



REPUBLIC OF KENYA



**Osebe v Republic (Criminal Appeal E020 of 2021)  
[2023] KEHC 189 (KLR) (24 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 189 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CRIMINAL APPEAL E020 OF 2021  
FA OCHIENG, J  
JANUARY 24, 2023**

**BETWEEN**

**VINCENT OSEBE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

- 1 The appellant, Vincent Osebe was convicted for the offence of Defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*.
- 2 He was then sentenced to 20 years' imprisonment.
- 3 In his appeal to this Court, he has challenged both the conviction and the sentence. The appellant raised 12 grounds of appeal, which can be summarised as follows:-
  1. The complainant testified that "Bad things" were done to her; that does not necessarily mean defilement.
  2. The complainant did not testify that she had been defiled between August and December 19, 2018; so the trial court was wrong to so find.
  3. As the complainant's mother did not complain, the father of the complainant could have had ill motives or vendetta against the appellant.
  4. The conclusions were not supported by the evidence.
  5. The charge sheet was ambiguous and thus defective.
  6. The trial court did not consider the appellant's alibi, yet the same was supported by witnesses who included the mother of the complainant.



7. The trial court erred by castigating the appellant for not giving a sworn defence: that amounted to shifting the burden of proof to the appellant.
  8. The Immunization Card was doctored, and therefore it could not be reliable source of proof of the contents thereof.
  9. The trial court failed to take into account the principles of sentencing, thus leading to a miscarriage of justice.
  10. The charge sheet did not specifically indicate the period when the offence was committed; therefore the trial court erred by finding that the charge was proved as drafted.
  11. The medical evidence exonerated the appellant.
  12. As the charge sheet was not specific about the dates when the offence was allegedly committed, it was defective.
- 4 The appeal was canvassed by written submissions.
- 5 In answer to the appeal, the respondent told this court that it was not supporting the judgment. In effect, the respondent conceded the appeal.
- 6 I have given due consideration to the concession; the appellant's submissions; and the entire record of the proceedings. I now make the following findings:

#### **Defective Charge**

- 7 The appellant had not touched on the issue of the names cited on the charge sheet. However, Mr. D. Majale, Principal Prosecution Counsel, drew the court's attention to the 2 sets of names appearing on the main charge and the alternative count.
- 8 On the main count, the accused is Vincent Osebe. But in the alternative charge the accused is Edwin Mbaka Ogoti.
- 9 The respondent said that because of the two different sets of names, it was not clear who was the accused. The appellant is Vincent Osebe. He knows who he is.
- 10 The prosecution witnesses testified about the appellant. And the trial court convicted the appellant.
- 11 I therefore find that there was no confusion about the identity of the accused. Perhaps if the trial court had convicted the appellant on the alternative count, an issue could have arisen, as the appellant is not Edwin Mbaka Ogoti.

#### **"Bad Things"**

- 12 The complainant was 11 years old. She testified that the offender had done "bad things" to her. As the appellant had pointed out, the use of the phrase "bad things" does not necessarily connote defilement.
- 13 The said phrase may connote defilement; but it is always prudent for the prosecution to probe further when a minor testified that "bad things" were done to her.
- 14 The prosecution should seek clarity, by asking the complainant to explain what was used in doing the "bad things". Hopefully, the complainant might tell the court that the offender used his "dudu" or "the thing he uses to urinate". It is further hoped that the complainant would say that the offender used his said "thing", by inserting it into the "thing" which the complainant uses to urinate.



- 15 Sometimes a complainant would literally point at her body-part, into which the offender inserted his “thing”.
- 16 Once the complainant gives further descriptive evidence which leaves no doubt about what had transpired, a conviction can be sustained.
- 17 But in this case the complainant only testified that the offender “did bad things”. In the circumstances, that piece of evidence, if uncorroborated, would be inconclusive.

