



**Amukoye v Republic (Criminal Appeal E043 of 2021)  
[2023] KEHC 282 (KLR) (Crim) (23 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 282 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL**

**CRIMINAL APPEAL E043 OF 2021**

**JM BWONWONG'A, J**

**JANUARY 23, 2023**

**BETWEEN**

**BONFACE LUKONE AMUKOYE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence delivered by Hon A. Kitinji, C.M, on 29th April 2021 in Makadara Chief Magistrate's Court Sexual Offence Case No. 114 of 2017 Republic vs Bonface Lukone Amukone)*

**JUDGMENT**

1. The appellant was charged and convicted of the offence of defilement contrary to section 8 (1) as read with 8 (2) of the [Sexual Offences Act](#), No 3 of 2006.
2. He was sentenced to fifteen (15) years imprisonment.
3. Being dissatisfied with the conviction and sentence, he filed a petition of appeal, in which he raised five (5) grounds.
4. In a coalesced form in grounds 1, 2, and 3 the appellant challenged the totality of the prosecution's evidence for being hearsay and not sufficient to warrant his conviction. In ground 4 the appellant challenged the manner in which the trial was conducted stating that he was not accorded a right to a fair trial contrary to article 50 (1) and (2) of the [Constitution of Kenya](#). In ground 5, the appellant has argued that the trial magistrate imposed an excessive sentence.
5. As this is the appellant's first appeal, the role of this appellate court is well settled. It was held in the case of [Okeno v Republic](#) [1972] EA 32 and further in the Court of Appeal case of [Mark Oruri Mose v R](#) [2013] eKLR, that this court is duty-bound to revisit the evidence tendered before the trial court



afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.

6. SW (name withheld) (Pw 1) made an unsworn statement after a voir dire examination was conducted. She stated that on the material day she was going to the shop in the company of her brother. They met the appellant, who held her hand but she slipped away. Another individual caught her and took her to the appellant. The appellant then took her to an abandoned place made of iron sheets.
7. She testified that the appellant removed his penis and inserted it into her vagina. She did not scream. When he was done, she realised she was bleeding from her private parts. She went home and had a bath. The following day, she felt pain in her private parts. She told her mother what had happened. Her mother took her to hospital. She identified the appellant as Baba Purity or Baba Shadrack.
8. IR (Pw 2) testified that she is the mother of the complainant aged 12 years. On July 1, 2017, she noticed that the complainant was not walking properly. Upon inquiry, the complainant told her that the appellant had taken her to a house and defiled her. She also showed her the inner clothes she was wearing at the time of the incident. She examined her genitalia which was reddish and foul-smelling.
9. She told the court that she took her to MSF hospital and reported the incident to the police. She identified the appellant as Baba Purity who was their neighbour and was known to her. She added that she visited the scene of the incident, which had a small gate that was rarely used.
10. Dr Joseph Maundu (Pw 3) from Nairobi Police Surgery testified that he examined the complainant on August 31, 2017. At the time she was aged 10 years and had already been treated at MSF and a PRC form was filled. On examination, there were no physical injuries, genitalia was foul smelling and had discharge which was not normal. Hymen was broken and there were old tears. There was evidence of penetration. He signed the p3 form which was produced in court.
11. After the close of the prosecution's case, the trial court found that the appellant had a case to answer and he was put on his defence. In his defence he made an unsworn statement and he did not call any witnesses. In his defence, he denied ever defiling the complainant.

### **Analysis and determination**

12. In a coalesced form in grounds 1, 2, and 3 the appellant challenged the totality of the prosecution's evidence as hearsay and not sufficient to warrant his conviction. He submitted that the evidence of the complainant was full of material contradictions. He also claimed that the complainant told the court that she voluntarily told her mother (Pw 2) of the incident. On the other hand, Pw 2 stated that she discovered the complainant's injuries on her own after examining her private parts. Further, there two gave contradicting evidence on whether the complainant's underpants were washed or not. The appellant submitted that these contradictions cast a doubt on whether the complainant was defiled by the appellant on July 30, 2017.
13. Section 8 (1) and (2) of the *Sexual Offences Act*, No 3 of 2006 provides that: -
  - 8.(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."
14. 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 in sexual offences is paramount considering that under the *Sexual Offences Act*, the prescribed sentence is determined by the age of the victim.
15. The complainant's mother (Pw 2) produced the victim's birth certificate – PEx 3, which confirmed that the victim was 12 years but was 10 years at the time of the commission of the offence. The prosecution, therefore, adduced credible evidence to prove that indeed the complainant was a child at the time the offence was committed.
  16. The question I must now grapple with is whether the prosecution adduced sufficient evidence to prove that the appellant defiled the child victim. Pw 1 after a *voire dire* examination made an unsworn statement in which she testified how the appellant with the help of another individual not before court forcefully lured her to an abandoned house. She told the court that the assailant removed his penis and inserted it into her vagina. She described in detail how she was bleeding from her private parts, after the incident and had to wash her clothes.
  17. The medical evidence presented confirmed that the complainant's hymen was broken, genitalia was foul smelling, lacerations and discharge were found, which was not normal. There was evidence of penetration. The conclusion by Pw 3 was that the complainant was likely to have been sexually assaulted.
  18. Regarding the identity of the perpetrator, the complainant knew the appellant and identified as him as the one who sexually assaulted her and he was known to her. The identification was therefore by recognition. From the evidence, the complainant was very clear on the events that took place and the identity of the perpetrator.
  19. After re-assessing the entire evidence on record, I am unable to fault the finding of the learned trial magistrate. The prosecution evidence leaves no doubt in my mind that the appellant defiled the complainant and the elements of the offence were proved beyond reasonable doubt.
  20. The appellant further submitted that the prosecution failed to call witnesses who would have proved his innocence. He argued that failure to call the complainant's brother who was with her before the incident was fatal. He relied on the case of *Bukenya & others v Uganda* [1972] EA 549. In the said case, the court addressed itself thus:-
    - (i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.
    - (ii) That court has a right and the duty to call witnesses whose evidence appears essential to the just decision of the case.
    - (iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution."
  21. From the record, the investigating officer did not testify in court. However, failure to call the investigating officer is not fatal to the prosecution. In cases where the evidence of the investigating officer is key in linking the accused to the crime, failure to call the investigating officer will be prejudicial to the prosecution's case. However, where evidence of other witnesses is sufficient to secure a conviction, failure to avail the investigating officer will not prejudice the prosecution case. It is however important that the prosecution avails investigating officers during trials.
  22. The evidence produced in the instant case proved the ingredients of the offence the appellant was charged with at trial court. This ground therefore fails and is hereby dismissed for lacking in merit



23. In ground 4 the appellant challenged the manner in which the trial was conducted stating that he was not accorded a right to a fair trial contrary to article 50 (1) and (2) of the *Constitution of Kenya*. The appellant did not submit on this ground. Consequently, this ground fails and is hereby dismissed.
24. In ground 5 the appellant argued that the trial magistrate imposed an excessive sentence. The Court of Appeal in *Bernard Kimani Gacheru v Republic* [2002] eKLR stated that:
- "It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."
25. In the circumstances, I find no basis to interfere with the sentence meted out upon the appellant considering the circumstances of this case.
26. In the premises, the appellant's appeal fails and is hereby dismissed in its entirety.

**JUDGEMENT SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 23<sup>RD</sup> DAY OF JANUARY, 2023.**

**JM BWONWONG'A**

**JUDGE**

**In the presence of-**

**Mr Kinyua: Court Assistant**

The applicant in person.

Ms Akunja for the respondent.

