



REPUBLIC OF KENYA



KENYA LAW
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**Nyarero v Republic (Criminal Appeal 72 of 2023)
[2024] KEHC 1737 (KLR) (27 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1737 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 72 OF 2023
DR KAVEDZA, J
FEBRUARY 27, 2024**

BETWEEN

EDWARD OGENJE NYARERO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered
on 24th August 2022 at Kibera Chief Magistrates' court Sexual
Offences Case No. 38 of 2019 Republic vs Edward Ogenje Nyarero)*

JUDGMENT

1. The appellant was charged with the offence of defilement, contrary to sections 8(1) and (3) of the *Sexual Offences Act* No. 3 of 2006. In the alternative, he was charged with the offence of indecent act with a child, contrary to Section 11(1) of the *Sexual Offences Act*. After a full trial, he was convicted on the main charge and the alternative charge. He was sentenced to serve 20 years imprisonment on the main and 10 years imprisonment on the alternative charge.
2. Being dissatisfied, he filed an appeal against the conviction and sentence in line with his petition of appeal. The appellant also filed amended grounds of appeal, and both parties have filed written submissions, which I have considered.
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 analyse and re-evaluate the evidence that was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.
4. With the above, I now proceed to determine the substance of the appeal. In his amended grounds and submissions, the Appellant has raised four grounds of appeal. He complains that the trial magistrate failed to appreciate that the ingredients of the offence of defilement were not proven. He further argued



that the prosecution's evidence was marred with contradictions and inconsistencies and that some key prosecution witnesses were not called to testify.

5. The thrust of the grounds of appeal is that the prosecution failed to prove its case beyond reasonable doubt. In order to succeed in a prosecution for defilement, it must be proven that the accused committed an act that caused penetration with a child. "Penetration" under section 2 of the Act means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person."
6. The prosecution case was as follows. The complainant (PW1) provided sworn testimony following a voir dire. She testified that she was 15 years old and acquainted with the appellant, who was her friend and used to reside with his cousins at (Particulars withheld) school. On April 22, 2019, while PW1 was on her balcony, the appellant called her twice, but she did not respond. It wasn't until PW1's sister sent her to the shop that she went to see why the appellant had been calling her. The appellant then requested that she accompany him to the baby class of the school, after which he closed the door behind them.
7. He then pushed her to the wall, and he pulled her skirt to her face, removed her panty to the knees, removed his trouser and innerwear up to his knees, and then inserted his penis into her vagina. During the act, PW1 tried pushing the appellant away, but he was strong, and she could not fight, or scream as no one was around.
8. Afterward, she got dressed and returned home. She chose not to inform her parents out of fear of being scolded. On April 24, 2019, the appellant called her again, and they went to the school bathroom. However, they soon heard footsteps. The appellant grabbed a bucket and mop, pretending to clean, when PW3, a teacher at the school who had seen PW1 entering the bathroom, arrived. PW3 discovered both PW1 and the appellant in the same bathroom. PW1 was questioned, and she recounted the events of April 22, 2019, but denied being assaulted a second time. Subsequently, the appellant was arrested.
9. In her testimony, PW1 gave clear and graphic testimony of the ordeal. She recalled that she had known the Appellant as a friend who used to live with his cousins before the incident. Further, the incident happened in broad daylight, and PW1 was able to recognise the appellant. I therefore hold that the appellant is the one who committed the act of sexual assault.
10. PW1's testimony did not require corroboration in accordance with the provision of Section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) if the trial magistrate recorded reasons why she believed the child was telling the truth. To this end, the trial magistrate recorded in the judgement that the court was satisfied that the victim, in her testimony, clearly stated that the appellant had been calling her and that they had sex on 22.02.2019.
11. Regarding additional corroborating evidence, the prosecution called Julius Okune Mambo, PW3, a teacher at (Particulars withheld) school, who discovered PW1 and the appellant together in the bathroom just before the sexual encounter. PW3 testified that PW1 disclosed having had intercourse with the appellant on April 22, 2019. He also mentioned recognizing the appellant from seeing him frequently around the school premises. This corroborates with PW1's testimony that the appellant resided in the school with his cousins.
12. Additionally, the prosecution called John Njuguna, a clinical officer at Nairobi Women's Hospital, produced the medical report and P3 form on behalf of his colleague, who had since resigned from the hospital. He stated that PW1 was examined on 25.4.2019 and the findings were that her outer genitalia and vagina were normal but the hymen was broken. He also examined the appellant and there was no abnormality. These medical findings were consistent with the testimony of PW1 on penetration.



