



REPUBLIC OF KENYA



**DKL v Republic (Criminal Appeal E039 of 2022)
[2025] KEHC 5145 (KLR) (29 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5145 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL APPEAL E039 OF 2022
JK NG'ARNG'AR, J
APRIL 29, 2025**

BETWEEN

DKL APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgment of Hon. K. Kibelion PM dated 27th September, 2022 at the Magistrate's Court at Bomet, Sexual Offence Case No.E024 OF 2022)

JUDGMENT

Introduction and Background

1. The Appellant was charged in the lower court with inter alia the offence of Defilement contrary to section 8(1) and (3) of the *Sexual Offences Act*. The particulars were that on 24th March, 2022 at Kamogoso Sub Location [Particulars Withheld] Village, Bomet County he intentionally and unlawfully caused his male genital organ to penetrate into the anus of EK a boy aged 10 years old. The appellant was also charged with committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.
2. After hearing the case, the learned trial magistrate found that the Respondent (“the Prosecution”) had proven its case beyond reasonable doubt and proceeded to convict and sentence the Appellant as per section 215 of the *Sexual Offences Act*. It is this decision that the Appellant has appealed against through grounds set out in his Petition of Appeal received on 7th December, 2023. The respondent relies on written submissions received on 25th December, 2023.

Analysis and Determination

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 analyze and re-evaluate the evidence which



was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may reverse those conclusions and there is nothing objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision. (see David Njuguna Wairimu v Republic KSM CA CRA No. 28 of 2009 [2010] Eklr and Pandya v Republic(1957) EA 336)

4. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions.
5. With the above, I now proceed to determine the Appellant's appeal which is premised on three grounds.
6. First, the appellant contends that the learned magistrate erred in law by failing to appreciate that the appellant was a layman who could not understand the process of court. He claims that he was unable to cross-examine the witnesses thus suffered injustice as per Article 50(2) of the constitution.. Before this court delves in deciding the said ground it must satisfy itself that there was manifestly insufficient, inconsistent, uncorroborated and had glaring gaps, hence incapable of sustaining a conviction.
7. The Court of Appeal held in Erick Onyango Ondeng' v Republic(CA NO. 5 OF 2013), The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honored devise for testing the truth or correctness of evidence.....), the alleged fact in this ground is not sufficiently proved.
8. On ground Two the Appellant aver that the learned magistrate erred in by sentencing the appellant to life imprisonment which is a mandatory minimum sentence.
9. In Fappyton Mutuku Nguu vs R (CA. No. 296 of 2010) it was held that age, penile penetration and identity of the perpetrator must be proved.
10. On age, the trial court considered the age assessment by the clinical officer reflecting that age was estimated to be 10 years.
11. On identification, first, Appellant is the victim's elder brother and they live in the same homestead hence easy for him to identify him. PW2 also corroborated the same having been informed of the incident being the victim and the appellant's mother.
12. On Penetration, EK in her testimony told court that the appellant removed his trouser and caused his genitals to enter the anus of EK. Further, a professional examination was done by the Medical Doctor whose report revealed that the Complainant's anus was penetrated. It is incontrovertible that there was penetration of the complainant's anus. All these seen together leave no doubt that there was penetration of the victim's anus. Hence, the second ingredient of the offence of defilement is profoundly satisfied.
13. Further, where the appellant avers that the trial magistrate failed to consider the appellants defense. It should be noted that the appellant was given sufficient audience and in fact testified. I fail to find any reason why the trial magistrate could ignore the defense just because he is a layman.



14. Further Appellant lays a claim that the learned Magistrate rejected his defence as a lay person. In my view the learned magistrate must have assessed the nature of the offence and the circumstance therein warranted the conviction and sentence given. The appellant was given an opportunity to defend himself on 18th August, 2022.
15. I have gone through the record and find that the evidence unerringly points at the Appellant as the perpetrator of the crime.
16. The trial court meted a life sentence which by law is permissible under section section 215 of the Criminal Procedure Act which provides as follows:

“The court having heard both the complainant and the accused person and their witnesses and evidence shall either convict the accused and pass sentence upon or make an order against him according to law, or shall acquit him.”

Conclusion and Disposition

17. In the foregoing and for the reasons stated above, I find that the trial court’s determination was sound, judicious and based on the evidence on record.
18. Consequently, and accordingly this court dismisses the Appellant’s appeal and affirm the trial court’s findings on both conviction and sentence.

DATED AND DELIVERED AT BOMET THIS 29TH APRIL, 2025

JUDGE

J. K. NG’ARNG’AR

Court of Assistant:

..... for the Appellant.

..... for the state.

