



**Katili v Director of Public Prosecutions (Criminal Appeal E072 of 2023)  
[2023] KEHC 24292 (KLR) (Crim) (24 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24292 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL APPEAL E072 OF 2023  
DR KAVEDZA, J  
OCTOBER 24, 2023**

**BETWEEN**

**BONIFACE MUTIE KATILI ..... APPELLANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT**

*(Being an appeal against a conviction and sentence of Kibera Law Court Sexual  
Offence Case No 33 of 2020 of Hon R. Kitagwa PM delivered on 23/02/2023)*

**JUDGMENT**

1. The appellant was charged with the offence of Defilement contrary to Section 8(3) of the [Sexual Offence Act](#) no.3 of 2006. He was convicted and sentenced to serve 20years imprisonment. The particulars of the offence are that on diverse dates between the month of December 2019 and 16<sup>th</sup> April 2020 at Kibera within Nairobi County, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of SAO a child aged 12years.
2. The Appellant being aggrieved filed the present Appeal on grounds that the Trial court erred in taking into consideration the contradictions and inconsistencies depicted in the complainant testimony. The trial court failed to consider that the appellant was not properly identified. That the sentence was harsh and excessive and generally that the trial court relied on poor investigation by the Respondent. The Appellant urged the court to allow the appeal and quash the conviction.
3. The Appellant and the Respondent filed their respective submissions in respect to the appeal.
4. This being the first appellate court I am mindful of my duty to reassess and reevaluate the evidence tendered in the trial court afresh and make my determination. This was the determination by the court in *Odhiambo v Republic* (2008) KLR 565, where the court said that: "... The court has a duty to ensure



it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence”.

5. In order to prove their case the prosecution called 5 witnesses. PW1 DOA the father to the complainant stated that his daughter was born on 27/8/2008, he further produced the birth certificate as proof of the age of the complainant. He also stated that the birth certificate had errors on the date of birth of the complainant and the error was yet to be corrected. He further stated that the complainant had visited her aunty when he was called and informed that he needs to take the minor to the hospital. He stated that the minor had no panty at that time. Upon examination it was noticed that she had been defiled. It was after one month that the father reported the case to the police.
6. PW2 SAO the complainant stated that she was born in 2008 and was 12years. She positively identified the appellant as their neighbor who used to pass at their place whenever she used to wash her mother’s plates and cups. She stated that the appellant used to invite her to his house where he could touch her breasts then threaten her with a panga before he could pull her skirt and started doing bad things to her. She acknowledged that she visited the appellant oftenly and that they engaged in sex several times. That upon informing the father she was taken to hospital.
7. PW3 no 101677 Police Constable Jane Wanjiru the investigating officer told the court that the matter was reported to the station and she was given the duty of investigating the matter.
8. PW4 John Njuguna the medical officer tendered documents on behalf of Simonn Nzambi who had left the country for further studies. Upon examining the complainant it was noted that she had normal external genitalia, the hymen had multiple hymenal tears,
9. PW5 Alice Gori a nurse further noted that the labia majora and minor were still forming. The complainant had painful lacerations at 11oclock and 1oclock region. She had heyprania at 3oclock, she also had luten meaning she had frequent sexual intercourse. She also had had whitish discharge.
10. After the close of the prosecution’s case, the appellant was found to have a case to answer. He was put on his defence and elected to give unsworn testimony. He called one witness. He told the court that he was given an assignment by the mother to the complainant and he discovered that the mother used to beat the complainant every now and then, he then reported the matter to SHOFCO and the mother was summoned. He stated that when the mother got to know about the person who reported the matter and she decided to revenge by reporting him over the current allegation which he didn’t commit.
11. DW2 David Omari an elder in the area told court that the complainant was always being assaulted by the parents and there was a time people from SHAFCO came and collected the girl since the matter had been reported.