13. The appellant complains that essential witnesses were not called. Particularly, he contended that the headmaster of the school in which the incident occurred was not called to testify. It is trite law that the prosecution need not call a multiplicity of witnesses to establish a fact. Section 143 of the *Evidence Act* provides that, in the absence of any requirement by the provision of law, no particular number of witnesses shall be required to prove a fact. However, it has been held that where the prosecution fails to call a particular witness who may appear essential, then the court may make an adverse inference as a result of failure to call that witness (see *Bukenya and Others v Uganda* [1972] EA 549 and *Erick Onyango Odeng' v Republic* [2014] eKLR).
14. According to the testimony of PW1, when the incident occurred, the school was deserted as it was on an Easter Monday. The headmaster in question was not an eyewitness. From the totality of the prosecution's case, I hold the view that the headmaster's evidence was not necessary to raise reasonable doubt against the totality of the prosecution's evidence. This is in line with provisions of Section 124 of the *Evidence Act*.
15. On the age of PW1, the trial court considered the birth certificate produced in evidence by PW2 the complainant's mother. From the record, the complainant was born on 23.09.2003 and was therefore 15 years at the time of the incident. This was further corroborated by the PRC and P3 forms, which indicated PW1's date of birth as 23.09.2003. There is therefore no doubt that PW1 was a child within the meaning of the law. The conviction on the main charge of defilement is thus affirmed.
16. On the conviction, the trial court convicted the appellant on both the main charge and the alternative charge. In doing so, the trial court fell into error as it is trite law that a conviction cannot be made on both the main charge and the alternative charge. This position was stated by the Court of Appeal in *David Ndumba vs Republic* [2013] eKLR thus:-

“On the issue of the alternative charge, we find that nothing turns on the fact that the trial court did not make a pronouncement on the same. In *M.B.O. -VS- Republic*, Criminal Appeal No. 342 of 2008, this Court held,

“The practice of charging offences in the alternative is one of abundant caution and that is why no finding is made on such charge once there is ample evidence to support the main charge.”
17. The charge is an alternative to and not an addition to and therefore once the trial court found that the prosecution had proved the main charge of defilement, she had no business in proceeding to convict the Appellant on the alternative. For that reason, I partially allow the appeal on conviction by setting aside the conviction on the alternative charge of the offence of indecent act with a child, contrary to Section 11(1) of the *Sexual Offences Act*, No. 3 of 2006.
18. On the appeal against the sentence, the appellant states the sentence was harsh in the circumstances. The appellant was sentenced to serve 20 years' imprisonment on the main count of defilement contrary to sections 8 (1) and 8(3) of the *Sexual Offences Act*. Section 8(3) provides that a person who commits an offence of defilement with a child between the age of twelve and fifteen is liable upon conviction to imprisonment for a term of not less than twenty years.
19. The prosecution proved that the child was 15 years old; hence, the court imposed a sentence of 20 years' imprisonment. However, this court is guided by the Court of Appeal in *William Okungu Kittiny v Republic* [2018] eKLR where the court held the mandatory minimum sentences were no longer applicable.



20. That notwithstanding, sentences are intended, inter alia, to punish an offender for his wrongdoing, they also aim to rehabilitate offenders to renounce their criminal tendencies and become law-abiding citizens. I have no doubt that the sentence imposed by the trial court, in this case, was lawful but considering that the appellant was a first offender, and was 20 years at the time the offence was committed, the appellant still has a full life ahead of him and needs rehabilitation. I am satisfied that the sentence was harsh and manifestly excessive.
21. For the above reasons, I hereby set aside the sentence of 20 years imposed on the main charge and substitute it with a sentence of 7 years imprisonment. The sentence on the alternative charge is set aside. The sentence shall be computed less 1 year, 10 months and 14 days which time he spent in remand custody.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 27TH DAY OF FEBRUARY 2024

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D. KAVEDZA

JUDGE

In the presence of:

The appellant present in person

Mr. Mutuma for the Respondent

Nelson Court Assistant

