



REPUBLIC OF KENYA



KENYA LAW
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**Kirido v Republic (Criminal Appeal 155 of 2023)
[2024] KEHC 1577 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1577 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 155 OF 2023
DR KAVEDZA, J
FEBRUARY 22, 2024**

BETWEEN

EVANS AMENYA KIRIDO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered by
Hon. M. Kamau (SRM) on 8th September 2022 at Kibera Chief Magistrate's
Court Sexual Offence Case no. 58 of 2014 Republic v Evans Amenya Kirido)*

JUDGMENT

1. The appellant was charged and after a full trial convicted for the offence of defilement contrary to section 8 (1) as read with 8 (3) of the *Sexual Offences Act*, No. 3 of 2006. He was sentenced to serve twelve (12) years imprisonment. Being aggrieved, he filed an appeal challenging his conviction and sentence.
2. In his petition of appeal, he raised nine grounds which have been coalized as follows. He challenged the totality of the prosecution's evidence against which he was convicted. He contended that his alibi defence was not considered by the trial court. He argued that he had already served 3 years for the same offence in criminal case no. 3443 of 2009. He urged the court to quash his conviction and set aside the sentence.
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 to 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. With the above, I now proceed to determine the substance of the appeal.



4. The prosecution called seven (7) witnesses in support of their case. M.M. testified as PW2, recounting her experience starting in January 2009 when she was living with her uncle in Machakos. Her mother arranged for her to meet the appellant, who was supposed to help find sponsorship for her high school fees. She moved in with the appellant, his wife, and their children.
5. One night in March, while the appellant's wife was away, he sexually assaulted her despite her protests. Two weeks later, he enrolled her in a school but she was sent away due to unpaid fees. She returned to his house but eventually went to live with her mother due to distress. The appellant continued to visit and eventually took her to Kisii where he arranged for her to undergo an abortion, claiming she was pregnant. After experiencing heavy bleeding and medical treatment, she reported the incidents to the police and was hospitalized.
6. SK (PW1) the complainant's mother testified about her struggles as a casual worker and her hospitalization in 2006. Facing financial difficulties, she sought sponsorship for her daughter M.M.'s high school fees through a church project led by the appellant, who agreed to sponsor M.M. under the condition that S joined their church and allowed M.M. to live with them.
7. In March 2009, M.M. was enrolled at [particulars withheld] High School with the appellant's sponsorship but was sent home after two weeks due to unpaid fees. M.M. stayed with the appellant, who suggested sending her to her grandmother in Kangundo. On July 16, 2009, the appellant claimed to take M.M. to Machakos but didn't. Concerned when M.M. didn't reach her grandmother's, PW 1 reported the matter to Ngong Police Station. M.M. returned home on July 25, 2009, in distress. At Nairobi Women's Hospital, it was discovered M.M. was pregnant and had attempted an abortion. After treatment, M.M. disclosed her ordeal. She was 14 years old during these events.
8. PW3, RKK, the complainant's uncle, testified that after M.M. completed her KCPE, she stayed with him for a month. He confirmed SK, PW 1 informed him about a sponsorship opportunity for M.M. Later, he learned M.M. was supposed to travel to Kangundo but had gone missing. He contacted the appellant who initially claimed M.M. was at a friend's place in Athi River but later admitted she was in Kisii.
9. PW4, the police doctor who examined the complainant, testified that she had irregular vaginal bleeding and a positive history of abortion. A pregnancy test at Nairobi Women's Hospital confirmed her pregnancy. Dr. Peter Wanyama (PW 5) presented a medical report stating the complainant's hymen was broken with old tears, indicating previous sexual activity. He diagnosed her with incomplete abortion due to sexual assault and performed a uterine cleaning procedure.
10. PW6, the appellant's ex-wife, confirmed they briefly lived with the complainant in March 2009 while seeking her sponsorship. In July, the appellant left, claiming a land dispute in Kisii. The complainant's mother informed PW6 that the appellant had taken the complainant to Kisii, which he initially denied. Upon return, he provided vague answers. PW6 admitted to participating in the complainant's school enrolment, including the pregnancy test requirement. She maintained that if the complainant had been pregnant, she wouldn't have been admitted.
11. PW7, Police Inspector Pauline Nderi, testified that the complainant, accompanied by her mother and uncle, arrived at Ngong Police Station on August 5, 2009, reporting the complainant's return after being reported missing. She interviewed them, obtained statements, and issued a P3 Form for her examination. A pair of blood-stained jeans worn by the complainant upon returning from Kisii was presented. PW7 also obtained her birth certificate, showing her birthdate as August 28, 1995. She completed the investigation and arrested the appellant. However, original bus fare receipts were misplaced, and copies were not produced despite court requests.



