



**Mugambi v Director of Public Prosecution (Criminal Appeal E003 of 2023)
[2024] KEHC 14803 (KLR) (22 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14803 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E003 OF 2023
LW GITARI, J
NOVEMBER 22, 2024**

BETWEEN

NICHOLAS MUGAMBI APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

JUDGMENT

1. The appeal arises from the proceedings in the Chief Magistrate’s Court at Meru Sexual Offences Case No.34/2023.
2. The appellant was charged with defilement Contrary to Section 8(1) of the *Sexual Offences Act* No.3 of 2006 in that on 5/9/2018 in Imenti North Sub-County within Meru County he defiled FG a child aged twelve(12) years.
3. The appellant denied the charges. The matter proceeded to full trial and at the conclusion, the appellant was found guilty on the offence of defilement, convicted and sentenced to serve Twenty Five years imprisonment.
4. The appellant was dissatisfied with the conviction and sentence and filed this appeal based on the following grounds:-
 1. That , the learned magistrate and the prosecution erred in law and also a fact by relying on defective charge.
 2. That , the learned trial magistrate erred in fact and law when he failed to properly evaluate the evidence on record and retired on insufficient evidence, that failed to capture the three ingredients that support conviction on defilement.



3. That, the learned trial magistrate erred by law and fact where he failed to make findings that the whole trial was founded on un-corroborated and contradictory testimonies, thus unworthy to safe conviction.
4. That the learned trial court magistrate erred in both matters of law and also a fact where he convicted and at the same time sentenced the appellant herein hence failed to note the vital and crucial witnesses were not called by prosecution side to testify.
5. That the learned trial court magistrate erred in both matters of law and fact where he rejected my defence over mere denial.
5. The appellant prays that the appeal be allowed, conviction be set aside and he be set at liberty.
6. The appellant opposed the appeal and has urged the court to uphold the conviction and dismiss the appeal.

The Prosecution's Case

7. This is a case involving a child who was mentally retarded and the case proceeded with the assistance of an intermediary.
8. PW1 – Salome Ntinyari was the intermediary. She testified that she knew the complainant as she is her neighbor. She also knew the appellant who was her neighbor. Her testimony was that on 5/9/2022 she went to the market and gave her child the key. The appellant went to the road and met PW1's son whose name is Tony Githinji, the complainant and other children who were at the road playing. The appellant beat Tony and took the complainant and led her to the bathroom.
9. PW1 went running and found the appellant had removed the complainant's clothes and she was on the floor. She took her and put her under pant on. She went and reported the matter to chief. PW1 identified the complainant in court and she told the court that she was a special need child and she understands her very well as they have lived together for long.
10. PW1 told the court that the complainant narrated to her the appellant had closed her mough while defiling her and that he had removed her clothes but she did not say she had defiled her. PW1 testified that she found the appellant in the bathroom with the complainant and he called her "aunty, ni mimi usiniseme".
11. The appellant tried to run away but the children who were playing tried to stop him. Then PW1 called the village elder who in turn called the chief and the chief arrested the appellant. PW1 then took the complainant to hospital and she was examined and a PRC Form, and a P3 form were filled. She then produced her birth certificate. She did not record a statement.
12. PW2 – DG is the complainant's mother. She testified that on 5/9/2018 at around 4.00pm she had gone for a funeral when she received a call reporting that the complainant had been defiled. She went home and found that the police had arrived and the appellant was in the police vehicle. She was told that the appellant had defield the complainant in the bathroom.
13. PW2 testified that the complainant is a special needs child but she is able to understand her when she talks. The child told her that the appellant held her hand and led her to the bathroom and she was feeling pain in her vagina. She went to Meru Police Station and later they went to Meru General Hospital where the complainant was examined and treated. The child was Fifteen (15) years at the time that the offence was committed.



