



REPUBLIC OF KENYA



**Samwel v Republic (Criminal Appeal E044 of 2022)
[2023] KEHC 22560 (KLR) (19 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22560 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E044 OF 2022
RE ABURILI, J
SEPTEMBER 19, 2023**

BETWEEN

STEPHEN OMONDI SAMWEL APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in Tamu Principal Magistrate's Court Sexual Offences Case No. E013 of 2022 delivered on 31st August 2022 by Hon. A. K. Mkoross (PM))

JUDGMENT

1. The appeal herein arises from the Judgment, conviction and sentence imposed by Hon. A. K. Mkoross, Principal Magistrate, Tamu Law Courts in Criminal Sexual Offences Case No. E013 of 2022, delivered on 31st August 2022.
2. The Appellant herein Stephen Omondi Samwel was charged tried and convicted of the main charge of defilement contrary to Section 8(1) as read with Section 8(4) of the [Sexual Offences Act](#) No. 3 of 2006.
3. Particulars of the charge are that on the 6th day of May 2022 in Muhoroni Sub county within Kisumu County, he intentionally caused his penis to penetrate the vagina of EN; a child aged 16 years.
4. The appellant, a male adult of sound mind was convicted and sentenced to serve fifteen (15) years imprisonment.
5. Aggrieved by the conviction and sentence imposed, the Appellant filed his Petition of appeal on 12th September 2022 setting out the following grounds of appeal:-
 - i. That both the prosecution and the trial court erred both in law and facts by not considering the rules and provisions of law required under [Sexual Offences Act](#) No. 3 of 2006.



- ii. That the trial magistrate erred in law and facts by failing to ‘apprehend’ the glaring contradictions and inconsistent evidence among prosecution witnesses.
 - iii. That the trial court failed in law and facts to take into account the need of Articles 50(2) (c) of *the Constitution* but ‘conceded’ to conviction and sentence.
 - iv. That the trial court failed to consider the animus of witnesses and their credibility.
 - v. That I wish to be present at the hearing of this appeal and or be supplied with trial record to enable me erect more grounds.
6. The appeal was admitted on 21st December 2022 and the Appellant was served with a record of appeal and directions given for the filing of written submissions. The Appellant took the liberty to file amended grounds of appeal dated 9th February 2023 as follows:-
- i. That the trial magistrate erred both in law and fact by failing to apprehend the glaring contradiction and inconsistencies evidence among prosecution witnesses.
 - ii. That the trial court failed in law and facts to take into account the need of Article 50(2) (c) of *the Constitution* of Kenya 2010 but proceeded to convict and sentence the Appellant herein.
 - iii. That key witnesses were not bonded to shed light on how the Appellant herein was arrested.
 - iv. That the trial magistrate acted on wrong principles while convicting the Appellant herein.
 - v. That the Appellant herein was not taken to hospital for examination to ascertain the allegation.
7. The Appellant prayed that his appeal succeeds in its entirety.
8. In support of his amended grounds of appeal, the Appellant filed written submissions dated 9th February 2023 as follows:-
- a. Contradictions

The Appellant submitted that there were contradictions in the prosecution evidence, citing PW 1 at Page 5 Line 9 where it is stated “I saw a naked man running while holding his clothes.” He relied on the case of Dankeri Ram Kishani Pandya Vs Republic Criminal Appeal No. 106 of 1950 EAC where it was held that “It is difficult to distinguish the truth from untruth and as to who was telling lies where evidence is contradicted.”
 - b. On the Right of fair trial, the Appellant submitted that the right is absolute under Article 25(c) of *the Constitution* and is not devogable. He referred to Article 50(2) of *the Constitution* and pages 2 line 1 and 12, page 3 lines 1 and 23, page 4 line 14, page 5 line 2 of the proceedings and submitted that the right of the accused person to be present during the time of trial. Proceedings was violated because the records are not clear whether the accused was present in court or not.
 - c. On the ground that key witnesses were not bonded to shed light on his arrest by the prosecution, the Appellant submitted that bonding of witnesses is a duty of the prosecution even if the witnesses are inconsistent (sic) with the evidence that is adduced before court. He submitted that the stranger who ran naked to the hill as per PW 2’s testimony and the stranger who ran into the Sugarcane as per PW 1’s testimony was not arrested and was not bonded to tell the court the reason for his arrest.



