



REPUBLIC OF KENYA



**KENYA LAW**  
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**Bosire v Republic (Criminal Appeal 17 of 2022)  
[2024] KEHC 1976 (KLR) (27 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1976 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CRIMINAL APPEAL 17 OF 2022  
TA ODERA, J  
FEBRUARY 27, 2024**

**BETWEEN**

**JARED DANVAS BOSIRE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal against the Conviction and Sentence of Hon. W. Kugwa (RM)  
in Kisii MCSO Case No. E085 of 2021 delivered on 23rd August 2022)*

**JUDGMENT**

1. Jared Danvas Bosire, the Appellant, was charged with the offence of defilement contrary to Section 8(1) & (2) of the *Sexual Offences Act* No. 3 of 2006 and an alternative count of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 24.11.2021, Kisii Central Sub-County of the Kisii County intentionally caused his penis to penetrate the vagina of S.K.M. a child aged 5 years.
2. He was arraigned on 30.11.2021 and pleaded not guilty to both charges. He was convicted on 23.8.2022 and sentenced to serve life imprisonment.
3. Dissatisfied, he filed a Petition of Appeal dated 1.9.2022. The grounds were:
  1. The Trial Magistrate erred in law and fact by disregarding the evidence produced by the accused but wholly concentrated on the prosecution dishonest evidence.
  2. The Trial Court erred in law and fact by convicting the accused by relying on the complainant's coached evidence.
  3. The Trial Magistrate failed to establish that there exists bad blood between the accused and the minor complainant's family, the accused having fell out with the complainant's parents having Stopped working for them as a herdsman.



4. The Trial Magistrate erred in his judgment by believing the evidence of PW2, the complainant's mother that she heard the child cry in the toilet but did not go to find out what was happening to the child. Which parent can actually ignore a crying child in the toilet?
  5. The Trial Court erred in law and fact by convicting the accused by believing the complainant's evidence that the accused used leaves to wipe her while the minor never demonstrated how the alleged leaves got into the alleged toilet.
  6. The Trial Court erred in law and fact as the prosecution did not establish as to whether the complainant schooled at [particulars withheld] School she alleges. The investigating officer also failed to investigate if at all the said toilet existed and what distance it was from where the complainant's mother was at the time she alleged time she heard the child cry. (sic)
  7. The Trial Court erred in law and fact by relying on the dishonest doctor's evidence. At a time of reporting of the alleged offence at the police station, the investigating officer PW4 in his evidence said the minor and her father had already visited Keumbu Sub-county Hospital.  
This was a sinister move as this happened without the presence of police officer and it is the appellant's view that the said Doctor was compromised to frame the appellant by uttering to court a falsified document.
  8. The Trial Court erred in law and fact by relying on the evidence of the Doctor which evidence says there were no protozoa seen but upon urinalysis pus was seen in urine. Pus in urine is purely a urinary tract infection. The minor's clothes were also reportedly washed to conceal evidence that no defilement had occurred. The Doctor also failed to establish the age of the injuries mentioned in his report to establish the concurrence with facts in regards to dates and time of the alleged offence. There were no cross-checks either carried out on the accused by the Doctor to establish if it was the accused who defiled the complainant.
  9. The Trial Court erred in law and fact by convicting the accused by in total disregard of his Defense when he honestly told court that at the time of the alleged offence, he was away at Nyamira where he was working.
  10. The Trial Magistrate wrongly evaluated the evidence which resulted in wrongful conviction of the accused.
4. The Court directed that the Appeal be disposed off by way of written submissions but only the Respondent filed their submissions.

### **The Respondent's Submissions**

5. They are dated 16.1.2024. It was submitted that the issue of age was not challenged.
6. On penetration, it was submitted that there were no allegations of fabrication of medical evidence during the trial. PW5 proved penetration as he produced the P3 Form and the PRC Form. This was corroborated by the evidence of PW3 who testified that the Appellant defiled her.
7. On identification, PW3 was able to identify the Appellant and called him Bosire who used to herd their cows. In addition, he was well known to the child and the other witnesses.
8. The Appellant's alibi was considered. It was not credible and was thus dismissed.
9. The Trial Court properly invoked Section 124 of the *Evidence Act* and finding that the prosecution proved its case beyond reasonable doubt.



