



REPUBLIC OF KENYA



KENYA LAW
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**William v Republic (Criminal Appeal E020 of 2023)
[2024] KEHC 4048 (KLR) (26 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4048 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E020 OF 2023**

M THANDE, J

APRIL 26, 2024

BETWEEN

HARRISON KALUME WILLIAM APPELLANT

AND

REPUBLIC RESPONDENT

*(An Appeal arising out of the judgment of Hon. L. N. Wasige B. Kabanga
PM delivered on 30.11.22 in Garsen Sexual Offence Case No. E032 of 2021)*

JUDGMENT

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act (SOA) and an alternative charge of committing an indecent Act with a child contrary to Section 11 (1) of the SOA. The particulars of the offence of which the Appellant was convicted, are that on diverse dated between 11th and 16th December 2021 at Tana Delta sub-county within Tana River County, he intentionally and unlawfully caused his penis to penetrate the vagina of M. S. (the Complainant), a girl aged 14 years. The Appellant also faced the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the SOA. The particulars of this offence were that on the same day and in the same place, the Appellant intentionally touched the vagina of the Complainant. The Appellant was tried, convicted and sentenced to 20 years imprisonment.
2. Being aggrieved with both the conviction and sentence the Appellant filed a petition of appeal on 15.11.23 6.1.22. In summary, the grounds are that the trial court erred by failing to consider that Article 49(1)(f) of the Constitution was violated and that the prosecution exhibits were unreliable. Further that the trial court failed to appreciate that his defence raised doubt on the prosecution case.
3. As a first appellate Court, I am required to subject the evidence adduced before the trial Magistrate to a fresh analysis and evaluation while giving due allowance for the fact that unlike the trial court,



I neither saw nor heard the witnesses. See *Okeno v Republic* [1972] EA 32 and *Kariuki Karanja v Republic* [1986] KLR 190).

4. The facts of the case according to the prosecution are that the Complainant disappeared from home on 10.12.21 at 10 pm after dinner saying she had gone to Sunday School. After searching for her, it was discovered that she was at the Appellant's house. She stayed there until 16.12.21. The Appellant took the Complainant to her father's home whereupon he was arrested.
5. Both the Appellant and Respondent filed their submissions which I have duly considered.
6. The critical elements forming the offence of defilement are the age of the complainant, proof of penetration and positive identification of the assailant. (See *Dominic Kibet Mwareng v Republic* [2013] eKLR).
7. The record shows that the Complainant was a 14 year old minor at the material time. This is borne out by her birth certificate which indicates that she was born on 26.6.07. This is not disputed by the Appellant.
8. As regards penetration, the Appellant does not dispute that there was penetration as the medical evidence, the P3 form indicated that she had no hymen.
9. What the Appellant disputes is that he is the assailant. His case is that the prosecution did not prove its case beyond reasonable doubt in this regard. While he acknowledges that he was well known to the Complainant, being her brother's friend, he asserts that the offence was not fully connected to him. He argued that the Chief's letter Pexh 1 indicated that the name of the person who eloped with the Complainant was Harrison Mwanyale while his name is Harrison Kalume William. As such the ingredient of identification of the Appellant as the assailant was not proved beyond reasonable doubt.
10. The evidence on record shows that PW1 SKJ the Complainant's father stated that he went to the home of the Appellant to collect his daughter so that she could return to school. He found the Appellant who admitted that she was staying with him but was not present at that moment. The Appellant thereafter took the Complainant to PW1's home whereupon he was arrested by the headman assisted by young men from the village. This was corroborated by PW2 SJJ the Complainant's mother. She stated that the Complainant left home on 11.12.21 and returned on 16.12.21. She stated that on the night the Appellant was arrested, he had brought the Complainant to their home. PW2 called the headman and neighbours who tied up the Appellant and the Complainant. The Appellant was thereafter handcuffed and taken to Garsen Police Station. The Complainant told PW2 that she was staying with the Appellant as a wife.
11. Similarly, the Complainant stated that the Appellant went to their home on the evening of 11.12.21 and forced her to go with him to his home. She spent the first night at his grandmother's home after she refused to go to his room. She however went to his house the following day Monday and they had sex on that day, Tuesday and Wednesday. When the Appellant took her to their home on Thursday, neighbours called the headman who handcuffed them and they were taken to Garsen Police Station. This was corroborated by PW5, the investigating officer. He stated that the OCS at Garsen Police station where he is stationed directed him to assist PW1 whose daughter, the Complainant was missing. While on the road to Kibusu village where the Complainant was last seen, the area residents brought the Appellant and the Complainant who they had tied with ropes. The Complainant was rescued and the Appellant was arrested.



12. I have considered the discrepancy in the Appellant's name in the Chief's letter. However, I find it to be inconsequential and cannot be a ground for quashing the conviction. In so finding, I am guided by the holding in *Willis Ochieng Odera v Republic* [2006] eKLR, where the Court of Appeal stated

As for the contradictions in the prosecution evidence it may be true that such contradictions, particularly with regard to the date indicated on the P3 form as the date of the offence, is different. But that per se is not a ground for quashing the conviction in view of the provisions of section 382 of the Criminal Procedure Code.

13. The Appellant submitted that the trial Magistrate did not consider his defence. The record shows that the trial Magistrate did in fact consider the Appellant's defence. She stated that the Appellant was arrested immediately upon taking the Complainant back home as he and not his grandmother was staying with her at his house. As regards the grudge he claimed existed after his brother cut the Complainant's brother with a knife, the trial Magistrate found between the same to be an afterthought. She further found that claim not credible as the evidence of DW2 was that there was no grudge between him and the Complainant's parents. Additionally, the Trial Magistrate found DW2's evidence as calculated to get the Appellant of the hook as given that they did not live in the same house, there was no way DW2 would have known the says the Appellant had the Complainant in his house. After considering the Appellant's defence, I find that the trial Magistrate found, and correctly so, that the Appellant's defence did not shake the prosecution case.

14. Upon analyzing the testimony on record, I am convinced that the Complainant was defiled and that the Appellant who is well known to her, is the person who did it.

15. The Appellant has challenged the 20 year sentence imposed upon him. The pre-bail report on record dated 20.7.22 indicates that the Appellant was 25 years old. He was thus 24 years old in December 2021 when he lured the Complainant, a 14 year old child kept her in his house from 11.12.21 to 16.12.21 and defiled her. As an adult, the Appellant ought to have known that it is unlawful to engage in sexual conduct with a child. Having committed this crime, he cannot escape punishment and must be subjected to the penal provisions of the law.

16. Section 8(3) of the *SOA* provides the penalty for defilement of a child of the age of the Complainant as follows:

A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

17. In the end, after reevaluating the evidence, my finding is that the Appellant was properly convicted and sentenced. Accordingly, both the conviction and sentence are upheld and the Appeal being devoid of merit is hereby dismissed.

DATED AND DELIVERED IN VIA MS TEAMS THIS 26TH DAY OF APRIL 2024.

M. THANDE

JUDGE