14. PW3 Doctor Malcom Githinji testified that the complainant's P3 form was filled by Doctor Kisili who had worked with for three years. The P3 form was filed by Erick, a clinical officer who he worked with and he knew their handwriting and signature.
15. He told the court that the P3 form showed that the hymen was broken and the same was captured on the P.R.C Form which indicated that the hymen was broken. The child was examined on 19/4/2022. The P.R.C form was filed on 5/10/2018.
16. PW3 also produced a medical report by a consultant Psychiatrist indicating that complainant had a severe intellectual disability. She is of unsound mind and not fit to testify. He produced the medical report as exhibit. He also produced the P3 form and the P.R.C form as exhibits.
17. PW4 P.C Irene Odhiambo is a police constable attached to Meru Police Station. She testified that she investigated this case which was reported on 16/12/2017 at 1700 Hours. The complainant was a juvenile aged Twelve years and the perpetrator was Nicholas Mugambi. At the time of giving evidence she told the court that complainant had passed away three months prior to that date. She told the court that the minor was playing outside when the appellant went and took her to a bathroom where he defiled her. Salome Ntinyari heard the child screaming for help and she went and assisted her. The child was disable. The appellant was arrested by the chief and members of the public and taken to the police station. He was later charged with this offence. The complainant was examined by a doctor and a P3 form was filled. She produced her birth certificate.
18. The appellant was put on his defence and gave a sworn statement. He told the court that he did not defile the complainant. He told the court that the complainant was well known to him, as she was his neighbor. He told the court that on the material day, children were playing with his wheelbarrow including the complainant. The complainant ran and fell down. Salome started screaming saying he had removed her clothes. Members of the public roughed him up. His father came to the scene. Police went to the scene and rescued him and put him in the police vehicle. He told the court that he had a long standing Land Dispute with Salome (PW1) since 2006 but she is not his neighbor. He told the court that he did not defile the child in question.

Analysis And Determination

19. I have considered the proceedings before the lower court, the grounds of appeal and the submissions. I find that the issue for determination is:-

Whether the charge against the appellant was proved beyond any reasonable doubts.
20. This is a first appeal and the law is well settled from the decisions of the High Court and the court of appeal that the court has to revisit the evidence which was adduced before the trial court, evaluate it and come up with its own independent finding. See Okego –vs- Republic (1972) E.A 32. The court is however supposed to leave room for the fact that it did not have an opportunity to see and hear the witnesses and leave room for that.
21. In Peter –vs- Sunday Post Ltd (1958) E.A it was stated that eh appropriate standard of review established in cases of appeal can be stated in three complementary principles:
 - i. Firstly, on first appeal the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusion.



- ii. In re-considering and re-evaluating evidence the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing witnesses testify before her and,
 - iii. It is not open to the first appellate court “to review the finding of a trial court simply because it would have reached a different result if it were hearing the matter for the first time.”
22. The appellant has challenged his conviction on the ground that the charge sheet was defective. The respondent did not respond to this ground. I find that it is important to deal with the ground. Section 134 of the Criminal Procedure Code provides as follows:-

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

- Committal proceedings because of inaccuracies or deficiencies in the charge and it gives poor description of the alleged offence in its particulars. The court of appeal in *Henry O. Edwin –vs- Republic* (2005 eKLR). The court stated that a person should be charged with an offence known in law.
22. In *Jason Nkumu Yongo –vs- Republic* (1983) KLR. The court of appeal stated that “a charge is defective under Section 214(1) of the Criminal Procedure Code where;
- a. It does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in committal proceedings discloses or
 - b. It does not for such reasons accord with the evidence given at the trial.
 - c. It gives a mis-description of the alleged offence in its particulars.
2. The appellant was charged with defilement Contrary to Section 8(1) (2) of the *Sexual Offences Act*. The section provides as follows:
- a. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - b. 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.
23. The particulars of the charge must therefore disclose the age and the particulars of victim, the act constituting the offence and the manner in which the offence was committed. Thus a proper charge of defilement should disclose the name and the age of the victim, the manner in which offence for example, caused his genital organ to penetrate the genital organ of the victim.
24. The purpose of disclosing the particulars is to give the accused person some information to make him understand the nature of the offence and to be able to prepare his defence. This is a matter of fair trial as stated in Article 50(c) of *the Constitution* which provides:
- Every accused person has the right to a fair trial which includes the right to have adequate time to be informed of the charge with sufficient detail to answer it and facilities to prepare a defence”