## Analysis

10. This is a first appeal and this Court has a duty to re-evaluate and reconsider the evidence before the Trial Court as well as the Judgment and arrive at its own independent judgment on whether or not to allow the appeal. See *Okeno v Republic* (1972) E.A. 32; *Pandya v Republic* [1975] E.A. 336.
11. The Prosecution called 5 witnesses.
12. PW1 was B.M.N., the Minor's father and he told this court that minor was born on 11.9.2016. He said that on 25.11.2016, at 6.00 a.m., he was informed by his wife that the minor appeared to have been defiled. He took the Minor to Keumbu Hospital for examination. She was examined found to have been defiled and put on PREPS. He took the child to Kegati Police Post and reported at around 1400 Hours. He later interviewed the child and asked where they had gone with the Accused. She told him that they went to the maize shamba and she told him that the accused laid on top of her. After the ordeal, the Accused wiped her with leaves. He went back to Kegati to report that he knew the perpetrator, who was his cousin from his extended family. Upon reporting, he was told to go back the following day, Saturday which was the following day, he took the police officers to his home and arrested the Accused on the road. They proceeded to Keumbu Hospital for the Accused to be tested for HIV Virus. They found the hospital was closed, and the test was taken at a chemist and accused was found to be HIV negative. On cross-examination, he was not able to tell the exact time the defilement occurred and put it between 2.00p.m. to 6.00 p.m. He said the child used to leave school at 2.00 p.m. The toilet was 100 metres from the house. He said that only a doctor could determine whether a child could stay a whole day upon being defiled without bleeding.
13. PW2 was N.B.O, is the child's mother. She told this court that on 24.11.2022 at 5.00 p.m., she called the minor herein to bathe her but the minor refused and hid her self, but later came slowly and reported to her that she felt pain when urinating. On enquiry, she refused to say what had happened to her. PW2 then told the child to remove her clothes. N.B.O. checked and found that the minor's genitals had been "opened" and very red. She went to her mother-in-law and asked her to also check the child and she saw her and advised her not to bathe the child and her under garment. PW2 realized that the minor had already dipped her panty in water by that time. N.B.O. reported to her husband ( PW1) the following morning and it was PW1 who took the Minor to the hospital. On cross-examination, she testified that she did not say that she heard the Minor cry in the toilet. She did not go to the toilet. The child said that it was the Accused who had defiled her.
14. PW3 was S.K., the victim. She gave unsworn testimony. She recognized the Accused and called him Bosire. He did bad things to her outside the house. He then wiped her with leaves. She did not bleed. She reported to her mother. She was taken to hospital the following morning and she was treated. The Trial Court's record indicates that PW3 was able to point to her crotch area when referring to the act done by the Accused. On cross-examination, she testified that the incident occurred in the evening in their toilet.
15. PW4 was Henry Atandi, P.C. No. 95038. On 25.11.2021 at around 2.00 p.m., PW1 reported to the station with a child, PW3. He reported that PW3 was defiled by someone known to her on her back from Kabweri Primary School. He referred them to the hospital but PW1 informed him that he had already taken PW3 to Keumbu Sub-County Hospital. Usually, a victim is taken to hospital by the police after recording an OB. He recorded the matter in the OB. He confirmed that PW3 was taken to Keumbu Sub-County Hospital. On 27.11.2021, at 8.00 a.m., PW1 called him and informed him that they had found the person who had defiled PW3. PW4 and other police officers went to Benson Mwamba's house and found the Accused and Benson Mwamba. They arrested the Accused. He was



taken to Kegati Police Post, took his fingerprints and later took him to Keumbu Sub-County Hospital. PW3 went to the station on 27.11.2021 and pointed at the Accused identifying him as the person who defiled her. PW3 was defiled when she was 5 years according to the birth certificate and timelines. He gave MWAMBA a P3 Form at the police post Kegati to take to hospital to be filled by medical personnel.