- d. On the issue of medical report and examination, the Appellant submitted that there was no medical evidence to prove penetration being an essential element of the offence of defilement and that he was never taken to hospital and examined to link him to the offence yet he was arrested on the same day of the incident. He faults the Investigating officer for failure to take him to hospital for examination to establish the truth of whether it was him who had defiled the complainant. Further that the doctor testified of a normal white discharge but he did not say if there were spermatozoa seen.
9. The Respondent State did not file any submissions.

Analysis And Determination

10. I have considered the grounds of appeal as amended and the written submissions filed by the Appellant.
11. The issue for determination is whether the prosecution proved all the elements of the offence of defilement beyond reasonable doubt. To determine this issue fully, this court must as a first appellate court reevaluate and reassess all the evidence adduced before the trial court and arrive at its own independent conclusion bearing in mind the fact that unlike the trial court, it neither heard nor saw the witnesses as they testified hence give an allowance for that. See *Okeno Vs Republic* [1972]EA 32 at 3b; *Pandya Vs Republic* (1957) EA 336.
12. I will therefore reassess the evidence adduced before the trial court regarding proof of each element of the offence of defilement as charged.

Age of the Complainant

13. Proof of the victim's age is a key ingredient to prove an offence of defilement given that the penalty is heavy upon conviction, depending on the complainant's age.
14. In the instant case, the evidence of PW 2 the Complainant's mother was that the complainant was aged 15 years old although not mentally well and she was also epileptic and was not attending school. She identified the birth certificate for the complainant which was produced as P. exhibit 5. The birth certificate dated 22nd June 2021 No. xxxx shows that the complainant EN was born on 2nd April 2006. The offence allegedly took place on 6th May 2022 according to the charge sheet. Therefore, the complainant was 16 years, one month and four days old.
15. There was no contrary evidence challenging the age of the complainant. Accordingly, I am satisfied that the prosecution proved beyond reasonable doubt the age of the complainant to be 16 years old hence a child.
16. On the second element of proof of penetration, PW 2, EKS the complainant's mother testified that she had gone to the farm at 4.00am and returned at around 9.00am when she found both doors to her house closed. She had left her daughter the complainant in the house as was the norm and that the daughter would be the one to open the doors and windows whenever she woke up so PW 2 thought that the complainant had not yet woken up. PW 2 then opened the door and heard the sound of her daughter crying from the sitting room so she thought that the complainant who was epileptic had fallen down. When PW 2 got into the sitting room, he found a man having sex with the complainant. She did not know the man who had removed his pants and was naked from the waist downwards. Her daughter was also naked so PW 2 screamed and the man stood, took his clothes and ran out of the house. PW1 raised an alarm as the man ran up the hill and the people who were weeding the farms up the hill arrested the man and took him to the police station and reported the incident. The complainant was examined and PRC as well as P3 forms were filled. Lab results too were released.