### **Analysis and Determination**

12. In grounds 1, 2, and 3 the appellant challenged the totality of the prosecutions evidence as hearsay and not sufficient to warrant a conviction. He submitted that the evidence of the complainant was full of material contradictions. He claimed that there were contradictions as to when the alleged defilement was done. That the medical officers failed to give an estimate of the age of the injuries seen on the minor. He further contended that the issue relating to broken utensils were not put into consideration by the court. He also asserted that the age of the complainant was not proved as required.



13. Section 2 (1) of the *Sexual Offences Act*, no 3 of 2006 defines penetration as follows:

‘Penetration’ means the partial or complete insertion of the genital organs of a person into the genital organs of another person.

Further, section 8(1) and (3) of the *Sexual Offences Act*, no 3 of 2006 provides thus: -

14.

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(3) A person who commits an offence of defilement with a child between the age the age of twelve and fifteen years is guilty of an offence termed defilement and is liable upon conviction to imprisonment for a term not less than twenty years.

15. Bearing in mind the above provisions, I will now analyze the evidence on record to ascertain whether the essential ingredients of the offence preferred against the appellant were established to the required standard of proof. Regarding proof of age, I wish to state at the outset that the importance of proving the age of a victim, proof of penetration, and positive identification of the assailant in sexual offences is paramount. The complainant’s father (PW 1) indicated that the complainant was born on 27/8/2008 and was nine (12) years at the time of the alleged incident. Her birth certificate was produced to that effect and though it had some errors the father explained the cause of the error. The trial Magistrate also noted that he observed the demeanor of the complainant and that she was child. The prosecution, therefore, adduced credible evidence to prove that indeed the complainant was a child at the time the offence was allegedly committed.

16. The question I must now grapple with is whether the prosecution adduced sufficient evidence to prove that the appellant defiled the child victim as alleged. PW 2 after a voire dire examination gave an unsworn statement in which she narrated how the appellant forcefully lured her to his house and defiled her. She told the court that the assailant removed her skirt before removing his trouser and then doing bad manners to her. She further told the court that she used to go to the appellants house oftenly and they used to have sex.

17. The medical evidence presented confirmed that the complainant’s genital area was that her external genitalia were normal, the hymen had multiple tears. She had heyprania at 3.00oclock and she also had lutels and indication that she had frequent sexual intercourse. The conclusion by PW 4 and PW 5 was that the complainant had been defiled and the object used was a penis. There is no other possible explanation of what could have happened to the minor’s genitals besides evidence that she was defiled.

18. Regarding the identity of the perpetrator, the complainant knew the appellant and identified him as their neighbor who had sexually defiled her. The identification was therefore by recognition. From the evidence, the complainant was very clear on the events that took place and the identity of the perpetrator. After my appraisal of the evidence on record, I am unable to fault the finding of the learned trial magistrate. The prosecution evidence leaves no doubt in my mind that the appellant defiled the complainant and the elements of the offence have been proven.

19. In ground 4 the appellant complained how the trial was conducted arguing that he was never issued witness statements before the trial began. From the record of the trial court, the appellant was issued with witness statements on 5 th March 2018 and he confirmed receipt. That ground of appeal therefore fails.

20. On the sentence, the appellant was convicted to serve twenty years imprisonment. In the sentencing proceedings, the trial court noted that he had considered the age of the offender and his mitigation. He



stated that his hands were however tied by the law and proceeded to sentence him to 20years because of the victims age.

21. Thus, in my view, section 329 of the *Criminal Procedure Code*, gives to the judges and magistrates, in appropriate cases to consider mitigation and mete out a sentence that fits the offence committed despite another sentence being provided for under the Act in which the offence is prescribed. In that regard, I find 20years for a first offender being somewhat too stiff and shatters the hope. It would be an injustice to keep certain offenders for an indefinite period of time, when the circumstances of their cases suggest that they should at some point be given a chance to start afresh.
22. Therefore, the appeal on sentence succeeds. The minimum mandatory sentence of 20years is hereby vacated. I hereby resentence the appellant to 10 years imprisonment from the date of his conviction being 20th February 2023.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 24<sup>TH</sup> DAY OF OCTOBER 2023**

**D. KAVEDZA**

**JUDGE**

**In the presence of:**

