

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO
CRIMINAL DIVISION
HCCRA NO. E018 OF 2024

BETWEEN
EMMANUEL KIBET
NGENO.....APPELLANT

AND

REPUBLIC.....RESPO
NDENT

[Appeal arising from the judgment and sentence delivered on 11th June, 2024 by Hon. Clare Odunga, Resident Magistrate in Kericho Chief Magistrate Criminal Case No. E014 of 2022 in Republic Vs. Emmanuel Kibet Ngeno]

JUDGMENT

1. The Appellant, **Emmanuel Kibet Ngeno**, was charged before the Resident Magistrate at Kericho with the offence of defilement, **Contrary** to **Section 8[1]** read with **Section 8[2]** of the **Sexual Offences Act**. Alternatively, he faced a charge of committing an indecent act, **Contrary** to **Section 11 [1]** of the **Sexual Offences Act**. It was alleged that on divers dates between 2nd August 2022 and 8th August, he defiled a child referred to as **“F. C.”** aged between eleven [11] years at Kapseger Village - Londiani -

Kericho County or that he committed an indecent act with the child.

2. After a full trial, the Appellant was convicted on the Main Count of defilement and sentenced to life imprisonment. He filed the present appeal as an expression of his dissatisfaction with the conviction and sentence.
3. The grounds of appeal are set out in the petition of appeal. They all boil down to a contention that the trial court erred in both law and facts by convicting the Appellant on the basis of evidence which was insufficient and unable to prove the material ingredients of the offence. That, the Appellants defence was disregarded by the trial court which then handed him a life sentence which was unwarranted in the circumstance.
4. The Appellant therefore prayed for the conviction to be quashed and the sentence to be set aside. He represented himself at the hearing of the appeal and relied on his written submissions in support of his case. The Learned Prosecution Counsel, **Mr. Ogutu**, represented the State/ Respondent and also relied on his written submissions in opposition to the appeal.
5. This courts duty was to consider the appeal, the Respondent's opposition thereto and both parties rival

submissions before reconsidering the evidence availed at the trial court and drawing its own conclusions bearing in mind that the trial court had the benefit of hearing and seeing the witnesses.

6. Briefly, the prosecution case was that the child Complainant, **[PW1]** lived with her parents and during the August school holidays she was at home when the Appellant who was their neighbour instructed her to proceed to his home to fetch his house keys through the window. Shortly thereafter, the Appellant followed her and entered the house through the same window. He then held her shoulders, removed her inner wear and defiled her at a corner in the house. He thwarted her attempt to scream by holding and shutting her mouth.
7. Thereafter, the Complainant went back to her home amid threats from the Appellant that he would kill her if she disclosed what happened to anybody. She however, disclosed the incident to a friend in school and this led to her mother **Sharon Langat [PW2]** learning of it.
8. The Complainant's mother **[PW2]** learnt of a rumour doing rounds that a girl had gone to the Appellant's house to fetch keys and was defiled. The person who spread the rumour to her was the Appellant's wife and when she communicated to the Complainant about the rumour, she

[Complainant] opened up and indicated that she was the girl who was defiled by the Appellant.

- 9.** The Area Chief, **Christabel Cheron** [PW3], received the necessary information from a villager and while doing so learnt that the Appellant was suspected of having defiled three girls inclusive of the Complainant. She then caused the arrest of the Appellant and took him to Chepseon Police Station.
- 10.** **CPL. Charity Muturi** [PW5], investigated the case and later preferred the present charge against the Appellant after the Complainant had been subjected to a medical examination by **Alfred Chesire** [PW4], a clinical officer at the Londiani Sub-County hospital. In his report [P3 form - **P. Exhibit 1**] it was noted that the Complainant was of the age of twelve [12] years and that she had actually been defiled approximately four [4] months prior to the date of her examination in the month of December 2022.
- 11.** The Appellant's defence case was that at the material time of the offence in August 2022 he was at Kuresoi where he went in the month of July 2022 and returned to his Kapseger Village on the 10th August 2022 and before returning to Kuresoi using his motor cycle as a means of transport at all times during his journeys. He denied

committing the offence and called **Lucy Cherop Koskei [DW2]** and **Daniel Ngeno [DW3]** as his witnesses.

12. Both witnesses indicated that the Appellant was in Kuresoi at the material time but returned home on 9th august 2022 to exercise his right to vote before returning to Kuresoi

In actual sense, the Appellant's defence was that of an alibi as supported by his two witnesses.

13. The trial court considered the evidence in its totality and concluded that all the three key ingredients of the offence of defilement i.e. age of the victim, penetration and identification of the offender had been proved against the Appellant beyond reasonable doubt.

14. Indeed, all the three elements or ingredients of defilement have to be established and proved against an Accused Person for a sound and safe conviction.

Herein, the opinion of this court as may be deciphered from the evidence as a whole is that there was no dispute or substantial dispute that the Complainant was defiled. The crucial issue which arose for determination was the identity of the Appellant as the Offender.

15. The elements of the age of the victim and penetration were not contested in the Appellants defence. His

contention was that he was not the person who sexually assaulted the Complainant as alleged because he was not at the scene of the offence when it occurred. He therefore implied that he was arrested and charged for no good reason.

16. The evidence by the Complainant and her mother **[PW2]** established that the 20th December 2010 was the Complainant's date of birth. The birth certificate **[P. Exhibit 3]** confirmed as much. This meant that the Complainant was four [4] months shy of the age of twelve years considering that the offence occurred between the 2nd August 2022 and 8th August 2022. The exact date of the offence was not ascertained.

