



**Sire v Republic (Criminal Appeal E056 of 2024)  
[2024] KEHC 15908 (KLR) (17 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15908 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL E056 OF 2024  
DR KAVEDZA, J  
DECEMBER 17, 2024**

**BETWEEN**

**BENARD SIRE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered on 27th May 2024 at Kibera Chief Magistrate's Court Sexual offence case No. E001 of 2021 Republic vs Benard Sire)*

**JUDGMENT**

1. The Appellant was charged and after full trial convicted by the Subordinate Court of the offence of defilement contrary to section 8(1) as read with 8(3) of the [Sexual Offences Act](#) No. 3 of 2006 (the Act). The appellant was sentenced to serve 20 years imprisonment.
2. Being dissatisfied, he has filed an appeal against the conviction and sentence in line with his petition of 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 analyse and re-evaluate the evidence that was before the trial court, and come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.
4. With the above, I now proceed to determine the substance of the appeal. In his Petition of Appeal and written submissions, the appellant has raised several grounds for appeal. The appellant complains that the prosecution failed to prove its case beyond reasonable doubt. The appellant also complained that the court convicted him on insufficient and contradictory evidence.



5. 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."
6. The prosecution called six witnesses to prove its case. PW2 the complainant herein a 14-year-old who had completed class 8 at [Particulars Withheld] School, testified that on 21st December 2020, when she was 12, she lived with her grandmother. On that day, she went to visit a friend. Instead of her friend, she found her uncle, known as Baba Abel, the appellant. He told her that her friend had gone to the shop and urged her to wait. He then closed the door, and when she protested, he told her to keep quiet. He then touched her breasts and when she resisted, he threatened to kill her.
7. The appellant proceeded to undress and undressed himself while they were seated on the couch. He laid her on the seat and had sex with her. When her friend knocked on the door, the appellant told her to dress hurriedly and threatened to kill her if she told anyone what had happened. When she went back home she was afraid to tell her grandmother what had transpired.
8. On 30<sup>th</sup> December 2020, she confronted her fears and informed her friend PW3 of her ordeal. PW3 advised her to report the matter to the area chief.
9. On cross-examination, she maintained that she feared for her life and that the appellant, being bigger and stronger, removed her clothes and threatened to kill her. She said that it was PW3 who encouraged her to report the matter.
10. PW2's testimony did not require corroboration within the proviso of section 124 of the Evidence Act (Chapter 80 of the Laws of Kenya) if there are to believe that the minor was telling the truth. I have also thoroughly gone through the testimony of PW2 and found that she was consistent throughout her narration, despite being subjected to rigorous cross-examination by counsel for the appellant.
11. PW2 gave a clear and graphic testimony on the series of events and remained steadfast that the appellant was the one who had sex with her. The appellant was someone well known to her as Baba Abel; a neighbour and also as the uncle to one of her friends. I therefore hold that the appellant was correctly identified and is the perpetrator in this case.
12. Regarding additional corroborating evidence, PW3 stated that on 29<sup>th</sup> and 30<sup>th</sup> December 2020, PW2 informed her of how she had been raped by the appellant. She is the one who took her to the chief's office to report the incident. She said that the person who had raped the complainant was Baba Abel.
13. PW1, the complainant's grandmother, testified that she received a call from the chief's office informing her that PW2 and PW3 were there. When she arrived, she was told that Baba Abel her neighbour, had defiled PW2 and threatened to kill her if she spoke out. She took PW2 to Nairobi Women's Hospital, but they were told to return the next day. They then went to Coptic Hospital, where a PRC form was filled. Later, a P3 form was issued and completed at Mbagathi Hospital. On cross-examination, she confirmed that she did not have a grudge against the appellant or his wife and that she had no reason to frame the appellant.
14. She also said that it was she who informed the police which led to Baba Abel's arrest. It was her averment that the appellant called her on the phone and asked for forgiveness for defiling her granddaughter. On cross-examination, she confirmed that she did not have a grudge against the appellant's wife and that she had no reason to frame the appellant.
15. PW4, Lorraine Mwendu, a clinical officer at Coptic Hospital, produced the PRC form filled on 30 December 2020 for PW2. She stated that the sexual assault allegedly occurred on 21 December 2020 by a man known to the victim. The complaint involved vaginal and anal penetration. On examination,



