



REPUBLIC OF KENYA



**Nzomo v Republic (Criminal Appeal E015 of 2020)  
[2024] KEHC 4249 (KLR) (15 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 4249 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CRIMINAL APPEAL E015 OF 2020  
JN ONYIEGO, J  
MARCH 15, 2024**

**BETWEEN**

**NICODEMUS MUTEMI NZOMO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence of hon. D.W.Mbuteti (RM) delivered on 3rd December 2020) in sexual offence case number 45 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. The particulars of the charge were that on 27.09.2019 at around 0630hrs at [particulars withheld] area in Garissa County, he unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of JMM, a child aged 5 years.
2. He also faced 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 27.09.2019 at around 0630hrs at [particulars withheld] area in Garissa County, wilfully and intentionally touched the genital organ namely vagina of JMM, a child aged 5 years with his genital organ namely penis.
3. At the hearing, the prosecution called four (4) witnesses in support of the charge and in a judgment delivered on 03.12.2020, the learned trial magistrate convicted the appellant of the offence of defilement and sentenced him to serve 24 years imprisonment.
4. The appellant being dissatisfied with the conviction and the sentence, appealed to this court and listed five (5) grounds of appeal in the petition of appeal filed in court on 14.12.2020 citing the following grounds;



- i. That the learned trial magistrate erred in law and fact when she failed to consider the fact that the prosecution did not discharge its burden of proof.
  - ii. That the learned trial magistrate erred in law and fact when she convicted the appellant on inconsistent and contradictory evidence.
  - iii. That the learned trial magistrate erred in law and fact by shifting the burden of proof to him hence reaching an unsupported determination.
  - iv. 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 the parties complied with. In his submissions filed in court on 21.11.2023, the appellant contended that the elements of the offence herein were not proved to the required standards. To that end, he relied on the cases of *Sekitoliko v Uganda* (1967) EA 53 and *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013 where it was held that for the offence of defilement to be proved, it is incumbent upon the prosecution to prove the age of the complainant, proof of penetration and positive identification of the assailant.
6. He decried the fact that the element of penetration was not proved as the complainant testified that he allegedly defiled her while having his clothes on. He urged that the complainant did not indicate whether he removed his clothes before defiling her.
7. He also stated that *voire dire* conducted by the trial court was not effective as the same did not follow the laid down procedures as provided for under section 19 of [Oaths and Statutory Declaration Act](#). That from the questions put across by the trial court, none was to the effect whether the complainant understood the importance of telling the truth. He relied *inter alia* on the case of [Joseph Opando v Republic](#), Criminal Appeal No. 91 of 1999 where the Court of Appeal outlined the stages to be followed when ascertaining whether a witness understands the meaning, nature and purpose of telling the truth.
8. He argued that his *alibi* defence was not considered by the trial court despite the same being strong. He relied on the case of [Victor Mwenda Mulinge v Republic](#) (2004) eKLR where the court held that the defence of *alibi* ought to be raised earlier enough to avoid the same being viewed as an afterthought. He urged this court to quash his conviction and thereafter set aside his sentence.
9. On the part of the respondent, Mr. Kihara while relying on his submissions filed on 24.04.2023 argued that the prosecution was expected to prove the elements in establishing the offence herein which include; age of the victim, penetration and identity of the perpetrator. That the prosecution proved the said elements to the required standards hence the guilty verdict returned by the trial court ought to be upheld. Counsel relied on the cases of [Hudson Ali Mwachongo v Republic](#) [2016] eKLR and *Francis Omuroni v Uganda*, Criminal Appeal No. 2 of 2000 where the courts reiterated the importance of determining the age of the victim in order to prescribe the sentence to be meted out.
10. Counsel contended that the elements of penetration and identity were proved as the same was corroborated by the medical report produced; He opined that the appellant herein was recognized as the person responsible for the injuries of the complainant as they lived together in the same house. On sentence, he urged the court to uphold the same as the sentence by the trial court was appropriate in the circumstances herein. He argued that the appeal lacked merit and thus should be dismissed.
11. The court has considered submissions by the parties as well as the grounds of appeal as fronted by the appellant. This being a first appellate court, it is duty bound to independently re-evaluate and re-assess afresh the evidence tendered before the trial court to be able to arrive at an independent determination



bearing in mind that it did not see nor listen to the witnesses testify so as to assess their general demeanour. See *Joseph Njuguna Mwaura & 2 Others v Republic* [2013] eKLR.

