



**Wangombe v Republic (Criminal Appeal 73 of 2023)
[2024] KEHC 9523 (KLR) (Crim) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9523 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
CRIMINAL
CRIMINAL APPEAL 73 OF 2023
CM KARIUKI, J
JULY 26, 2024**

BETWEEN

JOSEPH KARIRU WANGOMBE APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant herein was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on diverse dates between 1st December 2018 and 1st January 2019 in Laikipia West Sub County within Laikipia County, he intentionally and unlawfully caused his male organ, namely penis, to penetrate the vagina of EWM, a girl aged 15 years without her consent.
2. Alternatively, he was charged with committing an indecent act against the EWM, a child aged 15 years.
3. The Appellant pleaded not guilty, and the matter proceeded to a hearing. The prosecution relied on three witnesses, and the Appellant chose to remain silent in his defense. Consequently, the Appellant was found guilty of the main charge and was convicted to serve 20 years imprisonment vide the judgment delivered on 22/6/2023.
4. The Appellant appealed against the trial court's judgment vide the petition of Appeal dated 29/6/2023 on conviction and sentence. The grounds of Appeal raised by the Appellant were as follows:-
 - i. He pleaded not guilty to the charge.
 - ii. That the learned trial magistrate erred in both law and facts by convicting the Appellant based on unsubstantiated facts regarding age since no document was produced before the court to ascertain the same.



- iii. The learned trial magistrate erred in both law and facts by convicting the Appellant on contradictory evidence since the evidence of PW1 and PW2 did not collaborate. PW1 said she was 14 years old, yet PW2, who was her father, told the court that his daughter was 15 years and it was unknown if the mother could have been there to witness; she may have told the court about a different age, i.e., 17 or 18 years. This created doubts about the apparent age of the Complainant.
- iv. That the learned trial magistrate erred in both law and facts by convicting the Appellant based on mandatory sentence without considering the strength of the evidence brought before the court, which was doubtful.
- v. That the whole evidence remains mere allegation since no eye witness saw the Appellant with the Complainant and also since the Complainant alleges that she was impregnated in the process of the act by the accused person D.N.A. could have been the best option for the prosecution to conduct in order to clear the air and clear speculation that lead to a conviction of an innocent person.

5. Appellant's Submissions

6. The Appellant submitted that the Complainant's age did not meet the required standards. The charge sheet indicated that she was 15, while the doctor who examined her indicated her age was 14 years in the treatment note. The doctor who filed the P3 form on 11/5/2019 estimated the Complainant's age to be 15 years, and PW1 also gave her age to be 15 years, while PW2 stated that she was 14.
7. It was stated that no documentary evidence was available to prove her age, yet the trial magistrate stated that there was justified proof that she was 14 at the time of the commission of the offense, basing it on the P3Form, which indicated that she was 15 years old.
8. The Appellant asserted that the Complainant's age was not conclusively proved, given the grave contradictions in the medical record and the evidence of the witnesses, and it was unsafe for the court to find that the Complainant was aged 14 years and the offense fell within the ambits of section 8 (3) of the sexual offenses act. One cannot tell a person's age by observing their physical appearance as the trial court did.
9. Reliance was placed on *Kenneth Kimngetchi Soi v R* [2014] eKLR, *Alfayo Gombe Okello v R* [2010] eKLR, *Eliud Waweru Wambui v R* (Criminal Appeal No. 102 of 2016 (2019) KECA 906 (K.L.R.) (22nd March 2019)
10. On penetration, the Appellant averred that the charge sheet indicated defilement was committed between 1/12/2018 and 1/1/2019. In her court evidence, the Complainant alleged that she was defiled in December 2018 and March 2019. The medical history given to the doctor who filed the treatment notes and the P3 form was that the defilement took place in October and December 2018 without a condom.
11. It was asserted that the treatment notes indicate that the Complainant was five months pregnant, and the same note and P3 form indicate that the estimation of pregnancy duration was 24 weeks, i.e., six months. The clinical officer stated that the defilement occurred four months before the examination. The Appellant stated that a simple calculation would reveal that if the Complainant was 24 weeks pregnant on 11/5/2019, then the date of conception was in November 2018 and not December 2018. No pregnancy test results or ultrasound results were produced as evidence to ascertain the conceptual age or the length of the alleged pregnancy.



