



**Lusaka v Republic (Criminal Appeal 42 of 2019)  
[2023] KEHC 20461 (KLR) (17 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20461 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL APPEAL 42 OF 2019  
RN NYAKUNDI, J  
JULY 17, 2023**

**BETWEEN**

**GEORGE LUSAKA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

Coram: Before Justice R. Nyakundi

Mr. Mugun for the State

1. The appellant herein was charged with the offence of defilement contrary to section 8(1)(3) of the *Sexual Offences Act* and an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on 18<sup>th</sup> December 2017, in Eldoret within Uasin Gishu, he intentionally and unlawfully caused his genital organ, namely penis, to penetrate the genital organ, namely vagina, of CKL, a child aged 8 years.
2. The prosecution called 5 witnesses in support of its case. The appellant elected to testify on his own defence and did not call any witnesses.
3. The complainant testified that on the material date she had been sent to buy tomatoes and on her way back she met the accused who offered her a lift home. After she dropped the tomatoes home he asked her to accompany her to see his children and they went to his house but they did not find his children there. Thereafter he took her to the video shop where he left her and came back to pick her at 7 pm. She testified that they went home, ate supper and had sex. In the morning he gave her 100.00 and she went home. She admitted that the first time she slept with the accused was 18<sup>th</sup> December 2017 and added that the accused did not force her.



4. PW2, the village elder testified that the complainant had been beaten by her parents who were enquiring where she had been the previous night. She revealed that the accused had taken her to live with her. PW3, rev. Lwanga testified that the complainant is his daughter. He produced her birth certificate proving that she was born on 18<sup>th</sup> July 2004. He testified that the minor fled from home on 17<sup>th</sup> January 2018 and when she returned, her mother had beaten her to the point that she alleged that she had gone to the accused house in Moi's bridge.
5. PW4, Dr Lillian Taban, a medical doctor testified on behalf of Dr. Temet. She produced the P3 on the complainant which revealed that the complainant had a hymeneal tear with a whitish discharge. The physical examination findings were consistent with defilement.
6. The accused was placed on his defence and testified that the accusation as due to a grudge against him by the complainant's mother as he had refused to get into a relationship with her.
7. Upon considering the testimonies and evidence presented in court, the trial magistrate was satisfied that the prosecution had proved its case beyond reasonable doubt. The trial magistrate convicted him of the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* and sentenced him to 20 years' imprisonment.
8. Being aggrieved with the conviction and sentence, the appellant instituted the present appeal vide a petition of appeal filed on 15<sup>th</sup> March 2018 premised on the following grounds;
  1. That the trial magistrate erred in law and in facts when she failed to note that the medical evidence was benign and unable to prove penetration.
  2. That the trial magistrate erred in law and in facts by convicting (me) yet the prosecution case was not proved beyond the required threshold in criminal law.
  3. That the trial magistrate is faulted for conducting unfair trial in tandem to him/her as the law provides.
  4. That the trial magistrate is faulted for not finding that all the prosecution witnesses were not credible to base a conviction.
  5. That the trial magistrate erred in law and in facts by failing to appreciate (my) alibi defence without giving any cogent reason for disregarding the same.
  6. That further grounds will be adduced at the hearing of this appeal thereof.

The court directed that the appeal be canvassed by way of written submissions.

### **Appellant's Submissions**

9. The appellant submitted that the medical evidence was doubtful. He urged that the charge sheet stated that the offence occurred on 18<sup>th</sup> December 2017 and the



examination was carried out on 18<sup>th</sup> January 2018, a year later. Further that the clinical officer did not explain whether the discharge was fresh or not. He maintained that the witness's testimonies were full of hearsay and speculations, contradictory and inconsistent. He stated that the complainant was forced to confess something that never happened because her parents beat her. He urged that the complainant's father stated that he had reported his daughter missing but there was no documentary evidence of the report.

10. The appellant submitted that he was proved to be HIV positive by the testimony of the medical officer but the complainant who was tested a month later was negative. He stated that his constitutional rights were violated as he was arraigned two days after his arrest.
11. The appellant urged that the appeal be allowed and he be set at liberty.

### **Respondent's Case**

12. There were no submissions filed on behalf of the respondent.

### **Analysis & Determination**

13. As a first appellate court; I should re-evaluate the evidence afresh and arrive at own independent conclusions. I am however reminded to bear in mind that I neither saw nor heard the witnesses and give due regard for that. See *Njoroge v Republic* (1987) KLR, 19 & *Okeno v Republic* (1972) E.A, 32.
14. Upon considering the petition of appeal and the submissions thereto, the following issues emerge for determination;

### **Whether the offence of defilement was proved to the required standard**

15. 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:

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- (1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- (3) 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.

16. 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:
  - i. Age of the complainant;
  - ii. Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*; and
  - iii. Positive identification of the assailant.



17. The age of the complainant was proved by production of her birth certificate by her father. The complainant's age was proved to be 13 years old at the time of the offence. The medical evidence of the clinical officer was conclusive with regards to penetration having occurred. The appellant was identified by recognition.
18. From the evidence on record, I conclude that the appellant had been repeatedly having sex with the minor and as such, the trial court was justified in its finding. The single witness evidence of the complainant was corroborated by the medical evidence. I therefore find no reason to disturb the conviction.
19. As for the sentence, the minimum sentence for the offence of defilement is prescribed as twenty years. I have considered the mitigation of the accused and the impact of the offence on the victim and it is my considered view that the sentence is commensurate with the offence.
20. In the premises, the appeal is dismissed in its entirety.

**DELIVERED, DATED, SIGNED AT ELDORET THIS 17<sup>TH</sup> DAY OF JULY 2023**

**R. NYAKUNDI**

**JUDGE**

