



REPUBLIC OF KENYA



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**Halilu v Republic (Criminal Appeal E004 of 2022)
[2023] KEHC 19722 (KLR) (7 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19722 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL E004 OF 2022
JRA WANANDA, J
JULY 7, 2023**

BETWEEN

DENNIS LIREJI HALILU APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant was charged in Eldoret Chief Magistrate’s Court Criminal Sexual Offences Case No. 34 of 2019 with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that on 6/01/2019 in Turbo sub-County within Uasin Gishu County, the Appellant intentionally caused his penis to penetrate the vagina of SM, a child aged 7-year-old.
2. The Appellant was also charged with the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the same date and same place as above, he unlawfully caused his penis to come into contact with the vagina of the same SM, a child.
3. Before the trial Court, the Appellant was represented by one Mr. Ayieko, Advocate.

Prosecution evidence

4. PW1 was the child complainant. She was taken through a voire dire examination and upon the trial Magistrate being satisfied that the complainant understood the importance of giving evidence, allowed her to give sworn testimony.
5. PW1 stated that on 6/01/2019 she was outside the gate, the Appellant took her to his place, they entered the house, the Appellant did to her “tabia mbaya” (bad manners). Translated to English, she stated in the Kiswahili language that the Appellant removed her clothes then did to her “bad manners”,



- he lay on him and inserted “his thing” into her vagina. She added that afterwards she reported the matter to her mother, the mother took her to hospital, she told her mother that it was the Appellant who committed the act. In cross-examination, she stated that they are neighbours with the Appellant, her mother had never quarreled with the Appellant, the Appellant assaulted her on the back. In re-examination, she reiterated that the Appellant took her to his house, removed his trousers and did to her “bad manners”, he removed her clothes and inserted his thing into hers.
6. PW2 was the PW1’s aunt. It transpired that the “mother” that PW1 kept referring to in her evidence was in fact PW2, the aunt. PW2 stated that on 6/01/2019 while from work around 5 pm, she was bathing PW1 when PW1 started resisting stating that she was in pain, when PW2 asked for an explanation, PW1 told her that the Appellant had barred her from the gate and defiled her earlier in the day, PW2 took her to the hospital, they were referred to Moi Teaching & Referral hospital, they went there and afterwards went to the police to report. PW2 further stated that she lives with PW1 since PW1’s parents abandoned her, PW1 is about 6 years old, an age assessment was conducted, PW1 told her that the Appellant found her outside the gate, took her to his house, removed her clothes and defiled her. PW2 stated that she found that PW1 had changed the clothes that she was wearing in the morning, she had left PW1 with the grandmother. She testified further that she reported the matter at Baharini station, they then went to Hope hospital then to Moi Teaching & Referral Hospital. In cross-examination, PW2 stated that she knows the Appellant very well, he is the son to her landlord, it is not true that the Appellant’s father attempted to chase her from the plot, the Appellant is known as Dan, the P3 was filled in 4 days later, the plot has about 100 doors, there are very many people, nobody witnessed the incident. In re-examination, she denied that it was her who had scratched PW1 while bathing her.
 7. PW3 was one Alice Chepngetich Sang from Hope Worldwide Kenya where, she stated, they conduct HIV prescription. She stated that on 7/01/2019 she received a call from the in-charge at 3 pm and was assigned a child who had been defiled, she took the child to Moi Teaching & Referral hospital, they later on reported at Baharini police station, the child was a 7-year-old girl, the child stated that she was playing when a certain man took her to his house, placed her on the bed, undressed her, then undressed himself and did to her “tabia mbaya”. PW3 stated that she understood the description to mean sexual intercourse, the following day, while at the police station, the girl took them to the Appellant’s home and identified him.
 8. PW4 was one CPL Caroline Kipkorio. She stated that she is attached to Baharini Police Post, she was the Investigating and arresting Officer in the case, on 8/01/2019 at 8 am she was assigned the case, she recorded PW1’s statement, PW1 told her that on 6/01/2019 while playing outside at Shirika the Appellant found her at the gate, called her to his house in the same plot and then defiled her. She added that PW1 told her that the Appellant undressed her, then undressed himself and had sexual intercourse with her. She stated that after recording PW1’s statement, she issued a P3 Form which was filled at Moi Teaching & Referral hospital, she visited the scene where PW1 showed them the Appellant’s home, they found the Appellant in the house, the house is adjacent to PW1’s house, the victim’s house is No. 29 and the Appellant’s is No. 27, PW1 positively identified the Appellant, the Appellant was then charged with the offence, PW1 was 7 years old, the age assessment test conducted on 1/2/2019 placed PW1’s age at 6-11 years. She then produced the test result
 9. PW5 was one Dr. Taban Tokosong. She stated that she works at Moi Teaching & Referral Hospital. She referred to the P3 Form for PW1 who was 7 years old, she tested PW1 who had changed clothes, PW1 told her that she was playing at the fence, a neighbour by the name Denny took her to his house, removed her clothes and defiled her and that while bathing she felt pain. PW5 stated that she tested PW1 on 7/01/2019 while the offence was committed on 6/01/2019, she had a randed labia minora, it