12. The Appellant contended that the Complainant alleged that he was responsible for her pregnancy. Nevertheless, there were contradictions in the state of alleged defilement and length of the pregnancy, and no D.N.A. test was conducted to link him to the pregnancy and to prove that he had defiled the Complainant; therefore, the trial magistrate erred in finding that the Complainant's pregnancy corroborated her testimony that she was defiled on December 2018 by the Appellant.
13. On the issue of the perpetrator, the Appellant argued that no eye witness had ever confirmed seeing the Complainant with the Appellant. The Complainant's grandmother was mentioned in evidence but was not called a witness. It was submitted that the prosecution failed to discharge the burden that the Appellant defiled the Complainant if at all she was defiled. The Complainant did not scream or report the defilement to her teachers at all, and her grandmother encouraged her. She only incriminated the Appellant after her pregnancy was discovered. They, therefore, urged the court to find that the conviction was unsafe.
14. The Appellant pointed out that he was sentenced to 20 years because it was the mandatory minimum sentence provided for in Section 8 (3) of the *Sexual Offences Act*. If the Appeal on conviction is to fail, they urged the court to hold that the Complainant was not forced to participate in sexual intercourse, she was not threatened in any way, and she voluntarily participated in the act; therefore, it is unfortunate that the Appellant will have to spend 20 years in prison whereas the Complainant continues to enjoy her freedom.
15. It was argued that mandatory minimum sentences under the *Sexual Offences Act* were declared unconstitutional, and they prayed for the sentence to be set aside for an appropriate sentence based on a pre-sentence report to be preferred. Reliance was placed on Joshua Gichuki Mwangi v R in urging the court to reduce the sentence.

16. Respondent's Submissions

17. The respondent submitted that the elements required to prove the offense of defilement are as set out in the case of Daniel Wambugu Maina vs. Republic [2018] eKLR, i.e., age, penetration, and identity.
18. On age, it was stated that they are of the firm view that the Complainant's age was sufficiently proved as 14 years beyond reasonable doubt in that the Complainant was a minor and below 18 years at the material time. Moreover, the trial court had the opportunity to observe the minor and believed that she was a minor. Reliance was placed on Mwalango Chichoro vs. Republic Msa C. Appeal No 24 of 2015 (U.R.)
19. The respondent asserted that PW1 testified that in December 2018, on her way from the posho mill, she met the Appellant, whom she referred to as Kariru, who took her into the bush and removed her panty and then removed his penis (kitu ya kukojoa) and inserted his penis into her vagina (sehemu ya kukojoa). Again, in March 2019, they met, and the Appellant took her into the bush and inserted his penis into her vagina, and did "bad manners" where after he gave her Kshs. 150. Reliance was placed on Daniel Mbugua Wainana vs. Republic (supra)
20. Further, PW3, who physically examined the Complainant, found that she was 24 weeks pregnant in May 2019, which then means she conceived in December 2018. This then confirms that penetration must have happened as it was in December 2018 when she was defiled. PW3 proceeded and produced the P3 form, which confirmed that, indeed, penetration was done, which led to her being pregnant.
21. On identity, it was contended that the Appellant used to take her home on his motorcycle and even referred to him as Kariru, but later, he took advantage and even defiled her severally, leading to getting her pregnant. She stated that she used to meet the Appellant on the way and say hi to each other and that



he had even gone to their home once; therefore, chances of mistake identity are remote as the Appellant was sufficiently recognized and identified. The Appellant relied on the case of *Roria v Republic* 1967 EA 583 (unreported).

22. The respondent averred that the offense of defilement is done in secrecy, and the only evidence that the court can rely on is the testimony of the victim, well corroborated by medical evidence, which is sufficient to enter a conviction. In this case, the victim's evidence was watertight, for the prosecution effectively proved all three elements of defilement.
23. On the issue of no D.N.A. being conducted, it was stated that no objection was raised during the trial, and further, the issues for determination were defilement and not parental or maintenance. Reliance was placed on *Kabindi v Republic (Criminal Appeal 33 of 2018)* KECA.
24. Regarding the sentence, it was averred that the same was passed on 22.6.2023, and the hands of the trial magistrate were tied in view of having convicted the Appellant. However, the respondent urged the court not to interfere with the sentence because the Appellant defiled an innocent girl and impregnated her, hence wholly ruining her life and leading to her dropping out of school. Lastly, they urged the court to find that the Appeal has no merit and should be dismissed.

