



**IAA v Republic (Criminal Appeal E002 of 2020)
[2024] KEHC 2374 (KLR) (30 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 2374 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL APPEAL E002 OF 2020
JN ONYIEGO, J
JANUARY 30, 2024**

BETWEEN

IAA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence of Hon.C.M. Maundu (CM) delivered on 22nd October 2020 in Sexual Offences Case No. 12 of 2019 Garissa CM’s court)

JUDGMENT

1. The appellant herein was charged with the offence of defilement contrary to Section 8(1)(2) of the [Sexual Offences Act](#) No. 3 of 2006. Particulars were that on March 18, 2019 in Fafi Sub-County, within Garissa County, he intentionally and unlawfully caused his genital organ(penis) to penetrate the genital organ (anus) of OMI., a child of 10 years.
2. He was also faced 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. Particulars were that; on March 18, 2019 in Fafi Sub-County, within Garissa County, he intentionally and unlawfully caused his genital organ (penis) to touch the genital organ(anus) of OMI, a child of 10 years.
3. During the hearing, prosecution called four (4) witnesses in support of the charge. In its judgment delivered on October 22, 2020, the learned trial magistrate convicted the appellant of the main count and sentenced him to serve 20 years’ imprisonment.
4. The appellant being dissatisfied with the said conviction and sentence, appealed to this court thus listing five (5) grounds of appeal reflected in the amended petition of appeal filed in court on November 16, 2023 as follows:



- i. That the learned trial magistrate erred in law and fact when she failed to consider the fact that the prosecution had not discharged their burden of proving the offence of defilement against the accused beyond reasonable doubt.
 - ii. That the learned trial magistrate erred in law and fact when he convicted the appellant on inconsistent and contradictory evidence.
 - iii. That the learned trial magistrate erred in law and fact by convicting him yet he was not supplied with witnesses' statements.
 - iv. That the learned trial magistrate erred in law and fact by convicting and thereafter sentencing him without considering his defence.
 - v. That the sentence by the trial magistrate was excessive in the circumstances.
5. When the appeal came up for hearing, the court gave directions on filing of submissions which directions parties complied with. The appellant relied on submissions dated November 15, 2023 and filed in court on 16.11.2023 thus contending that the elements of the offence in question were not proved to the required standard. In that regard, he relied on the cases of *Hamisi Bakari & Another v Republic* [1987] eKLR and *Kimani Ndung'u v Republic* [1979] KLR to express the position that prosecution is under obligation to prove its case to the required standard.
 6. He also contended that prosecution evidence was not only contradictory but also inconsistent. That the credibility of the prosecution witnesses ought not have been relied on for the same was not corroborated. Further, he faulted the trial court for not ensuring that he was supplied with prosecution witness statements contrary to the provisions of articles 25(c), 35(b), 47(1), 50(2) (j) and (k) of the *Constitution*.
 7. He also decried the fact that the trial magistrate failed to consider his defence before reaching its decision. Consequently, he urged this court to quash his conviction and set aside the sentence.
 8. On the part of the respondent, Mr. Kihara prosecution counsel relied on his submissions filed on November 17, 2023 arguing that prosecution sufficiently proved the requisite elements to the required standards hence the guilty verdict returned by the trial court. The court was referred to the cases of *Hudson Ali Mwachongo v Republic* [2016] eKLR and Francis Omuroni v Uganda, Criminal Appeal No. 2 od 2000 where both courts reiterated the importance of determining the age of the victim in order to prescribe the sentence to be meted out.
 9. Learned counsel contended that the elements of penetration were also proved as the medical report produced confirmed the same; On recognition of the perpetrator, counsel contended that the appellant herein was recognized as the person responsible for the injuries of the complainant. On sentence, learned counsel urged the court to uphold the same as it was appropriate in the circumstances herein. He argued that the appeal lacked merit and thus should be dismissed.
 10. As the first appellate court, I am duty bound to re-evaluate and re-consider a fresh the evidence adduced before the trial court and arrive at an independent determination. [See *Joseph Njuguna Mwaura & 2 Others v Republic* [2013] eKLR].
 11. Brief facts of the case are that, on a date she could not remember, PW1, AM left for a burial at around noon and returned at about 200pm. At home, she left her children among them the victim herein. Upon her return, she entered her house and to her surprise, she found the appellant sodomizing her son, the complainant herein. That the complainant had bent while the appellant was sodomizing him and both were naked. She stated that the appellant is a step father to her son.



