



REPUBLIC OF KENYA



**Kiio v Republic (Criminal Appeal E110 of 2021)
[2023] KEHC 24237 (KLR) (16 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24237 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E110 OF 2021
GMA DULU, J
OCTOBER 16, 2023**

BETWEEN

BRIAN KIMANTHI KIIO APPELLANT

AND

REPUBLIC RESPONDENT

*(From the conviction and sentence in Sexual Offence Case No. E017 of 2021
at Makeni Law Courts on 18th November 2021 by Hon. Sagero (SRM))*

JUDGMENT

1. The appellant was charged in the Magistrate's court with defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of offence were that on 2nd August 2021 at 1600hours in Makeni County intentionally and unlawfully caused his penis to penetrate the vagina of CKJ a child aged 15 years.
2. In the alternative, he was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act, the particulars which being that on the same date, time and place intentionally touched the vagina of CKJ a child aged 15 years.
3. He denied both charges. After a full trial, he was convicted on the main charge of defilement and sentenced to 20 years imprisonment.
4. Dissatisfied with the conviction and sentence of the trial court, the appellant has appealed to this court, and relied on the following grounds:-
 1. The trial Magistrate erred by failing to observe that the trial was conducted in contravention of Section 19 of the Oaths and Statutory Declarations Act concerned with the reception and admissibility of evidence of a child of tender years, Article 4 of the Constitution, and Section 2 of the SOA as well as presiding over an unfair trial against his constitutional right.



2. The learned trial Magistrate erred both in law and fact when he presided over the trial based on illegality by admitting and considering evidence obtained through torture or inhuman or degrading treatment contrary to the law.
3. The learned trial Magistrate erred both in law and fact by convicting him without considering that there was no evidence to prove penetration without which the prosecution could not prove the offence of defilement to the required standard in law of beyond reasonable doubt.
4. The learned Magistrate erred in fact and in law in shifting the burden of proof to the appellant, misapprehending and misdirecting himself on the evidence, hence arriving at the wrong conclusion, by failing to observe that the prosecution evidence was untenable, unworthy, contradictory, inconsistent and full of lies which required him to resolve the doubts in favour of the appellant.
5. The learned Magistrate erred both in law and fact when he dismissed his sworn defence which alleged the possibility of being framed up due to an existing grudge without giving cogent reasons and sentence him without applying our current jurisprudence on minimum mandatory sentencing.
5. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions. Both sides relied on decided court cases.
6. This being a first appeal, I am guided by the principle stated over and over again by courts that as a first appellate court, I have a duty to consider all the evidence on record afresh and come to my own independent conclusions and inferences but bear in mind that I did not have the opportunity to see witnesses testify to determine their demeanour. See *Okeno v Republic* (1972) EA 32.
7. In proving their case, the prosecution called six (6) witnesses. On his part, the appellant tendered sworn defence testimony and did not call any additional evidence.
8. This is a case where the appellant was convicted of defilement. The appellant has raised both technical and substantive grounds of appeal.
9. The first technical ground is that Section 19 of the *Oaths and Statutory Declarations Act* (Cap.15) was violated with regard to the reception and admission of evidence of a child of tender years, PW1.
10. First of all, PW1 was not strictly speaking a child of tender years, as Section 2 of the *Sexual Offences Act* defines tender years as 10 years and below, while PW1 herein was 15 years old.
11. Secondly, as a matter of caution, the trial Magistrate in fact conducted voire-dire examination of PW1 before allowing her to testify on oath. That ground has no basis, and I dismiss the same.
12. The second technical ground is that the Magistrate admitted illegal evidence obtained through torture and inhuman and degrading treatment. Again on this ground, there is nothing on record to suggest that either the appellant or any of the witnesses for the prosecution tendered evidence which was obtained through torture, degrading treatment or any other illegality. There is also no evidence that the appellant was tortured. That ground also fails.
13. I now turn to the substantive grounds regarding proof of the ingredients of the offence, and shifting the burden of proof and not considering the appellant's defence.
14. The elements of defilement are age of the victim who should be less than 18 years. The fact of sexual penetration. Thirdly, the identity of the culprit.



15. With regard to age of PW1 CKK, she testified that she was 15 years old. She relied on her birth certificate, which was produced in court as an exhibit. It was not contested. In my view, the age of the complainant PW1 was proved beyond reasonable doubt.
16. With regard to penetration, the evidence on record is that of PW1 the victim alone, as the evidence of PW4 Stella Ndambuki Muasya a Clinical Officer does not indicate any findings of forced recent sexual penetration as the hymen of PW1 was broken long before the date of the alleged incident.
17. In my view, the graphic evidence of PW1 was very clear on what happened that day. She invited someone to her mother's rented house when the mother was away for sexual intercourse. She testified that the two had consensual sex, before the mother and brother unexpectedly knocked at the door.
18. In my view therefore, the evidence of PW1 was clear and believable and is thus saved by the proviso to Section 124 of the *Evidence Act* (Cap.80). The Magistrate was thus correct in believing and relying on the same. I uphold the finding that sexual penetration was proved.
19. With the identity of the culprit, in my view, there was no possibility of mistaken identity. It was the appellant who was invited to that house, and found therein by PW2 Benard Nyamai, and PW3 Annastacia Nthenya that evening with the complainant PW1.
20. I am aware that the appellant said that he did not know CKJ. However, it is clear from the evidence on record, that those were initials of CKK, whom he admitted meeting that day. So the appellant was the perpetrator.
21. Having said so however, in my view, the conduct of the complainant of inviting the appellant home for the purposes of having sex, shows that she was actually the primary offender, not the culprit herein who was the accused. PW1 should actually have been charged with enticing somebody to have sex with her, though such offence does not exist under the *Sexual Offences Act*.
22. However, the Act under Section 8(5) provides for a defence for victims of such enticement, by people who behave like adults like the victim herein PW1.
23. I thus find that the defence under Section 8(5) of the *Sexual Offences Act* applies in this case. On that account alone, I will allow the appeal, quash the conviction and set aside the sentence.
24. For the above reasons, I allow the appeal quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 16TH DAY OF OCTOBER 2023 VIRTUALLY AT VOI.

GEORGE DULU

JUDGE

In the presence of:-

Alfred – Court Assistant

Appellant

Mr. Kazungu for State

