



REPUBLIC OF KENYA



**Ndung'u v Republic (Criminal Appeal E002 of 2022)
[2023] KEHC 21962 (KLR) (1 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 21962 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E002 OF 2022
HI ONG'UDI, J
SEPTEMBER 1, 2023**

BETWEEN

SAMUEL MWANGI NDUNG'U APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment dated 11th January 2022 by Hon. D.N
Sure (SRM) in Criminal case No. E033 OF 2021 at Engineer SRM's Court)*

JUDGMENT

1. Samuel Mwangi Ndung'u hereinafter referred to as 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](#) No 3 of 2006. The particulars were that the appellant on April 25, 2021 within Nyandarua county intentionally caused his penis to penetrate the vagina of GWK a girl aged 14 years old.
2. He faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) No 3 of 2006. The particulars being that the appellant on April 25, 2021 within Nyandarua county intentionally touched the vagina of GWK a child aged 14 years.
3. The appellant pleaded not guilty to both counts and the case proceeded to full hearing. The prosecution called four (4) witnesses while the appellant gave an unsworn statement of defence. He was thereafter convicted and sentenced to 19 years imprisonment on the principal count.
4. Being aggrieved with the judgment he filed this appeal citing the following grounds.
 - i. That, the learned trial magistrate erred in law and fact by convicting the appellant in a prosecution case where the age of the appellant was not proved.



- ii. That the learned trial magistrate erred in law and fact by holding that penetration of the complainant's genitals (vagina) was penetrated by the appellant while there was no evidence tendered to prove the same.
 - iii. That the learned trial magistrate erred in law and fact by convicting the appellant but failed to note that the prosecution case was not proved beyond reasonable doubt to the required standard.
 - iv. That the appellants defence was not considered accordingly, the evidence tendered was not conclusively considered alongside the appellant's defence
5. The respondent filed the following grounds of opposition dated May 23, 2023
 - i. That the learned magistrate properly convicted the appellant on the count of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* after carefully analyzing the evidence on record.
 - ii. That the prosecution proved its case against the appellant to the required standard of beyond reasonable doubt
 - iii. That the sentence that was meted out by the trial court was legal.
 - iv. That the appellant's appeal lacks merit and should accordingly be dismissed.
6. A summary of the prosecution is that the victim (PW1) who was aged 14 years at the time of incident lived with her grandmother. On the date of incident she had been sent to the shop by the grandmother to buy credit for Kshs 100/=. On her way back she met the appellant a neighbour. She identified him by face and voice though it was dark. He had severally tried to have sex with her and he would talk to her so she knew his voice. When they met he pulled her as he held her sweater. He pushed her to the ground, removed her pant and trouser. She was wearing a skirt which pulled up before removing her pant. He then inserted his male sexual organ into hers. When he was through he warned her not to disclose lest he kills her.
7. On reaching home she informed her grandmother of what had happened. The grandmother (PW2) took her to Karangatha police station where a report was made and she was referred to Cheese Hospital who referred her to Engineer District Hospital from where she was treated and a P3 form filled. PW2 gave similar evidence to that of PW1, in respect of the report she received from PW1.
8. PW3, Dr Martin Owuor examined PW1 and confirmed that she had been sexually assaulted. He produced the P3 form (Pexh 3) and PRC (Pexh 4). PW4 Cpl Wilson Nzioka No 49xxx based at Karangatha police station confirmed receipt of the report from PW1 and PW2. He booked the report and sent them to the hospital. He later effected arrest of the appellant. He produced PW1's birth certificate (Pexh 2) showing the child was born on October 10, 2006.
9. In his unsworn defence the appellant stated that the victim spoke of 6pm as the time of incident yet that time usually finds him at the market place and not at home. That PW1 never saw the culprit but only heard voices which can be misleading. He dismissed PW2's evidence as it did not implicate him. That she had given contradictory evidence on PW1's age. It was his evidence that he had been fixed in this case.
10. In arguing the appeal both parties filed written submissions which they wholly relied on. In his submissions the appellant states that the evidence of PW1 should not be relied on as it was not corroborated by the doctor's evidence. That the only evidence implicating him was that of him having



chased away his wife. He cited the case of *Michael Odhiambo v Republic* (2005) eKLR to support his submission on uncorroborated evidence.

11. On the other hand the respondent who filed its submissions through Mr Alex Ndiema senior prosecution counsel, opposed the appeal. Counsel submitted that a birth certificate produced (Pexh 2) confirmed the victim's age to be 14 years and this was never rebutted by way of evidence. He further submitted that the P3 form, post rape care form and the oral evidence of the doctor (PW3) proved penetration. Additionally that the prosecution witnesses were forthright and should not be doubted. The prosecution case was therefore proved beyond reasonable doubt as the appellant's defence was a mere denial.

On sentence it was counsel's submission that the offence facing the appellant was no ordinary crime and it deserves a more greater sentence like life imprisonment.

Analysis and Determination

12. This is a first appeal and this court has a duty to reconsider and re-evaluate the evidence on record plus the applicable law and arrive at its own conclusion. In the case of *Kiilu & another v Republic* (2005)1 KLR 174 the Court of Appeal held thus;

- (2) An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion.
- (3) It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.