12. That during the act, the right hand and the right leg of the complainant were tied together and likewise the left hand tied to the left leg; That the complainant's mouth was tied with a piece of cloth. She thus took her son to Hagedera Hospital and thereafter reported the matter to Hagedera Refugee Camp (Githuthe) Police Post.
13. PW2, OI testified that he lived with his step father, the appellant herein. He testified that on the material day, the appellant inserted his penis in his anus with a promise to give him money. The appellant thereafter threatened that he would slaughter him should he inform anyone about the incidence. He identified the appellant as the person responsible for his injuries.
14. PW3, Dr. Marvin Ngau recalled that on March 19, 2019, he received a call from his colleague from the support centre informing him of a defilement case of a young boy. That he examined him and found that there was indication of a forcible penetration and therefore, concluded that the boy was sodomised. He filled the P3 Form and Post Rape Report which he produced as Pex 1 and 2 respectively.
15. PW4, Wicliff Otieno, the investigating officer recalled that on 20.03.2019 at around 10.00 a.m. he was assigned to investigate the matter herein. That he recorded the statements of the complainant and his mother on how the appellant sexually assaulted the complainant. He later arrested the appellant and thereafter charged him in court with the offence in question. He further stated that on October 8, 2019, he took the complainant to Dadaab Sub – County Hospital for age assessment which was found to be approximately 9 years old. He produced the Age Assessment Report as Pex 3.
16. On his defence, DW1, Ismail Abdi Abalone denied committing the offence herein as he claimed to have been framed. He stated that he was sickly as he could not pass urine, a condition he has had since his childhood. He further stated that the complainant's mother had previously wanted to divorce him as he could not have sex, a move he had rejected. That the complainant's mother thereafter promised to teach him a lesson and therefore he was convinced that the charges herein were a product of the dire consequences his wife had previously warned him of. On cross examination, he confirmed that he is the step father of the complainant but denied ever assaulting him sexually.

Determination

17. The appellant herein was charged with the offence of defilement and an alternative charge of committing an indecent act with a child. He denied the offence terming the same as a frame up. The appellant raised four pertinent grounds of appeal which I will separately address.
18. On whether the prosecution proved its case to the required degree which is a general ground, the court is duty bound to consider the key ingredients of the offence of defilement which includes;
 - a. Age of the complainant
 - b. Whether there was improper and unlawful penetration
 - c. Identification of the assailant, in this case, the appellant herein.
19. On the age of the complainant, the prosecution had to prove that the complainant was a child. Among the exhibits that were produced by the prosecution is an Age Assessment Report for the complainant. It revealed that he was 9 years old thus a child. [See *Eliud Waweru Wambui v Republic* Criminal Appeal No. 102 of 2016] where the court held that age can be ascertained through production of birth certificate, medical evidence, evidence of the victim or parent or common sense. With the birth certificate in place, I have no doubt the complainant was a child aged 9yrs old.



