



REPUBLIC OF KENYA



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**SNK v Republic (Criminal Appeal 38 of 2018)
[2024] KECA 1526 (KLR) (25 October 2024) (Judgment)**

Neutral citation: [2024] KECA 1526 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 38 OF 2018
FA OCHIENG & WK KORIR, JJA
OCTOBER 25, 2024**

BETWEEN

SNK APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Nyabururu
(R.P.V. Wendoh, J.) dated 10th April 2018 in HC.CR.A No. 146 of 2017)*

JUDGMENT

1. The appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of the offence were that on 7th October 2015 at [Particulars withheld] village in Laikipia County, the appellant intentionally and unlawfully caused his genital organ (penis), to penetrate the genital organ (vagina), of RMM a girl, aged 6 years.
3. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#).
4. The appellant pleaded ‘not guilty’ to the charges. Four witnesses testified in a bid to advance the prosecution’s case against the appellant. At the end of the trial, the appellant was found guilty, he was convicted, and sentenced to life imprisonment.
5. The brief facts of this case are that the appellant was a paternal uncle to the complainant. He stayed with the complainant’s grandmother. The complainant referred to him as “baba N”.
6. PW1 was the complainant. She could not understand the meaning of an oath. She told the court that on the material day when her mother had gone to Kampi and her father had gone to the clinic, the appellant promised to give her a sweet, lured her to his bed, and did ‘tabia’ to her and she felt pain in



- her private parts. She told the court that when the appellant was done, he told her to go because her mother was calling her. He also warned her not to tell anybody or he would beat her. However, she told her mother what had happened and she was taken to the hospital.
7. PW2 was the complainant's mother. She informed the court that on the material day when she was bathing the complainant, she noticed some discharge from her vagina. She enquired from the complainant what had happened, the complainant narrated to her what had happened. She took the complainant to the hospital and reported the matter to the police. PW2 told the court that the appellant was her husband's older brother.
 8. PW3 was a doctor at Nyahururu District Hospital. He examined the complainant on 15th October 2015. He observed that the complainant had a broken hymen with an old tear and pus cells. He formed the opinion that the complainant had been defiled.
 9. PW4 was the investigating officer. He produced the immunization card which showed that the complainant was born on 1st November 2009.
 10. When put to his defence, the appellant in his unsworn testimony stated that he was arrested on 16th October 2015 but was arraigned in court on 19th October 2015. The police took his money and phone but did not return the money to him. He told the court that he was charged because of an existing grudge between him and PW2.
 11. The trial court held that the offence of defilement had been proved beyond any reasonable doubt. Consequently, the appellant was found guilty, convicted, and sentenced to life imprisonment.
 12. Being aggrieved by the conviction and the sentence, the appellant appealed to the High Court. His appeal was dismissed and his conviction and sentence were upheld.
 13. In dismissing the appeal, the learned Judge held that the appellant was well known to the complainant and her mother as he was her uncle and they lived in the same compound. The learned Judge also held that the age of the complainant had been proved through the immunization card, to have been six years at the time of the incident.
 14. The learned Judge held that the complainant was a child of tender years who could not even describe what had happened to her except call it 'tabia'. She had pointed to her private parts as the place where it took place. The learned Judge further held that penetration was proved through the opinion of PW3 who concluded that the complainant was defiled.
 15. While considering the appellant's defence, the learned Judge found his defence of an existing grudge to be a sham as he did not allude to the nature of the said grudge.
 16. The learned Judge found that the delay in taking up the matter was satisfactorily explained when the same was attributed to the doctors' strike at the time.
 17. The learned Judge held that the prosecution had the discretion to call the witnesses they believed were relevant to their case and therefore, the failure to call the complainant's father and grandmother as witnesses did not leave any gap in the case presented by the prosecution.
 18. The learned Judge held that under Section 124 of the *Evidence Act*, there is no obligation for corroboration in such an offence, and it was sufficient that the court believed the complainant and other available evidence.



19. The learned Judge further held that upon re-evaluating the evidence, there were no contradictions as was alleged by the appellant and proceeded to hold that the prosecution case was proved beyond any doubt and that the conviction was sound.
20. Consequently, the learned Judge upheld the appellant's conviction and the sentence.
21. Being dissatisfied with the judgment, the appellant lodged the appeal herein in which he raised the following supplementary grounds of appeal:
 - a. The learned Judge erred in finding that the appellant caused his genital organ to penetrate the victim's genital organ.
 - b. The learned Judge erred in failing to find that the evidence of the complainant did not amount to defilement but only disclosed sexual molestation.
 - c. The learned Judge erred in failing to appreciate that the prosecution did not prove the elements of the offence of defilement beyond reasonable doubt.
 - d. The appellant's defence was not properly considered.
 - e. The sentence imposed was harsh, excessive, in mandatory terms, and unconstitutional.
22. When the appeal came up for hearing on 29th April 2024, the appellant was present in person, whereas Mr. Omutelema, Assistant Deputy Director of Public Prosecutions was present for the respondent. The parties relied on their respective written submissions.
23. In his written submissions, the appellant urged us to interfere with the sentence meted out against him. He submitted that the charge of defilement had not been proved against him as penetration was not proved.
24. The respondent further submitted that his defence was not adequately considered as he raised an alibi. He submitted that he was not at the scene, but rather he was grazing cows.
25. Opposing the appeal, the respondent submitted that penetration was proved through the evidence of the complainant, PW2, and PW3, who examined the complainant and concluded that she had been defiled.
26. The respondent further submitted that the age of the complainant was proved to be 6 years through the immunization card produced by PW4, which indicated that she was born on 1st November 2009; as well as the testimony of PW2, her mother.
27. The respondent submitted that the identity of the appellant was proved by the testimony of the complainant and PW2 who knew him well as the complainant's uncle, and they lived in the same compound.
28. The respondent pointed out that the trial Court, after conducting *voire dire*, found that the complainant was a child of tender years within the meaning of Section 19 of the *Oaths and Statutory Declarations Act*.
29. The respondent submitted further the appellant's defence was a mere denial and urged us to impose a severe sentence of imprisonment against the appellant.



