



**Shikokoti v Republic (Criminal Appeal E045 of 2022)
[2024] KEHC 3950 (KLR) (18 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3950 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E045 OF 2022
SC CHIRCHIR, J
APRIL 18, 2024**

BETWEEN

JAMES OKWANDA SHIKOKOTI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal against the Judgment of Hon. O.G OLLIMO (R.M) at Kakamega chief Magistrate's court Criminal Case No. 65 of 20220 delivered on 15th day of June 2022)

JUDGMENT

1. The Appellant, James Okwanda Shikokoti was charged with the offence of defilement contrary to Section 8(1) (2) of the [Sexual Offences Act](#) No. 3 of 2006 and sentenced to life imprisonment.
2. The particulars of the offence were that on the 6th day of December 2020 at around noon at*village,*sub-location in *....sub-county within Kakamega county Intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of W.A , a child aged 8 years. (* particulars withheld)
3. He also faced an alternative charge with an alternative offence of committing an indecent Act with a child contrary to section 11(1) of the [Sexual Offences Act](#) No.3 of 2006
4. He was convicted of the main charge and sentenced to life- imprisonment.
5. Being dissatisfied with the outcome, he filed the present Appeal and set out the following grounds:
 - a. That the learned trial magistrate erred in law by convicting and sentencing the appellant to serve a mandatory life sentence but failed to consider the circumstances of the case and recent law developments.



- b. That the learned trial magistrate erred both in law and in fact by holding that the offence of defilement was proved without proof of the ingredients of the offence charged.
 - c. That the learned trial magistrate erred in law by failing to evaluate the appellant's defence of alibi.
6. He prayed that the appeal be allowed, conviction quashed set aside.

Appellant's submission

- 7. The Appellant faulted the life imprisonment imposed on him on grounds that it takes away the court's discretion on sentencing.
- 8. He further submits that the sentence was too harsh and excessive and that the trial court failed to consider the circumstances surrounding the commission of the offence.
- 9. He stated that the sentence violated his rights to fair trial under Article 50(2)(q), and the right of access to justice under Article 48 of the Constitution.
- 10. He urged the court to consider the time he had served while still in custody and relied in the case of Abamad abolfathi Mohammed & another v republic (2018) eKLR.
- 11. He urged the court to be guided by the decisions in the case of Sammy Wanderi Kugotha v Republic (2021)eKLR and the court of appeal case in Regan Otieno Okello Cr. Appeal No 189 of 2016 in arriving at an appropriate sentence.
- 12. On whether the charge of defilement was proven proved, the Appellant submits that there were contradictions on the actual age of the complainant and thus the age of the complainant was not proved.
- 13. It is the Appellant's further submission that penetration was not proved and relied in the case of Mark Oiruri mose v Republic (2013) eKLR in this regard. The appellant faulted the the court for relying on the evidence presented without questioning the fact that the minor, despite allegedly being defiled did not feel pain or bled; that there were no bruises on her genitalia and or any discharge or spermatozoa in her vaginal carnal.

In this regard he has further relied on the the case of Arthur Mshilla Manga v Republic (2016).
- 14. He finally submits that his defence of alibi was not considered and that it was the duty of the prosecution to disapprove the defence of Alibi.

Respondent's submissions

- 15. The Respondent submits that due process was followed throughout the trial process including the Appellant being supplied with statements and been informed of his right to legal representation
- 16. On the ingredients of defilement, the respondent submits that PW1 the complainant was able to positively identify the appellate who was her uncle's caretaker; that the incident happened at day time, and the defilement took place three times.
- 17. On penetration, the Respondent submits that the medical examination conducted showed that the complainant's hymen was broken and vagina walls were swollen which was an indication of penetration.



18. On the age of the complainant, it is the respondent's submission that the complainant's birth certificate was produced showing that she was born on 12th August 2012.
19. The Respondent further submits that the sentence was commensurate to the offence and that the court took into account relevant factors like the age of the Accused as well as that of the complainant.