### **Disparity between the Charge Sheet and Evidence**

- 18 The charge sheet states that the offence was committed “on the diverse dates between August and December 19, 2018”.
- 19 However, the complainant testified thus;
- I went to hospital on Monday (2 days after the act). This was the first time accused did this to me.”
- 20 PW2 is the father of the complainant. He testified that the act was done to his daughter on December 19, 2018. He reported about the incident on the same date.
- 21 PW7 was a police officer based at the Keroka Police Station at the material time. She testified that PW2 escorted the complainant to the police station on the night of December 19, 2018.
- 22 PW3, PW4 and PW5 all testified about the incident which took place on December 19, 2018.
- 23 There was no evidence about any other incidents of alleged defilement between August and October 19, 2018.
- 24 In the event, the evidence tendered by the prosecution did not support the particulars of the charge, with regard to the dates when the offence was allegedly committed.

### **Penetration**

- 25 PW6, Lameck Nyaribo, is a Clinical Officer based at the Keroka Hospital. He testified that the complainant was taken to the said hospital on December 21, 2018. After he had examined the complainant, PW6 filled the P3 Form.
- 26 The following are the particulars on the P3 Form;
- Normal external and internal genitalia with absent hymen, hence penetration.”
- 27 During the trial, the court noted that the following words appear to have been inserted onto the Form subsequent to the rest of the information “... hence penetration”. The Clinical Officer told the court that it was on the morning of the same day when he was testifying, that he had inserted the words “hence penetration”.
- 28 For the completeness of the record, I note that PW6 testified on October 16, 2019, which was almost 10 months after he had first filled-in the P3 Form.
- 29 It is an unfortunate thing that the witness should choose to insert new information on a document, so long after he had first made the document.



30 If the original information reflected the correct factual position, as was observed by the witness on the first occasion, there would have been no need to insert further information on the document.

31 I find that the Clinical Officer inserted the words “hence penetration” in an attempt to fill a gap which was in the prosecution case. I so hold because the Clinical Officer had testified as follows, when giving evidence-in- chief;

Our findings were: - normal external genitalia and missing hymen. Lab tests were normal. The age of the complainant was 11 years. Hymen can be broken when child does extraneous duties. Due to struggle there were injuries on both upper limbs. There were bruises and age of injury was 3 days. The struggles lead to swelling of the face.”

32 This witness had made it clear that the absence of the hymen could possibly be attributable to “extraneous duties”. Therefore, when he deemed it necessary to add the phrase “hence penetration”, I find that he was trying to do away with any other possible causes for the loss of the hymen.

33 Accordingly, the addition of that phrase was prejudicial to the fair trial of the appellant.

### **Unsworn Defence**

34 It is the right of an accused person to choose how to respond when he has been put to his defence.

35 He has the right to give sworn or unsworn evidence. He may call witnesses, if he chooses to do so. But he could even choose to remain absolutely silent.

36 Regardless of the choice made by the accused, the trial court can only convict him if the evidence tendered by the prosecution proved beyond any reasonable doubt, that the accused was culpable.

37 The fact that the accused made a choice to give unsworn evidence cannot, of itself, elevate the evidence tendered by the prosecution, if such evidence was otherwise insufficient to found a conviction.

38 In this case the appellant did not suggest to the complainant’s father (PW2), that he had any ill motives or vendetta against the complainant. As he did not pursue that line of defence when he was cross-examining PW2, I find that the trial court was right to hold that the said defence was an afterthought.

39 Therefore, if that had been the only ground of appeal, I would have dismissed the said appeal.

### **Conclusion**

40 Having re-evaluated the evidence on record, I do appreciate that the concession by the respondent is properly founded. Accordingly, the appeal is allowed; the conviction is quashed and the sentence is set aside.

41 I order that unless he is otherwise lawfully held, the appellant shall be set at liberty forthwith.

**Dated, signed and delivered this 24<sup>th</sup> day of January, 2023.**

**FRED A. OCHIENG**

**JUDGE**

*I certify that this is a  
true copy of the original.*

**DEPUTY REGISTRAR**

