



**POO v Republic (Criminal Appeal 50 of 2021)  
[2023] KECA 594 (KLR) (26 May 2023) (Judgment)**

Neutral citation: [2023] KECA 594 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPEAL 50 OF 2021  
AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA  
MAY 26, 2023**

**BETWEEN**

**POO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the Judgment of the High Court of Kenya at Nairobi (L. Kimaru, J.) delivered on 19th March 2015 in HC.CR. A No. 197 OF 2012)*

**JUDGMENT**

1. The appellant, Peter Odhiambo Okwama was charged before the Chief Magistrate Court at Thika with the offence of defilement of a child contrary to Section 8(1) as read with section 8(2) *Sexual Offences Act*. He also faced an alternative charge of causing an incest incident act, contrary to section 6(a) of the *Sexual Offences Act*. The particulars were that on September 1, 2011 and October 17, 2011 at [Particulars Withheld] estate in Thika within Kiambu county, he intentionally caused his penis to penetrate the anus of SOO a male juvenile (his son) aged 7 years while threatening to beat him if he disclosed the act.
2. After the trial in which five witnesses testified for the prosecution, the appellant gave unsworn evidence without calling witnesses. The trial magistrate in a judgment dated July 2, 2012 convicted the appellant of defiling his son, who was a minor aged 7 years at the time of the commission of the offence and sentenced him to life imprisonment.
3. Aggrieved by the conviction and sentence, the appellant lodged a first appeal in the High Court, which was heard by L. Kimaru, J (as he then was). In the judgment dated March 19, 2015, the trial Judge upheld both the conviction and sentence, thus precipitating this second appeal.



4. We will now consider the appellant's grounds of appeal which by dint of the provisions of section 361 of the *Criminal Procedure Code*, must be confined to issues of law only as stated in *Njoroge v Republic* [1982] KLR 388, where this court held as follows;

“...On this second appeal, we are only concerned with the points of law and consider ourselves bound by the concurrent findings of fact arrived at in the courts below, unless shown to be based on no evidence.’ See *M’Riungu v Republic* [1983] KLR 455.”

5. We find it imperative in summary form, to restate the prosecution's case before the trial court as well as the appellant's defence. The prosecution's case was that the complainant was the son of the appellant. According to the evidence that was adduced before the trial court, the appellant and the complainant were living together in a rental house in Thika, Kiambu county. At the time, the complainant's mother was not living with them. According to the complainant (PW1), the appellant sexually assaulted him on several occasions and that he would remove his clothes and insert his penis in his anus. The appellant would then warn the complainant not to tell anyone. According to the complainant, he felt pain during the ordeal but did not tell anyone due to fear of the appellant. He further testified that he lost control of his bowels and as a consequence passed stool without control.
6. PW2, DW, was a teacher at Kiboko primary school where the complainant was a pupil in class 2. It was her testimony that she was requested by the headmistress of the school to check on the complainant because he had loose bowel movement. PW2 talked to the complainant and after gaining his confidence, he confided in her that some people had been sexually molesting him. At that point, the complainant did not mention that it was the appellant who was sexually assaulting him. PW2 requested the complainant to request his father, the appellant, to accompany him to school the following day, but the appellant did not turn up. Upon further inquiry, the complainant informed PW2 that it was the appellant who was sexually assaulting him and she immediately reported the case to the children's office in Thika.
7. PW5, Mwiti Kiruki, the children's officer, Thika reported the case to the police, resulting in the arrest of the appellant. PW4, Dr. Benedict Macharia, produced the medical treatment notes and P3 form that were prepared by her colleague, Dr. Wekesa. The medical report revealed that indeed the complainant had been sodomized and put on treatment. PW5 Cpl. Shacton Davuda, was the investigating officer who after investigations, reached a conclusion that the appellant be charged.
8. When put to his defence, the appellant denied committing the offence and testified that he had a good relationship with his son and denied sexually assaulting him. The appellant in his evidence, stated that the complainant was unreliable as he had previously lied to him in an incident where he had stolen money. The appellant urged the trial court to find that the complainant's evidence was not credible and should not be believed.
9. The High Court after considering the prosecution case and the defense, convicted and upheld the sentence of life imprisonment.
10. Having duly considered the record, the judgments of the two lower courts, the appellant's grounds of appeal, and the written and oral submissions of the appellant and counsel for the Republic, we start by reminding ourselves of the approach that this court takes when it is invited to interfere with the concurrent findings of the trial court and the first appellate court. We are only confined to points of law.
11. The appellant in his memorandum of appeal has raised 8 grounds which we take the liberty to summarize as follows: that the prosecution did not prove the case beyond reasonable doubt; that appellant was not taken for medical examination; that the complainant was not a credible and reliable



