



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Njau v Republic (Criminal Appeal 160 of 2023)  
[2024] KEHC 5968 (KLR) (28 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5968 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL 160 OF 2023**

**DR KAVEDZA, J**

**MAY 28, 2024**

**BETWEEN**

**PATRICK LEANA NJAU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered by  
Hon. E. Riany (SRM) on 18th April 2023 at Kibera Chief Magistrate's  
Court Sexual Offences No. 11 of 2023 Republic vs Patrick Leana Njau)*

**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 (3) of the *Sexual Offences Act* (the Act). The particulars were that on 22<sup>nd</sup> January 2023 within Nairobi County, he intentionally and unlawfully caused his Penis to penetrate the Vagina of T.N., a child aged 13 years old. He was sentenced to serve 20 years' imprisonment.
2. Being dissatisfied, he filed an appeal against the conviction and sentence in line with his petition of appeal. Both parties have filed written submissions, which I have considered.
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 which 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.
4. With the above, I now proceed to determine the substance of the appeal. In his amended grounds and submissions, the Appellant has raised two main grounds of appeal. He challenged the totality of the prosecution's evidence against which he was convicted. He contended that section 77 (1) of the



Evidence Act was not complied with. He urged the court to quash his conviction and set aside the sentence.

5. The thrust of the grounds of appeal is that the prosecution failed to prove its case beyond reasonable doubt. 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 prosecution case was as follows. The Complainant (PW2) gave sworn testimony after voir dire examination. She testified that she was born on 26<sup>th</sup> September 2009. On 22<sup>nd</sup> January 2023, she went to her aunt's residence at Kikuyu. When she arrived, her aunt was not home and when she contacted her on the phone, the aunt informed her to wait for her at her door. As she waited, the caretaker of the premises invited her to his house. He was taking alcohol. He gave her food and sat next to her. He directed her to undress and made her lie on the couch. He undressed himself and inserted his penis into her vagina. He threatened her against making any noise. She was in pain and bleeding. He told her not to inform anyone. When the complainant's aunt arrived, she left the caretaker's house.
7. The next day, her aunt inquired why she was walking with her legs apart. She informed her what had transpired. She identified the appellant as the perpetrator.
8. PW1 detailed gave a clear and graphic description of the events that transpired in the appellant's house. She remained steadfast that it was the Appellant, who subjected her to the act of sexual assault. The appellant was someone well-known to her as he was the caretaker of the premises. Besides, she added in her testimony that at the material time of the incident, the appellant's house had electricity, so she was able to recognise him. I therefore hold that the Appellant is the one who committed the act of sexual assault.
9. PW1'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 recorded reasons why she believed the child was telling the truth. In this case, the trial magistrate in her judgement believed the testimony of PW1 to be truthful and found it to be sufficient evidence to prove that she was penetrated by the appellant. I have also thoroughly gone through the testimony of PW1 and noted that she was consistent all through, and her evidence was unshaken on cross-examination by the appellant.
10. Regarding additional corroborating evidence, the prosecution called PW2's aunt, PW3, who testified that in December 2022, the complainant called to inform her that she had arrived at her house. PW3 was not at home at the time and asked the complainant to wait. When PW3 arrived around 9 PM, the caretaker brought the complainant to the house. The complainant left later in the night and was escorted by PW3's son. While she was leaving, PW3 noticed the complainant walking strangely. Along with her younger sister, Mary Wanjiru, (PW4), they questioned the complainant about what had happened. The complainant began crying and described her ordeal. They noticed bloodstains with a smell when she removed the complainant's trousers. They reported the incident to the police, and the complainant was taken to the hospital for examination and treatment.
11. Additionally, the prosecution called John Njuguna, a clinical officer at Nairobi Women's Hospital (PW1), who produced the Post rape care (PRC) form on behalf of Simon Nzambu, his colleague who was out of the country. He stated that PW1 underwent an examination on 23<sup>rd</sup> January 2023 after giving a history of being sexually assaulted by the caretaker. Upon examination, no physical injuries were noted and the external genitalia was normal. She had a fresh hymenal tear with vaginal bleeding with clotted blood which was consistent with penile penetration. Given that the complainant was examined within 24 hours after the incident, it is my finding that medical evidence as adduced by PW1 is consistent with the complainant's testimony on penetration and it well corroborates it.