17. PW 1 testified of how he was in the farm slashing bushes when he heard screams from PW 2's house saying somebody was raping her child so PW 1 ran to the house of PW 2 and as he approached the homestead, he saw a naked man running while holding his clothes. PW 1 followed the man into the cane plantation but could not catch up with him. They screamed and other people who heard the screams arrested the man whose face PW1 had seen but did not know him before. They then took the man to the Chief and PW 1 recorded his statement at Chemelil. They also took the child to Chemelil.
18. PW 3 Collins Owigi a Clinical Officer at Muhoroni Sub county hospital recalled that on 6th May 2022, the complainant was taken to the hospital on allegations of having been defiled. He examined her and on vaginal examination, he found some whitish discharge and did laboratory tests, HVS, BDNR, PITC, Urinalysis and Hepatitis B as well as for Syphilis and Gonorea. All other tests were negative but in the urine they found some epithelial cells indicative of penetration. A Post Rape Care form was filled and examination confirmed penetration. That information was used by PW 3 to fill the P3 form. He signed both the Post Rape Care form and the P3 form which he produced as exhibits.
19. In cross examination, PW 3 reiterated that there were tissues of penetration albeit there was no injury and that the hymen was not intact but there were signs of penetration. He stated that he could not tell if that was the first time the complainant had sexual intercourse but added that lab results showed epithelial cells indicative of minor injuries and penetration.
20. From the above evidence of PW 2, PW 3, I am satisfied that there was evidence of penetration of the complainant's vagina established proved beyond reasonable doubt.
21. The remaining question is, who penetrated the minor and whether the Appellant was positively identified as the perpetrator of the penetration of the complainant's vagina. The evidence for the prosecution on who defiled the complainant is direct evidence as adduced by PW 2 who found a man that she did not know having sex with the complainant and corroborated by PW 1 who saw the naked man escape from the house of PW 2.
22. I have already reproduced that evidence above. In his evidence, the Appellant denied committing the offence. He stated that on 5th May 2022 he had gone to work on a farm when a lady went and started quarrelling him saying she had not been paid so she called the chief who took the appellant to the police and while at the police station, the chief reported that the Appellant had defiled a child. That the Appellant was then taken to court and charged with the offence that he knew nothing about. He maintained his innocence saying he was not taken to hospital to be examined to pin him to the offence.
23. The appellant submitted that there was no reason why he was not examined medically to confirm if he was the perpetrator of the offence as alleged since he was arrested the same day of the offence so that it could be confirmed if the white discharge had his spermatozoa in it linking him to the offence.
24. He claimed that when he asked the police officer why they had not taken him to hospital, they beat him.
25. The burden of proof lies with the prosecution to prove the guilt of an accused person beyond reasonable doubt. The accused person is under no duty to exonerate himself from the offence. He is not even obliged to give any evidence or challenge any evidence albeit it is in his right to adduce and challenge the evidence adduced against him.
26. From the testimony of PW 2 and PW 1 that the incident took place at 9.00am and that PW 2 found the Appellant stark naked with no pants and her daughter who was mentally challenged and epileptic, naked, with the Appellant in the act of having sexual intercourse with the child crying, PW2 screamed and the Appellant escaped but met PW 1 who saw his face, followed him but could not catch up as he ran into the sugarcane; PW1 and PW 2 screamed and raised an alarm and people who were in the



farms assisted in giving chase and arresting the appellant and escorting him to the police, that evidence compared with the Appellant's defence which claims that he had merely gone to the farm when a lady went to him and quarrelled saying she had not been paid, I am unable to connect the relationship between the appellant and the lady as there was no evidence that the lady in question then turned around and framed the appellant for such a heinous offence which took place on 6th May 2022; I am satisfied that the prosecution witness evidence of PW 1 and PW 2 was sufficient and displaced the defence of denial proffered by the appellant.

27. In my view, there was no mistaken identity of the appellant by PW 1 and PW 2 who saw him naked and as he escaped, he was arrested by people in the farms and escorted to police station. PW 2 found the appellant in the act of defiling the complainant and he and the victim were naked. She screamed and attracted PW 1 who ran to the house only to meet the Appellant escape, naked.
28. The appellant was arrested by members of the public before he could go far and taken to the police that very morning, according to PW 5. He had no opportunity to disappear completely and if he had escaped, he may never have been traced and charged.
29. PW 1 and PW 2 were clear in their testimonies that they had not known the Appellant before, unlike the Appellant who alleged that on 5th May 2022 which was a day before the offence, an unnamed lady had gone to the farm where he worked asking for her pay. There was no evidence that the appellant was responsible for paying the complainant's mother her wages for the work done. There is no evidence of mistaken identity as the offence took place in broad daylight.
30. The Appellant claims in his grounds of appeal and the submissions that other witnesses who participated in the arrest of the appellant were not called to shed light on how he was arrested. However, PW 1 was among those people who chased after the Appellant who entered the sugarcane and when PW 1 and PW 2 screamed asking for help, other people went to the scene and helped arrest the appellant. In my view, the prosecution did not have to call all members of the public who heard the screams for help and who participated in the arrest of the appellant. Furthermore, absence of evidence of arresting persons or even a police officer effecting arrest in itself does not occasion any prejudice to the accused person who was nonetheless arrested and taken to the police station and that is how he ended up in court. See Criminal Appeal No. 168 of 2013 Kenneth Kimngetich Sol Vs Republic (2014) eKLR citing Kiriungi Vs Republic (2009) KLR 638.
31. The Appellant also claimed that he was not taken to hospital for medical examination to establish whether he was the one linked to the defilement of the complainant. In other words, he is claiming that there was no DNA results linking him to the defilement of the complainant. He submitted that only the complainant was medically examined.
32. Section 36 of the *Sexual Offences Act* provides that where a person is charged with committing an offence under the Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing including DNA test, in order to gather evidence and to ascertain whether or not the accused person committed the offence.
33. From a reading of the above provision, there is no mandatory legal requirement that a suspect in defilement cases must be subjected to DNA to establish whether he committed the offence. The Section gives discretion to the trial court, having regard to the circumstances of each case, to order for medical or forensic examination of the suspect under the *Sexual Offences Act*.
34. In this case, the trial court believed the testimonies of PW 1 and PW 2 and I have no reason to doubt those testimonies that were subjected to thorough cross examination by the Appellant as though he



