



**Juma v Republic (Criminal Appeal E004 of 2024)  
[2024] KEHC 13439 (KLR) (29 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13439 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL E004 OF 2024  
DR KAVEDZA, J  
OCTOBER 29, 2024**

**BETWEEN**

**KEVIN ODHIAMBO JUMA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered on 30th January 2024 by Hon. M. Murage (P.M) at Kibera Chief Magistrate's Court Sexual Offences Case no. E019 of 2023 Republic vs Kelvin Odhiambo Juma)*

**JUDGMENT**

1. The appellant Kevin Odhiambo Juma was charged and after a full trial convicted for the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*, No. 3 of 2006. He was sentenced to serve twenty (20) years imprisonment. Being aggrieved, he filed an appeal challenging his conviction and sentence.
2. In the petition of appeal and amended grounds of appeal, he raised the following main grounds: The appellant challenged the totality of the prosecution's evidence against which he was convicted; he challenged the sentence imposed and urged the court to quash his conviction and set aside the sentence imposed.
3. This is the first appellate court and in *Okeno v. R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence that was before the trial court, and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.
4. To succeed in a prosecution for defilement, it must be proven that the accused committed an act that caused penetration with a child. "Penetration" under section 2 of the Act means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person."



5. Further, section 8(1) and (4) of the *Sexual Offences Act*, No. 3 of 2006 provides thus: -
  8. Defilement
    - (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
    - (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
6. Bearing in mind the above provisions, I will now analyse the evidence on record to ascertain whether the essential ingredients of the offence preferred against the appellant were established to the required standard of proof. Regarding proof of age, I wish to state at the outset that the importance of proving the age of a victim, proof of penetration, and positive identification of the assailant in sexual offences is paramount.
7. PW2, RAO, a minor born on 10/08/2008, gave sworn testimony following a voir dire examination. She testified that she was a student at [Particulars Withheld] School in Class 7. On 31/01/2022, she recalled being at the appellant's house, located near her home along the Bypass. She explained that the appellant asked her to accompany him to his house, where they spent the night together, though nothing happened initially. PW2 stated that she did not return home and stayed with the appellant from Tuesday to Sunday.
8. She further testified that they had sexual intercourse on Wednesday. When she eventually left the appellant's house on Saturday
9. When she left the appellant's house on Saturday where she met Mama Stano who told her that her father was looking for her. Shortly afterward, her father found her and instructed her to take him to the appellant's house. He followed her to the location, where they found the appellant. PW2 recalled that her father tied up the appellant along with other boys and escorted them to Kibera Police Station.
10. On cross-examination, the complainant testified that she left the appellant's house on Saturday and met Mama Stano thereafter.
11. PW3, BA, produced PW2's birth certificate and testified that PW2 went missing in January 2023, reappearing in early February. On 31/01/2023, PW2 was with the appellant, and Mama Stano later brought her home. PW3 saw the appellant during his arrest, and PW2 was taken to Nairobi Women's Hospital, with medical documents produced. On cross-examination, PW3 confirmed PW2's birth date and admitted she did not report her disappearance.
12. John Njuguna, a clinician from Nairobi Women's Hospital, testified regarding the treatment of the complainant on 4th February 2023. She was brought in by her mother, who reported that she had been defiled without protection. Upon examination, no physical injuries or injuries to the genitalia were found; however, the hymen was noted to be torn with old remnants. He produced the PRC dated 5/2/2023 (MFI: PEXH:1), GVRC dated 4/02/23, and P3 form dated 8/2/23. During cross-examination, he stated that the complainant had indicated she had engaged in sexual activity several times. He further clarified that while the hymen was torn, the evidence was inconclusive regarding penetration, suggesting that injuries to the genitalia could heal naturally.
13. The investigating officer Corporal Antony Kiragu recounted the evidence of the complainant. He testified that the complainant's parents were uncooperative during the investigations. He testified that



the incident was reported on 4<sup>th</sup> February 2023 and the appellant was arrested thereafter. He produced the complainant's birth certificate confirming her age.

