



REPUBLIC OF KENYA



**KENYA LAW**  
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**John Njenga v Republic (Criminal Appeal E041 of 2021)  
[2024] KEHC 13269 (KLR) (29 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13269 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL APPEAL E041 OF 2021  
PN GICHOHI, J  
OCTOBER 29, 2024**

**BETWEEN**

**JOHN NJENGA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against judgement dated 15th November 2021 by  
Hon. R. Yator (PM) at Molo Law Courts in S.O Case No. 123 of 2018)*

**JUDGMENT**

1. The Appellant (John Njenga) was charged with the offence of Defilement Contrary to Section 8 (1) as read with Section 8 (2) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars were that on 3<sup>rd</sup> day of November 2018 within Nakuru County, he intentionally caused his penis penetrate the vagina of VC child aged 8 years.
2. In the alternative, he was charged with the offence of Committing an Indecent Act with a child Contrary to Section 11 (1) of the Sexual fences [Act No. 3 of 2006](#). The particulars were that on 3<sup>rd</sup> day of November 2018 within Nakuru County, he intentionally touched the vagina of VC a child aged 8 years with his penis.
3. He denied that the charges and the case proceeded for full hearing. He was convicted on the main charge and sentenced him to serve life imprisonment.
4. Aggrieved, the Appellant appealed to this Court vide an Amended Grounds of Appeal filed on 18<sup>th</sup> April 2023 which also contains his submissions. His five (5) grounds of appeal are that: -
  1. The learned trial magistrate erred in law and fact when she relied on the evidence on identification at the scene of crime yet none of the five (5) witnesses who testified before court were at the scene.



2. The learned magistrate erred in law and fact when she relied on contradictory evidence.
3. The learned trial magistrate erred in law and fact when she violated Article 49 of *the Constitution* of Kenya 2010.
4. The learned trial magistrate erred in law and fact when she did not put more reliance on exhibits that were found at the scene by PW3.
5. The learned trial magistrate erred in law and fact when she did not note that the accused had a grudge between him and PW3 before the incident occurred.

### **Appellant's Submissions**

5. On Identification, it was his submissions that no one saw the Appellant at the scene according to the evidence adduced by PW5 and that none of the people mentioned in the case were called as witnesses.
6. On Contradiction, the Appellant submitted that according to the Complainant, the incident occurred at 6.00 pm while the evidence by Investigating Officer (PW5) was that the incident occurred before 7.00 p.m.
7. He further submitted that there was contradiction in regard to age as while the complainant stated that she was 9 years old, the evidence adduced was that she was 8 years as at the time she was allegedly defiled.
8. Regarding exhibits, he submitted that while PW3 testified that he went to the scene after the incident and found a cap belonging to the Appellant, that cap was not produced in court to prove that it was the Appellant who defiled the minor.
9. He submitted that from the evidence before the trial court, it was clear that the PW3, who was PW1's father, knew the Appellant and that PW3 had disagreed with the Appellant and hence, PW3 held a grudge against Appellant but the trial court failed to consider his defence. He therefore submitted that it was out of malice that he was charged with this offence.
10. It was his submissions that his rights under Article 49 of *the Constitution* were violated in that he was arrested on 3<sup>rd</sup> November 2018 but he was taken for plea on 9<sup>th</sup> November 2018 after being in the cells for six (6) days.
11. Arguing that there was no direct evidence linking him to the offence, he submitted that he was innocent and urged the court to acquit him.

### **Respondent's Submissions**

12. The Respondent filed his submissions on 18<sup>th</sup> January 2024. On identification, it was submitted that the evidence of the Complainant (PW1) was clear and unchallenged that she had accompanied her father to Sachang'wan centre on the material date as she was to have her hair shaved.
13. That it is then that the Appellant bought her an orange and asked her to follow him. He took her to his shamba where he removed her pant laid her on the ground. That he removed his trouser and inserted his penis in her vagina. That it was before darkness fell and therefore, she was able to see him well and she identified him in the dock.
14. The Respondent further submitted that the Complainant's evidence was corroborated by one DKK (PW2) who testified as to how he heard screams and headed to the direction the screams were coming from and found the Appellant arrested by members of the public. They escorted the Appellant to the Police Station. It was therefore submitted that the evidence was cogent to prove identification.