- was a trained advocate, that the appellant was positively identified as the defiler hence there was no necessity for medical examination to prove that the whitish discharge had spermatozoa of the appellant in it, as it is not in all cases that defilers leave sperms in their victim's genital organs.
35. There is indeed no legal requirement that before being charged, an accused in sexual offences must be taken for medical examination to link him to the offence.
 36. In this case, I find that there is no evidence that there was any gap in the evidence of the prosecution to warrant medical examination of the appellant to link him to the offence which took place in the early morning and daylight with the appellant being caught in the act and such failure to subject him to medical examination did not occasion him any prejudice in view of the overwhelming evidence of him being found in the act of defiling the minor hence such failure is not fatal to the prosecution's case.
 37. The Appellant further pleaded and submitted that his rights to fair trial which are absolute as contemplated in Article 50(2) (c) of *the Constitution* and unlimited under Article 25 of *the Constitution* were violated.
 38. He also lamented that there was no indication in the trial court proceedings as to whether the Appellant was present on the pages stated in the submissions. On the latter submissions, I have perused the trial court proceedings and albeit the record does not say 'present', on the pages that the appellant claims the court did not say he was present, the record shows that the trial court recorded 'accused person' and on many of those occasions such as on the plea day of 16th May 2022, the accused responded to the charge although the record does not say..present. On subsequent dates such as 23rd May 2022, accused person states-- I pray for another date. On 20th June 2022, the appellant/accused said; 'I am ready' and the hearing commenced and he ably cross examined the witnesses on all the hearing dates. Even on 6th July 2022 when the prosecutor was said to have had a sick child, the appellant prayed for a nearer date. The same situation happened on 13th July 2022 when the prosecution prayed for adjournment saying the Investigating Officer was sent on a rescue mission and the doctor was engaged in other duties, the appellant stated; 'I pray that the case be hastened. On 21st July 2022 the accused said 'I am ready' although there is no specific record of 'Accused present' and he proceeded and cross examined the witnesses.
 39. For the above reasons, albeit it is a good practice for the trial court to indicate whether an accused person is present in court whether virtually or physically, failure to indicate when, in fact, the accused is in court and participates actively and fully in the hearing of his case, is not prejudicial to the accused and therefore not fatal to his case. I therefore find and hold that the ground of appeal and lamentation by the appellant on the recording of whether he was present in court or nor has no merit.
 40. On the allegation that his rights to a fair trial under Article 50(2) (c) of *the Constitution* were violated, Article 50(2) (c) of *the Constitution* stipulates that every accused person has the right to a fair trial which includes the right to have adequate time and facility to prepare a defence. The appellant has not substantiated how his right to fair trial under the sub Article 50(2) (c) of *the Constitution* was violated.
 41. But again, revisiting the trial court record, I observe that the Appellant was promptly informed of his right to legal representation, he was supplied with all witness statements and accorded the opportunity to cross examine and he did cross examine witnesses in detail, he was also given the opportunity to tender his defence and the opted to give unsworn statement of defence denying that the committed the offence. There is nothing on record to suggest that the appellant's right to fair trial was compromised in any way and neither did he raise any issue during the trial of his right to a fair trial being violated during the trial.



