



**Boyere v Republic (Criminal Appeal 62 of 2019)
[2023] KEHC 2545 (KLR) (Crim) (27 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2545 (KLR)

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

CRIMINAL

CRIMINAL APPEAL 62 OF 2019

DO OGEMBO, J

MARCH 27, 2023

BETWEEN

MANOAH ABISA BOYERE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence arising from Criminal Case No. 66 of 2017 in the principal Magistrate's Court at Kibera, by Hon. Juma, SPM, dated 20.12.2018)

JUDGMENT

1. The appellant MANOAH ABISA BOYERE, was charged with 1 Count of Defilement contrary to section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, No. 3 of 2006. That on 6-7-2017 at about 19:00hours in Langata within Nairobi County, he intentionally and unlawfully caused his male genital organ (penis) to penetrate the female genital organ (vagina) of CA, a child aged 10 years.
2. He faced an alternative charge of committing an indecent act with a girl contrary to section 11(1) of the *sexual Offences Act*, No. 3 of 2006. That on 16.7.2017 at about 19:00hours in Langata within Nairobi County, he intentionally and unlawfully caused his genital organ (penis) to come into contact with the female genital organ (Vagina) of CA, a girl aged 10 years.
3. After a full hearing, the appellant on 20.12.2018, convicted on the main count and sentenced to serve life imprisonment. Aggrieved, the appellant filed an appeal before this court on 15.3.2019. In the original memorandum and grounds of appeal filed, the appellant listed upto 5 grounds as follows:-
 1. That the learned trial magistrate erred in matters of law and fact in failing to find that the main charge is not supported by evidence as the penile penetration of the complainants' genitalia was not proved.



2. That the learned trial magistrate erred in both law and fact by failing to find that the alternative charge is also not supported by evidence.
 3. That the learned trial magistrate erred in both fact and law in failing to find the complainant never testified, creating a lacuna in the prosecution's case.
 4. That the learned trial magistrate made an erred in both law and fact in failing to appreciate that there were material self contradictions capable of unsettling the prosecution case and the verdict that was arrived at.
 5. That the learned trial magistrate erred in law fact for failing to find that there was a background of grudge, sufficient, by itself a motive for a framed case.
4. The appellant has pleaded that his appeal be allowed, convicted be quashed and that he be set at liberty. The Respondent, opposes this appeal and pleaded that the same be dismissed.
 5. This appeal was canvassed by way of written submissions. Both parties filed their set of submissions. In the submissions of the appellant, the appellant has filed a new set of grounds of appeal, which grounds are substantially different from the grounds originally filed. The appellant, did not however, obtain leave of the court prior to the filing of the new grounds of appeal. The new grounds now raised by the appellant are as follows:
 - a. That the learned trial magistrate erred in matters of law and in fact in failing to find that the elements of the offence of defilement were not proved beyond reasonable doubt as required by the law.
 - b. That the learned trial magistrate erred in both law and fact by conducting the voire dire examination in total violation of the law.
 - c. That the learned trial magistrate erred in law and fact in failing to find that crucial exhibits were not produced.
 - d. That the learned trial magistrate erred in fact and law when he failed to properly evaluate the evidence on record and relied on insufficient, uncorroborated and incredible evidence and came to the wrong decision that the appellant had defiled the 2 minors.
 - e. That the trial magistrate erred in law by failing to note that the burden and standard of proof by the prosecution was discharged and thus the prosecution case was not proved beyond reasonable doubt as provided for under the law.
 6. The appellant first submitted that for the prosecution to prove a case of defilement beyond reasonable doubt, the 3 elements of the offence must be proved i.e age of the victim, fact of penetration and lastly identification of the assailant. He relied on Charles Wamukoya Karani Versus Republic, Criminal Appeal No. 72 of 2013, where court held;

The critical ingredients forming the offence of defilement are, age of the complainant, proof of penetration and positive identification of the assailant.”
 7. He also relied on the Ugandan case of Sekitoliko Versus Uganda (1967)EA 53 in which it was held;-

“The prosecution has a duty to prove all the elements of the offence beyond reasonable doubt and that the conviction of the accused is depended upon the strength of the prosecution case and not the weakness of the defence.”



8. That the trial magistrate erred in making a finding that the findings on the medical examination report proved the offence and that there was penetration (page 51, lines 9-11). That in P.K.W Versus Republic the Court of Appeal (Maraga and Rawal (J.J.A) held;

They appear to have placed a high premium on the finding that the Childs hymen had been broken. Was thus justified? Is hymen only ruptured by sexual intercourse?

