



**TOO v Republic (Criminal Appeal E011 of 2023)  
[2024] KEHC 15581 (KLR) (6 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15581 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL APPEAL E011 OF 2023  
DK KEMEL, J  
DECEMBER 6, 2024**

**BETWEEN**

**TOO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from Original Conviction and Sentence in S.O No. E023 of 2023 of Hon. S.W. Mathenge (S.R.M) in Bondo Principal Magistrate’s court Sexual Offence Case No. E23 of 2023 dated 10/02/2023)*

**JUDGMENT**

1. The Appellant herein TOO was charged with the offence of defilement contrary to Section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 18<sup>th</sup> January 2022 at 0000hrs at Bondo Sub County within Siaya County, intentionally and unlawfully caused his penis to penetrate the vagina of MA a girl aged 17 years.
2. The Appellant was also charged with 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 particulars were that on 18<sup>th</sup> January 2022 at Bondo Sub County within Siaya County, intentionally and unlawfully touched the vagina of MA a girl aged 17 years with his penis.
3. The Appellant denied the charge and after a full hearing he was convicted and sentenced to seven (7) years” imprisonment.
4. Aggrieved by both the conviction and sentence of the trial court, the Appellant has appealed to this court on the following grounds:
  - i. Penetration was not proved beyond reasonable doubt.



- ii. The trial court did not record the reasons for believing the testimony of PW1.
  - iii. The trial court erred in failing to properly assess the evidence before and ignored the evidence of the defense.
  - iv. That the prosecution failed to investigate the root cause of the matter as regards the offence the Appellant was charged with.
  - v. The Appellant prays that the appeal be allowed, conviction quashed and sentence set aside.
7. This being the first appellate court, its jurisdiction is well settled. In the case of Okeno –Vs. R (1972) EA 32 it was held that the duty of the first Appellate Court is to re-assess, re-evaluate and re-analyze the evidence tendered before the trial court and to come to its own conclusion of course bearing in mind that the court did not have the benefit of seeing or observing the witnesses as they testified. It is therefore imperative that this court fairly considers the evidence on record and reach its own determination.
8. The Respondent called a total of five witnesses in support of its case.
9. PW1 MA stated that she was born on 22/2/2004. She produced her birth certificate serial No. 0464529-PMFI 1. She stated that on 18/1/2022 at about midnight, her uncle TO (Appellant) requested her for some drinking water. That she left her bedroom, went to the kitchen and took water to his bedroom. That instead of him drinking the water, he pushed her to the wall and started touching her breasts. That this happened while he was naked. That he put her on the floor and removed her clothes and put his hand inside her vagina. That he came on top of her, put his penis inside her vagina and had sexual intercourse with her. That he threatened her that he would kill her if she screamed or informed anyone. That she was able to tell that it was the appellant as he had a bright torch in his hand. That from 18/1/2022 to 28/2/2022 the Appellant would have sex with her twice a week when his wife was not around. That on 4/3/2022, she went to visit her mother in Nairobi and on 17/3/2022 she informed her about what had been happening. That on 18/3/2022, her mother took her to Mama Lucy hospital for treatment and that a pregnancy and HIV test were done and were later referred to the Children office Nairobi and then to Bondo. She identified the treatment notes from Mama Lucy Hospital (PMFI 2). They reported to Bondo police station where she was issued with P3 form which was filled at Bondo sub county hospital. She identified the documents which were marked as; PRC form- PMFI- 3, P3 form –PMFI -4. She identified the Appellant as the perpetrator by pointing at him in the dock. That she had known the Appellant since 2017 and who is a cousin to her mother.
- On cross examination, the complainant stated inter alia; that the appellant is his uncle; that she went to live with him after the grandfather had chased her because she had not slept at home; that she went to live with the appellant because her other uncles lived far from her school; that she was not sent to his house to pin him down; that he woke her up at midnight and that he was touching her with both hands; that she informed her friends what had happened and that she did not inform her teacher because the appellant gave her death threats; that she didn't inform her grandfather; that she was afraid of her mother and so she informed her after a while; that she stayed with the appellant from October 2021 to 4/3/2022; that she has a bipolar condition and that she wasn't forced to testify against the Appellant.
10. PW2 LH stated that she lives in Nairobi and that the complainant MA is her daughter born on 22/2/2004 as per the birth certificate-PMFI 1. That on 17/3/2022 about 1700hrs her daughter M informed her on what had happened. That she took her to Mama Lucy hospital on 26/3/2022 as per the treatment notes –PMFI 2. That she reported to Nairobi children's office who referred her to Bondo. She reported to Bondo police station where a p3 form was issued which was filled at Bondo county hospital. That the PRC form was filled at Mama Lucy hospital. That she could see the appellant in court-points at the appellant in court.



On cross examination, she stated that her daughter stayed with the appellant during the second and third terms of 2021. That they did not collude to set the appellant up.