should be pink, the posterior fourchette had a cut which was fresh, her hymen was freshly torn, the object used was blunt, urinalysis showed a lot of blood, she concluded that PW1 was defiled, she filled the P3 Form on 14/01/2019 which she then produced as exhibit

10. At the close of the prosecution case, the Court made a finding that there was a case to answer and placed the accused to his defence.

Defence evidence

11. In his defence, the Appellant gave sworn testimony and called 2 witnesses.
12. The Appellant (DW1) stated that on 6/01/2019 he did not know what happened, the offence is full of lies, he has nothing to add. In cross-examination, he stated that he never had disagreements with PW1's family. He conceded that he had not said anything to the Court regarding the events of 6/01/2019.
13. DW2 was one EN. She stated that she knows the complainant, she is a neighbour, on 6/01/2019 she was fetching water when she heard "mum" talking to the complainant, she heard that PW1 had been defiled, PW1's grandmother is a drunkard, DW2 asked them to take PW1 to hospital, PW1 had been defiled, she talked about and showed them 4 people, she did not mention the Appellant, the Appellant got STI. In cross-examination, she stated that she was fetching water at a neighbour's house, not at the well, she was not there when PW1 was defiled, she just heard what people said, she did not investigate the matter, she did not know who defiled PW1, she did not know about the Appellant.
14. DW3 was one SW. She stated that both the Appellant and PW1 are her neighbours, she was not there on 6/01/2019, she just took PW1 to hospital, on the road PW1 showed her a different person, she kept showing them different doors, not people, PW1's grandmother again said that it was a different person. In cross-examination, she conceded that she was not at home on 6/01/2019.

Hearing of the Appeal

15. The parties then filed written Submissions in support of their arguments. The Appellant's Submissions was filed on 18/05/2023. On its part, the Respondent had filed its Submissions earlier on 25/01/2023 through Learned Prosecution Counsel Ursula Kimaru.

Appellant's Submissions

16. The Appellant submits that his Appeal is against both on conviction and sentence. A perusal of the Submissions reveals that it comprises majorly of factual matters of evidence that cannot be newly introduced at this Appellate stage. Granted, in this Appeal the Appellant does not have the benefit of legal representation. It is therefore understandable that not fully understanding Court procedures, he has drafted the Submissions in the manner that he has done. However, this being an Appellate Court, the law only allows this Court to re-evaluate the evidence already adduced before the trial Court and only the evidence already on record. The Appellant has however, unfortunately, introduced new factual accounts and versions of events, including allegations of alibi, which he believes exonerate him from the offence. I note that before the trial Court, the Appellant was represented by Counsel. Since the Appellant did not bring these matters before the trial Court, the law does not allow this Appellate Court to entertain such new factual narratives.
17. Doing the best that I can and sieving through the Appellant's Submissions, the admissible submissions that he has made include the submission that his date of arrest was 6/01/2019 and not 1/01/2018 as alleged, for this reason the charge sheet is fabricated, in his defence he stated that he does not know what happened, he was convicted for something that was not proved, none of the people who testified witnessed the incident, the witness should not have been PW1's aunt but the grandmother,



the case is a result of false information. He also faulted the fact that although the incident occurred on 6/01/2019, it was reported to the authorities on 7/01/2019 and the medical test carried out on 8/01/2019, according to him this was a delay which gave the real culprit time to escape, he should have been arrested first before the medical tests were conducted not the other way round, this led to wrong identification, the clothes worn at the time of the incident were not produced or neither were they subjected to forensic tests, the colour of the clothes was also not disclosed, considering the age of the complainant, penetration by the Appellant would have caused much more severe injuries on the complainant's sexual organs.