20. On whether there was unlawful penetration, the evidence available to the court was that of the complainant who narrated how the appellant sent away his other siblings before defiling him. PW1 recalled on how upon returning home, found the appellant sodomising the complainant. Their testimonies were corroborated by the findings of PW3 and PW4 who upon examining the complainant found that he had been penetrated and upon carrying out investigations, found that indeed the complainant was defiled.
21. Penetration is defined under Section 2 of the *Sexual Offences Act* to mean partial or complete insertion of the genital organ of a person in to the genital organ of another person. Having in mind the definition herein together with the testimony of the prosecution witnesses, it is my finding that indeed the complainant was sexually penetrated. This is clear from the evidence of the complainant and PW1 plus the medical evidence.
22. On identification, the same was not controverted. The complainant identified the appellant herein as his step father. The appellant also did not deny that the complainant was his step son. As such, identification was that of recognition. The prosecution evidence in my view was not only cogent but also believable. Although the appellant claimed that he was medically incapable of penile erection, there was no proof.
23. On the allegation that there was a grudge between PW1 mother to the victim and the appellant, that allegation was not brought up on cross examination. This defence could as well be an afterthought. In any event, why would pw2 implicate his step father yet sustain injuries on his anal area. From the evidence on record, the existence of anal penetration could not have been caused by somebody else other than the appellant. I have no doubt that the appellant was responsible hence properly convicted by the trial court.
24. On the ground that he was not supplied with prosecution witness statements, this court has independently perused the record and find that during the plea taking, the trial court directed that the appellant be issued with witness statements. On the 2nd time the matter came up for hearing, the appellant informed the court that he had not been supplied with statements and the trial court further directed that he be supplied with the said statements. On the third occasion when the matter came up for hearing, the appellant indicated that he was ready to proceed and did not complain or raise any concern in regards to having been supplied with the statements.
25. On November 5, 2019, the prosecutor prayed for an adjournment stating that he had not received the police file and that he would notify the investigating officer to bond witnesses. The appellant reacted by asking who those new witnesses were and that he had not received their statements. The trial court directed that the appellant be supplied with the said statements. When the matter came up for hearing before court on December 4, 2019, the appellant indicated that he was ready to proceed and did not mention whether he had been supplied with the statements that he had sought for.
26. In as much as the hearing continued to the end and the said issue was not raised again, I note that the appellant played an active role in the hearing process. I further note that the appellant having been active during the hearing process, he was fast enough to ask for statements every time a new witness was due to testify. The same was witnessed when he demanded for the statements of PW3 and PW4 whom the prosecutor had indicated that were yet to be bonded by the investigating officer.
27. From the chain of events, I am inclined to agree with the prosecution that the appellant was supplied with statements of the prosecution witnesses. It seems unbelievable that the appellant would agree to proceed with the hearing process without statements noting that he kept the court and the prosecution



on toes whenever a witness was lined up to testify. For those reasons, it is my finding that that ground is not sustainable.

28. Regarding the argument that his defence was not considered, the same is not viable as the record denotes a different state of affairs. Indeed, the trial court in its judgment noted that the appellant's defence was a mere afterthought as the prosecution had adduced evidence beyond reasonable doubt that he was guilty of the offence as charged. I am in total agreement with the view of the trial court and therefore I proceed to dismiss the ground.
29. On the ground that the sentence meted out was severe, the appellant 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 which stipulates 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.
30. In reference to the developments recently espoused in our jurisprudence, the Court of Appeal has interpreted life imprisonment to mean a term of thirty years' sentence. The Court of Appeal in the case of [Evans Nyamari Ayako v Republic](#) Criminal Appeal No. 22 of 2018 in para 26 stated that:

“On our part, considering this comparative jurisprudence and the prevailing socio-economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the convict. Instead, we now hold that life imprisonment translates to thirty years”.
31. In this case, the appellant was sentenced to serve a twenty-years imprisonment term. To that extent, the appeal against conviction is hereby dismissed. However, I note that the learned magistrate did not consider the appellant's mitigation on record. Therefore, having considered the mitigation on record regarding the appellant's poor health and that he is a first offender, and further considering the about 20 months spent in remand custody, am inclined to substitute the sentence of 20 years to 15 years imprisonment. The same shall run from the date of sentence.

ROA 14 days

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF JANUARY 2024

J. N. ONYIEGO

JUDGE

