



REPUBLIC OF KENYA



KENYA LAW
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**Okwemba v Republic (Criminal Appeal 86 of 2018)
[2023] KEHC 1636 (KLR) (Crim) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1636 (KLR)

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

**CRIMINAL
CRIMINAL APPEAL 86 OF 2018**

**LN MUTENDE, J
FEBRUARY 28, 2023**

BETWEEN

EVANS OKWEMBA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal against the original conviction and sentence in Sexual Offences Case No 32 of 2014 at the Chief Magistrates' Court Kibera by Hon. F. Mutuku - SRM. on 9th March, 2018)

JUDGMENT

1. Evans Okwemba, the appellant, was charged with the offence of defilement. Particulars being that on the March 13, 2014 at around 7.30 pm at Kawangare within Nairobi County, unlawfully and intentionally caused penetration of his male organ namely (penis) into a female genital organ namely (vagina) of RM a girl aged 8 years old.
2. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006. Particulars being that on March 13, 2014, at Kawangware within Nairobi County, he allowed his genital organ namely (penis) to get into contact with a female genital organ namely (vagina) of RM a girl aged 8 old.
3. Having been take through full trial, he was found guilty, convicted and sentenced to serve life imprisonment.
4. Aggrieved, he appeals against both the conviction and sentence on grounds that: key ingredients of the offence were not proved; medical evidence relied on was not corroborated; and that the strong defence which exonerated him from wrong doing was not exhaustively and comprehensively analyzed.



5. The appeal was canvassed through written submissions. The appellant urged that the age of the victim was not proved to the required threshold following varied accounts by witnesses.
6. On the issue of penetration, the appellant was in agreement that it did occur but the question was whether it could be attributed to him.
7. Regarding positive identification of the assailant he urged that the examination carried out showed presence of pus cells which he interpreted to be a sexually transmitted infection. And, that having been examined and no injuries having been noted on his genitals, he could not have been the assailant. In this respect he cited the case of *Gabriel Gatonye Gakunga v Republic* (2019) eKLR where Meoli J. stated that:

“It is also evident that the complainant took herself to the appellant’s house in the evening between 6.00p.m. and 9.30 p.m. When the mother knocked onto the door around 9.30 p.m. the complainant hid herself behind the door. No evidence of her having screamed was tendered.

The medical evidence was clear that sexual intercourse and penetration had taken place, but not clear when such took place. It is doubtful then whether the sexual intercourse was by the appellant or not. I state so because I do not think that an infection would have manifested itself hours after the act if at all it took place. Further the appellant was not tested for any venereal disease or infection that he would have passed to and infected the complainant with.

The medical evidence in my view confirms sexual activity by the complainant leading to the infection.

It does not state with conclusively that the appellant is the one who perforated the complainant’s vagina nor that he was the one who had infected her with a venereal infection.

The trial magistrate took the clinical officers evidence as credible and truthful without adequate analysis.

The salient questions as to whether the infection was by the sexual assault one day prior to the examination and if so whether it was the appellant who infected the complainant by the sexual assault, more so that the appellant denied having had sexual intercourse with the complainant. In that regard I am guided by the holding in *Peter Mwangi Muthanya v Republic* HCA No 154 of 2005 – Nakuru (Kimaru J) when in very similar circumstances the court found that the prosecution did not prove its case to the required standard.”

8. Further, the appellant submitted that in his defence he recounted circumstances that led to his arrest and implication of charges. That had the trial court carefully considered the defence it could have granted the appellant a benefit of doubt.
9. In the result, that the prosecution failed to prove the case beyond reasonable doubt.
10. The respondent through learned prosecution counsel, Zaphida Chege, opposed the appeal. That the prosecution proved the case beyond reasonable doubt. It is urged that what was required was the victim to be proved to be below the age of 18 years. That the element of penetration was proved and the appellant positively identified the victim as the perpetrator.
11. That being a sexual offence it could be proved by a single witness. That there was no requirement of corroboration as clearly stated by section 124 of the *Evidence Act*.