15. On whether there was contradiction in the evidence, the Respondent maintained that the issue of time of the offence given by PW1 as 7.00 pm while PW5 testified that the Appellant was taken to the Police Station at 6.00 pm did not go to the root of the matter.
16. On the issue of age, the Respondent submitted that there was no contradiction on dates because the child's birth Certificate indicated that she was born on 28/11/2009. That as at the time of the offence, the child was aged 8 years and therefore, as at the time she testified on 28/05/2019, she was already 9 years.
17. On violation of Article 49 of *the Constitution* in that the Appellant was allegedly placed in custody for six (6) days, the Respondent submitted that this Court lacks jurisdiction to handle the issue in this appeal. That the Appellant never raised it before the trial court. That the issue can only be raised by way of a petition and not in an appeal and therefore, that ground must fail.
18. On failure to produce some exhibits (cap), the Respondent submitted that it was the Investigating Officer's duty and not for PW3 to collect the cap from the scene. That in any case, the cap was not crucial to the case.
19. Regarding the Appellant's issue that his defence was not considered, the Respondent submitted that the trial court did consider the defence and found it to be mere denials.
20. Lastly, the Respondent submitted that the prosecution had proved its case beyond reasonable doubt as provided by law and therefore, the conviction was safe and the sentence lawful. He urged the Court not to disturb it.

#### **Analysis And Determination**

21. This court has a duty to re-evaluate and assess the evidence adduced by the trial court and come up with its own conclusions but bearing in mind that it did not have the benefit of seeing and hearing the witnesses testify - See *Okeno v Republic* [1972] EA.
22. As this Court embarks on analysis, it is clear, as discerned from the grounds of appeal and the submissions by parties, that the main issues for consideration in this appeal are: -
  1. Whether the trial court violated the Appellants rights under Article 49 of *the Constitution*.
  2. Whether the Respondent proved its case to warrant a conviction.
  3. Whether the sentence should be disturbed.

#### **Whether this Court has jurisdiction to determine violation of Appellants rights for being held for six (6) days before being arraigned in court for plea.**

23. On this issue, Article 49 (f) of *the Constitution* of Kenya 2010 provides that an arrested person has the right: -

“to be brought before a court as soon as reasonably possible, but not later than-

  - i. Twenty -four hours after being arrested; or
  - ii. 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.”
24. There is no dispute that the Appellant was arrested on 3<sup>rd</sup> November 2018 and placed in police cells before he was brought to court on 9<sup>th</sup> November 2018 when he took plea. The Appellant submitted



that he spent six (6) days in the cells but the trial court did not note it so as to give him the benefit of doubt.

25. The Appellant should not construe such alleged violation of his rights as a ground for his automatic acquittal. His recourse lies in a suit for him to claim damages if aggrieved. Further, under Section 332(2) of the Criminal Procedure Code, such period of incarceration from the date of arrest pending trial is for consideration while computing sentence where a determinate sentence has been passed.

**Whether the Respondent proved its case to warrant a conviction.**

26. For the charge the Appellant was facing, the Respondent had to prove: -

1. The age of the victim.
2. Penetration.
3. Identity of the perpetrator.

27. The age of the victim is critical under the *Sexual Offences Act* particularly as the Act lays emphasis on the expected sentence to be meted upon an offender if found guilty of the offence he is charged with. In this case, Section (8) of the Act provides that: -

“(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.” [Emphasis added]

28. Regarding proof of the age of the victim, the Court of Appeal in *Mwalango Chichoro Mwanjembe v Republic* [2016] eKLR held: -

“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 documentary 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. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See *Denis Kinywa v R* Cr. Appeal No.19 of 2014 and *Omar Uche v R*, Cr.App.No.11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in *Francis Omuroni v Uganda*, Crim. Appeal No.2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim’s age, it has to be credible and reliable.” [Emphasis added]

29. The evidence on record shows that indeed, the Victim (PW1) testified on 28<sup>th</sup> May 2019 that she was 9 years old. The Birth Certificate produced as PEXH.1 indicates the victim’s date of birth as 28<sup>th</sup> November 2009. The P3 Form issued on 4<sup>th</sup> November 2018 (PEXH.2) indicates age of the victim as 8 years and the date of the alleged offence as 3<sup>rd</sup> November 2018.
30. The charge sheet shows that the victim was aged 8 years as at the time she was allegedly defiled. In the circumstances, this Court finds no contradiction in regard to the age of the victim.



