# Inguche v Republic (Criminal Appeal E080 of 2022) [2024] KEHC 8912 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8912 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KITALE**

**CRIMINAL APPEAL E080 OF 2022**

**AC MRIMA, J**

**JULY 25, 2024**

**BETWEEN**

**ALEX SIMIYU INGUCHE ......................................................................... APPELLANT**

**AND**

**REPUBLIC ............................................................................................ RESPONDENT**

***(Appeal arising out of the judgment, conviction and sentence of Hon. D. K. Mutai (Senior Resident Magistrate) in Kitale Chief Magistrate's Court Sexual Offence No. 187 of 2019 delivered on 19th October, 2022)***

## JUDGMENT

### Background:

1. Alex Simiyu Inguche, the Appellant herein, was charged in Kitale Chief Magistrates Criminal (S.O.) No. 187 of 2019. He faced two main counts. The first count was on Defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on 10th August, 2019 at [Particulars Withheld], the Appellant intentionally caused his genital organ namely penis to penetrate the genital organ namely vagina of COE, a child aged 4 years.

2. The Appellant faced an alternative charge to the main count. It was that of Committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* whose particulars were that on 10th August, 2019 at [Particulars Withheld], the Appellant intentionally touched the vagina of COE with his fingers against her will.

3. The second count was Sexual assault with a child contrary to Section 11(1) of the *Sexual Offences Act* whose particulars were that on 10th August, 2019 at [Particulars Withheld], the Appellant unlawfully used his fingers to penetrate the vagina of COE, a child aged 4 years.

4. The accused denied the charges and was put on trial. After a full hearing, he was found guilty and convicted on the main charge of defilement. He was sentenced to serve a term of 20 years' imprisonment.

5. Further, he was convicted of the alternative countof committing an indecent act with a child, but he was discharged under Section 35(1) of the Penal Code. The accused was also discharged under Section 35(1) of the Penal Code on the second count.

6. The Appellant was aggrieved by the convictions and sentence. He lodged an appeal which is under consideration in this judgment.

**The Appeal:**

7. In his Grounds of Appeal, the Appellant contended that the Prosecution failed to discharge their burden of proof to the required standard. He alleged that his rights under Articles 20, 25, 27, 47, 48, 40 and 50 of *the Constitution* were infringed as he was arrested on 16th August 2019 and arraigned before Court on 19th August 2019, 3 days later. He also alleged that the evidence was contradictory and inconsistent, that crucial witnesses were not called, that the defence was not properly considered and that the sentence as harsh.

8. He urged this Court to allow the appeal, quash the conviction and set aside the sentence imposed on him.

9. The Appellant argued his appeal by way of written submissions filed on 22nd September 2023. He expounded on the grounds of appeal.

10. On the part of the prosecution, through its extensive written submissions dated 4th October, 2023, it contended that the conviction was safe and that all the ingredients of the offence had been proved as required in law. It urged that the appeal be dismissed.

11. The prosecution relied on various decisions in support of its case.

**Analysis:**

12. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See Okono v Republic [1972] EA 74).

13. In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in Ajode v. Republic [2004] KLR 81.

14. Having carefully perused the record, this Court is now called upon to determine whether the offence of defilement was committed, and if so, whether by the Appellant.

15. For ease of this discussion, six prosecution witnesses testified in the case. They were the victim/ complainant who testified as PW1, the Complainant's father as PW2, the Complainant's mother as PW3, a Clinical Officer from Matunda County Hospital as PW4, the investigating officer as PW5 and another Clinical Officer from Kitale County Referral Hospital as PW6.

16. When placed on his defence, the Appellant gave a sworn testimony [as DW1] and called 3 witnesses. The witnesses were the Appellant's fellow caretaker in-charge of the immediate neighboring farm. He was DW2. The Appellant's lady employer who testified as DW3 and the Appellant's male employer who testified as DW4.

17. It was on the basis of the evidence of the above witnesses that the Appellant was found culpable and duly convicted.

18. It is established by law and settled judicial precedents that the offence of defilement carries three components. They are the age of the victim, penetration and identification of the assailant.

