



**Njenga v Republic (Criminal Appeal E063 of 2024)  
[2024] KEHC 14721 (KLR) (26 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14721 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL E063 OF 2024  
DR KAVEDZA, J  
NOVEMBER 26, 2024**

**BETWEEN**

**SIMON KAVATI NJENGA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered  
by Hon. W. Lopokoiyit (SRM) at Kibera Chief Magistrate's Court  
Criminal case no. E065 of 2023 Republic vs Simon Kavati Njenga)*

**JUDGMENT**

1. The appellant was charged and after a full trial convicted for the offence of gang defilement contrary to section 10 of the *Sexual Offences Act*. The appellant was sentenced to serve twenty (20) years imprisonment.
2. Being aggrieved, he filed the present appeal challenging his conviction and sentence. In the petition of appeal received on 19<sup>th</sup> July 2024, the appellant raised grounds, which have been coalized as follows: He challenged the totality of the prosecution's evidence against which he was convicted. He complained that the prosecution did not prove the ingredients of the offence charged. He urged the court to quash his conviction and set aside the sentence imposed.
3. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, re-evaluate, and re-analyse the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind that it did not see witnesses testify and give due consideration for that. (See *Okeno v Republic* [1972] EA 32).
4. The prosecution called four (4) witnesses in support of their case. In her testimony, PW1, A.N.N, said that she was born on 16<sup>th</sup> April 2007 and was 16 years old. She recalled that on the night of 31<sup>st</sup>



- December 2021 and 1<sup>st</sup> January 2022, she left the church with her friend at (Particulars withheld) . On their way home, they met five men who stopped them and did a body search. They tried to flee but she was caught while her friend managed to run away. She was taken to a place called (Particulars withheld) in a mud house.
5. Inside the house, the assailants threatened her with a machete if she screamed.  
  
They instructed her to undress and she obliged. They then defiled her one after another. In the morning, one of the assailants poured alcohol on her face before escorting her out of the house. As they were leaving, they encountered a woman who asked what she was doing with the assailants, stating they were known criminals. On hearing this, the assailants fled, leaving her with the woman. The woman then took her home to her parents, who reported the incident to the police. PW1 insisted that it was the appellant who poured alcohol on her and stated she clearly identified him.  
  
During cross-examination, she said that four people raped her. She stated that she participated in three identification parades and identified the appellant during the last one. However, upon re-examination, she admitted the house was dimly lit, and she only saw someone resembling him. She also clarified that she was unsure if she saw the appellant and did not identify him during the first two parades.
  6. PW 1's testimony normally does not require corroboration in accordance with the proviso to section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya). I have thoroughly looked at the record and I note that PW1 was inconsistent in her narration of the series of events. Despite being subjected identification parade three times, she only identified the appellant on the last parade. She also said that she said that the house was not very bright, she was not sure whether she saw the appellant, and that she did not identify him in the ID parade.
  7. PW2, John Njuguna from Nairobi Women's Hospital, presented medical documents prepared by Robert Kipkoech, a former staff member at the hospital. He submitted the PRC form for a 14-year-old girl who had difficulty walking. She sustained facial injuries, including a swollen eye. A genital examination revealed a torn hymen and a vaginal laceration. No sexually transmitted infections were detected. He concluded that vaginal penetration had occurred. He produced the PRC and P3 forms, which classified the victim's injuries as grievous harm due to trauma to her face and genital area. During cross-examination, he stated that no DNA analysis was conducted at the hospital.
  8. PW3, Pamela Okello, a government chemist, testified that on 4th January 2022, she received vaginal swabs from the victim, the appellant, and three other suspects. She stated that the vaginal swab contained semen, and a DNA analysis was conducted. The DNA profile matched Ben, the fourth suspect. She signed the report, which was submitted as a prosecution exhibit, along with the DNA profiling report and the exhibit memo form.
  9. During cross-examination, she confirmed that the appellant's DNA was not found in the semen but noted that he might have been involved despite the absence of his DNA.
  10. PW4, No 225860 Shallet Chirondo from Capital Hill Police Station, testified that the appellant was arrested in May 2023 after being in hiding for one year. She stated that, during interrogation, the appellant appeared unaware of the case and declined to provide a written statement. During cross-examination, she confirmed that the appellant had been drinking with the four other suspects. She also noted that the minor did not see the appellant's face and was unable to identify him. However, the other four suspects implicated the appellant in the incident.
  11. In his defence, the appellant stated that he resides in Kibera and operates an alcohol business. He claimed that on 1st January 2022, he closed his business as usual and went home to sleep, with nothing unusual occurring that day. He stated that on 1st May 2023, he was summoned to the police station,



where he was shown pictures of people he did not recognize and was asked to write a statement, which he declined. He alleged that it was only then that he was charged with the offence, insisting that he did not know the victim. He further claimed that the investigating officer indicated his only involvement was selling alcohol to the suspects.