Evidence in brief

20. PW1, was the complainant. She gave an unsworn statement .She identified the accused as James Okwani, her uncle's care taker at home. She told the court that on 16/12/2020 she was headed to the river when the accused called her and asked her to escort him to his bedroom which she obliged and that the accused asked her to lie down , removed her dress and as she stated "akainidunga na dudu yake kwa dudu yangu,".(which loosely translated means " he penetrated me with his penis)
21. She testified that the accused had defiled her three times before at the same room and that this time, she went and told Brenda (PW4) and that Brenda told her grandmother , Jane (PW2). Jane then informed the complainant's mother (PW3). The mother took the complainant to Butere sub- county hospital.
22. During cross examination, she identified the accused as her uncle peter's caretaker and denied allegations that her mother had coached her to lie against her. She restated that she only informed Brenda who told her grandmother.
23. PW2, was the complainant's grandmother. She testified that on 7th December 2020 her granddaughter, Brenda informed her that the accused had defiled PW1. She then asked PW1 to ask her mother to take her to hospital.
On cross examination, she identified that accused as peter's employee .
24. PW3, the complainant's mother told the court that on 7/12/2020, she was informed that her daughter had an issue and when she inquired from complainant, she refused to tell her which prompted her to slap her. She asked Brenda and Brenda told her what the complainant had reported to her. She took the complainant to hospital. She told the court that the complainant was born on 12.8.2012.
25. PW4, recalled that on 6th December 2020, they were playing with Esther and Chelsea when Pw1 came and told them that the accused had slept with her in his room and threatened to kill her if she disclosed to anyone. She went and told her grandmother Jane. During cross examination, she claimed that PW1 had informed her that the accused had slept with her in his room.
26. PW5 recalled that on 7th December 2020 he was at home when he heard screams from the neighbouring home. when he went to investigate, he found Pw3 crying and saying that the accused had defiled her daughter. He went with the nyumba kumi (Elders in charge of security in a given area,)to the accused home. They found that he had gone into hiding and carried his belongings) . The following day, he was informed that the accused had been sighted at Shikulu . The villagers assisted in the arrest and was taken to the chief's office and later to Butere police station.
27. Pw5 was the investigating officer from Butere police station. She testified that on 7/12/2020, the complainant was escorted by her mother to the station. to report that she had been defiled by the accused. She proceeded to book them and escorted the girl to the hospital where she was examined and treated and later issued with the p3 form.
28. She further stated that she went to take the statements at the station and visited the scene at Shirotsa where she established that the complainant had been defiled on 6th December 2020 at about 2 pm by



the herdsman and that the accused had escaped but was arrested later. She produced the birth certificate which indicated that the complainant was born on 12th August 2012 .

29. PW6 was the the clinical officer. He produced the p3 form and the treatment notes that had been prepared and filled by her colleague Titus Mlawa. On examination, it was established that the complainants the hymen was broken and the vaginal wall was swollen. She concluded that the complainant had been defiled. She produced the treatment notes as and the p3 form.
30. She stated that the complaint’s dress was not torn or soiled or blood- stained. She stated that according to the complaint, she had been previously been defiled and that the hymen had been broken before.
31. The accused was put on his defence and he opted for unsworn statement. He told the court that he was a herdsman and that the charges against him was trumped up since his employer wanted to employ a new herdsman and that they colluded to have him behind bars.

Determination

32. The offence of defilement is rooted on three main ingredients being the age of the victim (must be a minor), penetration and the proper identification of the perpetrator. These ingredients are provided for under section 8(1) of the *sexual Offences Act* No. 3 of 2006 and the prosecution must prove each of the said ingredients beyond reasonable doubt.
33. Section 8(1) of the *Sexual Offences Act* provides as follows:
 - “8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
 - (3)
 - (4).....
34. In his submissions, the appellant avers that the age of the complaint was not proven to the required standards as the charge sheet stated that she was 8 years while the witnesses who testified to her age, and the birth certificate, indicate 9 years. The appellant argues that due to the said , contradiction the age of the complainant was not proved.
35. On cases of defilement of children , the age of the child is a material consideration as it determines the appropriate sentence to be meted out. In this case whether the child was 8 or 9 years is a contradiction which did not go into the core of the case, as the prescribed sentence for defilement of a 8 or a 9 year old is the same , namely life sentence. In *Dickson Elia Nsamba Shapwata & Another v. The Republic*, CR. APP. NO. 92 OF 2007 the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows,
 - “In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.” (Emphasis added)
36. The age of the child was duly proved by the production of the birth certificate. The contradiction between the age indicated in the charge sheet and sme pieces of evidence did not go into the core of the case. The critical fact was that the child was nder the age of 11 years.



37. The next ingredient for determination is penetration. Penetration is defined under Section 2 of the [Sexual Offences Act](#) as: “The partial or complete insertion of the genital organ of a person into the genital organs of another person.”

38. Penetration is proved through the evidence of the complainant and may or may not be corroborated by medical evidence of a medical practitioner. In the case of *Bassita Vs Uganda S. C Criminal Appeal Number 35 of 1995*, the Supreme Court held that: -

“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victims own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt.”

39. On the matter of penetration, Pw1 testified that the appellant had called her to his house at around lunch time while she was headed to the river, took her to his bedroom, and removed her dress. She stated that “akaidunga na dudu yake kwa dudu yangu “and asked her not to tell anyone and that this was the 3rd time that the appellant had defiled. What the complainant was describing was a child's language or euphemisms of describing the act of penetrative sex. The Court of Appeal in the case of [Muganga Chilejo Saha v R](#), Criminal Appeal No. 28 of 2016 (2017) eKLR held as follows: -

“Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a court room. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms like, “alinifanyia tabia mbaya”, (*IE v R*, Kapenguria HC Cr. Case No. 11 of 2016), “he pricked me with a thorn from the front part of this body.”, (*Samuel Mwangi Kinyati v R*, Nanyuki HCCRA. NO. 48 of 2015), “he used his thing for peeing”, (*David Otieno Alex v R*, Homa Bay HC Cr Ap No. 44 of 2015), “he inserted his “dudu” into my “mapaja”, (*Joses Kaburu v R*, Meru HC Cr Case No. 196 of 2016), “he used his munyunyu”, (*Thomas Alugha Ndegwa*, Nbi HC Cr. Appeal No. 116 of 2011), as apt description of acts of defilement. We, however, need to remind trial courts that the use of certain words and phrases like “he defiled me”, which are sometimes attributed to child victims, are inappropriate, technical and unlikely to be used by them in their testimony”.