19. This Court will deal with each of the issues in turn.

**Age of the victim:**

20. The age of a person may be proved in many ways. It may be by way of medical evidence or any official documentation for instance Certificate of Birth, Child Health and Nutrition Card, School registration documents, among others. The age may also be proved by evidence of the parents or persons who may positively testify to the fact. The age may also be proved by observation and common sense.

21. In this case, the age of the complainant was proved by way of a Certificate of Birth No. 0430205 which indicated that the victim was born on 19th June, 2015.

22. The production and the contents of the Certificate were not contested.

23. Given that the offence was committed in August 2019, then the victim was slightly above 4 years old by then.

24. The complainant was, therefore, a child within the meaning ascribed to the term under the Children's Act.

**Penetration:**

25. Section 2(1) of the *Sexual Offences Act* defines "penetration" to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

26. This position was fortified in Mark Oiruri Mose v R [2013] eKLR when the Court of Appeal stated thus: -

    .... Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.... (emphasis added).

27. Later the Court of Appeal, then differently constituted, in Erick Onyango Ondeng v Republic [2014] eKLR held as such on the aspect of penetration: -

    > In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.

28. From the definition of penetration and the guidance by the Court of Appeal, it is the position that penetration may only be 'slightest and to the surface' to suffice in law. It, therefore, means that there may be instances where the slight penetration, depending on other factors including passage of time, may not be possible to be ascertained by way of medical evidence. Therefore, the failure to prove penetration by medical evidence does not ipsa facto mean that there was no penetration. It all depends on the peculiar circumstances of a case and the extent to which the trial Court believes the victim. However, in such instances, the Court must exercise extreme caution as to weed out miscarriage of justice including instances where a victim is framed up for ulterior motives.

29. The issue of penetration was testified to by three witnesses, the complainant [PW1] and the two Clinical officers who testified as PW4 and PW6.

30. PW1 testified on how a male person she knew well took her into a maize plantation and did bad manners on her. She stated that the person placed a sack on the ground and laid her down. He then asked her to spread her legs and he inserted his fingers into her vagina. He then inserted his male genital organ into her genital organ and thereafter told PW1 not to tell anyone.

31. PW1 was given a male and female doll in Court and she demonstrated what happened between her and the male person.

32. On reaching home, PW1 told her mother [PW3] who in turn told PW2. The matter was reported to the police and they were referred to hospital.

33. PW1 was first attended to at Kitale County Referral Hospital on 14th August 2019. There was a re-visit to the hospital on 24th September 2019. The initial examination on PW1 revealed an extensive rash on her private parts, inflamed labia minora and labia majora as well as the vaginal walls. The hymen was also absent.

34. PW1 was also examined on 18th August 2019 at Matunda County Hospital by PW4. That was 4 days after the first examination. PW4 found bruises on the left side of PW1's labia minora. The hymen was perforated and still fresh. The injury was about a week old.

35. PW4 clarified that it takes around 14 days for the raptured hymen to heal.

36. Both PW4 and PW6 confirmed that PW1's vagina was penetrated by a male genital organ.

37. On the basis of the above evidence, this Court is satisfied that PW1's vagina was forcefully entered into by a male sexual organ, the penis. That is congent evidence of penetration.

**Identity of the perpetrator:**

38. The identification of a perpetrator remains the most critical aspect in criminal cases. Whereas an offence may truly have been committed, it is a cardinal principle in law that the identity of the assailant must be firmly established more so to eradicate instances where innocent persons are convicted and sentenced thereby ending up serving sentences for offences they never committed. As Lord Denning once said it is better to acquit 10 guilty persons than to convict one innocent person. That is the gravity of identification.

39. The identification aspect in this matter was attested to by the complainant, PW1. The Complainant testified that on the events of the fateful day. She identified the perpetrator as the Appellant herein.

40. The Appellant denied any involvement in the alleged ordeal. He called evidence to aver that he was being set up due to disagreements between his employers and the complainant's parents.

