



**Kyalo v Republic (Criminal Appeal E045 of 2023)  
[2024] KEHC 14105 (KLR) (13 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14105 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITUI  
CRIMINAL APPEAL E045 OF 2023  
RK LIMO, J  
NOVEMBER 13, 2024**

**BETWEEN**

**PATRICK KIMANZI KYALO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. This Appeal arises from Kyuso Case No. Criminal Case E016 of 2021 where the Appellant had been charged with the offence of defilement contrary to Section 8(1)(4) of *Sexual Offences Act* No 3 of 2006.
2. The particulars of the offence were that on diverse dates between 25<sup>th</sup> July and 28<sup>th</sup> July 2021 at Kyuso Sub-county within Kitui County he intentionally caused his penis to penetrate the vagina and anus of F.M a child aged 16 years.
3. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No.3 of 2006.

The alternative count is however, not relevant in this appeal because after trial he was found guilty of the principal count of defilement and convicted. He was sentenced to serve 15 years imprisonment on 25/11/2021. He was aggrieved and filed this appeal raising the following grounds namely;

1. That he pleaded not guilty at the trial
2. The learned magistrate erred in law by failing to appreciate that the case of defilement was not proven beyond reasonable doubt.
3. That the learned magistrate erred in matters of law by failing to consider that the adduced prosecution evidence was insufficient, unsatisfactory, hence inconclusive to sustain a conviction.



4. That the learned magistrate still erred in law and facts by failing to record reasons for believing a single witness.
  5. That the learned magistrate erred in law by imposing a harsh and excessive sentence without taking into consideration that the appellant was a first offender.
  6. That he cannot recall all that transpired during trial and he requested to be furnished with certified trial proceedings and judgment so as to adduce further grounds during the hearing of this appeal.
4. Before I look at the grounds raised in this appeal, I will consider the evidence tendered during trial.
  5. The complainant (PW1) gave unsworn statement on what happened to her after the trial court noted that she could not appreciate the significance of testifying on oath. She testified that on 25/7/2021 she had gone to have a haircut at Kamuwongo Market with her friend and cousin named J (PW2). She stated that the appellant who was a hawker selling eggs found her at the barber shop and later at 7.00pm lured her into his house and locked her there and defiled her for 3 days. She stated that at one time the appellant burnt her arm with a cigarette to silence her.
  6. She stated that on 28/7/2021 the appellant got a boda boda and sent her back home. Later on, PW 1 stated that the Accused called a motorbike to take her to the river and she walked to her Aunt's place named L and told her where she had been.
  7. She stated that she was taken to Kamuwongo Police Station to report after she reported the incident.
  8. JN (PW2) also gave evidence that on 25.7.2021, which was a Sunday, she and PW1 who is her cousin were to have a haircut and went to the barbershop. She stated that they found many people and went to a different barber. He stated that she went to buy a razor blade but upon returning, she did not find PW1 but found the appellant person, who sells eggs at Kamuwongo. The accused gave her a cellphone number and told her that if anybody asks for PW1, they should call the number. She went home and gave her mother the number.
  9. She stated that her mother called the number she gave her but the line got disconnected and went dead. She stated that she was later called and asked to go and write a statement at the Police Station.
  10. DKK (PW3) a brother to PW1 gave evidence which largely corroborated the evidence of PW1 and PW2.
  11. He stated that on 25/7/2021 he left for church and when he went back at 4.00pm, PW1 was not at home and thought she had gone to her grandmother's place. He stated that at 8.00pm he went to the grandmother but did not find her and that the complainant did not return the following day either.
  12. On Wednesday, he stated that their grandmother CM called him to go to Kamuwongo, because she had found out where PW1 was and they agreed to report the matter at the police station. He stated that the sister (PW1) was later found and she reported to have been locked up and defiled by someone who used to sell eggs.
  13. CMM (PW4) the complainant's grandmother testified and corroborated the evidence given by PW3. She stated that when she realized her granddaughter was missing, she reported the matter at the police.
  14. PW 4 noted that PW 1 was not fully developed and is easily influenced. PW 1 had told her that he was taken by one 'Kombela', which she confirmed was a nickname associated with the appellant and that he was having sex with her. She identified the appellant at the dock. On cross-examination. She could not recall the date when PW 1 was found but stated that she arrived home at around 9:00pm.



