



REPUBLIC OF KENYA



KENYA LAW
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**Osman v Republic (Criminal Appeal E014 of 2024)
[2024] KEHC 14730 (KLR) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14730 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL APPEAL E014 OF 2024
JN ONYIEGO, J
NOVEMBER 21, 2024**

BETWEEN

AYUB ALI OSMAN APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the sentence and conviction by Hon. Lemayan in Sexual Offences Case No. E013 of 2023 in the SPM's Court at Daadab delivered on 14.03.2024)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act*. The particulars of the offence are that on 06.10.2023 within Garissa County, he intentionally and unlawfully caused his penis to penetrate the vagina of FMS a child aged 15 years.
2. He also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*. Particulars were that on 06.10.2023 within Garissa County, he intentionally touched the vagina, buttocks and breasts of FMS a child aged 15 years.
3. He pleaded not guilty to both the main charge and its alternative count. Prosecution presented the evidence of four witnesses in support of its case.
4. The trial court found the appellant guilty of the charge of defilement contrary to section 8 (1) as read with section 8(3) and sentenced him to 20 years' imprisonment.
5. Being dissatisfied with the finding of the trial court, he filed a petition of appeal on the following grounds:
 - i. That the trial magistrate erred in law and fact by convicting the appellant and yet the prosecution's evidence was marred with contradictions and inconsistencies.



- ii. That the trial magistrate erred in law and fact by convicting and thereafter meting out a harsh sentence.
 - iii. That the trial magistrate erred in law and fact by failing to consider his defence without giving any reason.
 - iv. That the trial magistrate erred in law and fact by reaching a manifestly wrong determination.
 - v. That the trial magistrate erred in law and fact by convicting the appellant and yet the prosecution did not prove its case beyond any reasonable doubt.
 - vi. That the trial magistrate erred in law and fact by convicting the appellant by relying on flawed evidence.
6. The court directed that parties file their written submissions. However, they chose to argue the appeal orally.
 7. The appellant in his oral submissions urged that the trial magistrate erred by convicting him yet the evidence by the prosecution did not prove the offence to the required standard. That currently, he is suffering in custody hence urged this court to release him. It was his contention that this case was simply a fabrication as he is married and therefore could not defile the complainant. He urged his court to quash the conviction and set aside his sentence.
 8. The learned prosecutor opposed the appeal by stating that the prosecution proved it case beyond any reasonable doubt. That the evidence was not only cogent but also admissible and therefore, conviction of the appellant was regular. Counsel contended that the appeal herein is devoid of any merit as the evidence by the prosecution was overwhelming leading to a sound finding by the trial court. He urged this court to dismiss the appeal.
 9. The duty of the first appellate court is to re-analyse and re-consider the evidence presented before the trial court a fresh with a view to arriving at its own conclusion while bearing in mind the fact that it neither heard nor saw the witnesses testify. [See *Kiilu & Another vs Republic* [2005]1 KLR 174].
 10. PW1, FMS, testified that she lived with her mother and other siblings in Block xx within [Particulars withheld] refugee camp with the appellant as their neighbour. That on 06.10.2023, the appellant visited her at midnight after which he defiled her. It was her evidence that in as much as she tried to wade off the attack by the appellant, he overpowered her.
 11. That it was the first time that they had sex noting that previously, they were just friends. On cross examination, she stated that the appellant had been at their home at least five times and additionally, she used to visit him at his place. That the appellant was arrested when her mother got to learn of their relationship. On re-examination, she stated that the appellant was in the habit of calling her through her mother's phone and that he only touched her breasts.
 12. PW2, MA, PW1's mother testified that on the material day, the complainant was asleep at her usual room when MA woke her up informing her that the appellant had sneaked into her children's room. Together with her husband, they took a torch and her husband followed the said MA. That they managed to arrest the appellant as he tried to escape.
 13. Upon arresting the appellant, they interrogated him and further called his mother who came to the scene but stated that she did not want to be associated with the appellant's actions. That the appellant's uncle visited them with a view to have the matter resolved but he did not come with the elders thereby prompting them to report the matter to the police.



14. PW3, Dr. Sylus Chirchir testified on behalf of Ousna Jepchirchir that upon the complainant being examined, it was found that her hymen was missing and there were lacerations at 7O'clock in as much as the rest of the body was alright. In conclusion, it was stated that the complainant had been defiled.
15. PW4, No. 90xxx, Sgt. F M testified that she was the investigating officer in this case. She recalled that the complainant and the appellant were in a relationship and within a short period of time, the appellant started visiting the complainant for sex escapades. That on the material time, they had sex and the appellant fell asleep and as such failed to leave. That he was thereafter found by a neighbour who informed PW2.
16. She went further to state that the parents of PW1 had initially thought that the appellant was a thief but to the contrary, they found him sleeping besides the complainant wearing a kikoi. The appellant in his attempts to flee turned futile as he was arrested and thereafter presented before the court of law. She also testified that she took the appellant and the minor for age assessment where it was determined that he was an adult aged 21 years while the minor was 14-years old.
17. At the close of the prosecution's case, the trial court found that he had a case to answer thus placed him on his defence.
18. The appellant in his sworn defence denied committing the offence in as much as he stated that he was a neighbour to the complainant. To the contrary, he stated that there exists a grudge between his family and that of the complainant hence the allegations herein. On cross examination, he stated that they were friends with the complainant after having met and exchanged contacts at his younger brother's wedding.
19. I have considered the grounds of appeal, the record herein and the submissions by the respective parties. Issues that germinate for determination are:
 - i. Whether the offence of defilement was proved to the required degree.
 - ii. Whether the sentence meted out was commensurate with the offence?
20. The appellant is charged with the offence of defilement contrary to Section 8 of the [Sexual Offences Act](#) which stipulates as follows: -