41. The evidence of the complainant was, hence, that of a single witness. It was, however, on identification of the assailant by way of recognition.

42. Evidence by a single witness must be treated carefully and cautiously. In R –vs- Turnbull & Others (1973) 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial

system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said: -

> …. The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way…? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made….

43. The evidence by the single witness ordinarily calls for corroboration as so provided under Section 124 of the *Evidence Act*, Cap. 80 of the Laws of Kenya save for the evidence of a victim in sexual offences as long as the Court believes the victim.

44. In giving guidance on how the issue of recognition ought to be distinguished from that of identification of a stranger, the Court of Appeal in Peter Musau Mwanzia v Republic [2008] eKLR, Court stated as follows: -

> We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident.

45. Further, the Court of Appeal in upholding the evidence of recognition at night in Douglas Muthanwa Ntoribi v Republic [2014] eKLR held as follows: -

> On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified: -
>
> "I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant."
>
> The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error…"

46. Again, the Court of Appeal in Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another v R (unreported) had this to say on the evidence of recognition at night: -

> We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours

from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants."

47. The above Courts in essence emphasized on witnesses laying sound basis for recognizing alleged assailants. A Court must, therefore, be satisfied that the evidence on recognition is watertight so as not to cause an injustice to an innocent accused.

48. Again, this Court reiterates that the witnesses testified before the trial Court and the Court observed their demeanors. There were no adverse findings made on any of the witnesses. The Court also believed their evidence.

49. The complainant seemed to be quite forthright on the identity of the assailant. The incident occurred during the day in a maize field. PW1 stated that she knew the assailant as a farm hand who worked in their neighbourhood.

50. Despite the foregoing, this Court has to critically consider the Appellant's defence. In doing so, this Court reiterates that the trial Court meticulously handled the issue. The Court dealt with all aspects of the defence and analyzed each aspect thereof.

51. The trial Court, as well as this Court, could not agree with the Appellant that he did not know PW1. There was indeed sufficient evidence, more particularly from DW2, that it was the Appellant who told him of the allegation facing him and PW1 a day after the event.

52. The Appellant, therefore, potrayed himself to be untruthful; more so given that all his witnesses [whom they lived and interacted with PW1 and her family] affirmed knowing PW1. Further, it was the Appellant who informed DW2, DW3 and DW4 of the allegation and in doing so he was forthright in referring to PW1.

53. There were also allegations on disputes between PW1's family and that of DW3 and DW4 in which the Appellant worked as a farm helper. To the defence, the Appellant was framed in order to settle scores.

54. This Court has carefully considered this aspect. However, the Court is not convinced that the Appellant may have been framed up. Whereas there may have been issues between the parties, the evidence of PW1 is so moving and straight forward. The chances of a child aged 4 years old to repeatedly and falsely restate the same thing in various fora, are extremely minimal, if at all any. Just like the trial Court, this Court also believes PW1's testimony.

55. The defence can only be regarded as an afterthought, just as the trial Court found it. That defence was, hence, rightly declined.

56. The trial Court was right in finding that the Appellant was positively identified by way of recognition. This Court affirms that finding and reiterates that the identification of the Appellant by PW1 by way of recognition was without error.

**Other issues**

57. There were also three other issues raised by the Appellant apart from the three ingredients of the offence. This Court will consider them.

58. The Appellant contended that there were inconsistencies in the evidence. As this Court has previously and severally stated, inconsistencies and discrepancies in the testimonies tendered by witnesses are bound to occur since people perceive things differently.

59. Therefore, unless the inconsistencies and discrepancies are so grave that they create doubt on the overall assessment of the evidence and that they cannot be reconciled, minor inconsistencies and discrepancies are not fatal to the prosecution's case.

60. The alleged inconsistencies and discrepancies in this matter were of minor character and the trial Court reconciled them well.