42. Furthermore, he was granted bail pending trial although there is no evidence that he raised the bond terms given to enable him undergo the trial while on bond.
43. Accordingly, I find and hold that the ground of appeal and submission on alleged violation of the appellant's rights under Article 50(2) (c) of the Constitution has no merit and is dismissed.
44. That appellant further pleaded and submitted that the prosecution witnesses gave contradictory evidence hence the case against him was not proved beyond reasonable doubt. He cited the testimonies of PW 1 and PW 2 wherein PW 1 stated that when he saw the naked man running away from the homestead of PW 2 while holding clothes, he followed him into the cane plantation but could not get him and the testimony of PW 2 who stated that when she found the man having sexual intercourse with her daughter, and both were naked, she screamed and the man stood up and took his clothes and ran out of the house when she raised the alarm and he ran up the hill and the people who were weeding farms up the hill arrested the man.
45. Whereas I agree that there is some inconsistency in that evidence of PW 1 and PW 2 regarding where the accused ran to, with PW 1 stating that he ran into the sugarcane whereas PW 2 stated that he ran up the hill, this contradiction in my view is not material for reasons that there is nothing on record to show that up the hill, there was no sugarcane plantation where the accused, according to PW 1 ran into after escaping from the house of PW 2.
46. The contradiction in my view is minor and does not go to the root of the case nor vitiate the evidence that the appellant is the person whom PW 2 found naked and having sexual intercourse with her daughter inside the house. She saw his face and he took his clothes, ran out up the hill and as she screamed for help, the said person whom she identified in court as the accused, was arrested by people who were weeding in the farms.
47. In my view, that contradiction is so minute as not to vitiate the conviction of the appellant.
48. In the end, I find and hold that the prosecution proved its case against the appellant beyond reasonable doubt and therefore the conviction of the appellant was sound and safe. I uphold it and dismiss this appeal against conviction.
49. On sentence, the appellant never raised any issue not even in the amended grounds of appeal and submissions in support.
50. The appellant was convicted and sentenced to serve fifteen (15) years imprisonment under Section 8(1) as read with Section 8(4) of the Sexual Offences Act. He was a first offender. In mitigation, he pleaded for a sentence that will allow him to take care of his children who are suffering. In the sentencing remarks, the trial magistrate observed that Section 8(1) (4) of the Sexual Offences Act provides that any person found guilty of an offence under the Section shall be sentenced in prison for a period of not less than fifteen (15) years. That the court's hands were thus bound and he accordingly sentenced the accused person to imprisonment for a period of 15 years.
51. From the above sentencing remarks, the trial court did not consider the mitigation of the appellant and the fact that the appellant was a first offender. Ofcourse, the offence with which the appellant was convicted is heinous and the situation is made worse because the complainant was a sick child with epilepsy which had impaired her mental faculties. According to the psychiatrist report dated 5th July 2022, the child was affected by the poorly controlled epileptic fits. The appellant took advantage of a vulnerable child who was not in a position to defend herself. From the prisons records, the appellant was 45 years old and therefore the defiled child could have been his own daughter's age mate.



52. He pleaded for lenient sentence because his children were suffering. He should have considered the consequences of his heinous action.
53. Nonetheless, as the appellant was not on bond during the trial and the trial court did not consider that he was a first offender and the mitigations; and in view of the discretion given to the trial courts in sentencing especially where the penalty Section uses the term 'liable to', as is in the present case, I find that this is a proper case for this court to interfere with the sentence imposed on the appellant and further invoke the provisions of Section 333(2) of the Criminal Procedure Code, to take into account the period that the Appellant spent in custody during the trial.
54. Accordingly, I hereby uphold the conviction of the appellant and dismiss the appeal against conviction. I set aside the sentence of fifteen (15) years imprisonment and substitute it with a prison term of ten (10) years imprisonment to be calculated from the date of arrest on 6th May 2022 as the appellant never raised bond granted to him by the trial court.
55. I so order.
56. This file is hereby closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 19TH DAY OF SEPTEMBER, 2023

R. E. ABURILI

JUDGE

