



**Korir v Republic (Criminal Appeal E002 of 2022)
[2023] KEHC 19656 (KLR) (5 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19656 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KILGORIS
CRIMINAL APPEAL E002 OF 2022**

F GIKONYO, J

JULY 5, 2023

BETWEEN

BENARD KORIR APPELLANT

AND

REPUBLIC RESPONDENT

(From the judgment on conviction of Hon. R.M. Oanda (S.P.M.) and sentence of Hon. M.I.G. Moranga (S.P.M) in Kilgoris SPM SOA Case No. 52'B' of 2020 on 18th May 2022)

JUDGMENT

1. The appellant was dissatisfied with the conviction and sentence of 15 years' imprisonment for defilement of a 15 year old girl. He filed this appeal and cited the following 11 grounds in the memorandum of appeal dated 17/01/2023: -
 - i. That the learned magistrate was biased in his decision and did not take into consideration the evidence rendered by the appellant during trial.
 - ii. That the learned trial magistrate failed to consider the doctor's report which clearly indicated that the complainant was not defiled and if defiled not by the appellant.
 - iii. That the learned magistrate did not listen to the complainant who stated during the hearing that she was not defiled by the appellant.
 - iv. That the learned magistrate erred when he forcefully had the girl locked in the cells for speaking the truth thus intimidating her and forcing her to give false evidence.
 - v. That the learned magistrate did not rely on the evidence tendered but went ahead to make his decision from his own imaginations and on the false tendered by the prosecution witness.
 - vi. That the learned magistrate was biased in his sentencing which is too harsh.



- vii. That the magistrate did not take into consideration the mitigation of the appellant before sentencing him.
 - viii. That the fact that the complainant stated she was not defiled was enough to set the appellant free but because of biasness, things had to be fixed by the magistrate to ensure that the appellant was imprisoned for something he did not do.
 - ix. That the magistrate did not consider the fact that the appellant's father and the complainant's father had to use all possible means to have the appellant imprisoned as a way to torture the family of the appellant as the appellant was the only employed person in that family.
 - x. That the appellant is innocent and should be set free unconditionally.
 - xi. That the magistrate did not consider the fact that the prosecution had to prove their case beyond reasonable doubt and went ahead to make a judgement based on the contradicting evidence of the prosecution witnesses.
2. The appeal was canvassed by way of written submissions.

Appellant's Submissions.

3. The appellant's submissions are considered in detail in the analysis. Notably, however, the appellant relied on the case of MM vs. Republic [2020] eKLR.

The respondent's submissions.

4. The respondent's submissions are also discussed in detail in the analysis by the court. Notably, the respondent relied on the following authorities;
- i. IG vs, Republic [2022] eKLR.
 - ii. Simion Kipngetich Rotich vs. Republic [2021] eKLR.
 - iii. Okeno vs. Republic [1972] EA ,32
 - iv. Kiilu & Another vs. Republic [2005]1 KLR,174
 - v. Mercy Chelangat vs. Republic [2022] eKLR.
 - vi. KMG vs. Republic [2022]eKLR.
 - vii. Erick Kibwaro vs. Republic [2021]eKLR.
 - viii. DS vs. Republic [2022]eKLR.

Analysis And Determination.

Court's duty

5. First appellate court has the duty to re-evaluate the evidence afresh and arrive at own independent conclusions. Except, bearing in mind that it neither saw nor heard the witnesses and should give due allowance thereto (Njoroge vs. Republic (1987) KLR, 19 & Okeno vs. Republic (1972) E.A, 32.)



Issues

6. The overarching issues arising from the grounds of appeal, evidence adduced in the lower court and the respective parties' submissions are; i) Whether the prosecution proved its case beyond reasonable doubt; and ii) Whether the sentence imposed was harsh or excessive.
7. However, the overall impression of the evidence will also require consideration by the court: i) Of alleged grudge and alibi defense; and ii) Application of section 124 of the [Evidence Act](#).

Proof Beyond Reasonable Doubt

Elements of offence of defilement

8. 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](#).
9. Section 8(1) of the [Sexual Offences Act](#) establishes the offence of defilement, thus; 'A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.'
10. Section 8(3) of the [Sexual Offences Act](#) prescribes the penalty thus; '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.'
11. Accordingly, 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: i) Age of the complainant; ii) Penetration in accordance with section 2(1) of the [Sexual Offences Act](#); and iii) The appellant is the assailant.

Age of complainant

12. The prosecution submitted that age of the complainant was proven beyond reasonable doubt.
13. The appellant argued that the age of the complainant was not proved as required in law.
14. He also submitted that the trial court did not give reasons why it believed the victim was in a position to comprehend the importance of oath.

Of voire dire examination

15. On July 29, 2020, PW1 appeared before the trial court to give her evidence. After putting some questions to her, the trial court observed that she said she was 17 years hence was satisfied she was old enough to give sworn testimony. Contrary to the submission by the appellant, the trial court gave reasons why it took her evidence on oath. And, the reason given is sufficient reason in law.
16. In any event, the taking of the said evidence by the trial court in the manner it did not offend section 19 of the [Oaths and Statutory Declarations Act](#) on evidence of children of tender years called as witness. The said evidence is a proper deposition in law. For purposes of section 19 (ibid), decisional law has defined children of tender age to be children of 14 years.
17. The objection to the manner the evidence of PW1 was taken does not hold sway and is dismissed.
18. PW1 was placed on the stand to testify. She stated that she was in form 3 at [Particulars Withheld] school and is 17 years old. She added that she was born in the year 2002.