25. *The Constitution* therefore gives an accused person an inalienable right to be informed of the charge with sufficient details to be able to answer it. This is buttressed by Section 134 of the Criminal Procedure Code (Supra).
26. The particulars of the offence in this case were given as follows:

"Nicholas Mugambi: on 5th September 2018 at Gakoromone area in Imenti North Sub-County within Meru County you defiled Faith Gatwiri a child aged 12 years"
27. This particulars lacked sufficient details to enable the appellant to answer the charge. The charge was defilement of the necessary particulars that would give the appellant sufficient information as to the nature of the offence charged.
28. The appellant has further submitted that the learned magistrate failed to note that the three ingredients of the charge were not proved. I will consider this ground with the next ground that the learned magistrate failed to find that evidence was contradictory.
29. The law is well settled that the three key ingredients of the charge of defilement are: Age of the victim Penetration Positive identification of the perpetrator
30. The age of the victim was proved with credible evidence as the prosecution produced the birth certificate of the minor showing that she was born 7/5/2006. The birth certificate was produced as exhibit 4 which proved that she was twelve years at the time the offence was committed.
31. The evidence on penetration was adduced by witnesses starting with PW1 who purported to give an eyewitness account. Her testimony was that the offence was committed on 5/9/2022. I take it that this could be an error although the respondent did not correct it, because she was giving evidence on 18/5/2022 way before the alleged date she state. The evidence of PW1 did not confirm the date the offence was committed as stated on the particulars of the charge.
32. PW2 – the complainant’s mother gave the date of the offence was 5/9/2018. According to PW2 the complainant was taken to the hospital the same day. When you come to the medical reports produced by Doctor Malcom Githinji (PW3) starting with the Post Rape Care Form, it was filled on 5/10/2018. It states that it gives the date and time of the incident as 5/10/2018 at 4.00pm and date and time of examination as 6.50pm. It’s then very clear from this document that the offence was committed on 5/10/2018 at 4.00pm. The Post Rape Care form (PRC) was produced as Exhibit-1.
33. The P3 form on the other hand states that the date and time the offence was reported to the police was on 5/10/2018. That she was sent to the hospital on 19/4/2022. This means that the P3 form was filled when the matter was still pending in court. The only positive side at time of filling the P3 form was the broken hymen.
34. PW4 the investigating officer on her part testified that the matter was reported to the police on 16/12/2017 at 1700 Hours. The date maintained on the charge sheet as the date the offence was committed was 5/9/2018.
35. The learned magistrate turned a blind eye to this discrepancies and contradictions in her judgment. The only evidence that suggests that the offence was committed on 5/9/2018 is the PW2 who is the complainant’s mother.
36. However, there is no medical evidence to show that the complainant was defiled on 5/9/2018. The P3 form and the PRC Form state the offence was committed on 5/10/2018. I find that the evidence



does not support the charge. This adds to the finding above that the charge sheet was defective for the reasons that it does not accord with the evidence given at the trial.

37. Though the prosecution proved that the complainant's hymen was broken there was no evidence to prove that it was broken on 5/9/2018 which is the date the appellant is alleged to have committed the offence. There was no connection between the date of the offence the accused is charged with and the offence committed on 5/10/2018. The contradictions and inconsistencies are grave. In the case of John Barasa –vs- Republic Cr. Appeal No.22/2005 Justice Maraga as he then was stated that,

“Where the evidence was contradictory and uncorroborated the testimonies should not be relied on to convict an accused person.”

38. In the case of Twehangane Alfred –vs- Uganda Criminal Appeal No.139/2001 (2003) UGCA6

The court of Appeal of Uganda stated that contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case.

39. In this case, the inconsistencies were not explained and they affect the main substance of the charge as it ended up that the evidence did not support the charge.
40. I need not consider other grounds. I find that the inconsistencies on the evidence and the charge were grave and cast doubts in the prosecution case. In such circumstances, the evidence cannot be relied on to convict. I allow the appeal, the conviction is quashed and the sentence is set aside and the appellant is set at liberty unless he is otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 22ND DAY OF NOVEMBER 2024.

L.W. GITARI

JUDGE

22/11/2024

The Judgment has been read out in open court

L.W. GITARI

JUDGE

