquiry, she learnt that she had left school earlier than usual. She later came to learn that the complainant had been taken to a children's home. She told the court that when she told the appellant about the disappearance of the complainant, he informed her that it was a usual practise and she should not be worried.
6. CNM (PW 3) testified that she was a teacher at the complainant's school. That in 2019, she was informed by teacher P of a pupil who had soiled herself. They reported the matter to the headteacher and did not make any further inquiry on the matter.
7. Marion Adhiambo Onyango (PW 4) a community health volunteer testified that she received a call about a case of alleged defilement. Upon inquiry, she was informed that the child was allegedly defiled by someone known to her. She visited the school and took the victim to Kilimani Police Station to file a report. There, they were referred to Capitol Hill Police station where the report was filed. They also recorded statements and were issued with a P3 form which was filled at Nairobi Women's Hospital. The child had been allegedly defiled by her father.
8. John Njuguna (PW 5) a clinical officer at Nairobi Women's Hospital gave evidence on behalf of his colleague Irene Rose Wamaitha who had left for further studies. The victim was brought to the facility reporting a case of alleged defilement. She was examined and it was observed that: she was unable to control stool; had pain in the anal region; had loose anal muscle; she had no injury to the vagina and her hymen was intact. He produced the PRC form as an exhibit. The conclusion made was that there was anal penetration.
9. No. 101770 PC Mildred Musibeke (PW 6) the investigating officer told the court that on 28/05/2019 a report was made by a teacher and a health social worker of a case of alleged defilement. She recorded statements and conducted investigations. She also requested for a custodial order and the complainant was placed in a care and protection facility. In addition, she escorted the appellant to Nairobi Women's Hospital where he was examined. Thereafter, he was charged with the offence. She produced the complainant's birth certificate indicating that the minor was born on December 10, 2012. That although a DNA test was conducted, she never got the results back. She also told the court that that teacher Purity had since passed on.
10. After the close of the prosecution's case, the appellant was found to have a case to answer and was put on his defence. He gave sworn testimony and did not call any witnesses. He testified that on the material day, he went to his sister's house (PW 2) for tea. Thereafter, he left for work as she prepared to go to church. He told the court that he came back in the evening and nothing seemed unusual. He maintained his innocence and confirmed that his daughter, the complainant herein was staying with his sister, PW 2 at the time of the alleged incident.



11. On cross-examination by the prosecution, the appellant was apprehensive that the complainant was likely coached to testify against him. This is due to a disagreement they had over the child's education.

Analysis and Determination.

12. In his appeal, he challenged the totality of the prosecution's evidence against which he was convicted. He argued that the elements of the offence of defilement were not proven beyond reasonable doubt. Further, the prosecution's evidence was full of discrepancies and lacked corroboration.
13. Section 2 (1) of the *Sexual Offences Act*, No. 3 of 2006 defines penetration as follows:

‘Penetration’ means the partial or complete insertion of the genital organs of a person into the genital organs of another person.

14. Further, section 8(1) and (2) of the *Sexual Offences Act*, No. 3 of 2006 provides thus: -

8. Defilement

- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
15. Bearing in mind the above provisions, I will now analyse the evidence on record to ascertain whether the essential ingredients of the offence preferred against the appellant were established to the required standard of proof. Regarding proof of age, I wish to state at the outset that the importance of proving the age of a victim, proof of penetration, and positive identification of the assailant in sexual offences is paramount.
 16. The first element is age. The Court of Appeal in *Edwin Nyambogo Onsongo vs. Republic* (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

“... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, 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. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.”

17. The investigating officer, (PW 6) produced a birth certificate indicating that the complainant was born on December 10, 2012. She was therefore six (6) years at the time of the alleged incident. The prosecution, therefore, adduced credible evidence to prove that indeed the complainant was a child at the time the offence was allegedly committed.
18. The question I must now grapple with is whether the prosecution adduced sufficient evidence to prove that the appellant defiled the child victim as alleged. Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred. Where the medical examination may not be available or conclusive, the court ought to weigh with thorough scrutiny and utmost caution, the evidence of the child, in order to determine whether there was penetration.



19. Pw 1 after a voire dire examination gave an unsworn statement in which she narrated how the appellant defiled her. She told the court that the assailant removed his penis and inserted it into her anus. She was in a lot of pain. She also told the court that it was the first time he had sexually assaulted her.
20. The following day after the incident, she went to school and teacher P (now deceased) and PW 3 noticed that she had soiled herself. She also was also in discomfort while walking. She was taken to hospital where she was examined. PW 5 testified that she was unable to control stool, had pain in the anal region and had loose anal muscles. He concluded that she had undergone anal penetration. The medical report produced confirmed that indeed the complainant had been sexually assaulted.
21. Regarding the identity of the perpetrator, the complainant was very categorical who was her assailant. He identified his father, the appellant as the perpetrator. The identification was therefore by recognition. From the evidence, the complainant was very clear on the events that took place and the identity of the perpetrator. That being the case, the prosecution proved their case beyond reasonable doubt to warrant a conviction by the trial court.
22. The appellant also complained that the trial court failed to consider his defence. In his defence, the appellant denied defiling the complainant. He pointed an accusing finger at his sister (PW 2) whom he believed had framed him. This justification was however uncorroborated and unsubstantiated. The trial court considered this defence as an afterthought and disbelieved the evidence entirely because it was incredible. This was the justification for the rejection of the defence evidence. I, therefore, reject the appellant's ground in that regard.
23. This Court finds that a weighing of the evidence adduced by the Prosecution and the Defence as a whole establishes all the elements of the offence of defilement beyond reasonable doubt. The charge of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* against the appellant was proven. I, therefore, uphold the appellant's conviction.
24. On the sentence, the appellant was sentenced to life imprisonment. In the sentencing proceedings, the trial court noted that he had considered the age of the offender and his mitigation. He stated that his hands were however tied by the law and proceeded to sentence him to life imprisonment because of the victim's age of 6 years.
25. However, in light of the various judicial decisions the mandatory minimum sentence can be vacated in appropriate case. (See *Dismas Wafula Kilawake vs Republic* [2019] eKLR and *Joshua Gichuki Mwangi v Republic* Criminal Appeal No 84 of 2015). Further pursuant to the provisions of section 216 and 329 of the *Criminal Procedure Code* (Cap 75) Laws of Kenya, mitigation is part of the process under section 329 which provides that the court may before passing sentence, receive such evidence as it thinks fit to inform itself as to the proper sentence to be passed.
26. Thus, in my view, section 329 of the *Criminal Procedure Code*, gives judges and magistrates, in appropriate cases to consider mitigation and mete out a sentence that fits the offence committed despite another sentence being provided for under the Act in which the offence is prescribed. In that regard, I find life imprisonment shatters all the hopes of the appellant for rehabilitation or having another chance to start afresh.
27. Therefore, the appeal on sentence succeeds. The minimum mandatory sentence of life imprisonment is hereby vacated. I hereby resentence the appellant to 30 years imprisonment from the date of his conviction being July 29, 2021.

Orders accordingly

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 16TH DAY OF JUNE 2023



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D. KAVEDZA

JUDGE

In the presence of:

Ms Ntabo for the State

Habiba C/A

Appellant present (VTC)