18. I have therefore deliberately not recited the other matters submitted upon by the Appellant since, as aforesaid, they are new factual matters introduced for the first time in the Submissions and which were never brought up before the trial Court.

Respondent's Submissions

19. On her part, Counsel for the Respondent submits that all the elements of the charge of defilement were proved, namely, age of the victim, identification and penetration. Counsel further submitted that regarding Section 150 of the Criminal Procedure Act on the Court's powers to recall and examine witnesses, at no time did the Appellant ask the Court to avail specific witnesses to determine any issue, the Appellant also never at any point requested that the matter starts afresh and that he is on a mission of fishing out for chances of being released. Although Counsel referred to Section 135, it is clear that she meant Section 150.
20. In respect to the charge sheet, Counsel submits that the Appellant has not demonstrated how the same is defective.

Analysis and determination

21. I have considered the appeal and submissions by both parties. I have also read the record of the trial Court and the impugned Judgment.
22. 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] E.A 32).

Issues for determination

23. Although in his Petition, the Appellant has alluded that the charge sheet was defective, he has not in his Submissions demonstrated how and in what manner the same is defective. He appears to submit that the defectiveness of the charge sheet is because the date of his arrest stated therein is not correct. He has not however referred to any evidence proving the alleged error and neither did he bring this allegation before the trial Court.
24. The Appellant has also faulted the trial Court for allegedly not adhering to Section 35 and of the *Sexual Offences Act*. This Section gives the Court powers to order for medical treatment of a convict or the victim of a sexual offence. He has however also not explained how and in what manner this provision would have arisen before the trial Court and how it was not adhered to.
25. The Appellant has also alleged the trial Court breached Section 150 of the Criminal Procedure Act. This section gives the Court the power to summon and examine any person as a witness or to recall and examine any witness. I agree with the State Counsel that the record does not demonstrate that at any point, the Appellant or his Counsel requested the Court to summon any person or recall any witnesses to determine any issue nor did they at any time request that the hearing begins afresh.



26. Other matters that the Appellant mentioned in his Submissions but for which there is no cogent explanation on how they affected the trial, are that the Appellant should have been arrested first before the medical tests were conducted, that PW1's grandmother, and not the aunt, should have been the prosecution witness, that the clothes worn at the time of the incident were not produced and that the colour of the clothes was also not disclosed.
27. In the circumstances, I summarily decline to admit the said matters raised in the Petition of Appeal as being issues for determination in this Appeal.
28. In view of the foregoing, my view is that the only genuine issues that arise for determination in this appeal are the following;
 - i. Whether the prosecution proved its case beyond reasonable doubt.
 - ii. Whether the imposition of life imprisonment was justified.
29. I now proceed to analyse and answer the said issues.

Whether the prosecution proved its case beyond reasonable doubt Elements of the offence of defilement

30. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. The two Sections provide as follows:

“8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

8(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.”
31. The specific elements of the offence of defilement arising from Section 8(1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are the following:
 - a. Age of the complainant.
 - b. Proof of penetration.
 - c. Identification of the perpetrator.
32. The above was reiterated in the case of Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013 where it was stated as follows:

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

Age of the complainant

33. 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 is also used as an aggravating factor for purposes of determining the sentence to be imposed, the younger the child the more severe the sentence.
34. The offence is stated to have been committed on 6/01/2019. In the Charge Sheet dated 23/01/2019, the complainant's age is stated to be 7 years. The complainant's aunt (PW2) who is also her guardian, testified that the complainant was about 6 years old. On her part, the Investigating Officer (PW4) produced an age assessment Report dated 1/02/2019 which placed the complainant's age at 6-11 years.