12. PW1, JM in her unsworn statement stated that one day as aunt E had gone to the bathroom, the appellant called her in the house and told her to do '*tabia mbaya haraka haraka*'. That he had only a shuka. She testified that he removed her biker and pant and proceeded to defile her. She testified that she felt a lot of pain between her legs and upon the appellant finishing, he dressed her up. It was her evidence that she informed PW2 who reported the matter to the police. The trial magistrate in his notes noted that the witness was not only a bright girl but also very confident and courageous. On cross examination, she stated that after being defiled by the appellant, she informed her aunt who told her that she would report the matter to the appellant. That she instead took her to board the school bus. On re-examination, she stated that Nzomo, the appellant herein was the one who did '*tabia mbaya*' to her.
13. PW2, RM testified that she used to reside with her sister, the wife to the appellant. That on 27.09.2019 at around 5.00 p.m., she arrived home only to be informed by PW1 that the appellant had defiled her. It was her statement that she thus took PW1 to Chief's Camp Dispensary wherein she was advised to report to the Police Station and thereafter to PGH Garissa. She stated that PW1 was aged 5 years at the time of the alleged incident. She testified that she examined PW1 on her private parts and noted that indeed, she had been injured.
14. PW3, 10xxxx PC Sammy Chargana testified that on 28.09.2019, a mother and a child arrived at the station and reported a case of defilement. That he issued them a P3 form and thereafter accompanied them to PGH Garissa. He recorded their statement whereby PW1 stated that '*baba*' was responsible for her injuries. He arrested and thereafter charged the appellant with the offence herein.
15. PW4, Jeremiah Mosibei testified on behalf of Mcdonald Kithambi who had since been transferred from PGH Garissa. He stated that when PW1's genitalia was examined, it was found that the hymen had ruptured with a fresh tear. There were lacerations on the vaginal opening (lower side of the vagina), the vagina was extremely red, hyperemic with blood and whitish discharge. There was blood from the vagina and upon lab investigation, it was found that there were pulse cells in the urine and epithelial cells.
16. He produced the outpatient card as Pex2; the lab request forms for HIV, Syphilis as Pex3. He proceeded to state that a high vaginal swab indicated that there was blood stains and many red blood cells which indicated that she had a bacterial infection. That the presence of epithelial cells indicated that there were lacerations on the vagina. He thus concluded that PW1 was defiled.
17. The trial court via a ruling delivered on 21.09.2024, placed the appellant on his defence noting that the prosecution had proved a prima facie case against him.
18. DW1, NN in his sworn testimony denied defiling the complainant. He stated that he was framed as there existed differences between him and PW2. That the same was exacerbated by the fact that PW2 had wanted to overstay in their house while the same house was not capable of holding all of them at once. He stated that the differences were so severe to the extent that PW2 detached herself from the rest of his family. That later, PW2 brought along police officers who arrested him and thereafter charged him with the offence herein. On cross examination, he stated that they lived together with the complainant from May to September 2019 and that the averments before the court were baseless.
19. I have considered the grounds of appeal herein, record of appeal and submissions by both parties. Issues that arise for determination are; whether the prosecution proved its case to the required degree; whether voire dire examination was properly conducted; whether the sentence was harsh in the circumstances.



