



REPUBLIC OF KENYA



KENYA LAW
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**Ng'ang'a v Republic (Criminal Appeal 57 of 2023)
[2024] KEHC 3153 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3153 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 57 OF 2023
DR KAVEDZA, J
MARCH 20, 2024**

BETWEEN

GEOFFREY NJAU NG'ANG'A APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered by
Hon. E. Boke (SPM) on 5th November 2018 at Kibera Chief Magistrate's
Court Sexual Offences No. 3 of 2018 Republic vs Geoffrey Njau Ng'ang'a)*

JUDGMENT

1. The Appellant was charged and after full trial convicted by the Subordinate Court of the offence of defilement contrary to section 8(1) and (4) of the *Sexual Offences Act* (the Act). The particulars were that on diverse dates between 23.12.2016 and 07.01.2017 in Nairobi County, he intentionally and unlawfully caused his Penis to penetrate the Vagina of JAO, a child aged 16 years old. He was sentenced to serve 15 years' imprisonment.
2. Being dissatisfied, he file an appeal against the conviction and sentence in line with his petition of appeal. 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 which 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 two issues in his submissions. He complains that he was not positively identified as the perpetrator and that the ingredient of penetration was not conclusively proven.



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 a sworn testimony stating that she was 17 years old at the time of the incident. She testified that on 23.12.2016, she was delayed in returning home and encountered the appellant. The appellant offered her a place to sleep at his sister’s house, which he claimed was nearby. However, the following morning, the appellant locked her in the house and left. Upon his return later in the evening, he began to touch her breasts and subsequently pushed her onto the bed.
7. PW1 detailed how the appellant proceeded to undress her and then forcefully inserted his penis into her vagina. She screamed in response, which led to the appellant becoming annoyed and physically assaulting her. The appellant continued to have sexual intercourse with PW1 for five consecutive days, often resorting to assaulting her when she screamed. On January 7, 2017, PW1 was rescued from the appellant’s house by police officers, including PC Paul Nyamai Kanyithia (PW3) and John Onyando Muchenda (PW2), who is PW1’s father.
8. In her testimony, PW1 gave clear and graphic testimony of the series of events since the day the appellant took her to his house to when she was rescued. Despite being subjected to rigorous cross-examination, PW1 remained steadfast that it was the appellant who locked her in his house and defiled her on several occasions. She alluded to the fact that the ordeal was so traumatizing that she even burned the clothes that she had on during the period. Besides, despite not mentioning having known the appellant from before, the duration of which she was at the appellant’s house was sufficient for her to identify him. I therefore hold that the Appellant is the one who committed the act of sexual assault.
9. PW1’s testimony did not require corroboration in accordance with the proviso to section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) if there are recorded reasons why she believed the child was telling the truth. I have thoroughly gone through the testimony of PW1 and noted that she was consistent all through, and her evidence was unshaken on cross-examination by the appellant.
10. Regarding additional corroborating evidence, PW2 and PW3 were called as witnesses, both of whom confirmed that PW1 was rescued from the appellant’s residence, where the appellant was subsequently arrested. This corroborates the evidence of PW 1 that the appellant had confined her within his house during the period in which he committed the offense.
11. Additionally, the prosecution called Peter Ngatia, a doctor at Nairobi Women’s Hospital Hurlingham, PW4, who produced the Post rape care (PRC) form on behalf of Dr. Simon Nzambu who no longer worked at the hospital and who could not be traced. He stated that PW1 underwent an examination on 08.01.2017, which revealed no physical injuries. However, there was a whitish discharge in her vaginal area, and her hymen showed signs of tearing with old scars. The nature of the discharge, described as sticky and stretching similar to pre-ejaculation fluid, suggested possible penetration. He further explained that the presence of old tears indicated that the penetration might not have been a one-time occurrence; it could have happened repeatedly. Additionally, the hymen tearing appeared to be more than 7 or 8 days old. Considering that PW1 was examined approximately two weeks after her first sexual encounter with the appellant, and taking into account the repetitive nature of their sexual activity, these medical findings align with PW1’s testimony regarding penetration.



12. On age of PW1, the trial court considered the birth certificate produced in evidence by PW5. She was born on 07.02.2000 meaning that she was 16 years and 11 months old at the time of the alleged offence. There is therefore no doubt that PW1 was a child. The conviction on the charge of defilement is therefore affirmed.
13. On the sentence, section 8(4) provides that a person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years. The prosecution proved that the child was 16 years old; hence, the trial court imposed the sentence of 15 years' imprisonment, upon considering that that the appellant was a first offender and that he had been in custody throughout the trial. However, this court is guided by the decision in *Abamad Abolfathi Mohammed & Another v Republic* [2018]eKLR, where the Court of Appeal held that it is not enough for the court to merely state that it has taken into account the period already spent in custody, and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody.
14. I have considered the circumstances of the case and find that the sentence of 15 years' imprisonment was proportionate and I affirm it. Even so, the sentence shall be computed less 1 year, 10 months and 29 days, which time the appellant spent in remand custody.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 20TH DAY OF MARCH 2024

D. KAVEDZA

JUDGE

In the presence of:

Appellant present in person

Ms. Tumaini for the Respondent

Joy Court Assistant.