30. This is a second appeal. Section 361(1) of the Criminal Procedure Code enjoins us to consider only questions of law. In the case of Karani v Republic [2010] 1 KLR 73 the court stated thus:

“This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.”

31. We have carefully considered the record of appeal, the written submissions by both parties, the authorities cited, and the law. The issues for determination are; whether the prosecution proved the offence of defilement against the appellant beyond reasonable doubt, and whether or not this Court ought to interfere with the sentence meted out against the appellant.

32. Section 8(1) of the Sexual Offences Act provides that:

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

33. Under the Sexual Offences Act, the elements of the offence of defilement are as follows: the victim must be a minor, there must be penetration of the genital organ, but such penetration need not be complete, partial penetration will suffice; and the identity of the perpetrator must be established. For the offence of defilement to be established, the prosecution must prove each of the above elements. In the case of Charles Karani v Republic, Criminal Appeal No. 72 of 2013, the Court stated that:

“The critical ingredients forming the offence of defilement are; the age of the complainant, proof of penetration, and positive identification of the assailant.”

34. It is trite that the burden of proof regarding the age of the complainant lies with the prosecution. According to Section 8(1) of the Sexual Offences Act, a person is considered to have committed defilement if they engage in an act that involves penetration with a child. The definition of a child is as outlined in Section 2(1) of the Children Act, which means any person under the age of 18 years.

35. In the case of Kaingu Elias Kasomo v Republic, Criminal Appeal No. 504 of 2010, the Court emphasized the importance of proving the age of the victim of defilement, as the sentence imposed upon conviction depends on the victim’s age.

36. In this case, the complainant testified that she was six years old.

This evidence was corroborated by the evidence of PW2, the complainant’s mother. The evidence was further corroborated by the immunization card produced by PW4 showing that the complainant was born on 1st November 2009. The evidence adduced established that the complainant was six years old at the time when she was defiled. In the case of Richard Wahome Chege v Republic, Criminal Appeal No 61 of 2014, the court held that:

“On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by the production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that



the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 [the doctor] who examined the complainant, and the complainant herself.”

37. In the case of *Francis Omuron v Uganda*, (*supra*), the Court of Appeal of Uganda held that:
- “In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim’s parent or guardian, and by observation and common sense.”
38. We find that the complainant’s age was proved beyond reasonable doubt, to be six years at the time of the incident.
39. The complainant narrated to the Court how the appellant lured her into his bed on the promise of giving her a sweet and proceeded to defile her. This evidence was corroborated by the evidence of PW3 who produced the P3 form indicating that the complainant’s hymen was broken, and in his expert opinion, the doctor concluded that the complainant was defiled. We are of the considered view that this evidence is sufficient proof of penetration.
40. As regards the identity of the appellant, the complainant and PW2 knew the appellant as the complainant’s uncle. When the complainant talked about what had happened, she referred to the appellant as “baba N”, and the person who had defiled her.
41. This is satisfactory proof that the appellant was well-known to the said witnesses. The risk of mistaken identity was non-existent. Therefore, this was a case based on recognition as opposed to identification by a stranger. In the case of *Anjononi & Others v Republic* (1976-1980) KLR 1566, the court held that:
- “...when it comes to identification, the recognition of an assailant is satisfactory, more assuring, and more reliable than the identification of a stranger because it depends upon personal knowledge of the assailant in some form or other.”
42. In the circumstances, we find that the appellant was positively identified through recognition by two of the prosecution witnesses.
43. We find that the two courts extensively analyzed the appellant’s defence. At no given point did the appellant raise an alibi. In any event, the appellant’s claim that he was grazing cows when he was arrested does not refer to the time when the incident took place.
44. In the result, we find that all the ingredients of the offence of defilement were proved beyond any reasonable doubt. We find no reason to interfere with the findings of fact by the two courts below. The appellant’s conviction was safe.
45. As regards the sentence meted against the appellant, Section 8(2) of the *Sexual Offences Act* provides that:
- “A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”
46. It is trite that a sentence is meted out at the discretion of the court. The trial court sentenced the appellant to life imprisonment. This sentence was upheld by the High Court. Under Section 362(1) of the *Criminal Procedure Code*, the severity of sentence is a matter of fact and therefore not a legal issue open for consideration by this Court on a second appeal. Therefore, we find that this Court lacks jurisdiction to interfere in the sentence meted out against the appellant, on the ground that the



sentence was harsh or excessive. In the circumstances, as the sentence is lawful, we find no reason to interfere with the same.

47. We have also given due consideration to the evidence on record and the circumstances of this case. It is unfathomable that a man would defile a child of such tender years and blame it on a grudge.
48. Accordingly, we dismiss the appeal in its entirety and uphold the appellant's conviction and sentence.
49. This judgment is delivered in accordance with Rule 34(3) of the *Court of Appeal Rules of 2022*, as Nyamweya J.A. declined to sign.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF OCTOBER, 2024.

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