40. Further the complainant's evidence was corroborated by the clinical officer who produced the P3 form and the treatment notes . The examination showed that the hymen was broken and the vaginal wall was swollen . He concluded that the child had been defiled. While a broken hymen may not necessarily prove of penetration, the swollen vaginal walls certainly proved that penetration had taken place.

41. Am satisfied that there was sufficient evidence to prove penetration.

42. On the matter of identification of the accused person, this Court takes note of the fact that , during hearing at the trial Court, the complainant positively identified the accused as her uncle Peter's employee and that he worked as is herdsman. Thus the complainant not only knew the Appellant but what he did . The same evidence was given PW2. The Appellant too told the court he was a herdsman, and that he was being framed simply because the said uncle wanted to fire him from the job. Thus it



is clearly evident that the complainant, the Appellant and some of the witnesses knew each other well before the incident.

43. This was therefore a case of identification through recognition. In this regard, I rely on the case of *Reuben Taabu & 2 others v Republic* (1980) eKLR where the court of Appeal had this to say about identification by way of recognition: “This was , however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory , more assuring , and more reliable than an identification of a stranger because it depends upon the personal knowledge of the assailant in some form or the other”
44. Am satisfied that that the Appellant was duly identified as the perpetrator of the crime .
45. On the final issue, the appellant submitted that his defence was not considered by the trial court. He avers that he stated that his employer wanted to employ a new herdsman and hence colluded to have him imprisoned.
46. He asserted that the evidence against him was fabricated a claim that the trial court failed to observe. A perusal of the trial court’s judgement dated 15th June 2022 shows that the trial magistrate considered the appellant’s defence. I agree with the trial court that the issues of fabrication was never addressed during the cross- examination the prosecution’s witnesses, and therefore I consider it an afterthought. Further having opted for unsworn statement his testimony was not subjected to cross- examination. I find his defence implausible, and did not displace the prosecution’s evidence in any event.
47. Am satisfied that the prosecution proved its case beyond reasonable doubt, and the Appeal against conviction has no merit.

The sentence

48. The Appellant has argued that the sentence was manifestly harsh and should be interfered with, and that the trial court failed to individualize the circumstances of the offence thus leading to excessive punishment. He further urged the court to reconsider his sentence since section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* was bad law; that it would prejudice him since the life imprisonment meant that there was no parole and that it would deprive him of his right to liberty. He has relied on Article 48 of the constitution and section 216 and 329 of the criminal procedure code.
49. Section 8(2) of the *Sexual Offences Act* prescribes a mandatory minimum sentence of life imprisonment for the offence of defilement of a child of 11 years and below. In this case, it was established that the complainant was 9 years. The hands of the trial court was therefore tied in as far as the sentencing was concerned.
50. However in the recent decision in *Manyeso v Republic* (Criminal Appeal No. 12 of 2001) [2023] KECA (KLR) the Court of Appeal held that life imprisonment was unconstitutional. It stated : “ In addition an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under article 28 , and we are in this respect persuaded by the reasoning of the European court of Human Rights in *Vinter and others v United Kingdom* (Application Nos 66069,130/10and 3896/10[2016]III ECHR 317(9 July 2013) that an indeterminate life sentence without any prospect of release or possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release....”
51. This court is bound by the decisions of the court of Appeal and thus in line with the aforesaid decision , I hereby set aside the sentence of life imprisonment .



52. In the instant case, the minor complainant was 89years old. In mitigation the Appellant sought for leniency and a non-custodial sentence. However I agree with the trial court that the Appellant, estimated by the trial court to be 40 years of age at the time, took advantage of a child of tender years. He was also “her uncle’s herdsman”, and therefore there must have been a level of trust that the child had had on him. He betrayed that trust. The traumatic effect of the defilement must also have a long-term effect on the child.
53. Considering all the foregoing , I hereby sentence the Appellant to 40 years in prison
54. In conclusion:
- a). The Appeal against conviction is hereby dismissed.
 - b). The sentence of life imprisonment is hereby set aside and substituted with 40 years.

DATED , SIGNED AND DELIVERED AT NAIROBI VIA MICROSOFT TEAMS THIS 18TH DAY OF APRIL 2024.

S.CHIRCHIR

JUDGE.

In the presence of :

Godwin- Court Assistant

Appellant

