



**RNN v Republic (Criminal Appeal E081 of 2023)
[2024] KEHC 15367 (KLR) (6 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15367 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL APPEAL E081 OF 2023
MA ODERO, J
DECEMBER 6, 2024**

BETWEEN

RNN APPELLANT

AND

REPUBLIC RESPONDENT

***(FROM THE ORIGINAL CONVICTION AND SENTENCE IN
SO NO. 31 OF 2019 CMS MAGISTRATES COURT AT NYERI)***

JUDGMENT

1. The Appellant RNN has filed this Amended Memorandum of Appeal challenging his conviction and sentence in the Lower Court.
2. The Respondent, the office of the Director of Public Prosecution (ODPP) opposed the appeal. The matter was canvassed by way of written submissions. The Appellant filed submissions dated 21st May 2021 whilst the Respondents relied upon his written submissions filed on 23rd October 2024.

Background

3. This appeal emanates from the trial of the Appellant in the Nyeri Chief Magistrates Case No. 31 of 2019 .
4. In that case the Appellant was charged with the offence of Defilement Contrary To Section 8 (1) as read with Section 8 (3) Of The [Sexual Offences Act](#) .
5. The Appellant faced an alternative charge of Committing An Indecent Act With A Child Contrary To Section 11(1) Of The [Sexual Offences Act](#) .
6. The Appellant entered a plea of ‘Not Guilty’ to both charges. The prosecution called eight (8) witnesses in support of their case.



7. The complainant CN testified as PW2. She told the court she was aged thirteen (13) years old. That on 28th July 2019 she was at [Particulars withheld] when the Appellant whom the child referred to as her father called her to escort him to pick milk.
8. The child obliged but instead the Appellant led her into a coffee plantation. He told her to remove her clothes and laid her on the ground.
That the Appellant then climbed on top of the child and defiled her.
9. The child then left crying and reported the incident to fellow villagers. It was not until 29th July 2019 – that the child reported the incident to her mother.
10. PW1 SNN was the complainant’s mother. She informed the court that her daughter suffered from some mental challenges. PW1 further informed the court that she had cohabited with the Appellant for about ten (10) years but that they separated in the year 2018 and the Appellant married somebody else.
11. PW1 stated that the complainant knew the Appellant as her father because the Appellant had raised her from a young age.
12. According to PW1 the complainant had initially reported the defilement to fellow villagers on 28th July 2019. However she stated that the child did not report the incident to her mother until the night of 29th July 2019. PW1 then reported to police and the Appellant was arrested.
Upon conclusion of investigations the Appellant was taken to court and charged.
13. The prosecution closed their case on 11th November 2021. On 15th December 2021, the Court ruled that a prima facie case had been established and placed the Appellant on his defence.
14. On 18th January 2022 the Appellant gave a sworn defence in which he categorically denied having molested and/or defiled the complainant. The Appellant alleged that the charges had been fabricated by the child’s mother as a ploy to have him jailed so that she could take his property.
15. The learned trial Magistrate delivered her judgment on 22nd February 2022, in which she convicted the Appellant on the charge of Defilement and thereafter sentenced him to serve twenty (20) years imprisonment.
16. Being aggrieved by his conviction and sentence the Appellant filed this Amended Memorandum of Appeal which was premised upon the following grounds;-

- “ 1. That, the learned magistrate erred in law and fact in the conviction of the appellant to serve a sentence that goes against the letter and spirit of the current constitution.
2. That, the learned magistrate erred in law and fact in putting relevance upon inconsistent and contradicted prosecution evidence.
3. That, the learned magistrate erred in law and fact in overlooking the fact that some very essential witnesses were not availed the prosecution in the trial to testify and be cross-examined.
4. That, the learned magistrate erred in law by ignoring that the prosecution relied upon a defective charge sheet and convicted the appellant on the same.



5. That, the learned judge erred in law in affirming the gross violation of my fundamental rights in a way that depicted an open bias.”

17. As stated earlier the appeal was opposed.

Analysis And Determination

18. I have carefully considered this Memorandum of Appeal, the record of proceedings before the trial court as well as the written submissions filed by both parties.

19. This being a first appeal it is the duty of this court to examine the evidence adduced during the trial and to draw its own conclusion on the same. In *Selle & Another -vs- Associated Motor Boat Company Ltd & Others* [1968] E.A 123 the court held as follows:-

“An appeal to this court from trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion through it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”

20. Likewise in *Okeno -vs- Republic* [1972] E.A And *Mark Oirui Mose -vs- Republic* [2013] eKLR it was reiterated that a first appellate court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate, analyze it and come to its own independent conclusion giving allowance for the fact that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence.

21. As was rightly observed by the learned trial magistrate in her judgement the offence of Defilement requires proof of the following three critical elements:-

- (i) Proof of age
- (ii) Proof that Penetration had occurred.
- (iii) Proof that said penetration was committed by the Accused.

22. The age of the complainant if a case of defilement is a factor of critical importance. This is because the *Sexual Offences Act* provides for mandatory sentences which depend on the age of the victim.

23. In the case of *Harison Ali Mwachongo -vs- Republic*, the Court of Appeal held that

“The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim.”

