



REPUBLIC OF KENYA



KENYA LAW
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**Rogito v Republic (Criminal Appeal 52 of 2023)
[2024] KEHC 3832 (KLR) (23 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3832 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 52 OF 2023**

DR KAVEDZA, J

APRIL 23, 2024

BETWEEN

DALMAS ONGERI ROGITO APPELLANT

AND

REPUBLIC RESPONDENT

*(eing an appeal against the original conviction and sentence delivered by
Hon. M. Maroro on 18th August 2022 at Kibera Chief Magistrate's Court
Sexual Offences Case no. E098 of 2020 Republic vs Dalmas Ongeru Rogito)*

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 (2) of the *Sexual Offences Act*. The particulars were that on diverse dates between 2nd September 2020 and 21st September 2020 at Westlands Sub County within Nairobi County, he intentionally and unlawfully caused his Penis to penetrate the Vagina of W.N, a child aged 6 years old. He was sentenced to life imprisonment. Being dissatisfied, he filed an appeal against the conviction and sentence in line with his petition of appeal.
2. 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 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.
3. With the above, I now proceed to determine the substance of the appeal. In his petition of appeal, the appellant raised 7 grounds which have been coalized as follows: He challenged the totality of the prosecution's evidence against which he was convicted. He urged the court to quash his conviction and set aside the sentence.



4. 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."
5. The prosecution case was as follows. The Complainant (PW3) provided unsworn testimony after vior dire examination. It was her evidence that the appellant who was a neighbour in the premises where she lived lured her to his house and locked the door. He made her lie on her stomach, removed her skirt and panty, and inserted his 'tail' into her vagina from behind. She tried to resist be her efforts were futile. After the incident, she did not tell any as he had warned her against informing anyone. That she only informed her mother later on. She maintained that she knew the appellant and had never forgotten him.
6. In her testimony, PW3 gave clear and graphic testimony of the ordeal. PW3 remained steadfast that it was the appellant who took her into the house which was vacant and subjected her to the act of sexual assault. The victim maintained that she knew the appellant and the identification was by recognition. I therefore hold that the Appellant is the one who committed the act of sexual assault.
7. As discussed in the *Kenya Judiciary Criminal Procedure Bench Book* 2018 paragraphs 94-96 no corroboration is necessary for the evidence of a child taken on oath although cross-examination is available for sworn or unsworn evidence of a child in the usual way:
 - “94. No corroboration is required if the evidence of the child is sworn (*Kibangeny arap Kolil v R* 1959 EA 92). Unsworn evidence of a victim who is a child of tender years must be corroborated by other material evidence implicating the accused person for a conviction to be secured (*Oloo v R* (2009) KLR).
 95. However, in cases involving sexual offences, if the victim's evidence is the only evidence available, the court can convict on the basis on that evidence provided that the court is satisfied that the victim is truthful (s. 124, *Evidence Act*). The reasons for the court's satisfaction must be recorded in the proceedings (*Isaac Nyoro Kimita v R Court of Appeal at Nairobi* Criminal Appeal No. 187 of 2009; *Julius Kiunga M'biritbia v R* High Court at Meru Criminal Appeal No. 111 of 2011).
 96. The evidence of a child, sworn or unsworn, received under section 19 of the *Oaths and Statutory Declarations Act* is subject to cross-examination pursuant to the right to fair trial, which encompasses the right to adduce and challenge the evidence produced against the accused (art. 50(2)(k), CoK”
8. PW3'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 reasons to believe that the child was telling the truth. In this regard, the trial magistrate noted that PW3 testified with the innocence of a child and that the evidence as to what transpired remained consistent throughout. While I acknowledge that PW3's testimony was tendered with the innocence of a child, her grasp of the events was quite clear.
9. J.N(name withheld) PW4 testified that he was playing with the complainant and her friends when the appellant arrived and took her away. He escorted her by hand to a vacant house, where he observed that both the complainant and the appellant were undressed. When PW4 and others attempted to peep inside, the appellant noticed them and threatened to harm them. Fearing for his safety, PW4 ran to inform the complainant's mother about what he had witnessed. In court, PW4 identified the appellant, whom he recognized from the incident.



10. The complainant's mother (PW2) testified that the complainant was born on 5th October 2014. She told the court that on 25th September 2020, she was informed by PW4, that the complainant had been locked in a vacant house and defiled by the appellant. She interrogated the complainant who narrated her ordeal. She reported the incident to the police and the appellant was arrested.
11. Additionally, the prosecution called Dr. John Njuguna (PW1) a Clinical Officer at Nairobi Women's Hospital. He produced the medical report prepared by Edwin Ochwang' who went to undertake higher education outside Nairobi. Upon examination of PW3, the Doctor made the following finding; her hymen was torn with old scars. The injuries were approximately three weeks old. On cross-examination, he indicated that the mucus membrane heals fast between 24 hrs and 72 hours and does not scar frequently. was examined, her vagina had a large posterior tear between the vagina and anus, and blood was oozing from the site.
12. The medical evidence of PW1 corroborated with the testimony of PW3 and PW4 regarding the incident and conclusively proved defilement.
13. On the age of PW3, the trial court considered the birth certificate produced in evidence by PW5. She was born on 5th October 2014 meaning that she was 6 years old at the time of the offence. There is therefore no doubt that PW3 was a child.
14. In his defence, the appellant gave sworn evidence and did not call any witnesses. He testified that on the material date, he was not in Nairobi and as such could not have committed the crime he was charged with. He maintained his innocence, narrating how he was arrested. In addition, he contended that he did not know his accusers.
15. From the record, the issue was considered by the trial court and found to be baseless. 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. The conviction on the charge of defilement is therefore affirmed.
16. On the sentence, section 8(2) provides that a person who commits an offence of defilement with a child below the age of eleven years is liable upon conviction to life imprisonment. The prosecution proved that the child was 6 years old. Regarding the sentence imposed by the trial court, the appellant did not specify his grievance regarding his sentence in his grounds of appeal. However, during the sentence, the trial court noted the mandatory nature of the sentences under the Sexual Offences Act, No. 3 of 2006. She then proceeded to sentence the appellant to life imprisonment.
17. It is trite that although sentencing is at the discretion of the trial court, that discretion must be exercised judiciously in accordance with the law taking into account the facts and circumstances of each case. The punishment prescribed by the law for the offence of defilement is a minimum is life imprisonment for a child below the age of 11 years. The court record shows that the appellant was a first offender.
18. Although 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, I am satisfied that the sentence was harsh and manifestly excessive.
19. For the above reason, I hereby set aside the sentence of life imprisonment passed by the trial court and substitute it with a sentence of twenty (20) years imprisonment. The sentence shall take effect from the date of the appellant's conviction.

Orders accordingly.



JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 23RD DAY OF APRIL 2024

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D. KAVEDZA

JUDGE

In the presence of:

Nyaboke h/b for Mr. Nyambega for the Appellant

Ms. Gladys for the Respondent

Nelson Court Assistant.