- witness as envisaged by section 124 of the *Evidence Act*; that sections 77 and 163 of the *Evidence Act* were violated; and that the trial Judge made adverse comments against the appellant when evaluating the doctor's evidence; that the defence evidence was not considered and that appellant's constitutional rights were violated.
12. When the matter was called out for hearing, the appellant relied on his undated written submissions, which were endorsed with his thumbprint. The submission reinforces the grounds of appeal and have cited various authorities, which we have read and considered. On his part, the prosecution through Mr. O. J. Omondi, for the State relied on his written submissions dated February 3, 2023. We have considered the submissions and the authorities cited.
  13. As already noted, this is a second appeal and we have a legal duty to respect the concurrent findings of facts by the two courts below. This court can only interfere with the findings on facts, if and only if, we are satisfied that there was no evidence on which those findings were made or if there was evidence, it was of such nature that no reasonable court could be expected to base any decision on it. We have also reminded ourselves that this is a second appeal and we are obligated under sections 361 of the *Criminal Procedure Code* to deal with issues of law only.
  14. Upon perusal of the grounds of appeal, the rival submissions, and the authorities, the only question of law that arises is whether the conviction and sentence of the appellant were based on sound evidence or, to put it differently, whether the ingredients of the offence were proved beyond any reasonable doubt; that is, whether the age of the complainant was established, whether there was penetration and whether the identity of the penetrator was established.
  15. We note that the appellant was charged with the offence of defilement of a child contrary to section 8(1) (2) of the *Sexual Offences Act*. The main ingredient of the offence is an act of causing penetration with a child. We have carefully considered the evidence adduced by the prosecution to satisfy ourselves that it was proved beyond reasonable that the appellant defiled the complainant, who was his son.
  16. We note that the trial magistrate conducted a voir dire on the complainant and found that the complainant was aware of the duty to be truthful and consequently, held that the complainant could adduce sworn evidence. The High Court was satisfied that the evidence of the complainant was credible and that the case was proved beyond reasonable doubt. We note that PW1 gave evidence that he used to stay alone with his father, the appellant. He narrated that the mother was not staying with them and that the appellant would remove his clothes at night and insert his penis in his anus. He later informed PW2, his teacher. The appellant was summoned to school but failed to go with the complainant. When the complainant disclosed that the person who was defiling him was the appellant, the case was reported to the children's officer, Thika and the appellant was arrested. PW5, a doctor at Thika level 5 hospital produced the P3 form that confirmed that the complainant was sodomized.
  17. We note that this is a case where the ingredients of the offence were proved beyond reasonable doubt as held by the two lower courts. The act of defilement was proved and corroborated by the evidence of the doctor, and the age of the complainant was proved. The appellant's attack on his son as an unreliable witness both in the lower courts and this court is just but a mere allegation. The complainant gave evidence on how his father sodomized him at night. We are satisfied by the concurrent finding of the lower courts that the conviction and sentence was based on sound evidence and we do not find grounds that have been raised by the appellant that would persuade us to interfere with those findings. This is a conviction that is founded on solid evidence.
  18. In conclusion, it is our finding that the grounds of appeal raised by the appellant have no merit and that the appellant deserved the sentence that was meted out.



19. Accordingly, there is no basis for disturbing the conviction and sentence imposed by the trial court and the appeal is dismissed.

**DATED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF MAY, 2023.**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

**M. GACHOKA, CIArb, FCIArb**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

