



**JK v Republic (Criminal Appeal 125 of 2023)
[2024] KEHC 5973 (KLR) (28 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5973 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 125 OF 2023**

DR KAVEDZA, J

MAY 28, 2024

BETWEEN

JK APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered
by Hon. P. Mutua (SPM) on 9th September 2023 at Kibera Chief
Magistrate’s Court, Sexual Offences Case No. E097 of 2023 Republic vs JK)*

JUDGMENT

1. The Appellant was charged and after full trial convicted by the subordinate court for the offence of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 30th April 2022, in Langata Sub-County within Nairobi County, he intentionally and unlawfully caused his male genital organ(penis) to penetrate the genital organ(anus) of A.M. a boy child aged 9 years. He was sentenced to serve life imprisonment.
2. Being dissatisfied, he has filed an appeal against the conviction and sentence. In his petition of appeal and amended grounds of appeal, he challenged the totality of the prosecution’s evidence against which he was convicted. He argued that DNA evidence was not used which should have acquitted him. He challenged the sentence as being harsh and excessive. He urged the court to quash his conviction and set aside the sentence.
3. In response, the respondent filed grounds of opposition dated 25th March 2024. The grounds raised are that the appeal is misconceived and unsubstantiated. The appeal is an abuse of the court process. The appellant was properly convicted before the trial court and the prosecution did discharge its burden of proof beyond reasonable doubt. The appeal lacks merit and should be dismissed.



4. 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, 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.
5. 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 complainant, A.M, (PW2) gave evidence after voir dire examination. He told the court that on 29th April 2022, the appellant who sells oranges told him to go to his house to get oranges. He forgot but he went the next day. When he got into his house, the appellant locked the door. He ordered him to remove his clothes. He pinned him down and closed his mouth with his hand. He made him lie on the mattress which was on the carpet. He then inserted his penis into his anus. The complainant started crying and was in pain. When he finished he was directed to leave the house.
7. When the complainant's mother (PW1) came, he found him crying. She inquired what had happened but he did not tell her. She threatened to beat him and she recounted his ordeal. The complainant's mother confronted the appellant. She reported the matter to the police. The complainant was taken to hospital for examination and treatment. The complainant confirmed that he knew the appellant whom he identified as Mwas and he used to give children fruits.
8. In his testimony, PW2 gave clear and graphic testimony of the ordeal. He remained steadfast that it was the appellant who pinned him to the floor and sexually assaulted him. Besides, he knew the appellant as who sold fruits in the area. I therefore hold that the Appellant is the one who committed the act of sexual assault.
9. The testimony of PW1 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 the trial magistrate believed the child was telling the truth. In this case, the trial magistrate recorded in his judgement that the complainant aptly described the events in question. He added that the complainant was clear on where and how the defilement happened and that he had no reason to doubt his testimony. I have also thoroughly gone through the testimony of the complainant and noted that he was consistent all through, despite being subjected to thorough cross-examination by the appellant.
10. Regarding additional corroborating evidence, the prosecution called PW1, the complainant's mother. She recounted that on 30th August 2022, her son left home but did not return. She inquired from neighbours about his whereabouts. She was directed to the appellant's premises. There, she found the complainant crying outside the house. He had soiled himself. Upon inquiring about what had happened, the complainant initially stated that the appellant had beaten him. After being threatened with punishment he narrated his ordeal at the hands of the appellant. PW1 then confronted the appellant who denied the allegations. The matter was reported to the police and the appellant was arrested at the police station. The complainant was taken to Nairobi Women's Hospital for examination and treatment.
11. The prosecution also called John Njuguna a clinical officer at Nairobi Women's Hospital to testify on behalf of Thomas Sania who had examined the complainant. At the time, Dr. Sania was in a study workshop. Upon examination, the complainant's anus was inflamed with anal wall laceration. Faeces were also noted. It was his evidence that the findings were consistent with anal penetration. These medical findings of PW3 corroborate PW2's testimony regarding the incident and conclusively prove penetration.



12. In his defence, the appellant admitted he was known as M in the area. He testified that the complainant's mother, PW1, was his girlfriend. When she discovered he had another girlfriend, she became unhappy and fabricated the charges against him. Additionally, on the day in question, she assaulted him, and he had to seek medical attention. He denied knowing the complainant and maintained his innocence. The trial court considered the defence and found it to be baseless. In addition, PW2 had no reason to falsely accuse the appellant of defiling him. I have already found above that her testimony was truthful and consistent all through. When weighed against the prosecution case, the appellant's defence did not raise any doubts thereof and it was rightly dismissed by the trial court.
13. The appellant also faulted the prosecution's failure to conduct a DNA test linking him to the offence. It is a well-established principle of law that a DNA test is not necessary to establish the offence of defilement or rape. (See [AML v Republic](#) [2012] eKLR)
14. Faced with a similar argument, in [Williamson Sowa Mbwanga v Republic](#) [2016] eKLR, the Court of Appeal pronounced itself thus:

“...it is patently clear to us that whilst paternity of PM's child may prove that the father of the child had defiled PM, that is not the only evidence by which defilement of PM can be proved. The fact, as happens in many cases, that a pregnancy does not result from conduct that would otherwise constitute a sexual offence does not mean that the sexual offence has not been committed. In this case, there does not have to be a pregnancy to prove defilement. A DNA test of the appellant would at most determine whether he was the father of PM's child, which is a different question from whether the appellant had defiled PM.”
15. I am guided by the above authority to find that it was not necessary in this case for the court to order a DNA test as the same was not necessary to prove penetration. The Appellant's contention in this regard therefore fails. I therefore find that penetration was proved to the required legal standard.
16. On the age of PW2, the trial court considered the birth certificate produced in evidence by the investigating officer PW6, which indicated PW2's date of birth as 17th August 2012, being nine years old at the time of the incident. There is no doubt that PW1 was a child within the meaning of the law. The conviction on the main charge of defilement is therefore affirmed.
17. On the appeal against the sentence, the appellant submitted that in light of emerging jurisprudence, section 8(2) of the [Act](#) is unconstitutional as it takes away the discretion of the court in determining the appropriate penalty. The appellant was sentenced to serve life imprisonment. Section 8(2) provides that a person who commits an offence of defilement with a child between 11 years and below is liable to life imprisonment.
18. 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, he needs rehabilitation. I am satisfied that the sentence was harsh and manifestly excessive.
19. For the above reasons, I hereby set aside the sentence of life imprisonment and substitute it with a sentence of twenty (20) years' imprisonment. The sentence shall run from the date of the appellant's arrest 30th April 2022 pursuant to section 333(2) of the [Criminal Procedure Code](#).

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 28TH DAY OF MAY 2024



D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Ms. Tumaini for the Respondent

Joy Court Assistant