9. That the court went on to enumerate how the hymen would be broken in many other ways. And in his opinion, the inflammation of the mucus membrane is not caused by sexual intercourse. It is evident that the complainant may have got the same due to other predisposing factors which did not include sexual intercourse.

10. With regard to the conduct of *voire dire* by the court, the appellant submitted that same was not properly done. That the purpose of *voire dire* is to ensure that the child understands his duty to report accurately and the child's propensity of telling the truth, but that in this case, the child's only responded that it was wrong to tell lies and that if she did whipping would follow. He relied on the case of Joseph Opondo Versus republic Criminal Appeal No. 91 of 1999, in which the Court of Appeal, dealing with the issue, held;

There are 2 stages which must be followed and must appear on the record of the trial court. First, the examination must endeavor to ascertain whether the witness understands the meaning, nature and purpose of oath. The question or questions by the court must be directed to that. If the court from the answers it received from the witness is satisfied that the witness understands the meaning, nature and the purpose of the oath, the witness must then be allowed to give sworn evidence. Stage two of the matter does not then come into play. Where, however, the witness does not understand the meaning and purpose of an oath, stage two of the examination then follows. The witness is examined by the court to ascertain whether the witness is possessed of sufficient intelligence to justify reception of his or her evidence though not upon oath. The examination must equally appear on record. Simple elementary questions would normally be asked like date, the day, the school the witness is attending and other matters. If the court is satisfied from the answers to such questions that the witness is possessed of sufficient intelligence, the court will allow the witness to give unsworn evidence.”

11. The appellant, on the same issued based further submissions on John Muiruri Versus republic (1983)KLR, 447, Peter Kariga Kiume Versus republic, Criminal Appeal No. 77/1982 and the English case of Regina Versus Campell (no citation given). The court was urged to find that the learned trial magistrate did not satisfy the 2 stages as above.

12. It was further submitted that certain crucial exhibits were not produced including the blood stained panty (page 11, line 14). He relied on 2 cases. First, DPP Versus Marias Pakine Tenkewa Ha Naresho Bar and Restaurant (2017)eKLR, that failure to produce in court an exhibit is untenable in a criminal case. Second on Joseph Njaramba Karura Versus Republic (1982-88)KAR 1165 that;

Where there is no identification in court for a key exhibit, such as exhibit remained unidentified and that destroy the judgment.”

13. Lastly, the appellant submits that the trial court failed to interrogate his defence.



14. The Respondents filed their submissions on 1.3.2022. It was therein submitted that the prosecution duly proved the 3 ingredients of the offence of defilement i.e proof of penetration, age of the victim, and the positive identification of the assailant.
15. Counsel submitted that section 2(1) of the Act, defines penetration as;-

Penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person,

And

genital organs includes the whole or part of male or female genital organs and for purposes of this Act, includes the anus.”
16. That in the case of John Onzere Kambi Versus Republic (2013)eKLR, the court held:

I find that there was at least partial penetration of the complainant’s anal orifice. The said penetration was by way of the appellant’s penis. Therefore, I find that the ingredients of the offence of defilement were proved beyond any reasonable doubt.”
17. The evidence of PW3 and PW1 was relied on. Also evidence of PW2 and PW7. And relying on Kaingu Elias Kasomo Versus Republic, Malindi Criminal Case No. 504 of 2014, exhibit 3, showing that the complainant was born on 13.12.2006 was relied on to prove the age of the complainant as a minor.
18. On identification of the assailant, the Respondent relied on the celebrated case of Regina Versus Turnbull (1976)3 WLR 445 on the circumstances to be considered for positive identification of the assailant. That the complainant knew the appellant wellbeing neighbours.
19. That the appellant did not challenge the prosecution evidence in his defence which only dwelt on how he was arrested. Relying on the case of Republic Versus Stephen Mweizela Mutuku & 2 others (2020)eKLR.

The court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”
20. The court was urged to dismiss this appeal.
21. From the record of proceedings of the lower court, the case of the prosecution commenced with the evidence of PW1 CAO, a resident of Raila Slum in Otiende. Her evidence was that CA is her grandchild staying with her. That on 16.7.2017, the child went to church with their neighbor and came back at 4:00pm. That she then left for a chama, leaving the complainant behind, but on coming back at around 7:00pm, did not find the complainant. That later in the house, the complainant washed her clothes. That the following morning, she saw the complainant crying of pain when passing urine. Her body had fever. When she asked her what the problem was, complainant told her, “manu alinidinya” i.e that Manu had sex with her. She noticed that the complainant’s genital was wet and swollen and with whitish discharge. The child told her she feared telling her. The witness went on to tell neighbours and members of the public who accosted the appellant and took him to the village elder and later to the police.
22. That the child was taken to hospital and pre form filled for her (MFI-1). A P3 form was also filled for her (MFI-2). The witness confirmed that the appellant was equally examined. Further, that the complainant had washed her underpants which was blood stained. That the child had gone to the house of the appellant to watch TV.