14. In his defence, the appellant denied any involvement in the alleged offence. The appellant testified that on the material date, he encountered PW2, who informed him that she had been evicted from her home and subjected to physical abuse by her father. He recalled that his girlfriend, Becky, was at his residence at the time. He stated that he took PW2 to his house and left her in Becky's care. Becky later informed him that PW2 had visible injuries on her body, prompting him to suggest they take her to SHOFCO for assistance. He added that PW2 spent the night at his residence, where they provided her with a spare mattress.
15. The appellant further testified that when he returned home the following evening, Becky informed him that they had attempted to return PW2 to her home but found no one present. He recounted that on the following Saturday, three individuals, accompanied by PW2, entered his house, at which point he was arrested and taken to Kibera Police Station, where he was detained for 11 days before being brought before the court. He maintained that the medical report would speak for itself regarding the matter. During cross-examination, DW1 reiterated that PW2 had sought refuge at his residence.
16. In his submissions, the appellant challenged the totality of the prosecution's evidence against which he was convicted. He maintained that the prosecution's evidence was marred by contradictions and inconsistencies. In addition, the prosecution witnesses were unreliable. In rebuttal, the respondent argued that the appellant was properly charged and convicted as the prosecution proved their case beyond reasonable doubt.
17. I have re-evaluated the evidence on record and considered the written submissions and the applicable law. To succeed in a prosecution for defilement, it must be proven that the accused committed an act that caused penetration with a child.
18. Regarding proof of age, I wish to state at the outset that the importance of proving the age of a victim, proof of penetration, and positive identification of the assailant in sexual offences is paramount.
19. On the age of the complainant, the trial court considered the birth certificate produced by the complainant's mother PW3. The birth certificate indicated that the complainant was born on 10<sup>th</sup> August 2008. She was therefore fourteen (14) years old at the time of the incident. offence. There is therefore no doubt that the complainant was a child.
20. The question I must now grapple with is whether the prosecution adduced sufficient evidence to prove that the appellant defiled the child victim as alleged.
21. Having re-evaluated the witness account of the events at the material time, the following inconsistencies are noticeable: The complainant testified that she went to the appellant's house on 31st January 2023, staying there from Tuesday to Sunday. However, in the same testimony, she contradicted herself by claiming she left the appellant's house on Saturday when she encountered Mama Stano, who escorted her home. During cross-examination, she maintained that her stay at the appellant's residence lasted from Tuesday to Sunday, a period of six days. Additionally, she stated that she and the appellant had engaged in sexual intercourse only once.
22. The complainant further testified that her father had assaulted her prior to her departure with the appellant. PW3, during cross-examination, conceded that the complainant had disappeared from home on two prior occasions, but no report of her disappearance was ever made. The complainant's account also leaves several critical gaps. She asserted that she remained at the appellant's house for only



six days, but the timeline for her whereabouts outside of this period remains unaccounted for. This suggests that the complainant was likely a truant child.

23. A medical examination revealed that her hymen was broken and had already healed. This contradicts her allegation that she had been defiled on the Wednesday prior to her rescue, as the doctor would have observed fresh injuries to her genitalia if her claim were accurate.
24. The fact that the complainant was allegedly rescued on Saturday or Sunday, several days after the supposed defilement, further raises questions. Cross-examination of the complainant's mother uncovered that the parents were aware of the father's abusive conduct toward the child and that the child had a history of disappearing from home. The failure of the parents to report her absence reinforces the conclusion that such behaviour was not unusual.
25. The complainant also admitted that no sexual activity took place on her first night at the appellant's house, corroborating the appellant's testimony. It is therefore plausible that, due to an abusive home environment, the complainant voluntarily left and sought refuge at the appellant's residence.
26. In addition, the medical findings corroborate this hypothesis, showing that the hymen had old scars and had healed, inconsistent with recent defilement. Given PW1's assertion that the alleged intercourse occurred only once, 3 to 4 days before her rescue, it is implausible that her hymen would have healed in such a short span. Furthermore, no search was conducted at the appellant's home to establish whether the complainant's clothing was present, raising further doubt as to the truthfulness of her account. It is also unclear what the complainant wore during her stay.
27. Furthermore, PW4 testified that the appellant was released from custody because the complainant's parents were uncooperative. This lack of cooperation further weakens the prosecution's case and suggests that material information may have been deliberately withheld by the complainant's parents. The evidence presented reveals several inconsistencies and omissions that cast doubt on the complainant's testimony and the prosecution's case as a whole. The reliability of the prosecution's case is brought into serious question.
28. The issue that this court has to grapple with is whether the contradictions and inconsistencies outlined in the foregoing analysis are so trivial as to be ignored, or whether they are substantial and fundamental to the issues for determination. In *Richard Munene vs Republic* [2018] eKLR, the Court of Appeal stated as follows about contradiction or inconsistency in the evidence of the prosecution witness:

Contradictions, discrepancies, and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favor of the accused.

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 create some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.

29. The test as to whether the contradictions are minor or substantial was laid out in the case of *Sigei v Republic* [2023] KECA 154 (KLR):

“In assessing the impact of contradictory statements or discrepancies on the prosecution's case, our understanding is that firstly, for contradictions to be fatal, it must relate to material



facts. Secondly, such contradictions must concern substantial matters in the case. Thirdly, such contradictions must deal with the real substance of the case.”

30. From the above authorities, it is clear that contradictions and inconsistencies, unless satisfactorily explained, would usually, but not necessarily, result in the evidence of a witness being rejected. The contradictions must be grave and point to deliberate untruthfulness.
31. Having analysed and re-evaluated the evidence on record, it is my finding that the Complainant was an untruthful witness as evidenced by the contradictions and inconsistencies in her evidence. The said contradictions are so substantial as they relate to material facts. They therefore affected her credibility.
32. For the foregoing reasons, I find the appeal merited and hereby quash the conviction and set aside the sentence of twenty (20) years imprisonment imposed by the trial court. The appellant is thus set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

**JUDGEMENT DATED AND DELIVERED THIS 29<sup>TH</sup> DAY OF OCTOBER 2024**

---

**D. KAVEDZA**

**JUDGE**

In the presence of:

Appellant Present

Ms. Omurokha for the Respondent

Achode Court Assistant

