



**JSM v Republic (Criminal Appeal 46 of 2023)
[2024] KEHC 14448 (KLR) (20 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14448 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 46 OF 2023
DR KAVEDZA, J
NOVEMBER 20, 2024**

BETWEEN

JSM APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered on 14th June 2023 by Hon. E. Riany (SRM) at Kibera Chief Magistrate's Court Sexual Offences Case no. 33 of 2023)

JUDGMENT

1. The appellant was charged and after full trial convicted by the Subordinate Court for the offence of defilement contrary to section 8(1) as read with 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that the appellant on diverse dates between the month of May 2022 and March 2023 at different times at Silanga Kibera, Lang'ata Sub-county within Nairobi County intentionally caused his penis to penetrate the vagina of R.N a child aged 13 years. He was sentenced to serve twenty (20) years imprisonment.
2. Aggrieved, he filed an appeal challenging his conviction and sentence. In his appeal, he challenged the totality of the prosecution's evidence against which he was convicted. He complained that the trial court failed to consider his mitigation. Finally, that the sentence imposed was excessive.
3. This being the first appellate court, we are guided by the ruling in *Okeno v. R* [1972] EA 32. In this case, the court opined that a court of first appeal ought to re-examine all the evidence afresh and in an exhaustive manner, so as to come up with its own conclusions without overlooking the conclusions of the trial court, bearing in mind that it never saw the witnesses testify.
4. To succeed in a prosecution for defilement, it must be proven 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."



5. Further, section 8(1) and (3) of the *Sexual Offences Act*, No. 3 of 2006 provides thus: -
 8. Defilement
 - (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
6. The complainant, PW1, R.N (name withheld) gave an sworn testimony following a voir dire examination. She testified that she used to leave with her grandparents and was attending school. When her grandmother was away, her grandfather would kiss her then proceed to insert his penis into her vagina. This happened on several occasions. She subsequently became withdrawn and did not want to go to school. When her teachers inquired she told them what had been happening at home. She continued that at one time her grandfather defiled her until she soiled herself. That's she had to go to school with a foul smell. She told the court that she confided in her teachers Joyce and Steve. The incident was reported to Langata Police Station and she was taken to Nairobi Women's Hospital for examination and treatment. She identified the appellant as her grandfather whom she had lived with for three years as the perpetrator of the offence.
7. In her testimony, PW1 gave clear and graphic testimony of the ordeal. She knew the appellant who was her grandfather and the incident had happened on multiple occasions. There was no issue of mistaken identity. I therefore hold that the appellant was properly identified.
8. PW1's testimony did not require corroboration in accordance with the provision of Section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) if the trial magistrate recorded reasons why she believed the child was telling the truth. To this end, the trial magistrate recorded in the judgement that the court was satisfied that the victim, was very clear in her testimony of her ordeal at the hands of the appellant.
9. Regarding additional corroborating evidence, two of her teachers, Joyce Wanjiku Munga and Agnes Kathure Kimanthi, herein PW2 and PW3, were among the teachers who reported the matter to the police station on 9th March 2023, in addition to taking the complainant to the hospital on 10th March 2023. They testified that PW1 reported that she wanted to go back home in Uganda because she was being defiled by her grandfather. They reported the matter to the police who referred them to the hospital.
10. PW5, John Njuguna, a clinician at Nairobi Women's Hospital, presented PW1's medical records on behalf of Grace Malalo, who was no longer with the hospital. According to the medical examination conducted on 3rd and 9th March 2023, PW1 had a laceration at the 3 o'clock position, several tears on her outer genitalia, an old torn hymen, and normal vaginal discharge, consistent with penetration.
11. PW4, Corporal Peris Makio Mganga, from the Gender Section at Langata Police Station, testified regarding her involvement in the case. On 10th March 2023, she was informed that PW2 and PW3 had reported the matter at the DC Children's Office. They provided a detailed account of the events, after which PW4 interviewed PW1 to gather further information. Following the inquiry, she coordinated the appellant's arrest, interrogated him, and prepared him for court proceedings. She also carried out an age assessment of PW1, confirming that she was between 12 and 13 years old. To support this finding, PW4 submitted PW1's baptism card in court, which verified her age as 13. There is therefore no doubt that the complainant was a child.



12. In his defence, DW1, the appellant, denied the allegations, asserting that his only involvement with PW1 was to provide her with an education. He claimed that PW1 had been influenced by her teachers to accuse him falsely of defilement.
13. DW2, GB, the appellant's wife, stated that she, her husband, and PW1 lived in the same household. She admitted to disciplining PW1, including beating her when she failed to attend school. However, she testified that she had no personal knowledge of any sexual misconduct by her husband involving PW1. She explained that her awareness of the allegations came solely from what PW1's teachers who had communicated to her.
14. The court considered his defence and found it to be incredible. Given the foregoing, I find that the appellant's defence did not dislodge the cogent evidence adduced by the prosecution. In my view, the appellant's defence was properly dismissed by the trial court as an afterthought aimed at exonerating himself from the offence.
15. From the evidence of the prosecution witnesses, which was well corroborated, there is no doubt in my mind that the prosecution proved beyond reasonable doubt the offence charged. The conviction is therefore affirmed.
16. On sentence, the appellant was sentenced to serve twenty (20) years imprisonment. During sentencing, the court considered the pre-sentence report, the appellant's mitigation, and that he was the first offender. The court sentenced the appellant to the minimum sentence provided under the law.
17. As such, I find that the sentence was proper in light of the supreme court decision in Petition E018 of 2023 Republic vs Joshua Gichuki Mwangi. In the end, the appeal is found to be lacking in merit and is dismissed in its entirety.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 20TH DAY OF NOVEMBER 2024.

D. KAVEDZA

JUDGE

In the presence of:

Appellant absent

Mburugu for the Respondent

Achode Court Assistant