35. From the foregoing, I am satisfied that the complainant's age of about 7 years was proved and that the age therefore fell within the category of "child aged eleven years or less" as stated at Section 8(2) aforesaid.

Penetration

36. 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."

37. In this case, the complainant described the location of the Appellant's house, she described how she was outside the gate and that the Appellant took her to his place and did to her "tabia mbaya" (bad manners). She described how the Appellant removed her clothes then did to her "bad manners". She stated that the Appellant lay on him and inserted "his thing" into her vagina. I note that the complainant was consistent in her account noting that she gave the same story to her aunt, the medical staff and also to the police. There was no contradiction in her account.
38. The complainant's aunt (PW2) also testified that while bathing the complainant, she noticed that the complainant was experiencing pain around her private parts. She stated that upon inquiring, the complainant disclosed to her that she had been defiled and that upon examining her, she indeed found signs or indications of sexual activity.
39. The doctor (PW5) also testified that when the complainant was examined, among other results, her hymen was found to be freshly torn and her posterior foursche had a cut which was fresh. With these observations, she concluded that indeed, the complainant had been defiled.
40. In view of all the above, I agree with the State Counsel that penetration was proved.

Identification of the Appellant

41. It was not challenged that the complainant lives with her aunt who is her guardian. It is also not in issue and all witnesses, including the Appellant, confirmed that the Appellant is a neighbour to the complainant's household. The houses are said to be adjacent to each other and in fact, the Appellant is the son of the landlord of the plot. The Appellant is therefore not a stranger to the complainant. I therefore find that the Appellant was convincingly identified by the complainant.
42. In his Petition of Appeal, the Appellant argued that Section 36 of the *Sexual Offences Act* was not complied with. Section 36 gives the Court the power to call for evidence of medical or forensic nature. The Appellant has not clearly explained what nature of medical evidence he is referring to but since there indeed was medical evidence conducted on the complainant supporting the conclusion that she was defiled, the medical evidence that the Appellant is referring must be one that relates to him such as DNA or testing of semen sample.
43. However, it is trite law that medical evidence, although important, is not the exclusive or only evidence required to prove the commission of a sexual offence. This was affirmed in the case of *Kassim Ali v Republic* Cr. App. No. 84 of 2005 (Mombasa) where the Court stated the following:

"... [The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."



44. The above view was also asserted in *AML v Republic* [2012] eKLR (Mombasa), where Hon. Lady Justice M. Odero upheld the view that:

“The fact of rape or defilement is not proved by way of a DNA test but by way of evidence.”

45. The Appellant has also alleged that considering the age of the complainant, penetration by the Appellant would have caused much more severe injuries on the complainant’s sexual organs. I find this to be mere speculation not supported by any expert opinion.

46. Since I have already stated that I found the complainant’s evidence to be consistent, candid and credible, I find that the Appellant was positively identified as the perpetrator herein. There was no mistaken identity or error.

47. In view of the foregoing, I find that the prosecution evidence left no doubt that the Appellant was the defiler.

Finding

48. Accordingly, I find that the elements of defilement, namely, minority of the victim’s age, penetration and identity of the perpetrator were all proved. I also find the Appellant’s defence to have been merely a general denial without demonstration of any exonerating circumstances. The testimony of his witnesses was equally of no substantial relevance, it amounted to mere hearsay and did not create out any meaningful doubts on the testimony of the prosecution witnesses. I therefore find that the prosecution proved its case beyond reasonable doubt and that the trial court did not err in convicting the Appellant. The conviction was proper. The appeal on conviction therefore lacks merit and is hereby dismissed.

Whether the imposition of life imprisonment was justified

49. As already stated, Section 8(2) of the *Sexual Offences Act* provides as follows:

8(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.”

50. In the case of *Shadrack Kipkoech Kogo - vs - R*, Eldoret Criminal Appeal No. 253 of 2003, the Court of Appeal stated as follows:

“Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered.”

51. In the case of *Stephen Kimari Gathano v Republic* [2022] eKLR, Hon. Justice Gikonyo, in enhancing the sentence imposed on an Appellant convicted for defilement of a 9-year-old child, had the following to say:

“[42]. Was there anything vitiating exercise of discretion by the trial court in imposing a sentence of 15 years’ imprisonment?