31. Both oral and documentary evidence proved age of the victim herein and it falls within bracket stipulated under Section 8 (2) of the *Sexual Offences Act*. From the foregoing, the Appellant's challenge on the issue of age on alleged contradiction fails. The trial court's consideration and finding that the child's age as 8 years as at the time of the alleged offence cannot be faulted.
32. Regarding penetration, the victim's evidence is that the Appellant removed her pant and laid her on the ground in the shamba. That he also removed his clothes, lowered his trouser, put his penis into her vagina and that she screamed and cried due to pain.
33. The victim was examined by the doctor on the same day that she was allegedly defiled. The P3 form showed that the victim's hymen was torn. There were no lacerations on the vagina and no indication that the hymen was freshly torn.
34. However, Dr. Kinyanjui (PW4) explained that the victim had an injury by her hymen being torn. He told the court that it ordinarily meant the hymen was freshly torn. That if it is not freshly torn, it has to be indicated in the P3 Form as "old." He testified that the victim's clothes had a white discharge.
35. In his sworn statement in defence, the Appellant questioned how the hymen would have been torn if the victim's vagina was found to be normal. He challenged the allegation of defilement on the grounds that the P3 Form did not show any ingredients of defilement and therefore the alleged offence was based on hearsay. He maintained that the P3 Form did not clearly indicate the place of penetration as required by law and to specify whether this was an offence of defilement or attempted defilement.
36. In its judgment, the trial court had this to say on this issue: -

“The doctor testified and confirmed that that the victim had a freshly broken hymen. The PRC Form as well indicated hymen broken, no bruises.

The accused in his defence stated that witnesses contradicted themselves as it was not clear whether there was a case of defilement or attempted defilement. That penetration was not proved. He wondered how the complainant would not have injuries in the vagina if at all he penetrated and broke the hymen.

I am convinced by the doctor's evidence that for an 8-year old, it was not normal to have a broken hymen and that this was out of being defiled. I hence disagree with the accused that there was any contradiction as it is clear that indeed the girl's hymen was broken as a result of defilement. As such penetration was proved.”
37. This court is satisfied with the trial court's reasoning and finding on the issue as “penetration” under the *Sexual Offences Act* is not determined by a broken hymen. Further, Section 2 of the Act defines penetration as: - “the partial or complete insertion of the genital organs of a person into the genital organ of another person.”
38. On Identification of the offender, the victim explained in detail how she accompanied her father (PW3) to Kinyozi (barber shop) where she had her hair shaved. Then the Appellant who she had not seen before came and bought her an orange and asked her to follow him. He took her to the shamba and defiled her. It was about 7.00 pm and she was able to see him as it was not very dark.
39. She testified that when she screamed in pain, people heard and rushed to the scene. They screamed and beat the Appellant. The Appellant then wore his trouser and told them what he had done to her. She put on her pant and both were taken to her father's butchery. She was taken to hospital and the Appellant was taken to police.