19. PW2-KKP, the father of PW1, told the court that PW1 was his daughter and that she was 16 years. He produced a certificate of birth (P Exh1) which indicated that the complainant was born on 12/08/2004.
20. The sexual assault on the child herein is alleged to have occurred on 23/05/2020.
21. On the basis of the evidence adduced, the complainant was 15 years and 9 months at the time of the assault. I find the age of the victim was proved.

Penetration

22. The appellant submitted that PW2 did not witness the appellant defile PW1 neither did PW5. The appellant submitted that a broken hymen does not prove defilement. That it could have been broken by any other thing other than a penis. Further, according to the appellant; there was no nexus to the appellant; there was no specimen or spermatozoa or DNA test carried out as provided under Section 36(1) S.O.A. Also the laceration on the labia majora was long healed.
23. Penetration is defined in section 2(1) of the *Sexual Offences Act* as: ‘The partial or complete insertion of the genital organs of a person into the genital organ of another person.’
24. ‘...there is penetration whether only on the surface...and penetration need not be deep inside the girl’s organ’ (Mark Oiruri Mose v R [2013] eKLR). The partial penetration may inter alia, be because ‘Many times, the attacker does not fully complete the sexual act during commission of the offence’ (ibid) which also constitutes ‘...the main reason why the law does not require that evidence of spermatozoa be availed [sic].’ (Ibid).
25. PW1 in her testimony stated that on 23/5/2020, after doing the laundry at the river, she escorted her friend Cherono to her home. On her way back she passed by the appellant’s home. She went to his house where they had sex. Afterwards, the accused went out of the house where he found her father.
26. PW2, the father of the complainant told the trial court that, on the material date PW1 was missing from home. He had been told by his wife that the appellant was seducing her and so they suspected she may have gone to his house. Together with his brother (PW3) they decided to look for her. They went to the appellant’s house which was near the road. From a distance they saw the appellant’s door was open. They then used PW5, a young boy to check if the girl was inside the appellant’s house. The boy reported that the girl (PW1) was inside the bedroom of the appellant. The appellant then came out of the house and escaped.
27. PW6, a clinical officer attached to Kurangurik Health Centre examined the victim. He noted that the labia minora had no laceration, the labia majora had healed laceration. Hymen was broken, the victim was shading blood and the injuries were two days before. He also noted absence of spermatozoa after conducting high vaginal swab. He produced P3 form, PRC form and treatment notes as P Exh 2,3, and 4.
28. I should state here that absence of spermatozoa is not equal to disprove of penetration for; in some instances, the attacker may not have completed the sexual activity to ejaculation; and in others, the spermatozoa may have dissipated due to passage of time. I should also think that, bathing may also affect the evidence such as spermatozoa; the reason why victims are advised to be examined immediately or as soon as the assault happens in order to preserve evidence.
29. PW6 was, nevertheless very clear that penetration did occur.



30. The evidence of PW2, PW3 and PW5 who traced the victim found her at the residence of the appellant. The victim stated that she indeed was at the appellant's house on the material date and that they had sexual intercourse.
31. On the basis, of the foregoing evidence an irresistible conclusion is that the appellant had sex with the child herein.
32. I accordingly find that the medical evidence as well as that by PW1, PW2, PW3 and PW5 proves there was penetration of the child. But by whom?

Was the appellant the perpetrator?

33. The prosecution submitted that the victim and the other prosecution witnesses were able to identify the appellant. The identification was by recognition.
34. The appellant submitted that all the prosecution witnesses are from the same village with the appellant and know each other well.
35. It was PW1's evidence that she was at the appellant's house on the material date and that she was defiled by the appellant. PW1's evidence was corroborated by the testimony of PW2, PW3, and PW5 that they found them together.
36. Therefore, there was no mistaken identity. Identification was by recognition. The evidence by the prosecution leaves no doubt that the appellant caused penetration of the complainant.

Whether the appellant's alibi defense was considered and whether there was a grudge.

37. The appellant submitted that the trial court shifted the burden of proof to him and did not put emphasis on his defence contrary to section 107(1) of the *Evidence Act*. Further, that all witnesses except the clinical officer and the police officer are all members of the same family.
38. The prosecution submitted that the defense case was duly considered and the trial court considered it as an afterthought.
39. The appellant gave sworn evidence. He attributed his woes to a long standing land dispute between his father and the father to the complainant. He stated that at a given point in time, the complainant's family assaulted his brother. DW3, testified that he was at home when a fight began between PW2 and the appellant's father and that he later learnt that the appellant had been arrested but he did not know the reason for his arrest.
40. DW2, a member of Nyumba Kumi Committee confirmed that indeed there was a dispute between the two families.
41. PW1 denied existence of any conflict between the two families.
42. PW2 stated that they had had land issues but is not related to the matter herein. Also PW3 confirmed there was a land dispute between the two families.
43. Ordinarily, land disputes strain relationships between the disputants. In extreme situations, almost visible bitterness, hatred and resentment- a grudge- emerges and may persist permanently, and sadly, perpetually passed over to the members of the families concerned, present and future. It becomes quite insidious through the families concerned.