17. Nonetheless, it was established that at the material date of the offence the Complainant was a minor under the age of twelve [12] years. She was eleven [11] years and a few months on top. Approximately 11½ years old thereby placing her within the purview of **Section 8[2]** of the **Sexual Offence Act** under which the Appellant was sentenced.

18. The element of penetration was established and proved through the Complainant's evidence coupled with and corroborated by that of the Clinical Officer **[PW4]**. The

medical report **[P. Exhibit 1]** indicated that the estimated age of the unlawful sexual act was four [4] months prior to the medical examination of the Complainant.

19. All the foregoing factors clearly show that the trial courts findings on the defilement ingredients of age and penetration cannot be faulted by this court.

As regards the crucial ingredient of identification of the Offender, the Appellant raised an alibi only after he was called upon to make his defence. He did not do so at the earliest opportunity, say during the investigations stage or during Cross-Examination of the prosecution witnesses by himself.

20. The question would be whether in raising an alibi during the defence hearing, the prosecution was denied an opportunity to counter the alibi??.

The trial court's answer to the question is found at page eleven [11], paragraph thirty two [32] of its judgment to wit:

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“The governing principle on alibi defence is that a failure to disclose an alibi at a sufficient early opportunity to permit it to be investigated by the police is a factor which may be considered in determining the weight given to it. See the case of Charles Kasera Chogo Vs. Republic [2019] eKLR.”

The Accused raised the defence of alibi during the defence hearing. It was late in the day and the prosecution could not have started investigations during defence hearing. Had the Accused disclosed his defence prior to the said defence hearing, the prosecution would have investigated it so as to dispute it. See the case of Waka Evans Amira Vs. Republic [2021] eKLR."

21. Based on the decision cited in the trial court's answer, this court would agree with it but only to the extent of determining the weight to be given to the alibi defence raised belatedly during defence hearing. This court does not think that in such circumstances the prosecution would be denied an opportunity to counter or disprove the alibi because it would be entitled to apply for a re-calling of its witnesses or calling additional witnesses after the closure of its case and before the closure of the defence case or even prior to the final judgment of the court on the matter.

22. Besides, the witnesses already called by the prosecution prior to closure of its case would by their evidence be capable of disproving an alibi if they are found to be more credible than an Accused Person. In that way,

the alibi would have failed the test of credibility and be regarded as an afterthought. It would invariably be disproved by the prosecutions credible evidence.

23. There is no burden placed on the Accused Person to prove his alibi, but rather the burden to disprove the alibi lies with the prosecution **[See, Karanja Vs. Republic [1983] KLR 501]**

Indeed, in **[Victor Muendwa Mulinge Vs. Republic [2014] eKL,]** which was cited herein by the Respondent, it was held by the Court of Appeal that: -

“It is trite law that the burden of proving the falsity, if at all, of an Accused’s defence of alibi lies on the prosecution.....

this court held that in a proper case, a trial court may in testing a defence of alibi and in weighing it with all the other evidence to see if the Accused’s guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.”

24. In this case, the prosecution evidence of identification against the Appellant was only that of the Complainant **[PW1]**. The rest of the witnesses did not witness the unlawful act. The Complainant's mother **[PW2]** relied on a rumour confirmed by the complainant to direct responsibility for the offence to the Appellant. The incident was said to have occurred between the 2nd August 2022 to 8th August 2022 but the Complainant was unable to state or specify the exact date it happened. She however, indicated that the offence occurred during the day time at about 2:00pm.

25. It therefore appeared that the Appellant was placed at the scene at the material time of the offence whichever date it occurred by the Complainant despite his alibi defence that he was at Kuresoi at the material time and only returned to his home to exercise his right of voting on the 10th August 2022. His witnesses **[DW2]** and **[DW3]** indicated that he returned home on 9th August 2022.

26. On matters of credibility of witnesses, the trial court is always at an advantage than the appellate court for the reason that it saw and heard the witnesses and in a better position to make findings based on the credibility of a witness.

In that regard, particularly in Sexual Offences and by dint of **Section 124** of the **Evidence Act** the evidence of identification by a single witness and without independent corroboration may be relied upon by a trial court to convict an Accused Person.

27. So, in this case, the credibility of the alibi defence raised by the Appellants was highly dependent on the credibility of the Complainant's evidence which in the circumstances would disprove or fail to disprove the alibi.

The trial court found the Complainant's evidence more credible than that of the Appellant. This meant that the Appellant's alibi defence was found to be lacking in credibility and was disproved by the Complainant's evidence which showed that he was placed at the scene of the offence at the material time and could not be heard to say that he was elsewhere as doing so amounted to nothing short of an afterthought.

28. Besides, the contradiction between the Appellant and his witnesses on the actual date that he returned to his home was also a pointer to lack of credibility in his alibi defence. It is therefore for all the reasons foregoing that this court would agree with the trial court and hold that the Appellant was positively identified as the person who offended the Complainant. The third key ingredient of

defilement i.e. identification of the offender, was thus fully established and proved against the Appellant.

29. As to the sentence imposed by the trial court, it was lawful and in accordance with **Section 8[2]** of the **Sexual Offences Act** which provides for a sentence of imprisonment for life in mandatory terms thereby curtailing the court's discretion to pass any other sentence even if the circumstances allow like in this case where the Complainant was at the border line between the ages of eleven [11] and twelve] years. But, as the saying goes, "*the law is a ass.*" Otherwise, this appeal is devoid of merit and is dismissed in its entirety.

Delivered and Dated this 30th day of October, 2025

**HON. J. R. KARANJAH,
JUDGE**