12. On the question of the pus cells observed at the laboratory following tests conducted, it is urged that it was an indication of a urinary tract infection and not sexually transmitted infection as misconstrued by the appellant.
13. On sentence, the respondent urged the court to comply with the law as stipulated by section 8(2) of the *Sexual Offences Act*.
14. The case presented by the prosecution was that PW1 RM a minor, was sent by her mother PW2 EV to fetch water. She was accompanied by MV her younger sister. She carried some water home but she had to return to where they left other cans of water. On her way she encountered the appellant, Okwemba, a neighbour at their place of residence who asked her to accompany him to the field. She complied and on reaching the place of the incident, he asked her to lie down but she refused. However, he removed his trousers and lay on her while on the ground. He proceeded to remove her pant and inserted his genitals into her genitalia. Upon completing the act he stood and dressed up. Then he asked her not to wear her pant.
15. She stood up and noticed blood oozing from her genitalia but she did not wipe it. He escorted her until home that is when he asked her to wear the pant. She went to their house as he went to theirs. When she entered the house she found her parents looking for her. Her mother upon seeing the blood from her external reproductive organ sought to know who had defiled her and she mentioned the appellant.
16. PW2 took her to a private clinic at Kawangware where they were advised to go to Nairobi Women Hospital.
17. At Nairobi Women Hospital, she was subjected to medical examination. Her vagina had freshly perforated hymen showing a broken hymen. Laboratory tests conducted established presence of pus cells. It was concluded that she had a urinary tract infection. HIV, Syphilis and hepatitis B were negative.
18. PW4 No 8xx3 Corporal Beatrice Makokha investigated the case. She re-arrested the appellant who was taken to the Station by the victim's mother PW5, BMK. She caused him to be examined by a medical doctor.
19. PW6 Dr Maundu examined both the complainant and appellant on March 20, 2014, seven (7) days after the act. He found the complainant's hymen broken though not fresh, while the appellant had no injuries on his genitals. He filled P3 Forms in that respect.
20. Upon being put on his defence the appellant testified that on March 13, 2014, having returned from his place of work, where he worked as a welder, he got a telephone call at 7.30 pm from his girlfriend Jackline who was giving birth. He proceeded to Sky High Hospital. On his way he saw the complainant who told him that she had gone to fetch water. He proceeded to hospital and had Jackline transferred to Mbagathi Hospital. He returned home at 9.00 pm. That at 9.45 pm PW2, his sister took to him food and inquired if he had seen PW1 and he confirmed that he had seen her along the road.
21. That the following morning PW5 gave him some work at Karen. On March 19, 2014, he went to work with PW5, on reaching the Police Post, he caused the police to arrest him but was not told the reason of arrest. He was subsequently taken to Muthangari Police Station. On March 20, 2014, he was taken for medical examination with the complainant. He denied the charges.
22. The trial court analyzed evidence adduced and reached the finding that the age of the complainant was proved to be eight (8) years old; medical evidence adduced corroborated the complainants evidence as to the fact of penetration, and, that the appellant was identified as the perpetrator, hence the conviction.



23. This being a first appellate court I must examine and analyze evidence adduced at trial afresh and reach independent conclusions bearing in mind that I had no opportunity of seeing and hearing witnesses who testified. This duty of the court on a first appeal was stated by the court in the case of *Gabriel Kamau Njoroge v Republic* (1987) eKLR thus:

“It is the duty of the first appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this.”

24. Section 8(1) of the *Sexual Offences Act* provides that:

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

25. Clearly, the law provides ingredients to be proved by the prosecution beyond reasonable doubt which are:

- i. Age of the victim
- ii. The act of penetration; and,
- iii. Positive identification of the perpetrator

Age as an element of charge of defilement ought to be proved by medical evidence, birth certificate, baptism card and other cogent evidence as the victim’s parents/guardian and by common observation or sense (See *Joseph Kieti Seet v Republic* (2014) eKLR; *Kaigu Elias Kasomo v Republic* , Criminal Appeal No 504 of 2010, and *Fappyton Mutuku Ngui v Republic*, HC Machakos Cr Appeal No 296 of 2010).

26. PW2 the mother of the complainant could not recall her date of birth but estimated her age as ten(10) years. PW5, her father stated that she was born on September 17, 2005. He availed in evidence a copy of the immunization card issued to the complainant which had a date of birth, September 17, 2005. The medical doctor who examined the complainant estimated her age to be 8 years. An age assessment was done at Mbagathi Hospital and it was established that the complainant was below eighteen (18) years.

27. The parents of the minor are better placed to prove the age of the child. Evidence of the child Health Immunization Card is sufficient proof of the age of the child. Therefore in the instant case, the complainant was a minor, of an apparent age of nine (9) years.

28. On the question of the element of penetration; the term penetration is defined by section 2 of the *Sexual Offences Act* (SOA) thus:

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

29. This is a case where the complainant testified that vaginal penetration did occur. Looking at the definition, slight penetration is sufficient. PW1, the complainant narrated how the assailant removed his thing for urinating that he inserted into her thing for urinating. A penis, human anatomy is a conduit through which urine leaves the body while the part of the body through which the female urinate is the vagina. Therefore, the complainant testified how the appellant inserted his genital organ into hers, an act that resulted into her bleeding from the genital organs.