15. Lucas Makau Mwanzue (PW5) a Clinical Officer at Kyuso Sub-County Hospital gave his evidence and confirmed that he examined the complainant (PW1) and filed a P3 Form and PRC Form. He stated that the minor was 15 years old and when he examined her he noted a blister on her chest, abdomen and upper limbs. He noted that upon examination he saw presence of spermatozoa and lacerations on her vagina. He stated that the minor had a bacterial infection and treated her. He tendered P3 as PEX1, PRC Form PEX2, treatment notes PEX3 and treatment card as PEX4. He opined that the cause of blisters was a hot item and that the girl had been defiled.
16. PC Naru Veronica (PW6) testified that she was on duty on 29/7/2021 when the report on defilement was made by PW3 and PW4 in the company of PW1.
17. She stated that the report made was that PW1 went missing from 25/7/2021 to 28/7/2021 when she was found she stated that the girl reported to have been penetrated on her vagina and anus as well. She stated that she accompanied the minor to Kyuso Sub-County Hospital for medical examinations and treatment.
18. She stated that the appellant was later arrested and that when she visited the appellant's house accompanied by both the minor and appellant, she found a mattress on the floor just as the complainant (PW1) had described it. She tendered the birth certificate as PEX5 which indicated that the minor was 16 years at the material time. She also tendered an underwear (PEX6) worn by the minor when she was found.
19. When placed on defence the appellant gave a sworn defence and conceded that he sells eggs at Kamuwongo Centre. He stated that on 30/7/2021, while at his usual place of business he saw 2 police officers approaching him to arrest him and was later brought to Kyuso Police station.
20. The appellant stated that he later saw 4 people and PW 1 approaching. He stated that he could not see how he could have grabbed the girl in public because she could have raised alarm and he would have been arrested by the public. He also states that the dates given by witnesses are conflicting in respect to the time of disappearance.
21. He denied that the complainant was at his place for 3 days. He however denied having any problems with her.
22. The Trial Court was satisfied that the accused held the complainant hostage over the said period, where he defiled her severally. The accused was convicted on the main charge of defilement contrary to Section 8(1) and (3) and the accused was sentenced to 15 years imprisonment.
23. The Appellant submits first that the trial court erred in not considering that PW 1 was not a credible witness. He seeks an answer to the question that if the Appellant had told PW 1 bad things, how then could she have accompanied him to his house? Secondly, if they were in a plot, why did she not call for help if what she was saying was true?
24. The other ground that the Appellant urges is that the trial court failed to note that the prosecution evidence was contradictory, hence unreliable to sustain a safe conviction. For example, he noted that PW 2 who is a cousin to PW 1 stated that they went to a barbershop, where they found too many people hence they went to another one but the statement made by PW 1 was that the accused found her at a barbershop. It was also submitted that the police would not have taken time to arrest the appellant to custody if PW 3, who is PW 1's brother had reported the matter to the police station.
25. On the circumstances of the case, the Appellant states that PW 4 who is the mother of the complainant is his longtime friend of almost one year and they are of the same age. That they had a dispute over money that PW 4 got from selling her animals and she claimed that it was the appellant who took her



money and she wanted it back. After a long quarrel, she told the appellant that he would repay in other ways. He contends that he was framed.