11. PW3 Dr. Farah Mohamed from Mama Lucy hospital, a medical officer at Tumaini clinic which is the SGBV clinic. He testified that he has worked there for three years. That the medical report was filled by Rose Waweru, one of his nurses. That the said nurse left for greener pastures abroad but he didn't know the exact place she went to. The DPP prayed under section 33 of the *Evidence Act* that the doctor do produce the said document as the author could not be procured without undue delay. He was thus allowed to produce the said document. That on general examination, she was sad emotionally, genital examination was normal female external genitalia; whitish discharge in the vagina, old tears, 3, 6,9 o'clock positions. The examinations were conducted on 21/3/2022.

On cross test, he stated inter alia; that he had never seen the appellant before; that he did not know whether he defiled the girl or not; that the report showed old tears meaning injuries past 72 hour; that the tears were not fresh; that he had not been used by the family to intimidate him but was there as a professional.

12. PW4 John Okidi testified that he is a clinical officer from Bondo sub county hospital and he had a P3 form of MA who went to the hospital on 24/3/2022. That she reported having been defiled by a person known to her. On examination, the genital organs were normal with an old broken hymen. That there was discharge or signs of an infection in her genital areas. Pregnancy and HIV tests were negative. That the p3 report was based on the report from Mama Lucy hospital and that the nature of the offence was defilement. PRC –Exhibit 3, P3- Exhibit 4.

On cross-examination, he stated that the victim reported that the perpetrator was a person she was living with. That he is not aware of any family grudge and that he doesn't engage in such.

12. PW5 PC Julian Otieno of Bondo police station. She stated that she is the investigating officer in this matter. That on 24/03/2022 at 11.30am a defilement case was reported by MA who was accompanied by her mother LO, That TO was the perpetrator. That they were issued with p3 form that was filled at Bondo hospital. That the doctor had noted that she had an old scar of a broken hymen. That she compiled a file and presented it to the DPP on 25/4/2022. That she issued arrest warrants to Ayuong patrol base whereupon the appellant was arrested and later charged with defilement.

On cross-examination, she stated that she did not involve the area chief because it was not necessary. That she interrogated the complainant who informed her that she was residing with the Appellant as the mother was in Nairobi. That on sexual offences they rely on medical evidence and the complainants statement not on chief. That she did not ask about the behavior of the child and that the Appellant should have mentored her better.

13. The trial court ruled that a prima facie case had been established and thus put the Appellant on his defense.

14. DW 1 TOO tendered a sworn statement and testified that the genesis of this case is due to a land issue that the grandfather to the complainant was a younger brother to the Appellant's father, refused to show him his inheritance that his father left in the custody of the complainant's grandfather. That at some point, the grandfather of the complainant chased him away from home and threatened him. He however did not report the threats to the police or any law enforcement agent.

That on that material date, he had had his tooth extracted and that he was on medication which was confirmed by the complainant. Medical treatment notes marked as DFMI 1. That the grandfather of M used her to tie him to this case. That she stayed with PW1 for six months and that he never saw her



once with a watch. That her grandfather took away her phone. That she would see her with different phones from different men.

On cross examination, he stated that he did not defile PW1. That he never sent her to get water for him. That his wife left for Eldoret after PW1 had left the house. That he stays with his wife and kids.

15. DW2 Whitney Oyier aged 10yrs. She stated that she has never seen the complainant with a watch. That the complainant had a phone. That some men used to come look for her in their home. That her grandfather used to give her money. That when they went to fetch firewood she borrowed a motorcyclist a phone. That when she took her to shave, she went with a motorcyclist and told her to wait for her. That she loved talking to motorcycle riders such as David, Sadam and their delivery guy Tiger would come visit her.

On cross examination, she stated that the complainant is a bad girl as she was on her phone all the time and that she hid it from people. That Jack gave her ksh150 with which to buy chewing gums but did not share with her the chewing gum. That it is her father who told her what to say in court.

16. DW3 Anne Akinyi Omondi testified that on 10.9.2021 at about 5.00pm she returned home and found PW1 at her door and who informed her that her grandfather had chased her away because of many men. That she talked to her husband who is the appellant who spoke to the girl's mother (L) who agreed. That on 18/01/2022 she was in the house all through so she doesn't see how the defilement happened.

On cross examination, she stated that the complainant was a bad girl because she went to her house when she already knew men.

17. DW4 DO stated that he was 12 years, a son to the appellant. That they used to live with M, many people used to come to their home to look for her. That she owned a phone against his father's wish. That the complainant was a bad girl. On cross examination, he stated that she was good to him but she was associating with bad people who smoked and drunk alcohol. That he was only told to come and say that Millicent is bad..

18. The appeal was canvassed by way of written submissions. The Appellant submitted that the element of penetration was never proved. That the trial court ignored the evidence of the Appellant.

19. In a rebuttal, the Respondent submitted that it had proved its case beyond reasonable doubt since all the ingredients of the offence were established. Learned counsel submitted that the appeal be dismissed.

20. I have considered the record of the lower court and submissions presented. I find the singular issue for determination is whether the Respondent proved its case against the Appellant herein beyond reasonable doubt.

In Daniel Wambugu Maina V. Republic (2018) Eklr, the court stated that the elements to be proved in a charge of defilement are the age of the minor, penetration by the perpetrator and the identity of the suspect as the perpetrator.