12. On the age of the complainant, the trial court considered the birth certificate, which revealed that she was born on 26<sup>th</sup> September 2009 meaning that she was 13 years old at the time of the incident. There is therefore no doubt that PW1 was a child within the meaning of the law.
13. In his defence, the appellant denied committing the offense. He testified that on the day in question, he saw the complainant sitting outside her aunt's house crying. He invited her to wait in the waiting bay, left her there, and went back to work. When the aunt arrived, she thanked him for looking after the complainant. He was shocked to be arrested a few days later and charged.
14. The defence called Benson Muthoka, a resident at the premises where the appellant was a caretaker. He confirmed that the complainant was at the premises waiting for her aunt. When invited inside his house to wait, she refused. At that time, the appellant was consoling her. When he checked on her later, the complainant was no longer there as her aunt had arrived.
15. The trial court considered this defence and found it to be mere denial and a sham. I have come to the same conclusion.
16. The appellant contended that the trial court failed to comply with section 77(1) as read with (3) of the Evidence Act. He submitted that Dr. John Njuguna was not the maker of the PRC Form produced as a prosecution exhibit and should not have produced it. Section 77 of the Evidence Act provides,  
  
“77.
  - (1) in criminal proceedings any document purporting to be a report under the hand of Government analyst; medical practitioner or of any ballistic expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.
  - (2) The court may presume that the signature to any such document is genuine and then the person signing it held the office and qualification which he processed to hold at the time he signed it”.
  - (3) When any report is so used the court may if it thinks fit summon the analyst ballistic expert document examiner, medical practitioner or geologist as the case may be, and examine him as to the subject matter thereon.
17. The aforesaid provision allows public documents made by experts including medical practitioners to be admissible in evidence. In the present case, there is evidence that Simon Nzambu was not available to testify since he was outside the country. PW1 John Nuguna produced the PRC Form on his behalf. He testified that he was conversant with Dr. Nzambu's signature and handwriting and that the PRC form was filled by him. This was in compliance with section 33(b) and section 77 of the Evidence Act. I do not therefore find that the production of the PRC form by a person other than the maker was unlawful.
18. I have re-evaluated the evidence before the trial court and my own assessment of the same I am satisfied that the trial magistrate properly considered the evidence adduced and correctly arrived at the conclusion that the appellant penetrated the vagina of the complainant and therefore committed the act of defilement. The conviction on the charge of defilement is therefore affirmed.



19. On the sentence, the appellant submitted that whereas section 8(3) provides for a sentence of not less than 20 years, the trial magistrate imposed a sentence of 20 years. Suffice to note that the provisions of section 8(3) provide for a minimum mandatory, and in line with the present jurisprudence, a court is not necessarily bound by the mandatory minimums but has the discretion to determine the most appropriate sentence depending on the circumstances of each case. During sentencing, the trial magistrate considered the pre-sentence report and the appellant's mitigation.
20. It is trite that sentencing is at the discretion of the trial court, and that discretion must be exercised judiciously in accordance with the law considering the facts and circumstances of each case.
21. 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 do not doubt that the sentence imposed by the trial court was lawful but was harsh and manifestly excessive.
22. For the above reason, I hereby set aside the sentence of twenty years and substitute it with a sentence of fifteen (15) years imprisonment. The sentence shall take effect from the date of the appellant's arrest 25<sup>th</sup> January 2023 pursuant to section 333(2) of the *Criminal Procedure Code*.

Orders accordingly.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 28<sup>TH</sup> DAY OF MAY 2024**

**D. KAVEDZA**

**JUDGE**

In the presence of:

Appellant present

Ms. Tumaini for the Respondent

Joy Court Assistant.