26. The Appellant submits that the case was not proven beyond reasonable doubt and that the investigation officer did not conduct full investigations to know whether the appellant was involved or not, citing the example that there was anal intercourse but there were no such reports from the medical officer.
27. The Appellant also contended that his defence was disregarded by the Trial Court without giving any cogent reasons, stating that there was no report from anyone around that the appellant was holding the complainant. The Appellant prayed that this appeal be allowed and the imposed sentence of 15 years be set aside.
28. The respondent has opposed this appeal via written submissions insisting that all their ingredients of offence were proved beyond doubt.
29. On age, it was submitted that this was proven beyond reasonable doubt by Exhibit 5, which is the Complainant's birth certificate.
30. Regarding penetration, the respondent counsel submits there was corroboration of the oral evidence of PW 1 that there was penetration, contending that PW 3 produced the P3 Form, the PRC form and treatment notes confirming the fact of penetration.
31. On the element of identification of the appellant, Prosecution submits that there was no doubt that this was by recognition and by name. That PW 1 had informed the Court that the Appellant was well known to her and the Appellant conceded that he comes from Kamuwongo centre and he sells eggs.
32. It is the respondent's submission that the sentence was appropriate as defilement of a minor deserves a punitive sentence and urged the Court not to disturb the same.
33. The state contends that the evidence tendered was sufficient to sustain a conviction and supports the conviction as well as the sentence.
34. This court has laid out the appellant's case and opposition by the respondent.
35. The duty of the first appellate court as Aburili J in *KOO v Republic* [2019] eKLR reiterated the principles laid down in the case of *Okeno vs. Republic* (1972) EA 32 where the Court of Appeal for Eastern Africa found that:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya V R* 1975) E.A. 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M. Ruwala V. R* [1957] E.A. 570. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see (*Peters V Sunday Post* 1978) E.A. 424.”



36. The Appellant was charged with the offence of defilement contrary to Section 8(1)(3) of the [Sexual Offences Act](#) which provides:

“A person who commits an act which causes penetration with a child is guilty of the offence termed defilement and depending on the age of the victim is liable upon conviction to imprisonment for a term of not less than twenty years.

37. As correctly pointed out by the respondent the following ingredients must be proved to sustain a charge of defilements. The elements are;

- i. Age of the child
- ii. Penetration
- iii. Positive identification of the perpetrator

38.

- (i) Age

The element of age is not contested in this appeal. The birth certificate (PEX5) as well as P3 (PEX1) indicated that the child or the victim was 16 years old at the material time. The element of age was therefore proved beyond reasonable doubt.

39.

- (ii) Penetration

This is another crucial element which must be established. Section 2(1) Sexual Offence Act define penetration as;

“the partial or complete insertion of the genital organ of a person into the genital organs of another person.”

The minor (PW1) testified that she was defiled repeatedly during the 3 days she was kept at the appellant’s house. The medical officer (PW4) tendered a P3 Form (PEX4) indicating that the minor was penetrated or defiled. He also tendered a PRC Form (PEX2) which proved that penetration was positive. The medical officer corroborated the complainants evidence that she was defiled and that the appellant burnt her using a cigarette to silence her.

40. The PRC form indicated that there were lacerations on the complainant’s vagina and anus, contrary to the Appellant’s contention that the element of anal penetration was not proven. The key ingredient of penetration was therefore proven to standard.

41.

- (iii) Identification of the perpetrator

The final ingredient to establish defilement is the identity of the perpetrator. This was established by all the prosecution witnesses including the complainant herself, who stated that she knew the Accused well and that he used to sell eggs at Kamuwongo Centre. There were no contradictions as to who else it could have been, as the Appellant was well known to them

42. The Appellant raised issue as to why the complainant did not scream as he took her away. I note that from the PRC form produced by PW 5, the complainant is actually a person with a disability. This



could have been the reason that the Appellant saw her as an easy target and was able to lure her into his house.

This court finds that the evidence tendered by the prosecution proved beyond doubt that the minor was defiled. Conviction was therefore safe based on the evidence I have highlighted above.

43. Regarding sentence, the *Sexual Offences Act* provides at Section 8(4) that:

“A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”

The sentence meted out by the trial Court was lawful and lenient given the circumstances. This court finds that flowing from the above, the appeal herein lacks in merit and is disallowed.

**DATED, SIGNED AND DELIVERED AT KITUI THIS 13<sup>TH</sup> DAY OF NOVEMBER 2024.**

**HON. JUSTICE R. K. LIMO**

**JUDGE**