24. The age of the complainant can be proved in several ways such as production of a Birth Certificate, Baptism card, Immunization Card etc.

25. In the present case no such document was produced. PW1 the child’s mother told the court that the child’s birth certificate was with her biological father. No document such as an immunization card was produced as proof of the child’s age.



26. However the failure to avail documentary proof of age does not render the charge of defilement a non-starter. The court is at liberty to accept oral evidence from the child herself (or himself) or the parent to determine the age of the child.
27. In the case of *Edwin Nyambogo Onsongo -vs- Republic* [2016] eKLR the Court of Appeal stated that:-
 “.....the question of proof of age has finally been settled by recent decisions of the court to the effect that it can be proved by documents, evidence such as a birth certificate baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victims age, it has to be credible and reliable.” [own emphasis]
28. In this case as stated earlier no documents to prove the child’s age were tendered as evidence. However the complainant herself told the court that she was thirteen (13) years old. This corroborated evidence of her mother PW1 who told the court that her daughter was ‘13 years old .’
29. Additionally the trial magistrate in her judgment relied on the information contained in the P3 form at Part C where the Doctor who examined the complainant estimated her age to be about twelve (12) years old. From the available evidence I am satisfied that it has been proved that the complainant was aged thirteen years old.
30. The second element requiring proof in a defilement case is the fact of penetration – i.e proof that penetration had actually occurred. The complainant told the court that she was defiled on 28th July 2019.
 PW1 who was the child’s mother told the court that the child did not report the incident to her until the following day 29th July 2019.
31. However the mother stated that the child did immediately report the incident to some neighbours in [Particulars withheld] Town. That it was the same people who advised the mother to ask her daughter what had happened to her.
32. PW1 named one of these people as ‘M’ a Nyumba Kumi elder. This person was a critical witness to maintain the chain of evidence. Despite the fact that being a Nyumba Kumi elder, this person was easily traceable the prosecution failed to call him as a witness. No reasons were given why this crucial witness was not called to testify.
33. I am mindful of the fact that the evidence of the victim if believed by the court is sufficient to prove a case of defilement. However where there exists corroborative evidence then such a witness ought to be called.
34. The complainant was examined by a doctor on 30th July 2019 two days after the alleged defilement. Upon examination the doctor noted old tears in the hymen as well as vaginal discharge. The doctor did not note any fresh bruising or tears in the private part of the child. From the evidence of the doctor it would seem that the penetration occurred several days or weeks prior to 28th July 2019.
35. The complainant told the court that she was lured into a coffee plantation, made to lie down and was defiled. PW1 stated that the child said the perpetrator had hit her on the leg with a stone. No scratches or bruises were noted on the complainant’s body.



36. The complainant indicated that she had been defiled four times earlier by the same person. However the prosecution was required to provide proof that penetration occurred on 28th July 2019. In my view the prosecution failed to prove the fact that penetration occurred on the material date.
37. Upon examination the doctor only noted old tears in the hymen and noted that the genitalia was normal. There was no evidence of any recent tears and/or bruises in the vagina. No injuries were seen on any other part of the complainant's body.
38. Although the doctor noted that the complainant had an infection he did not attribute this infection to a recent penetration. In the area for age of injuries on the P3 form the doctor did not indicate any period.
39. The fact that the complainant had accused the appellant of defiling her on previous occasion cannot be taken to amount to proof that it was the appellant who defiled her on this particular occasion.
40. Section 124 of the *Evidence Act* allows a court to convict where the only evidence in a case of defilement is that of the victim of defilement if "for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."
41. In her judgment the learned trial magistrate found that the complainant was a credible witness. The trial court went on to explain the findings of the doctor as follows

"It was PW2's further testimony that this particular incident was not her first sexual encounter with the accused person. She testified that he accused had previously defiled her. Probably these previous unreported sexual encounters would be the reason behind the old broken hymen at only 13 years of age."
42. I find that the trial court misdirected itself. The Appellant was not on trial for 'previous' acts of defilement on the complainant. He was being accused of having defiled the complainant on a specific date being 28th July 2019 .
43. The medical evidence does not corroborate the trial courts finding that penetration occurred on that date. In my view the prosecution did not present a credible case as a crucial witness was not called to testify.
44. I find that it has not been proved beyond reasonable doubt that the penetration did in fact occur on 28th July 2019. In the absence of proof of penetration the charge of defilement cannot stand.
45. I have considered whether the evidence on record suffices to prove the alternative charge of indecent assault. Here again I find that the evidence falls short. Aside from the complainant's claim that the appellant lured her into a coffee plantation, there is no corroborative evidence to show that she was in any way molested. The only witness who saw the complainant on the material day was not called to testify.
46. The charge of defilement is a very serious charge which carries very stiff penalties upon conviction. It behoves the prosecution to adduce sufficient evidence to prove that charge beyond reasonable doubt. I find that the legal standard of proof was not met in this case. The charge of defilement was not proved beyond reasonable doubt.
47. Based on the foregoing this appeal succeeds. The conviction of the appellant by the trial court is quashed and his sentence is set aside. The appellant is to be released forthwith unless he is otherwise lawfully held.



DATED IN NYERI THIS 6TH DAY OF DECEMBER 2024

MAUREEN A. ODERO

JUDGE