30. PW2 examined her private parts upon arrival at home and found traces of blood. A subsequent examination done at Nairobi Women Hospital established a freshly perforated and broken hymen. It was concluded that the child had been sexually assaulted.
31. This evidence is denied by the appellant who submits that there was indeed interference with the complainant's vagina therefore penetration was proved.
32. On the element of positive identification of the perpetrator, the appellant denies being responsible for the act based on evidence that the child had an infection. The appellant argues that the complainant had a sexually transmitted infection that he did not have on examination.
33. Evidence adduced indicated that upon laboratory tests being done, the complainant had an infection on the urinary tract and a high vaginal swab being done, there was a presence of pus cells which indicated some infection. HIV, Syphilis and Hepatitis B were negative. On cross-examination the clinician stated that there was bacterial infection that brought about pus cells in the urine.
34. As correctly argued by the appellant, the complainant could have had the Urinary Transmitted Infection (UTI) even before the Act. UTI is commonly caused by bacteria. This cannot be said to be a Sexually Transmitted Infection (STI). Therefore, bacteria that cause UTI is not passed from one person to another during sex. In that regard the UTI could not have been passed to the complainant by the perpetrator.
35. The appellant was well known to the complainant and he even alleged that he was her maternal uncle. In his defence the appellant admitted having encountered the complainant and talked to her on the fateful night, soon after 7.30 pm. There was no allegation of an existing grudge between him and his alleged sister's family that could make them come up with such a serious allegation.
36. Looking at evidence in totality, there was no eye-witness to the act. Section 124 of the [Evidence Act](#) provides thus:

Notwithstanding the provisions of section 19 of the [Oaths and Statutory Declarations Act](#) (cap 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

37. Although the trial court did not interrogate this particular fact so as to reach a finding on the credibility of the complainant. As correctly submitted by the prosecution counsel, the minor complainant gave a clear account of how the appellant violated her sexually. In narrating the events to her parents and subsequently the investigation officer, she was consistent. This was a truthful witness. Therefore, I am satisfied that the appellant herein was the perpetrator.
38. On the sentence imposed of life imprisonment, that is what is provided by section 8 (2) of the [Sexual Offences Act](#). Following the decision of [Francis Karioko Muruatetu & another v Republic](#) (2017) eKLR where the Supreme Court set aside mandatory sentence for being unconstitutional; courts have followed the jurisprudence in meting out sentences although there was clarification in [Muruatetu v](#)



Republic (2021)eKLR where the Supreme Court clarified that the decision was meant to apply to murder cases.

39. This case was decided in 2018 when the court was expected to exercise discretion per the jurisprudence but it did not.

40. In the case of Joshua Gichuki Mwangi v Republic, (2015) eKLR, the Court of Appeal stated that:

This being a judicial function, it is impermissible for the Legislature to eliminate judicial discretion and seek to compel judges to mete out sentences that in some instances may be grossly disproportionate to what would otherwise be an appropriate sentence. This goes against the independence of the Judiciary as enshrined in article 160 of the Constitution. Further, the Judiciary has a mandate under article 159(2) (a) and (e) of the Constitution to exercise judicial authority in a manner that justice shall be done to all and to protect the purpose and principles of the Constitution. This includes the provision of article 25 which provides that the right to a fair trial is among the bill of rights that shall not be limited. This was well articulated by this court in Dismas Wafula Kilwake v Republic (2019) eKLR as follows;

“Being so persuaded, we hold that the provisions of section 8 of the sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.”

In the end, courts have a duty to dispense justice not only to the complainants but also to accused persons.

41. This is decision that is binding on this court. The appellant herein was 19 years old, a young man who was still growing. He had just attained the age of majority. Taking into consideration the principle of sentencing guidelines which enjoins courts to endeavor to achieve reformative objectives of sentencing, the sentence meted out is punitive, harsh and excessive. The appellant should be granted a chance of being able to return to the society one day.

42. In the premises, I confirm the conviction, but, set aside the sentence meted out of life imprisonment; which I substitute with a sentence of twenty (20) years imprisonment that will be effective from the date of arrest, the March 19, 2014.

43. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY
THROUGH MICROSOFT TEAMS AT NAIROBI,
THIS 28TH DAY OF FEBRUARY, 2023.**

L. N. MUTENDE



JUDGE

IN THE PRESENCE OF:

Appellant

Mr. Mutuma for DPP

Court Assistant - Evance

