



**Kaguiri v Republic (Criminal Appeal E055 of 2020)
[2023] KEHC 23471 (KLR) (9 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23471 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL E055 OF 2020
DAS MAJANJA, J
OCTOBER 9, 2023**

BETWEEN

JOHN WANGAI KAGUIRI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the Original Conviction and Sentence of Hon. V. Masivo, RM dated 7th September 2021 in Criminal (SO) Case No. 38 of 2020 at the Magistrate's Court at Nanyuki)

JUDGMENT

1. The Appellant was charged and convicted of the offence of defilement contrary to section 8(1) and (3) of the *Sexual Offences Act*. The particulars were that on 15.07.2020 in Laikipia County he intentionally and unlawfully caused his penis to penetrate into the vagina of MN, a girl aged 14 years old.
2. The Appellant was sentenced to 20 years' imprisonment and now appeals against the conviction and sentence. The grounds of appeal are set out in the Petition of Appeal received on 23.09.2021 and supplemented by written submissions. In addition, Waweru J., heard the appeal by way of oral arguments and reserved judgment but retired before he could deliver the judgment. I am now called upon to finalise the appeal.
3. This is the first appellate court and in *Okeno v. R* [1972] EA. 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court and at all times bearing in mind that it is the trial court that heard and saw the witnesses testify. In order to proceed with this task, it is necessary to outline the case as it emerged before the trial court.
4. After a voire dire, PW 1 testified that she was in class 7. She stated that she knew the Appellant as he used to come and buy fruits at her home. That on 15.07.2020, the Appellant came and asked her to



accompany him to the nearby forest. The proceeded there and took photographs on his phone. PW 1's mother, PW 2, found them at the forest and told her to go home. PW 1 did not go home but instead went to the Appellant's home where she stayed overnight. She explained that during the night, she was subjected to sexual intercourse by the Appellant. In the meantime, PW 2 had reported to the police that PW 1 did not come home that night. On the next day, Police officers came with PW 1's brother looking for her. They found her at the Appellant's house on the next day while the Appellant was out. After the Appellant was arrested, the police officers searched his house and found PW 1's clothes in the house.

5. The thrust of the Appellant's case is that the prosecution failed to prove all the elements of the offence of defilement beyond reasonable doubt. In order to succeed in a prosecution for defilement, it must be proved that the accused committed an act that caused penetration with a child. "Penetration" under section 2 of the *Act* means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person."
6. This is not a case where the Appellant was a stranger to the complainant (PW 1). PW 1 knew him as he had bought fruits from her before and he was also known by PW 2 who saw him with PW 1 on the same day of the incident. As regards the act of penetration, PW 1 gave clear testimony as to what took place on the material night while she was at the Appellant's home. PW 1's testimony that the Appellant is the person who committed the act of penetration was sufficient to support the conviction. The proviso to section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) permits the trial court to convict a person for a sexual offence without corroboration if the court records the reasons for being satisfied that the victim is telling the truth. In this respect, the trial magistrate noted that, "I listened keenly to her evidence she was firm in her testimony and gave or recall(ed) every detail well. I am therefore satisfied the victim is telling the truth."
7. In this case though, there is sufficient corroborative evidence to support PW 1's testimony. She was found by PW 3, a police officer, sleeping in the Appellant's house after she had been reported missing by her mother, PW 2. While the officers were there the Appellant arrived. In addition, PW 5, the Investigating Officer, confirmed that when she went to the Appellant home, she collected PW 1's clothes and panga which she had left in that house. Finally, there was also the medical testimony of the clinical officer, PW 4, who produced the P3 medical form and Post Rape Care (PRC) form and confirmed there was penetration based on the observation that the hymen was freshly broken and tender.
8. In his defence, the Appellant denied the offence. He told the court that on 15.07.2020 he woke up as usual and went to work and was only arrested when he was returning home. He denied that he was staying with a girl. He also denied that PW 1 was staying at his home. The trial magistrate rightly dismissed the defence as a mere denial in light of the overwhelming evidence against him.
9. Turning to the final ingredient of the offence of defilement, I find that the prosecution proved the age of the child. PW 1's birth certificate showing that she was born on 18.03.2006 was produced in evidence. Thus PW 1 was aged 15 years when the offence was committed. From the totality of evidence, I am satisfied that the conviction is safe as the prosecution proved that the Appellant is the person who committed the felonious act of penetrating the vagina of PW 1 with his penis.
10. The victim's age was proved to be 15 years hence the sentence fell within the tariff prescribed in section 8(3) of the *Sexual Offences Act* which prescribed a minimum sentence of 20 years' imprisonment. The sentence was within the law and is therefore affirmed.
11. The conviction and sentence are affirmed. The appeal is dismissed.



SIGNED AT NAIROBI

D.S. MAJANJA

JUDGE

DATED AND DELIVERED AT NANYUKI THIS 9TH DAY OF OCTOBER 2023.

A.K. NDUNG’U

JUDGE

