



REPUBLIC OF KENYA



KENYA LAW
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**Hinga v Republic (Criminal Appeal E098 of 2023)
[2024] KEHC 8906 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8906 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL E098 OF 2023**

**AM MUTETI, J
JULY 25, 2024**

BETWEEN

ELIAS NJENGA HINGA APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal against the judgment of the Learned Honorable L.K Nyabondo Resident Magistrate in Kikuyu S.O No. 10 of 2016 Republic Vs Elias Njenga Hinga delivered on the 31st August 2023)

JUDGMENT

1. The appellant in this case was charged with the offence of Defilement contrary to Section 8(1)(3) of the Sexual Offences Act No 3 of 2006. The Particulars of the offence were that on 13th March 2016 at [Particulars withheld] Village in Kikuyu Sub-County of Kiambu County he intentionally and unlawfully caused his Penis to penetrate the vagina of one AA, a child of 3 years.
2. The appellant also faced an alternative count of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No 3 of 2006.
3. The prosecution called a total of three witnesses in support of the charges whereas the defence led the evidence of the Appellant only in answer to the charges. The learned Honourable Magistrate upon hearing the matter found the appellant guilty of the Offence of Sexual Assault contrary to Section 5(1) (i) as read together with Section 5(2) of the Sexual Offences Act and sentenced him to a term of 10 years imprisonment. It is against this Conviction and sentence that the Appellant has moved this court on Appeal.
4. It is the duty of this court as a first appellate court to re-evaluate and analyze the evidence tendered in support of the charges, draw its own conclusions as to the veracity of that evidence while appreciating the fact that as an appellate court it has not had the opportunity to hear to see and hear the witnesses. The Court is guided by *Okeno v Republic* [1972] EA 32 and *Pandya v Republic* [1975] E.A. 336.



5. It is against this background that I now embark on the analysis of the Evidence tendered by the prosecution in support of the charges. The complainant was called to testify on the 14th September 2016. The learned Honourable Magistrate conducted a voire dire examination and determined that the child did not possess sufficient intelligence to understand what an oath is. The victim therefore proceeded to give unsworn evidence and stated,

“I know Njenga, he put his fingers in my private parts after that he gave me a sweet and a Big G chewing gum.”

6. The record shows that the victim was pointing at the accused person in the dock when she mentioned Njenga. The magistrate also captures her on record as pointing to her private parts when she made reference to Njenga inserting his fingers into her private parts. The victim went further to state that her mother was not around at the time when the incident occurred. She also indicated that she felt pain and when the mother came she informed her what Njenga had done.

7. Upon cross examination, the victim remained firm that the appellant inserted fingers in her private parts and the records reflect that she immediately started crying on being cross examined by the Appellant. The mother of the victim testified as PW2 and confirmed to the court that the victim was three (3) years 7 months old. She gave the victim's birthday as being 19th February, 2013. She made reference to a copy of a clinic card MFI -1, a PRC form MFI -2 and a P3 form MFI -5.

8. I have examined the record and established that the P3 form was produced by PW3 as exhibit 3 and PRC form as exhibit 2. The clinic card was however not produced.

9. Notably, PW3 Maina Chege was a clinical officer at Wangige hospital and he testified that the victim PW1 was examined by one Dr. Kinoti and the complaint was that she had been defiled. According to him there was penetration and the victim appeared unhappy and irritable. He went further to state that there was an inflamed Labia minora and the hymen had fresh tears.

10. The appellant in his defense denied committing the offence and alleged that it was a frame up by the mother of the complainant. He went on to challenge the medical record tendered by PW3 since the witness had not examined the victim. According to him the victim's mother wanted him to marry her and he refused and that he believes was the reason he was framed up and charged.

11. The analysis above captures the case as presented before the learned Honourable Magistrate. To my mind, I have no doubt that the version of events narrated by the victim were true and considering her age she had absolutely no reason to give false testimony against the appellant.

12. At the hearing of the appeal, Mr. Warui Advocate for the appellant urged the court to allow the appeal on the basis that the, medical evidence tendered by PW3 ought not to be relied on by the Magistrate since the witness had not personally examined the complainant. To this submission, I must say, Mr. Warui Advocate missed the point that PW3 had produced the P3 form and the contents thereof were not disputed. The evidence of an expert can only be challenged by calling of another expert to rebut such evidence. In the instant case, that did not happen thus the evidence remained unchallenged. The learned Honourable Magistrate was therefore right in relying on the medical evidence tendered by PW3. It is not all cases that a medical report will be produced by the maker. All that the witness producing it needs to do is to lay a basis why the author could not be called in this case that was done.

13. The evidence showed that the hymen had tears, injuries that were consistent with the insertion of fingers into the vagina of the little girl. Mr. Warui further contented that the evidence tendered by PW1 and PW2 was marred with contradictions and inconsistencies as to render the same worthless.



This submission merits rejection for counsel did not demonstrate how the alleged contradictions affected the evidence on the key elements of the offence that the appellant was found guilty of. It is trite law that contradictions and inconsistencies in evidence can only vitiate a finding of guilt if such contradictions and inconsistencies go to the root of the matter so as to render the conviction unsafe. The contradictions must therefore be material and affect the prosecution's case fundamentally. See [Njagi v Republic](#) (Criminal Appeal E002 of 2022) [2022] KEHC.

14. Section 5 of the [Sexual Offences Act](#) sets out the ingredients of the offence as being the penetration of the genital organs of another with any part of the body of another or that person or an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes.
15. I have not found any evidence to suggest that the appellant inserted his fingers into the genital organ of PW1 for professional hygienic or medical purposes. The appellant strikes me as a man who derives pleasure from inserting fingers into female genital organs for his own gratification without caring about the effect that such conduct has on the victims. In this case, I must say he crossed the line by engaging in such conduct with an innocent child of tender years. Children must be protected from such sexual pervers.
16. It is this kind of conduct that parliament must have intended to eradicate from society so as to protect the dignity of everyone in society whether man or woman. The facts of the case did not support the offence of defilement.
17. The learned Honorable Magistrate was correct in entering a conviction against the appellant for the offence of Sexual Assault contrary to section 5 (1) (a) (i) as read with Section 5 (2) of the [Sexual Offences Act](#) by deed of Section 186 of the [Sexual Offences Act](#) which in my view was enacted to cure situations where, such as in this case, the prosecution presents a charge that is eventually not supported by the evidence but such evidence discloses the commission of another offence under the [Sexual Offences Act](#). The use of fingers by the appellant in committing the offence satisfies the ingredients of the offence. The elements of the offence under Section 5(1) as read with 5(2) were adequately established. The appeal on conviction therefore fails.
18. As regards sentence, I find that the sentence of 10 years imprisonment being the minimum sentence provided for under the law, the learned Honourable Magistrate was correct in imposing it in line with the Supreme Court decision in Petition Number E018 of 2023 [Republic v Joshua Gichuki Mwangi](#).
19. The appellant's appeal is hereby dismissed on both conviction and sentence.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF JULY 2024.

A. M. MUTETI

JUDGE

In the presence of

Yussuf: Court Assistant

Warui Maina for the Appellant

Ms Kabutha for the Respondent

No appearance Appellant