25. Analysis and Determination

26. This being a first appeal, I am expected to review and analyze the evidence afresh to form an independent opinion and draw my conclusions, bearing in mind that I did not have the benefit of seeing and observing the witnesses. The principles were set out in the case of *David Njuguna Wairimu vs. Rep* [2010] eKLR, where the Court of Appeal stated: -

“The first appellate court must analyze and re-evaluate the evidence before the trial court, and itself come to its conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think anything is objectionable in doing so, provided it is clear that the court has considered the evidence based on the law and the evidence to satisfy itself on the correctness of the decision.”

27. (See *Okeno vs. Republic* [1972] E.A. 32 and *Kiilu & Another vs. Republic* [2005] 1 K.L.R., 174).
28. In a charge for defilement, the prosecution must prove the age of the Complainant, penetration, and the identification of the perpetrator of the crime.

29. Age of the Complainant

30. The Appellant contended that the Complainant's age was not proven to meet the required standard. The charge sheet indicated that she was 15, while the doctor who examined her indicated that her age was 14 years in the treatment note. The doctor who filed the P3 form on 11/5/2019 estimated the Complainant's age as 15 years, and PW1 also gave her age as 15 years, while PW2 stated that she was 14.
31. On age, the trial magistrate stated that:-

“The victim at the trial stated that she was fifteen (15) years old. Her father (PW2) said that the victim was fourteen (14) years old. He referred to the victim's birth certificate and stated that the date of birth was 3rd June 2006, but the birth certificate was not produced as an exhibit. Does failure to produce documentary evidence of age automatically mean that age remains



unproven? The Complainant's p3 form, which was filled out by a medical practitioner who is well placed to assess age, gave the Complainant's age as fourteen (14) years. I saw the Complainant on the hearing date and assessed the Complainant's age to be a child of tender years.....

.....From the foregoing, I am satisfied that there exists sufficient proof that the Complainant was fourteen (14) years old at the time of bringing this incident within the ambit of Section 8 (3) of the *Sexual Offences Act*."

32. Accordingly, the charge sheet indicated that the victim was 15 years old. PW1 stated that she was 15 while her father, PW2, indicated that she was 14 and that her date of birth as per her birth certificate was 3rd June 2006, even though the birth certificate was not produced. The medical examination report produced as P.Exh 2 indicated she was 14.

33. In *Joseph Kiet Seet v Republic* (2014) eKLR, the court held that:

"It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence, in the case of *Francis Omuroni – Versus Uganda*, Court of Appeal Criminal Appeal No. 2 of 2000. It was held thus: In a defilement case, medical evidence is paramount in determining the victim's age, and the doctor is the only person who can professionally determine the victim's age without any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian, observation, and common sense..."

34. Further, the Court of Appeal in *Edwin Nyambogo Onsongo vs. Republic* (2016) eKLR stated as follows concerning proving the age of a victim in cases of defilement:

"... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

35. Going by the above authorities, it is my considered view that the trial court did not err by holding that the victim's age was 14 years old. The father's testimony, the medical examination report, and the court's observation were all credible and reliable proof to settle the question of her age. It is also important to note that the time of the commission of the crime and when it came to court could account for the difference in age between 15 and 14 years old. In any case, these minor contradictions did not occasion any prejudice and/or injustice on the Appellant.

36. Penetration

37. Section 2 of the Sexual Offence Act defines penetration to mean:

"the partial or complete insertion of the genital organs of a person into the genital organ of another person."



38. In establishing this ingredient and according to the trial court's record and the learned trial magistrate's judgment, PW1 vividly testified that when her father asked her who was responsible for her pregnancy, she said it was Kariru's. She testified as follows:-

“Kariru is the one who impregnated me.There is a bush on the way. Sometime in December 2018, when we met, I was coming from the posho mill, and he told me to go with him to that bush. He carried me on the motorbike. I had not asked him for a ride. He did not force me. He was taking me home when he went into a bush near my home. He told me to follow him. He told me to prepare and get ready. I sat down. He then removed my inner pants, and I was wearing a dress. He made me sleep facing upwards, and then he removed my panty, and then he removed a belt that tied his trousers. He then removed his penis and put it in my body. He was on top of me. He then did "bad manner". He put his penis "kitu yake ya kukojoa" in my vagina "sehemu yangu ya kukojoa.

.....

I slept with him severally. The last time I slept with him was in March 2019. I had come from school sports day in Gatundia. I was catching up with my sister. We met on the road, and it was around 7 pm; he told me to follow him so that he could carry me on his motor bike. We went to a bush, and he touched my breasts and asked how I felt. I said I was feeling scared. He then put me on the ground, he removed my panty, and he removed his penis and put it in my vagina and did bad manners. He then gave me Kshs. 150/-.....”