Defilement

 1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 2. ...
 3. 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.
21. It is trite law that for the prosecution to prove the offence of defilement, three key elements must be established. The elements of the offence of defilement are therefore proof of age, proof of penetration and positive identification of the perpetrator. [See Charles Wamukoya Karani vs Republic, Criminal Appeal No. 72 of 2013].
22. On the age of the complainant, the [Sexual Offences Act](#) defines "Child" within the meaning of the Children's [Act No. 8 of 2001](#) which defines a "Child" as "...any human being under the age of eighteen years."

[Also see the case of Martin Okello Alogo vs Republic [2018] eKLR].



23. The complainant stated that she was aged 15 years old. The same was also confirmed by her mother. PW4 on the other hand testified that upon taking the complainant for age assessment, it was established that she was 14 years old. In the same breadth, the appellant did not contest the age of the complainant as being a minor. Therefore, it is my finding that the first ingredient of the offence of defilement was proved to the required standard.
24. On the ingredient of penetration, the same is defined under Section 2 of the Act as follows: -The partial or complete insertion of the genital organ of a person into the genital organs of another person.
25. The Court of Appeal, in the case of *Sahali Omar vs Republic* [2017] eKLR, noted that:
- “...penetration whether by use of fingers, penis or any other gadget is still penetration as provided for under the *Sexual Offences Act*.”
26. The minor testified that she was in a relationship with the appellant and during the material time they had sex. The investigating officer also testified that upon conducting her investigations, she found that the appellant and the complainant had sex and that the appellant failed to leave in time as he fell asleep. Equally, PW3 a medical doctor corroborated the evidence of the complainant that she was penetrated. This was clear from the medical report that pw1’s hymen was missing although not freshly torn. There was laceration on the vagina suggesting penetration had taken place.
27. In the case of *Dennis Osoro Obiri v Republic (Criminal Appeal 279 of 2011)* [2014] KECA 598 (KLR) (Crim) (9 May 2014) (Judgment) the court of appeal held as follows;
- “From the medical evidence available coupled with pw1’s evidence and the fact that the appellant was caught at night escaping from the house pw1 was sleeping is sufficient to conclude that there was sexual activity or engagement between the two hence proof of penetration. It worth noting that penetration need not necessarily be proved through medical evidence alone. See. The appellant secondly contends that there was no medical evidence adduced to link him with the defilement of PW1. In our view, such evidence was not necessary the moment the trial court found that there was sufficient medical evidence to prove that the appellant had been defiled and that the appellant’s evidence was trustworthy as to the identity of the person who had defiled her. In *KASSIM ALI VS REPUBLIC, Cr. App. No. 84 of 2005* (Mombasa), this Court held the same view in the following terms:
- “... [T]he absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.”
- “We do not see the reason why the principle should be different in a charge of defilement. The same view was repeated by this Court in *Geoffrey Kioji Vs Republic, Crim. App. No. 270 of 2010 (Nyeri)* where the Court stated:
- “Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict



an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”

We do not find any merit, either, in this ground of appeal”

28. Guided by the above case law, it is clear that the complainant was penetrated. Therefore, proof of penetration through medical evidence is not mandatory. The question that begs for an answer is who penetrated her?
29. It is the identification that links an accused person to the alleged offence. In this regard, the prosecution was also required to prove the identity of the assailant. In the case herein, the complainant testified that she was in a relationship with the appellant who was her neighbour. The appellant on the other hand did not deny knowing the complainant as he stated that they were friends and had known one another after meeting in his brother’s wedding.
30. The appellant urged that the prosecution’s evidence was marred with inconsistencies and contradictions. In my humble view, that allegation was not supported. The allegation that his defence was not considered, is not true as the learned magistrate did consider the same and dismissed it. As such, it is my finding that all the elements of the offence of defilement contrary to section 8(1)(3) were proved beyond any reasonable doubt and the appeal against conviction is therefore dismissed.
31. The appellant did not submit on the sentence. That notwithstanding, I note that he asked this court to quash his conviction and thereafter set aside the sentence of 20 years imprisonment. Of importance to note is the fact that the appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the Act. The same provides that 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.
32. It is trite that sentencing is an exercise of discretion by the trial court which should never be interfered with unless the trial court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle [See Shadrack Kipkoech Kogo vs R., and Wilson Waitegei vs Republic [2021] eKLR].
33. In light of the above, this court notes that the trial court exercised its discretion by sentencing the appellant to 20 years imprisonment. The same is not only appropriate but also legal as it is provided for by the law.
34. I therefore find no merit in the appeal herein both on conviction and sentence and therefore dismiss it.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 21ST DAY OF NOVEMBER 2024

J. N. ONYIEGO

JUDGE