44. Nevertheless, a party claiming a grudge is responsible for false accusations in a criminal charge, must demonstrate a direct nexus between the grudge and the charges faced; that they are trumped-up for purposes of getting back at the accused.
45. Merely that a dispute existed between the two families and their members may not necessarily be proof that the charges herein were fabricated to get back at the family of the appellant. There must be evidence on this nexus which is totally lacking.
46. The court consciously makes the foregoing statements to avoid an erroneous postulation that existence of a dispute is ipso facto an indomitable defense to a criminal prosecution of a member of one of the disputant families for criminal offence committed against the other family or its member or members.
47. Absence of evidence to show that the charges herein arose out of the grudge held by PW2 or his family against the appellant and his family, the court finds the defence to be hollow, and perhaps a mere afterthought. The trial court also considered the defense of the appellant and dismissed it. This court similarly, dismisses this ground of appeal.
48. Be that as it may, the court has lamented before in other cases where such defence was claimed by the accused. It is such a serious matter which ought to be prosecuted seriously by providing relevant details which establish a direct nexus with the mounting of the charges. But, most of the time it is left at very high level of generalization.
49. Just in passing, the court takes the view that falsely accusing a person of criminal charges is not only the most heinous criminal act a person may commit against another, but is also satanic or most demented spirit upon the individual making false accusations; which may confine such person to eternal condemnation and punishment.
50. The Holy Bible commands: 'You shall not bear false witness against your neighbor' (Exodus 20:16). And, that: 'Judges shall inquire diligently, and if the witness is a false witness and has accused his brother falsely, then you shall do to him as he had meant to do to his brother. So you shall purge the evil from your midst' (Deuteronomy 19:18-19). Accordingly, a person who falsely accuses another is evil.
51. Needless to state also that; false accusation is a blatant abuse of the criminal justice.

Whether PW1 was truthful in terms of Section 124.

52. The appellant submitted that PW1 denied having had sex with the appellant but was placed in custody by the trial court forcing her to change her statement. The appellant therefore argued that the evidence of PW1 was not firm and did not warrant the conviction.

As a general rule, a person may not be convicted upon evidence of a child of tender age taken pursuant to section 19 of the *Oaths and Statutory Declarations Act*, unless it is corroborated by other material evidence in support thereof implicating him (Section 124 of the *Evidence Act*) Provided, where, '...in a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth (proviso to Section 124 of the *Evidence Act*).

53. In sexual offences, corroboration of evidence of the victim of sexual assault is not a mandatory requirement. The law allows, in sexual offences, where 'the only evidence is that of the alleged victim of the offence,' (ibid) the trial court '...to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.' (ibid)



54. The trial court noted that the complainant was lying which informed the decision to place her in custody. The complainant later narrated to the court the events and how they occurred. After hearing PW1, the trial court noted that she was truthful. She was categorical that she went to the appellant's house where they kissed and then had sexual intercourse. Her evidence was cogent, gave a picturesque of the incident with such succinct details of the manner it happened and the identity of the assailant. The testimony of the complainant was corroborated by PW2, PW3 and PW5. The evidence leaves no doubt that the appellant caused penetration of her. I so find and hold.
55. 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

56. The appellant submitted that considering the mitigation by the appellant, the sentence was too harsh in the circumstances.
57. The prosecution submitted that the sentence was proper and factored in the appellant's mitigation.
58. It bears repeating that, Section 8 (3) of the *Sexual Offences Act* prescribes the sentence for the offence of defilement, thus; '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.'
59. The trial court sentenced the appellant to 15 years. I do note however that indeed this is a serious offence against a girl of the age of 15 years which took away her innocence. He deceived such a young girl to satisfy his bodily desires and lusts. Age is an aggravating factor and the law expresses the seriousness of such offence against a child by prescribing a sentence of 20 years. The trial court in its discretion imposed 15 years' imprisonment. In the circumstances, 15 years' imprisonment is not excessive but extremely lenient sentence. I see no reason of interfering with the sentence imposed by the trial court. His appeal on sentence fails.

Section 333(2) CPC.

60. I have perused the trial court record and found that the appellant was first arraigned in court on 27/7/2020. he was released on bond on 3/08/2020. The sentence will run from the date he was sentenced by the trial court; 18/05/2022.

Conclusion and orders.

61. The sentence of 15 years' imprisonment imposed by the trial court is upheld.
62. The sentence will run from the 18/05/2022 when he was sentenced by the trial court.
63. It is so ordered.

DATED, SIGNED AND DELIVERED AT KILGORIS THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 5TH DAY OF JULY 2023.

F. GIKONYO M.

JUDGE

In the Presence of:



1. CA – Leken
2. Ms. Pion for Appellant - present
3. Mr. Okeyo for DPP - present