61. There was also the issue of other witnesses having been called to testify.

62. The prosecution has a discretion to call any witnesses. (Section 143 of the *Evidence Act*). It is only in instances where crucial witnesses are not called and no plausible explanation is given when a Court may raise a red flag. (See Bukenya & Others v Uganda [1972] E.A. 594, Kingi versus Republic [1972] E.A. 280 and Nguku v Republic [1985] KLR 412).

63. The witnesses called in this case were sufficient to prove the offence. The ground, therefore, fails.

64. The other ground was that the Appellant alleged that his rights under Articles 20, 25, 27, 47, 48, 40 and 50 of *the Constitution* were infringed as he was arrested on 16th August 2019 and arraigned before Court on 19th August 2019, 3 days later.

65. Article 49(1)(f) of *the Constitution* provides that an arrested person should be brought before a Court as soon as reasonably possible, but not later than twenty-four hours after being arrested; or if the twenty-four hours ends outside ordinary Court hours, or on a day that is not an ordinary Court day, the end of the next Court day.

66. The Appellant herein was arrested on 16th August 2019. That was on a Friday. The 24-hour window fell on a Saturday. That was not an ordinary Court day. The next Court day was the 19th August 2019; the day the Appellant was arraigned before Court.

67. This Court finds that the Appellant's right under Article 49(1)(f) of *the Constitution* was not infringed. Further, the Appellant did not demonstrate how Articles 20, 25, 27, 47, 48, 40 and 50 of *the Constitution* were infringed. As such, the ground wholly fails.

68. Having dealt with all issues and since none of them has impugned the prosecution's evidence, this Court finds that the Appellant was properly identified as the perpetrator and that he was rightly found guilty and duly convicted.

69. It is also important for this Court to point out that the trial Court erred in convicting the Appellant on the alternative count after finding him guilty of the main count. Also, and as rightly pointed out by the trial Court, the offence of Sexual assault with a child was subsumed in that of defilement and was not necessary.

70. Subject to the foregoing, the appeal against the conviction on the offence of defilement is hereby dismissed.

**Sentence**

71. The Appellant was sentenced to 20 years imprisonment. The Appellant tendered mitigations and were duly considered by the sentencing Court.

72. The Court in Wanjema v Republic [1971] EA 493 laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

73. Sentencing is a crucial part in the criminal process and the administration of justice. It is also discretionary. In exercising the discretion, a sentencing Court is called upon to be guided by a raft of considerations. Such are discussed at length in the Sentencing Guidelines published on 29th April, 2016 vide Gazette Notice No. 2970 by the Hon. The Chief Justice of the Republic of Kenya who is also the Chairperson of the National Council on the Administration of Justice (NCAJ) and in case law including the Supreme Court in Petition No. 15 of 2015 Francis Karioko Muruatetu & another v Republic [2017] eKLR.

74. This Court does not see how the sentencing proceedings are to be impugned.

75. In fact, the Appellant should consider himself very lucky going by the recent decision by the Supreme Court of Kenya in Petition No. E018 of 2023 Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR) which was delivered on 12th July 2024. The decision affirmed the validity of Section 8 of the *Sexual Offences Act*.

76. This Court will not, however, review the sentence herein in line with the decision in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) case (supra) since the issue was not raised at the hearing of the appeal.

77. The appeal on the sentence fails as well.

**Disposition:**

78. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have still been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 thereby mostly being away from the station. Apologies galore.

79. Drawing from the above considerations, the following final orders of this Court issue: -

    a. The appeal is against the offence of defilement is dismissed.

    b. The convictions in respect of the offences of Committing an indecent act with a child and Sexual assault with a child are hereby quashed and the sentences set-aside accordingly.

    c. For clarity, the conviction on the offence of defilement is upheld as well as the sentence of 20 years' imprisonment.

    d. This file is marked as closed.

    It is so ordered.

**DELIVERED,DATED AND SIGNED AT KITALE THIS 25TH DAY OF JULY, 2024.**

**A. C. MRIMA**

**JUDGE**

Judgment delivered virtually and in the presence of: -

Alex Simiyu Inguche, the Appellant in person.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Chemosop/Duke – Court Assistants.