



**Lokadelio v Republic (Criminal Appeal E003 of 2023)
[2023] KEHC 23609 (KLR) (17 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23609 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CRIMINAL APPEAL E003 OF 2023
RN NYAKUNDI, J
OCTOBER 17, 2023**

BETWEEN

SAMSON ESINYEN LOKADELIO APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Samson Esinyen Lokadelio, the Appellant herein was charged with the offence of Defilement contrary to section 8(1) as read with section 8(4) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the offences were that on the 4th Day of July, 2022, at [Particulars withheld] village in Turkana central sub-county within Turkana County, intentionally caused his penis to penetrate the Vagina of JC, a child aged 16 years old.
2. Alternatively, he was charged with an offence of committing an Indecent Act with a child contrary to section 11(1) of the [sexual offences Act](#). The particulars of the offences were that on the 4th Day of July, 2022, at [Particulars withheld] village in Turkana central sub-county within Turkana County, intentionally caused his penis to penetrate the Vagina of JC, a child aged 16 years old with his penis.
3. The Appellant was found guilty as charged, convicted and sentenced to serve seven years imprisonment. He was aggrieved with the conviction after which he instituted the present appeal. The appeal is based on one ground which are couched as follows:
 1. The trial Court erred in law and in fact by failing to find that the offence of defilement was not proved beyond reasonable doubt.
4. Both parties filed their submissions which I have considered in making a determination.
5. The prosecution marshalled the evidence of five (5) witnesses in support of the charge whose evidence is summarized as follows.



6. PW1; JC the complainant in this matter testified that she was 14 years of age but did not know her exact year of birth. She also stated that she was in class 6 at [Particulars withheld] school when the alleged offence was committed. She stated that on 4th July, 2022 at around 7:00PM, she was at her home with her friend LE who asked her to escort her to the toilet which was distant and as they passed by the accused person's house, the accused person called her and told her that he loved her and then he began following them and told them to go to a field.
7. It was also her testimony that the accused person told her that she loved her again and as her friend remained behind the accused person stripped her off her skirt and her panty and had sexual intercourse with her without her consent.
8. She then left for home afterwards with her friend and that she did not disclose what had transpired to her mother as she was scared. Later, she said, her aunt disclosed to her mother that PW1 had had sex with the accused person and she was taken to [Particulars Withheld] Hospital and the accused person was arrested by the police. She also said that she was taken for age assessment where it was established that she was 16 years old.
9. PW2, LE, stated that on 4th July, 2022 at around 7:00PM she was at home with her cousin, PW1 and asked her to take her to the toilet after which they went to separate trees.
10. It was her further testimony that she heard a scream coming from PW1's side and she was scared that if she ran away then the accused person would rape her as well. PW1 went on to state that afterwards they returned home and they never told anyone of the incident.
11. PW2 testified that she told PW1's mother the following morning and PW1 was taken to hospital and then the matter was reported at [Particulars withheld] police station. She equally stated that she knew the accused person prior to the incident and that on the material day she was able to recognize him.
12. PW3, SO, told the trial court that she is a nurse at [Particulars withheld] Hospital and that PW1 was taken to her on 18th July, 2022 by the guardian with a complaint of having been defiled by a person known to her on 17th July, 2022 at around 8:00PM.
13. She testified that on examination of both PW1's Labia Majora and Labia Minora both were normal and that there was no abnormal discharge but PW1's Hymen was perforated. She went on to state that PW1 was HIV negative, pregnancy was negative and the Syphilis test turned out to be negative.
14. She also stated that she prepared the P3 form and relied on treatment notes from [Particulars withheld] then produced the treatment notes and the P3 Form as P. Exh. 1 and P. Exh. 2 respectively.
15. PW4, SA, told the trial court that on 17th July, 2022 at around 6:00PM she was at her home when she noticed that PW1 was not walking properly and on inquiry, PW1 told her of the incident where the accused person defiled her upon which she took PW1 to [Particulars withheld] Hospital where PW1 was examined and the matter was reported to the police. She also testified that the accused person is their neighbor and that PW1 was born on 6th June, 2006.
16. PW5, PC KC, testified that in 18th July, 2022, he was assigned the case as the investigating officer and he recorded the witness statements and that in his investigations he established that indeed the victim defiled.
17. PW5 further told the trial court that after recording witness statements, he found that the accused person had already been arrested and a P3 form had been issued to PW1 and that he took PW1 for an age assessment where it was established that PW1 was 16 years old. He proceeded to produce the age assessment as P. Exh. 3.



18. The accused at the trial court opted to remain silent and wait for the judgment of the court.
19. In determining this appeal this court shall satisfy itself that the ingredients of the offence of defilement were proved as so required in law; beyond reasonable doubt. The specific elements of the offence defilement arising from Section 8 (1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are:
- 1) Age of the complainant;
 - 2) Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*; and
 - 3) Positive identification of the assailant.
20. In the case of *Charles Wamukoya Karani vs. Republic*, Criminal Appeal No. 72 of 2013 it was stated that:
- "The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."
- What does the evidence portend?
21. This being a first appeal, this court is obligated to consider the evidence afresh in order to reach its own independent conclusion. In doing so, I must bear in mind that, unlike the trial court, I did not have the opportunity of observing the demeanour of the witnesses as they testified.
22. I have re-evaluated the evidence that was presented before the trial court and having considered the parties' submissions, I am persuaded that the appeal has merit. The learned prosecution counsel correctly conceded to the appeal.
23. The learned prosecution counsel conceded the appeal on two grounds, to which I agree. That the trial court failed to conduct voir dire examination and the testimonies given by the witnesses were contradictory.
24. According to the complainant, she was defiled on 4.07.2022. Later her aunt discovered and informed the mother. PW2 stated that it is the following day that she informed the complainant's mother and the complainant was taken to hospital. PW4 on the other hand informed the court that she was at home on 17.4.2022 when she noticed that the complainant was not walking properly and took her to hospital on 18.07.2022. As correctly observed by the prosecution counsel, the chain of event was not clearly established from the time of defilement to the time she was taken to hospital.
25. Additionally, the elements of defilement as aforementioned were not proven beyond reasonable doubt. I am therefore persuaded that the appeal herein has merit and I shall proceed to allow it.
26. Consequently, the sentence is set aside. The appellant is at liberty unless otherwise lawfully held. Accordingly, the appellant is set free unless otherwise lawfully held.

DATED AND SIGNED AT LODWAR THIS 17TH DAY OF OCTOBER, 2023

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R. NYAKUNDI

JUDGE