21. In the Court of Appeal case of John Mutua Munyoki V Republic [2017] EKLr (Makhandia, Ouko & Murgor JJA) it was held that under the *Sexual Offences Act*, the main elements of the offence of defilement are as follows:

- i. The victim must be a minor, and
- ii. There must be penetration of the genital organ and such penetration need not be complete or absolute. Partial penetration will suffice.
- iii. Identity of the perpetrator



22. On the issue of age, PW1 indicated that she was aged 17 years. The birth certificate produced as an exhibit showed her date of birth as 22/2/2004 and hence, she was 17 years at the time of the incident. In the case of *Mwalango Chichoro Vs. Republic Msa. C.appeal N. 24 OF 2015* the court held that a birth certificate is sufficient proof of age. Further, the issue of age is quite critical in these kind of offences as the same is used for purposes of establishing the kind of sentence to be imposed upon conviction of the offender. This ingredient was proved by the Respondent beyond reasonable doubt.
23. On the aspect of penetration, section 2 of the Sexual Offences provides that penetration is the partial or complete insertion of the genital organ of a person into the genital organ of another person. the case of *Langat Ndinyo Domokonyang V. Republic (2017) KLR* it was held that:

“for the offence of defilement, it must be proved by the prosecution beyond reasonable doubt that a male penis partially or fully penetrated the victim’s vagina and or anus.”

PW1 testified that ‘on 18/1/2022 at about midnight, her uncle TO requested her to take drinking water to him. That she left her bedroom, went to the kitchen and took water to his bedroom. That instead of drinking the water, he pushed her to the wall and started touching her breasts. That this happened while he was naked. That he put her on the floor and removed her clothes and put his hand inside her vagina and then came on top of her whereupon he put his penis inside her vagina and had sexual intercourse with her.’

PW3 corroborated PW1s testimony ‘...That on general examination, she was sad emotionally, genital examination was normal female external genitalia; whitish discharge in the vagina, old tears, 3, 6,9 o’clock positions.’ The complainant further added that the defilement went on for several days during the absence of the Appellant’s wife and that the sexual intercourse was twice a week. It is obvious that the aspect of penetration was established by the Respondent beyond any reasonable doubt.

23. On the aspect of identity, PW1 stated in her cross examination that she stayed with the Appellant from October 2021 to 4/3/2022. This then means that she was familiar with the offender and could not mistake him for someone else. The Appellant’s defence comprised of his wife and children seemed as an attack on the complainant’s morals as a loose girl always cavorting with several men mostly boda boda operators. The defence further sought to bring up a land dispute involving the Appellant and the complainant’s grandfather and that it was the contention of the defence that the charge was hatched with a view to fix him. I am unable to believe the version of the defence evidence in that it is highly unlikely for the parents of the complainant to use her as a victim of a sexual act so as to get at the Appellant over a land dispute. This was farfetched. The two minors who testified for the defence all confirmed that they had come to tell the court that the complainant was a bad girl as directed by their parents. It is thus clear that the defence witnesses had come solely to disparage the complainant. Even the complainant had loose morals as contended by the Appellant, the Appellant had no right to defile her. The incident of the defilement is alleged to have taken place at night and thus the issue of the identity of the Appellant becomes crucial. As noted above, the complainant had known the Appellant as her uncle with whom she lived in the same home. The complainant has also indicated that the sexual intercourse went on for several days mostly on Sundays whenever the Appellant’s wife had left for church. Even though the Appellant has pitched tent regarding his identification at night, I am satisfied that he was recognized by the complainant who had become familiar with him. In the case of *Anjononi Vs R [1980] KLR 59* it was held that recognition, not identification of assailants is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. The Appellant in his defence did confirm that the complainant lived with him and his family and thus he was not a stranger to her. I am satisfied that



the identity of the Appellant as the perpetrator was proved by the Respondent beyond any reasonable doubt.

24. In view of the foregoing observations, it is my finding that the conviction arrived at by the trial court was quite sound and I see no reason to interfere with it.

25. As regards sentence, it is noted that section 8(4) of the Sexual Offence Act provides for a sentence of not less than fifteen years' imprisonment upon conviction. It is noted that the Appellant was sentenced to serve seven years' imprisonment. Indeed, the Respondent has not filed a notice of enhancement of sentence but has urged the court not to interfere with the said sentence. It is noted that sentencing is at the discretion of the trial court and that an appellate court will not interfere with it unless it is shown that the same is excessive or harsh. I find the sentence was neither harsh nor excessive. I do not see the need to interfere with it.

26. In the result, it is my finding that the Appellant's appeal lacks merit. The same is dismissed.

Orders accordingly.

**DATE AND DELIVERED AT SIAYA THIS 6<sup>TH</sup> DAY OF DECEMBER, 2024**

**D. KEMEI**

**JUDGE**

In presence of: -

Tobias Omondi .....Appellant

Onyata.....for Appellant

Mocha.....for Respondent

Ogendo.....Court Assistant