[43]. Of important consideration: first, the victim of the offence is a child of 9 years. Second; the said child suffered physical injuries. Third, the manner of commission of the offence was cruel and violent- strangled her, violently



penetrated her as evidenced by the injuries. The appellant brutally defiled the victim. Fourth, the traumatic experience will linger in her life forever- and as she grows older to know exactly the violation she went through, she will live with the shame and great mental trauma caused to her by this savage act of sexual debauchery. Fifth, this is a serious offence of which extreme societal desire to get rid of society of such wickedness and sexual perversion has been expressed publicly and formally through *Sexual Offences Act*. See Okumu Wasike (2020) eKLR.

- [44]. It should also be noted that the appellant took an unfair advantage to secure and satisfy his sexual desires on a child of only 9 years. The Court considers the offence to be quite egregious, and it was committed against a minor. It bears repeating that the penalties enacted in the SOA reflect a deliberate intention by the legislature; (1) to protect the rights of the child; and (2) to signify the seriousness of the offence of defilement.
- [45]. Seriousness of the offence is a relevant factor in sentencing and in sexual offences. Generally, it is worth of note that, the assault leaves the innocent victim with eternal and time-explosive dent on the integrity of the person as a human being. For a girl, the assault destroys the beauty of a woman which is encapsulated in the pride, self-esteem, confidence, integrity and honour of the person. To say the least, their self-worth and innocence is irreparably damaged by the beastly act. They are left with deep and chronic trauma which will affect them psychologically, emotionally and physically for the rest of their lives. These things must be said to dramatize what it real means to rape or defile a person. I have stated before, and I will state it again without fear of contradiction, that whomever admires and defiles the prohibited; a child; will tremble in the right place; the prison. No wonder the legislative intent which is a reflection of the societal detestation of defilement exclude sexual offences from settlement through alternative dispute resolutions, traditional methods of dispute resolutions, plea bargaining, probation, community service order et al.
- [46]. The aggravating factors weigh heavy; against the mitigating factors of the appellant.
- [47]. Exercise of discretion by the trial court ought to have been exercised judicially. The trial court did not consider the tender age of the minor, the seriousness of the offence, the violent and brutal manner the offence was committed, the severe injuries the minor sustained and the traumatic effects on the girl which deserved a stiffer and deterrent sentence. Thus, the trial court committed an error in principle thereby imposing a patently lenient sentence.
- [48]. In an appeal on sentence, the court may sustain or reduce or enhance or alter the nature of sentence. The prosecution has sought for enhancement of sentence to life imprisonment. The request is reasonable and aimed at achieving justice for the victim, and punishing the offender for the offence. The circumstances herein warrant enhancement of sentence.



[49]. The circumstances of this case could even justify enhancement to life sentence. However, in exercise of my discretion, I set aside the 15 years' imprisonment and enhance the sentence to 30 years' imprisonment.”

52. I wholly associate myself with the above view and fully embrace it.

53. In this case, I take into account the circumstances of the offence and also the sentencing guiding principles and the authorities on this issue. I wholly agree and reiterate that it is inexcusable for an adult grown up person to initiate and engage in sexual activities with a minor. However, I also appreciate that in this case, there is no evidence of use of force or violence on the minor. I also believe that having already served a period of about 1 ½ years in custody, reality is slowly beginning to set in and the Appellant is now beginning to learn his lesson. I have also not come across any evidence in the record demonstrating that the trial Magistrate considered the Appellant's mitigation. In not doing so, my view is that the trial court committed an error in principle while determining the sentence to impose. In light of the above, I feel justified to interfere with and alter downwards the sentence of life imprisonment imposed by the trial Court. I therefore reduce the life imprisonment sentence to 25 years imprisonment.

Final Orders

54. In the end, I issue the following orders:

- i. The conviction is upheld.
- ii. In respect to the sentence, I hereby set aside the sentence of life imprisonment imposed by the trial Court and substitute it with a sentence of 25 years imprisonment.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 7TH DAY OF JULY 2023

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WANANDA J. R. ANURO

JUDGE