16. PW5 was Eric Abisi, a clinical officer based at Keumbu Sub-County Hospital. He produced the P3 Form filled on 12.1.2022 for PW3 on behalf of his colleague Eric Ombati who saw the minor and filled the P3 Form. He said he was familiar with the handwriting of the said Mr. Ombati as he had worked with him for a period of 3 years. He said that the blood-stained clothes were not taken to hospital. He said history was defilement of PW3 by a 36-year-old adult. The P3 Form was filled 2 days after defilement. He pointed out that the P3 form indicated that the minor's labia majora and minora were swollen with bruises. The hymen was torn and lower part lacerated. There were no spermatozoa but on urination, there was pus. She tested negative for syphilis. He produced the P3 form and PRC form (Pexh 2 and 3 respectively). On cross-examination, it was his testimony that he did not prepare the report.
17. The Appellant was subsequently put on his defence upon prosecution closing their case.
18. DW1 was the Appellant. He testified that he was at home on 24.22.2021 at 6.00 a.m. going for work in Nyamira. On Saturday, 27.11.2021 he was arrested on allegations of defilement. On cross-examination, he testified that he did not know why he was arrested. He was informed that he had defiled a child which he denied. He knew the complainant but he did not defile PW3. He did not use the route mentioned in the case.
19. Judgment was delivered on 23.8.2022. The Trial Court held that the Prosecution had proved the age of the Minor vide the Birth Certificate adduced by PW4 confirming the age of the Minor to be 5 years and 2 weeks at the time of the offence. On whether the Appellant defiled the Complainant, the Court held that the Complainant testified that she felt pain and it was the Appellant who had done it. The Trial Court cited and invoked Section 124 of the *Evidence Act*. The court found that the testimony of the PW5 a clinical officer was proof of penetration which was also corroborated by PW3. The Complainant knew the Appellant prior to the incident and was able to positively identify him as the perpetrator. The Appellant's alibi was not supported and thus not credible.
20. The Trial Court held that the Prosecution had proved its case beyond reasonable doubt and convicted the Appellant accordingly.
21. The Accused mitigated and continued to maintain his innocence. He was sentenced to serve life imprisonment.

### **The duty of this appellate Court.**

22. This court is duty bound re-examine and re-evaluate the evidence afresh and come to its own independent conclusion, bearing in mind that it did not have an opportunity to observe the demeanour of the witnesses as was held in the case of *Okeno v Republic* [1972] EA 32).

### **Determination**

23. The Appellant was convicted of the offence of defilement contrary to Section 8(1) & (2) of the *Sexual Offences Act*, No. 3 of 2006 which speaks to defilement of a child below the age of 11 years.
24. As was rightly held in the case of *George Opondo Olunga v Republic* [2016] eKLR, in a case of defilement, the Prosecution is required to establish the following:



- a. The age of the victim;
- b. Penetration; and
- c. The identification or recognition of the perpetrator.

### **Age of the Victim**

25. This was not challenged and it was sufficiently proved by PW1, PW2 evidence and the Minor's Birth Certificate which indicates that the minor was born on 11.9.16 and the incident allegedly occurred on 24.1.21 which means that the minor was about 5 years and 4 months at the material time.

### **Penetration**

26. On penetration, PW3 testified that she was defiled between her legs and even pointed out below her stomach. It is trite that children, owing to their age, may not use the proper terms when speaking to sexual offences. This was discussed by the Court of Appeal in *Muganga Chilejo Saba v R*, Criminal Appeal No. 28 of 2016 (2017) eKLR.
27. That said, the evidence of PW3 was corroborated by PW2 who examined PW3 and noted that "her genitals had been opened and very red". PW5's evidence also corroborated PW3's testimony. PW5 produced the P3 Form and PRC. It was noted in both documents that the labia majora and minora were swollen with bruises. The hymen was torn and the lower part lacerated.
28. I note that the Appellant alleged that the Doctor's evidence was dishonest. However, this was not raised during trial. At the point of production of the P3 and PRC Forms, he did not object. The Appellant has not laid a basis for the said allegation and I accordingly dismiss this ground.
29. As regards the lack of Spermatozoa on conducting urinalysis, I find that presence of spermatozoa that is not the only way to determine whether there was penetration. PW5 testified that upon examination, PW3's hymen was found to be torn. It is trite law that penetration whether full or partial is sufficient to constitute an offence of defilement. (See Section 2 of the *Sexual Offences Act*; *Festus Otieno v Republic* [2021] eKLR; *Twebangane Alfred v Uganda* Criminal Appeal No. 139 of 2001 (2003) UGGA 6 and *Cliff Odbiambo Oburu v Republic* (2017) eKLR)
30. I find that the Prosecution was able to prove penetration. I also find that failure to medically examine the Appellant was not fatal to the Prosecution's case, in light of the overwhelming evidence against the Appellant. I uphold the trial court's finding on penetration.
31. The trial court found that complainant knew accused before as a herdsman, identified him in court, to her parents and to the investigating officer. The court dismissed the alibi as incredible.
32. Appellant challenged the evidence of PW3 saying she was coached, that there was bad blood between complainant's family and him as he fell out with her parents upon stopping working for them as a herdsman and that the trial court erred in relying on the evidence of PW2 yet the child was crying in the toilet but she never went to her rescue.
33. On the evidence of PW3, despite her tender age, the record indicates that she was able to identify appellant as Bosire in court I noted that on cross examination on being asked if there was a witness to the sexual act, in her innocence she said it was appellant who witnessed the same.