20. The appellant herein having been charged with the offence of defilement and an alternative charge of committing an indecent act with a child, it was upon the prosecution to prove salient elements constituting the offence interalia;
  - a. Age of the complainant
  - b. Whether there was improper and unlawful penetration
  - c. Identification of the assailant, in this case, the appellant herein.
21. On the age of the complainant, the prosecution had to prove that the complainant was a child at the material time. Among the exhibits that were produced by the prosecution was a birth certificate for the complainant which showed that she was born on 10.09.2014. The offence herein was allegedly committed on 27.09.2019. Going by these dates, the complainant was aged 5 years 17 days thus a child.
22. On whether there was proper and unlawful penetration, the evidence available to the court was that of the complainant who testified as PW1. She stated how the appellant defiled her; PW2 also testified that she examined the private parts of PW1 and noted that she was injured. Of importance to note, PW4 testified that the hymen of PW1 had ruptured with a fresh tear. That there were lacerations on the vaginal opening (lower side of the vagina), the vagina was extremely red, hyperemic with blood and whitish discharge. That the presence of epithelial cells indicated that PW1 had a bacterial infection as well.
23. Penetration is defined under Section 2 of the *Sexual Offences Act* to mean partial or complete insertion of the genital organs of a person into the genital organs 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 assaulted hence proof of penetration.
24. On identification, the same was not controverted. The complainant identified the appellant herein whom she called 'baba' as the person who defiled her. There is no dispute that the appellant and the complainant lived in the same house and therefore, identification was by way of recognition. The appellant averred that he was framed for the reason that he had wanted PW2 to vacate their house which apparently was small in size. After consideration of the submission by the appellant vis a vis the evidence of the prosecution, I find that the prosecution evidence was not only cogent but also believable. The same was buttressed by the fact that the trial magistrate who saw the complainant testify noted that, the complainant was not only a bright girl but also very confident and courageous.
25. It is worth noting that besides the complainant, nobody witnessed the appellant sexually assault the victim. Therefore, the only direct evidence is that of the complainant. However, under section 124 of the *Evidence Act*, a court can safely convict based on the evidence of a single witness in this case the victim in a sexual offence without corroboration as long as the court is satisfied that the witness is truthful. See *JMM v Republic* (2020) eKLR.
26. In this case the court was satisfied that the child was truthful by being courageous in her testimony. Indeed, under Section 124 of the *Evidence Act*, corroboration is not mandatory. See *Sang v Republic* (2022) eKLR where the court held that under section 124 of the *Evidence Act*, the victim's evidence need not be corroborated as long as the court is satisfied of the truthfulness of the witness. From the testimony of PW1 which the trial court described as consistent and firm, she appeared unshaken even on cross examination. The appellant was well known as an uncle but often referred to as "baba". Identification was therefore recognition which I find was positive.
27. Having all these in mind, I find that the appellant was rightly indicted of the offence herein. It therefore follows that the prosecution had proved its case to the required standards.



28. On grounds that voire dire examination was not properly conducted, section 19 of the [Oaths and statutory Declaration Act](#) is clear. The objective of voire dire examination is to ascertain whether a child due to testify understands the nature of an oath; appreciates the importance of telling the truth and is intelligent enough to be able to follow the proceedings. See [Johnson Muiruri v Republic](#) (1983) KLR 445.
29. In the instant case, the court conducted the examination although not elaborate but was satisfied that the child was able to make unsworn testimony implying that she did not understand the nature of an oath. As regards being seized of the requisite intelligence, the court was satisfied that the child was capable of giving evidence. I do not find the technicality on not specifically recording the word intelligence as a ground to dismiss her evidence.
30. On the appellant's alibi defence, he was not under obligation to prove the same. However, the evidence of PW1 is not shaken. As a young girl, she could have inflicted sexual assault on her genitalia and yet fix the appellant whom she referred to as "baba". Where the incident took place was the appellant's residence hence no fabrication of evidence. Why would PW1 point at her uncle if indeed she was assaulted by somebody else. I do not buy the theory that the appellant was not in the house when the incident occurred.
31. 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.
32. 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”.
33. Having held as above, this court confirms conviction but reiterates that the 24 year imprisonment term shall be substituted with 20 years' imprisonment to enable the appellant have an opportunity to reform and later rejoin his family to finish the race in life.

ROA 14 days.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 15<sup>TH</sup> DAY OF MARCH 2024**

**J.N. ONYIEGO**

**JUDGE**