Further in the case of *Boru and another v Republic* (2005) 1 KLR 650 the Court of Appeal held that;

- (4) A duty is imposed on a court hearing a first appeal to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld, as well as to deal with any questions of law raised on the appeal.

13. Upon careful consideration of the evidence adduced herein, grounds of appeal, parties submissions, the law and case law, I find the main issues for determination to be;

- (i) Whether PW1 was defiled
- (ii) Whether the appellant was identified as the perpetrator
- (iii) Whether the sentence meted out is lawful



Issue No. (i) whether PW1 was defiled.

14. Section 8(1) of the *Sexual Offences Act* defines defilement as follows

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

Penetration is hence defined under the same Act as:

“penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person”

The *Children’s Act* (No 8 of 2001) on the other hand defines a child as follows;

“child” means any human being under the age of eighteen years”

15. PW4 who was the investigating officer produced the victim’s birth certificate No 0xxxx6 issued on July 23, 2018 (Pexh 2) it shows her date of birth as October 10, 2006. The alleged date of incident was April 25, 2021. On calculation, this comes to 14 years, 6 months + 15 days as the age of the victim then. She was yet to attain the age of 18 years, and was hence a child as per the *Children’s Act*.

16. The next issue is whether there was penetration of her genital organ and by what. The victim testified that a male organ was inserted in her female one. She was referred by the police to a medical facility for purposes of confirming the allegation. PW3 who introduced himself as a doctor and with his full credentials stated that he filled the victim’s P3 form on April 25, 2021, after examining her though she had been defiled on April 21, 2021. These findings show that the victim had a broken hymen at 3&9 positions with old tags. He thus established penetration of the victim’s female sexual organ.

17. Both the victim and PW3 were cross-examined by the appellant. He never cross-examined them on the issues he is trying to bring up in his grounds (i) and (ii) of the appeal. The fact that the victim was a minor (child) and was defiled are so clear from the evidence and I so find.

Issue No. (ii) whether the appellant was the perpetrator

18. The incident here is said to have occurred around 7.00pm. PW1 had been sent to the nearby shops at 6.30pm and took more time than expected to return. When she eventually returned PW2 inquired about the delay and she explained what Samuel had done to her. The Samuel she referred to is the appellant. It is the victim’s evidence that she knew the voice of the person who defiled her very well for the reason that he is a close neighbour and he had been severally talking to her in order to entice her into having sex with him. So she knew his voice. This is what she further stated in her evidence in chief.

“That night besides his voice I also saw his face> it was not too dark”

19. Identification of persons especially in difficult situations may cause injustice hence the need for caution, when dealing with such a matter. In the case of *Kiilu & another* (supra) this is what the court of appeal stated over the issue

“Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, point to guilt, from which a



judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error.

20. In the present case the victim upon arrival home and inquiry by PW2 of her delay at the shops she immediately revealed what had happened to her. She gave the name of the culprit (who is the appellant) to her grandmother (PW2). Action was taken immediately and a report made to the police the same night at 19.15hrs (as indicated in the P3). This also confirms that the incident did not occur late in the night. In the P3 form (Pexh 3) is indicated on the area of brief details as follows:-

“Alleges to have been defiled by a well known person to her”

21. All the witnesses were subjected to cross-examination by the appellant. He at no point raised any issue that dislodged the evidence by the prosecution witnesses. The evidence of the prosecution flowed together and corroborated each other so well. On the appellants defence which was unsworn I find no serious issue raised therein. The fact that he works at the market upto 6pm does not necessarily mean that he was at the said market on April 25, 2021 at around 7pm when the said incident occurred. He never adduced any evidence to support his claims of having been at the said market at the time of the incident. The learned trial magistrate who saw PW1- PW4 found them to be truthful witnesses. There is nothing presented before this court to make me find otherwise. I therefore uphold the appellant’s conviction.

Issue No (iii) whether the sentence meted out against the appellant is lawful

22. The petitioner submitted that the sentence meted out against him was done without consideration of his mitigation and the fact he is a first offender. I have taken note of the appellant’s mitigation. The record shows that he was arraigned in court on April 29, 2021 and was convicted and sentenced on January 11, 2022. His release on bond was suspended, before the witnesses testified which means he was never actually released on bond.
23. Under section 8(3) of the *Sexual Offence Act* any person convicted of defilement under section 8(1) as was the case here, is to be sentenced to a minimum of twenty years imprisonment. The trial court considered the appellant’s mitigation, time spent in remand and acted accordingly. I do not find anything unique in the mitigation to make me interfere with the sentence meted out as it is a lawful sentence as per the *Sexual Offences Act* which has not been amended.
24. The upshot is that the appeal lacks merit and is dismissed accordingly. The conviction and sentence are both upheld.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 1ST DAY OF SEPTEMBER 2023 IN OPEN COURT AT NAIVASHA.

HEDWIG ONG’UDI

JUDGE

In the presence of:

The appellant present, virtually

Mr. Atika for the respondent

Ms Ogutu- Court assistant