12. After the close of the prosecution's case, the appellant was found to have a case to answer and was put on his defence. In his defence, he called one witness. DEK (DW1), a teacher and former principal of [particulars withheld] Academy from January to April 2009. DW1 identified documents related to the complainant from the school, including admission forms, receipts, and reports, confirming her enrolment. He stated that prior to admission, students underwent medical examinations, including pregnancy tests, with the complainant's test yielding negative results.
13. In his sworn testimony, the appellant admitted his involvement in charitable work with his wife at [particulars withheld], where they supported M.M since she was in class 6. He produced documents, including the complainant's baptism card, to verify her background. He asserted that M.M was in boarding school from February to April 2009, contradicting the period when the alleged offence occurred. He attributed the complainant's dropout due to sponsorship cessation and denied any coercion for abortion. The appellant highlighted inconsistencies in the complainant's birthdate across documents and suggested the allegations were retaliation from the complainant's mother due to the sponsorship termination. He maintained M.M didn't stay at his house after school fees issues arose.
14. The appeal was canvassed by way of written submissions which have been duly considered. To succeed in a prosecution for defilement, the prosecution must prove 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.”

The other ingredients are proof of the age of the victim and the positive identification of the assailant.
15. The appellant challenged the totality of the prosecution's evidence against which he was convicted. He argued that the prosecution failed to establish the elements of the offence of defilement. In addition, the medical evidence was marred with contradictions.
16. I will now analyse the evidence on record to ascertain whether the essential ingredients of the offence preferred against the appellant were established to the required standard of proof. Regarding proof of age, I wish to state at the outset that the importance of proving the age of a victim, proof of penetration, and positive identification of the assailant in sexual offences is of paramount importance.
17. The investigating officer produced a birth certificate, which indicated that the complainant was born on August 28, 1995. This indicates that the complainant was 14 years old at the time of the alleged incident. The appellant challenged the evidence of age produced arguing that there were discrepancies. The best evidence in relation to the age of a person is a Birth certificate. In this case, it was produced. The prosecution, therefore, adduced credible evidence to prove that the complainant was indeed a child at the time the offence was allegedly committed.
18. The question I must now grapple with is whether the prosecution adduced sufficient evidence to prove that the appellant defiled the child victim as alleged. The complainant narrated how the appellant, who was her sponsor, forcefully defiled her in his home when she came to live with his family as she awaited to be enrolled in school.
19. The medical evidence presented confirmed that the complainant was pregnant and had attempted to procure an abortion, which was not complete. The medical examiner also noted old tears in her hymen, vagina with whitish discharge and no injuries. This evidence suggests M.M. experienced sexual assault, resulting in pregnancy and subsequent medical complications. This was evidence of penetration. The conclusion by PW 2 was that the complainant was likely to have been sexually assaulted. There is no



other possible explanation of what could have happened to the minor's genitals besides evidence that she was defiled.

20. Regarding the identity of the perpetrator, the complainant knew the appellant who was sponsoring her education and identified him as the one who sexually assaulted her. The identification was therefore by recognition. From the evidence, the complainant was very clear on the events that took place and the identity of the perpetrator.
21. After my appraisal of the evidence on record, I am unable to fault the finding of the learned trial magistrate. The prosecution evidence leaves no doubt in my mind that the appellant defiled the complainant and the elements of the offence have been proven.
22. The appellant also faulted the trial magistrate for rejecting his defence even though it was not challenged by the prosecution as per section 212 of the *Criminal Procedure Code*. The claim by the appellant that the charge was a fabrication by the complainant's mother is found to have no basis. The issue was considered by the trial court and found to be baseless. In addition, the appellant did not raise the alibi defence as alleged in his appeal. For the foregoing reasons, I have come to the same conclusion as the learned trial magistrate that in this case, the prosecution proved its case against the appellant beyond any reasonable doubt. I am thus satisfied that the appellant was properly convicted.
23. After my appraisal of the evidence on record, I am unable to fault the finding of the learned trial magistrate. The prosecution evidence leaves no doubt in my mind that the appellant defiled the complainant and the elements of the offence have been proved beyond reasonable doubt.
24. On appeal against the sentence, the Appellant was sentenced to serve twelve (12) years imprisonment. Before his conviction, the appellant had been tried, and convicted by the trial court. He filed an appeal in Nairobi High Court Criminal Appeal No. 264 of 2011. On 15th May 2014, Mbogholi J, quashed his conviction, set aside the sentence, and ordered a retrial. It is in this retrial that the appellant was sentenced to serve 12 years. However, before his conviction in the 2nd trial, the appellant had already served 2 years 11 months, and 14 days of the first conviction.
25. During the sentence proceedings, the trial court failed to indicate whether this period had been taken into consideration while sentencing the appellant. The inference is that it was not.
26. The upshot of the above analysis is that the appeal on the sentence partially succeeds. The sentence of twelve (12) years imposed is upheld. However, the period of 2 years 11 months, and 14 days shall be taken into consideration during the computation of the sentence.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 22ND DAY OF FEBRUARY 2024

D. KAVEDZA

JUDGE

In the presence of:-

Appellant present in person

Stanley Kinyanjui present for the Appellant

Ms. Ntabo for the State

Nelson Court Assistant

