



**Ndolo v Republic (Criminal Appeal 150 of 2023)
[2024] KEHC 5977 (KLR) (28 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5977 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 150 OF 2023**

DR KAVEDZA, J

MAY 28, 2024

BETWEEN

JAMES MWANGANGI NDOLO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. E. Riany (SRM) on 25th August 2022 at Kibera Chief Magistrate's Court, Sexual Offences Case No. 55 of 2022 Republic vs James Mwangangi Ndolo)

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 22nd May 2022 at Kangemi Location, Dagoretti Sub-County, he intentionally and unlawfully caused his penis to penetrate the anus of JMM a child aged 11 years. He was sentenced to serve twenty years 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 the trial court failed to consider his defence. He challenged the sentence as being harsh and excessive. He urged the court to quash his conviction and set aside the sentence.
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 that 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.



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 complainant, JMM (PW1), gave evidence after a voir dire examination. He told the court that on 22nd May 2022, around 10 AM, he was going home after playing with his friend when he met the appellant. The appellant asked him to go to his house, but he refused. However, the appellant convinced him to go along, and they went to a mabati shelter with a veranda. There, the appellant closed his eyes with a t-shirt and tied his hand and legs with a rope. He then undressed the complainant and inserted his penis into his anus. He was in a lot of pain. A lady appeared and the appellant untied him and released him.
6. The complainant ran away and informed his friend, who then took him home. There, he recounted his ordeal to his mother. The complainant was taken to the hospital for treatment, and the incident was reported to the police. He identified the appellant as the perpetrator and maintained that he knew him from when the appellant previously lived in their plot.
7. In his testimony, PW1 gave clear and graphic testimony of the ordeal. He remained steadfast that it was the appellant who tied his hands and legs, closed his eyes, and sexually assaulted him. Besides, he knew the appellant as had previously lived in the same plot. I therefore hold that the Appellant is the one who committed the act of sexual assault.
8. 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.
9. Regarding additional corroborating evidence, the prosecution called PW2, the complainant's mother. She informed the court that her son was born on 6th June 2011. On 22nd May 2022, her son returned home with a friend and recounted the incident involving the appellant. She reported the matter to the police station and was referred to MSF Clinic Mathare for examination and treatment. She maintained that she knew the appellant from when he previously lived in their plot and denied any involvement with him.
10. The prosecution also called Dr. Peninah Angwenyi a clinical officer at Nairobi Women's Hospital to testify on behalf of Dr. Doris Kerubo who was on leave but had examined the complainant. Upon examination, the complainant's anus was normal but was bruised at 6 O'clock. The anal urethral sphincter muscle was loose and was tender. There was also pain in the anus. It was her evidence that the findings were consistent with anal penetration. These medical findings of PW3 corroborate PW1's testimony regarding the incident and conclusively prove penetration.
11. In his defence, the appellant gave unsworn evidence. He denied committing the offence and stated that he was not in Nairobi at the time of the incident. The court considered the defence and found it to be incredible. I have arrived at the same conclusion.
12. On the age of PW1, the trial court considered the evidence of the complainant's mother who indicated that the complainant was born on 6th June 2011. He was therefore eleven (11) 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.



13. On the appeal against the sentence, the appellant submitted that the sentence was harsh and excessive. The appellant was sentenced to serve twenty years imprisonment. Section 8(2) provides that a person who commits an offence of defilement with a child 11 years and below is liable to life imprisonment.
14. 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. I am therefore satisfied that the sentence was proper and in consideration of the court's discretion.
15. The upshot of the above analysis is that the appeal is found to be lacking in merit and is dismissed.

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