39. Additionally, PW3 testified that he filled out the P3 form 11.5.2019 concerning the victim. He stated that she was pregnant, and the physical exam revealed that she was 24 weeks pregnant. Pregnancy was over. HIV was -ve, syphilis -ve. She had no illness from her urine test, no injuries on her body, and no discharge in the genital area. In cross-examination, he stated that the victim conceived around December 2018.
40. Accordingly, from PW1's testimony, which I find was both credible and reliable, I am convinced that there was proof of penetration. It is essential to state that the evidence of the victim of a sexual offense does not require corroboration as per Section 124 of the *Evidence Act*. Although the medical doctor did not establish paternity concerning the victim's pregnancy, it is indicative that the doctor stated that she conceived around December 2018, which was when the victim stated that she had her first encounter with the Appellant.
41. I must point out that proof of penetration is based on PW1's testimony that the Appellant "removed his penis and put it in my body. He was on top of me. He then did "bad manners." He put his penis "kitu yake ya kukojoa" in my vagina "sehemu yangu ya kukojoa." and not on her pregnancy. Further, even if the victim was not pregnant, I am satisfied that there was evidence of penetration and, therefore, the issue of D.N.A., as alleged by the Appellant, was unnecessary. I agree with the respondent that trial court was tasked with determining the issue of defilement and not paternity. Notably, there is no legal requirement of D.N.A. to prove penetration. On this issue, the Court of Appeal in *A.M.L. vs. Republic* [2012] eKLR authoritatively stated that:-

“The fact of rape or defilement is not proved by D.N.A. test but by way of evidence.”

42. Consequently, the prosecution proved beyond reasonable doubt that there was penetration. I find that the element of penetration was proved beyond a reasonable doubt, noting that in sexual offenses, the evidence of the victim is enough to convict the accused person as provided in Section 124 of the *Evidence Act* if that evidence is found by the trial court to be soundly credible and believable.



43. Positive Identification of the Perpetrator

44. PW1 stated that she used to meet the Appellant when going home from school. She stated that she knew him as Kariru and that he was the one who impregnated her, although she did not know him that well. He narrated her first encounter with him in December 2018 and how they went on to sleep together up to their last encounter around May 2019. She also stated that she had told her grandmother about the Appellant, but she did not take any action; instead, she wanted her to get married to him.
45. Accordingly, based on the evidence adduced in the trial court by the Complainant, I agree with the prosecution that the Appellant was positively identified as the perpetrator of the crime herein. I believe the victim recognized and knew the accused well because she had met him several TIMES and used to see him while going home from school. She even referred to him by his middle name. I find that no material has been placed before this court to warrant interference with the findings of the trial magistrate.
46. Moreover, the Appellant detailed a myriad of inconsistencies and contradictions, which he alleged cast doubt on the prosecution's evidence. I have had the opportunity to examine the contradictions, and I find that they are immaterial and not fatal; thus, they do not render the prosecution's case as falling below the required standard of proof. In my view, there were no material contradictions in this case, and if there were any, they were minor and would not tilt the outcome of the case in the Appellant's favor. I find no variance between the charge and the evidence adduced. Further, I am guided by the finding of the Court of Appeal's holding in the case of Richard Munene vs Rep [2018] eKLR, where it was stated that: -

“It is a settled principle of law, however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from.”

47. Consequently, the prosecution proved its case against the Appellant beyond all reasonable doubt.
48. On sentencing, I know the case of Joshua *Gichuki Mwangi vs Republic, Criminal Appeal No. 84 of 2015*, stating that mandatory minimum sentences were declared unconstitutional. However, considering the circumstances in which the offense was committed, I find that the sentence of 20 years imprisonment meted out was not harsh or illegal and appropriate. The menace of motorbike riders taking advantage of young school-going children, grooming them, and even impregnating them has been rampant, and I find that the sentence will serve as a deterrent.
49. . I find no justifiable reason to disturb the finding in the sentence.
50. Consequently, I find that the Appeal herein lacks merit, and I accordingly dismiss it and uphold both the conviction and sentence.
51. Thus, the court makes the orders that;
- i. The Appeal on both conviction and sentence is dismissed and upheld.

JUDGMENT DATED AND SIGNED AT NYANDARUA THIS 26TH DAY OF JULY, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

.....



CHARLES KARIUKI
JUDGE