12. During cross-examination, he reiterated that he did not know the victim and that the victim did not identify him as one of the perpetrators.

13. The main issue for determination is whether the prosecution proved its case in the charge of gang defilement beyond reasonable doubt. The appellants were jointly charged with the offence of gang defilement under section 10 of the [Sexual Offence Act](#) which provides that:

“Any person who commits the offence of rape or defilement under this Act in association with another or others or any other with common intention is in the company of another or others who commit the offence of rape or defilement is guilty of the offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen (15) years but which may be enhanced to imprisonment for life.”

14. The Sexual Offence Act defines the term ‘gang’ as “gang means two or more persons.” Therefore, to sustain the charge of gang defilement, the prosecution must prove the following essential elements:

- a. Commission of defilement/rape
- b. penetration as defined under Section 2 of the [Sexual Offences Act](#) without the consent of the victim.
- c. The offender is in association with another or with others or any other with common intention, is in the company of another or others who commit the offence of defilement/rape.
- d. The age of the victim in the case of gang defilement must be proved to be under 18 years.
- e. The perpetrator is positively identified.

15. I will start with the element of proof of defilement and its ingredients as stipulated in Section 8(1) of the [Sexual Offences Act](#) which provides that:

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

16. On proof of age of the complainant, the birth certificate shows that the complainant was born on 16<sup>th</sup> April 2007. The offence is stated to have taken place on the night of 31st December 2021 and 1st January 2022. She was therefore 14 years old at the time of the incident and therefore a child within the law.

17. On whether there was proof of penetration, Section 2 of the [Sexual Offences Act](#) defines penetration as: -

“The partial or complete insertion of the genital organs of a person into the genital organ of another person.”

18. Part of the complainant’s evidence on penetration was that the assailants who were four in number raped her one after the other from midnight till morning. The medical evidence presented by PW2 confirmed that the victim upon examination had a torn hymen and vaginal lacerations evidence of vaginal penetration. A vaginal swab revealed semen which after a DNA profile was conducted matched



one of the suspects. These pieces of evidence were cogent proof of penetration. The trial court was properly grounded on evidence in the finding that there was proof of penetration.

19. On identification, the essential element of gang defilement is defilement committed in association with two or more persons. Penetration was proved. I will deal with the other limb on whether he was the one who caused the penetration or with the other assailants not before the court and if so, if they had a common intention in the commission of the offence.
20. In her evidence in chief, PW1 testified that the appellant was one of the assailants who defiled her. She initially identified the appellant as the person who poured alcohol on her face in the morning. However, during cross-examination, she mentioned that the room where the incident occurred was dimly lit, and she was unable to identify the appellant during the first and second identification parades. It was only during a third parade that she was able to make an identification.
21. The complainant, although a mature 14-year-old, still had some limitations in her ability to identify the appellant. During the first identification parade, no identification was made, raising doubts. When the second parade was conducted, the appellant could not be identified, further reinforcing the uncertainty. It was only during the third parade, when the appellant's face had become more familiar, that an identification was made.
22. Moreover, when questioned further, the complainant admitted that she could not conclusively say that the appellant was one of the perpetrators. The investigating officer testified that the appellant was identified by the other assailants as one of the perpetrators, but this evidence was not presented in court. Furthermore, the prosecution failed to produce the identification parade forms.
23. In the decision of *Kiarie v Republic* [1984] KLR 739, the Court of Appeal had this to say: -

“It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification that evidence should be watertight to justify a conviction.”
24. In the instant case, the assailants defiled the complainant in a dimly lit house. In her evidence in chief, the complainant described the appellant as the person who poured alcohol on her face, indicating that the incident occurred in close proximity. However, during cross-examination, her evidence regarding the appellant's identity as one of the perpetrators was inconsistent. She admitted that she could not conclusively confirm the appellant's involvement in the offence.
25. I have addressed my mind to the decision in *R. v Turnbull & others* [1973] 3 ALL ER 549, on the factors to be considered when the only evidence of identification is that of a single witness. The court said thus: -

“..... 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 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 recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

26. I am satisfied that the evidence of PW1 when considered against the safeguards in Turnbull (*supra*), I come to the conclusion that the identification of the appellant was not proper.
27. This court finds that the identification parade was of evidential value as the appellant was convicted on the evidence of identification through an identification parade. It is my finding that the appellant was not properly and positively identified. In the premises, the conviction on the charge of gang defilement was not proper.
28. 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 VIRTUALLY THIS 26<sup>TH</sup> DAY OF NOVEMBER 2024**

---

**D. KAVEDZA**

**JUDGE**

In the presence of:

Appellant Present

Mburugu for the Respondent

Achode Court Assistant