## Whether the Appellant was the Perpetrator

It is the case of prosecution that PW3 knew the Appellant before as he used to herd her father's cows. She was able to identify him to her parents, at the police station and in Court. She also called him by his name Bosire. Accused raised a defence of alibi. It is trite law that even where an accused person raised a defence of alibi, the burden of prosecution to prove its case beyond any reasonable doubt does not shift to accused. In the case of *Uganda V. Sebyala & Others* [1969] EA 204, the learned Judge quoted a statement by his lordship the Chief Justice of Tanzania in Criminal Appeal No. 12D 68 of 1969 where his lordship observed:

“The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts.”

34. In the case of *Victor Mwendwa Mulinge v Republic* (2014) eKLR, it was held thus:

“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; see *Karanja v Republic*; the 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 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 investigating and thereby present any suggestion that the defence was an afterthought.”

35. I have weighed the alibi of appellant together with the evidence of PW3. The Appellant claimed that he was working in Nyamira and when he travelled back, he was arrested. As rightly pointed out by the Respondent, this was not raised when he cross-examined the Prosecution's witnesses and it is thus an afterthought. Appellant alleged that PW3 was coached to frame her and that her parents had grudge against him for stopping working for them. The issues of the alleged coaching and grudge were neither put to PW3 nor her parents during cross-examination. They first came out in this appeal. In any event when he cross-examined PW3 about who witnessed the incident, in her innocence she said it was appellant.

36. I find that the evidence of alibi adduced by accused was weak and did not displace the evidence of PW3 who despite her tender age was firm and clear that appellant who defiled her. The complainant was a 5-year-old child who had no reason to lie against the appellant. In any event, Section 124 of the *Evidence Act* provides thus:

124. Corroboration required in criminal cases

Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.



37. Even without any other evidence, the evidence of PW3 is admissible under the proviso to Section 124 of the Law of evidence Act. I agree with the trial court that the appellant was properly placed at the scene.
38. The conviction was therefore safe in the circumstances

### **Sentence**

39. The Appellant was sentenced to serve a life imprisonment. Recently, the Court of Appeal in Julius Kitsao Manyeso v Republic (Judgment 7/7/2023) (unreported) declared the life sentence to be unconstitutional.
40. Again, in Evans Nyamari Ayako v R (Criminal Appeal No. 22 of 2018), the Court of Appeal held that life imprisonment translates to thirty years' imprisonment.
41. There is no indication that the Trial Court exercised its discretion when meting out the sentence in view of Section 8(1) and (2) of the Sexual Offences Act.
42. The Appellant's mitigation constituted of him maintaining his innocence.
43. Looking at the totality of the facts in question, the tender age of the Complainant, I find that the life sentence ought to be properly translated to 30 years. I am guided by the Court of Appeal decision in Ngeno v Republic (Criminal Appeal 33 of 2017) [2023] KECA 1530 (KLR) (15 December 2023) (Judgment) where the Appellant was sentenced to 40 years imprisonment for defiling an 8 year-old girl.
44. The Appeal is therefore partially successful to the extent that the life sentence is substituted with imprisonment for 30 years.
45. It is so ordered.

**DATED, DELIVERED AND SIGNED AT KISII THIS 27<sup>TH</sup> DAY OF FEBRUARY 2024.**

**TERESA ODERA**

**JUDGE**

In the presence of:

Koima for the State

Appellant present in person

Oigo- Court Assistant