40. The evidence by DKK (PW2) was that he was with his siblings at home he heard screams at around 6.00 - 7.00 pm, and rushed to the unfinished incomplete construction and enquired from someone what was going on. He learnt that someone was trying to rape a child. He joined the crowd and they all escorted the suspect and the child to Sachangwan police station. He learnt that the child's father was S who owned a butchery.
41. On his part PW3 testified that he took his daughter (Victim) to Kinyozi at about 4.00 pm and at about 7.00 pm, PW2 came asking him if any of his children was missing and asked him to accompany him to the police station. PW5's evidence was that according to the evidence, it was around 6.00 pm that the crowd escorted the Appellant who was found defiling the child. This court does not find the contradiction on the time fatal to the case.
42. Further, the Appellant claimed PW3 had a grudge with him because they knew each other. He put that question to PW3 during cross-examination and he denied ever disagreeing with the Appellant.
43. PW3 explained how the Appellant had come to his butchery three times asking PW3 to sell him liver. Each time, PW3 told him that he did not have it. He then left. That all this time, the complainant was seated on the bench outside the butchery and could see the Appellant. The complainant went missing.
44. There is as no evidence to show any grudge existed between the two. Further, the Appellant is aggrieved that the cap mentioned as having recovered from the scene and allegedly belonging to him was not produced. However, there was no evidence that the complainant or other witnesses identified the Appellant by the cap he wore and therefore failure to produce it as an exhibit was not fatal.
45. The complainant identified the Appellant as the person who defiled her. The fact that none of the other witnesses testified that he found the Appellant in the act is not material in the circumstances herein. People heard the complainant screaming and responded by rushing to the scene and beat up the Appellant.
46. He was rescued by PW2 who suggested to the mob that they should instead take both the Appellant and the complainant to police station. Appellant was found at the scene and she identified him. He was arrested by the mob. His allegation that the complainant's father sent the mob to beat him over a grudge does not hold water. The Appellant's identification was without error.
47. On the issue that his defense was not considered, the evidence on record reveals otherwise as earlier highlighted by this Court in this judgment. This court is satisfied that the prosecution proved its case as against the Appellant beyond any reasonable doubt. The conviction was safe.

## **Sentence**

48. The record shows that the Appellant was a first offender but the Respondent had asked the trial court to consider the nature of the offence and that it was rampant in the area.
49. In mitigation, the Appellant stated: -

“I pray for a none- custodial sentence as I am medically unfit and cannot live well in prison custody and have no financial support for me to continue with my medication. I pray that the court also considers the period I have been in custody.”
50. While sentencing the Appellant, the trial court held: -

“I do note that the accused's mitigation and the nature of the offence herein and the unfortunate fact that the victim died months just after testifying and did not live to



conclusion of the matter. This was an 8-year-old that the accused took advantage of and these cases have been rampant. It has to be deterred. A non- custodial sentence as requested by the accused will not be accorded, as the kind of sentence that is spelt out in the Act is mandatory and as such, the accused is hereby sentenced to life imprisonment with right of appeal.”

51. At this juncture, it is important to clarify that though unfortunate, the death of the victim “months after testifying” was not related to this offence. According to the Death Certificate availed before the trial court, the complainant (victim) died on 15/11/2019 and the cause of death was Cardiorespiratory failure 26 % mixed 2<sup>nd</sup> degree burns.
52. Indeed, when her father (PW3) testified on 08/05/2020, he told the court regarding the complainant: - “Since the death of the victim, I have been disturbed...PW1 died last year as she was epileptic. She fell on the fire with hot water hence died of burns and I have the death certificate.”
53. It is also noted from the trial court’s record that the Appellant often informed the court that he was epileptic and have been unwell. The court variously ordered that he be taken to including that he “be taken to PGH for treatment.”
54. That supports his mitigation before the trial court but the court appeared to be tied by the mandatory sentence imposed by the Sexual Offences Act but life imprisonment has since been declared unconstitutional.
55. Considering the Appellant’s undisputed health condition, this Court is satisfied that a deterrent determinate sentence of twenty -five (25) years is most appropriate.
56. The Record shows that the Appellant was arrested on 03/11/2018 and remained in custody throughout until conviction and sentence. Under Section 333 (2) of the Criminal Procedure Code, that period spent should be taken into account when computing the sentence.
57. In conclusion, this Court makes the following orders: -
  1. The appeal on conviction is hereby dismissed.
  2. The sentence of life imprisonment be and is hereby set aside and substituted with a sentence of twenty-five (25) years imprisonment.
  3. The sentence above be computed from the date of arrest being 03/11/2018.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 29<sup>TH</sup> DAY OF OCTOBER, 2024**

**PATRICIA GICHOHI**

**JUDGE**

In the presence of:

JN - Appellant

Mr. Kihara for Respondent

Ruto - Court Assistant