- PW2 had a calm demeanour and had bathed before the exam. Her outer genitalia appeared normal, and no body marks were noted. A creamish vaginal discharge was observed, but no anal tears were found.
16. Additionally, her hymen was perforated with old hymen remnants, and a urinary tract infection (UTI) was detected due to pus cells and white blood cells. Since the examination took place more than 72 hours after the incident, no post-rape care was administered. PW4 produced the reports and the lab results. On cross-examination, she clarified that menstrual blood differs from red blood cells found in urine, and PW2 had not started her menses.
  17. Dr. Kanyama of Mbagathi hospital was PW6. He produced the P3 form dated 8/1/21 with respect to the 12-year-old victim. He noted that she had lower abdominal tenderness, a broken hymen, remnants of hymen noted with ragged walls, and a white vaginal discharge. The P3 form was produced.
  18. The evidence by the prosecution leaves no doubt that the ingredient of penetration was proved.
  19. On the age of the victim, the investigating officer produced the victim's birth certificate which confirmed that the complainant was born on 6<sup>th</sup> February 2008. She was therefore 12 years old at the time of the offence and a child within the law. The ingredient was sufficiently proven.
  20. In his defence, the appellant maintained his innocence. He stated that he had a conflict with the complainant's grandmother on 20<sup>th</sup> March 2020 when his wife was pregnant. That PW3 frequently visited their home, taking down names and promising food relief for the needy. After a month with no results, the appellant confronted her in frustration, leading to a breakdown in communication. Their disputes continued until November 2020. He explained that, after failing to secure leave on 19<sup>th</sup> December 2020, he travelled on 24<sup>th</sup> December 2020 to spend Christmas with his family, returning on 27<sup>th</sup> December. He claimed that on 31<sup>st</sup> December 2020, he was arrested and informed of allegations concerning sexual abuse of a 12-year-old child. He asserted that the charges stemmed from his conflict with the complainant's grandmother PW1.
  21. During cross-examination, the appellant admitted knowing the grandmother but denied knowing the complainant before his arrest. He argued that, although medical evidence confirmed defilement, there was no proof linking him to the offence.
  22. DW2, Moses Ameta, a colleague, testified that on 21<sup>st</sup> December 2020, he and the appellant worked in Thigiri until 5 PM, after which they went home separately. DW3, the appellant's wife, corroborated his travel timeline and the food-relief dispute. DW4, Bruce Juma, the appellant's brother-in-law, stated that on 1<sup>st</sup> January 2021, he visited the appellant's residence and was instructed by an unknown woman to lie about living with the appellant.
  23. The appellant's reliance on the alibi defence is unpersuasive due to the absence of credible and corroborative evidence. In legal principle, while the prosecution bears the overarching burden of proving the accused's guilt beyond reasonable doubt, the evidentiary burden of establishing an alibi rests with the appellant. This burden is not discharged by mere assertions or unsubstantiated statements. For an alibi to succeed, it must be supported by cogent and consistent evidence that reasonably casts doubt on the prosecution's case. The appellant's alibi, premised on claims of travel and work engagements, was not substantiated by verifiable records, documentation, or independent witnesses whose testimony could withstand scrutiny. Additionally, the testimonies of DW2, DW3, and DW4 lack the requisite reliability and specificity to exonerate the appellant. In the absence of such evidence, the court finds the alibi defence to be a mere afterthought, insufficient to negate the weight of the prosecution's case. Accordingly, the appellant's alibi defence is dismissed.



24. 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.
25. 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.
26. 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 17<sup>TH</sup> DAY OF DECEMBER 2024**

**D. KAVEDZA**

**JUDGE**

In the presence of:

Appellant Present

Mburugu for the Respondent

Achode Court Assistant.