23. PW2 Pacific Awuor Oriaro, a registered nurse at Kibera spelt Health Centre examined the complainant on 17.7.2017 (Sic 17.17.2017). She noted that her lips were dry and she had a cut on the left side. She was bleeding from the vagina, which was red. She duly filed the post rape care form (Exh.1). that complainant told he she had been defiled by “Manu”, nickname of the perpetrator that she knew well.
24. The 3rd witness was the complainant CAO. Before her evidence was taken, the court subjected her to vior dire examination. The court then noted that “the child is intelligent enough. She is able to understand questions put to her and she is able to give credible evidence.” The witness proceeded to give evidence on oath that she was in class 4. That on 16.7.2017, she had gone to church and was back home at about 8:00pm. That after PW1 left for a chama meeting, she went to the house of the appellatant, Manoah, to watch TV. That the appellatant took her to his bed and undressed her. The appellatant also removed his clothes and both were naked. He then lay on her and defiled her on the mattress. Lights were on.
25. That the following morning, she felt heaviness on the chest. She also had fever and felt pain while passing urine. That is when she told PW1 that appellatant had had sex with her the previous night. PW1 proceeded to examine her swollen genitals. She was then taken to Hospital and to the police station. The child produced her clinic card showing she was born on 13.2.2006 (MFI 1-3). She knows the appellatant well as a neighbours in whose house she used to go to watch TV.
26. On cross-examination, the witness went on that the appellatant had covered her mouth to prevent her from screaming.
27. And PW4, Racheal Khakasa, a Community elder recalled that on 17.7.2017 at about 7:00AM, PW1 went to her house and reported to her that PW3, was shaking with fear. They are neighbours. The witness went on to examine the child. She noticed that her vagina was swollen. And that she walked with difficulty. They proceeded to report to the village elder. That on going back, a crowd gathered and wanted to lynch the appellatant, and they had to hide him. The police then came and collected the appellatant.
28. Mathias Lubence Mutsalali, the Assistant to the Chief was PW5. He recalled that on 17.7.2017 at about 7:30Am, PW1 and PW4 approached him at his office and reported to him that PW3 had been defiled. He proceeded to arrest the appellatant from his house while protecting him from the charged crowd. He eventually took him to the Langata police station. And Henry Imbwagi Savaji, PW6 a clinical officer recalled that on 17.7.2017 at about 8:00Am, he was also part of the team who arrested the appellatant.
29. Dr. Joseph Maundu was PW7. He examined PW3 on 19.7.2017 and filed in her P3 form. He noted that she had a linear bruise to the left abdominal wall with an inflamed genitalia. Her hymen was not intact. She also had a slight tear on the linear part of the vagina wall and a small tear on the lower part of the vagina wall. He produced the P3 form (Exh. 2).
30. PW8 Henry Kiptoo Sang, a Government Chemist, examined the swabs presented. No semen were detected in swabs. And lastly, PW10 Noolen Chebet, was the investigating officer. He re-arrested the appellatant from the members of the public and took the statements of the witnesses.
31. When the appellatant was put to his own defence, he gave an unsworn evidence. He testified that on 17.7.2017 he had been in his house when he heard a knock and on opening found a stranger who walked him away. That he was assaulted and placed in a room. The police later came for him and took him to the police station before he was charged the following day. He called no witness.



32. This basically was the evidence before the trial court. The appellant faced a charge of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act, No. 3 of 2006. Section 8(1) of the Act, defines defilement as

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

33. At the same time, section 2 of the Act defines

penetration as Penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

34. The Sexual Offences Act, further defines a “child” as having the meaning assigned thereto in the children Act, No. 8 of 2001. And section 2 of the Children Act defines a child, thus

Child means any human being under the age of 18 years.”

35. This being a case of defilement, it is important to consider what would constitute defilement. The court of Appeal in Charles Wamukoya Karani Versus republic, Criminal Appeal, No. 72 of 2013, ruled on the same, that;

The critical ingredients forming the offence of defilement are age of the complainant, proof of penetration and positive identification of the assailant.”

36. In the case, there is no dispute on the fact that the complainant herein, PW3, was a minor at the time this offence was committed. Her evidence and the evidence of her grandmother, PW1, was that she was born on 13.2.2006 and so was 10 years at the time of this offence. Her birth clinic card confirming the date of birth was produced as an exhibit. (Exh.1).

37. The second issue therefore is whether the prosecution proved the element of penetration. The complainant herself (PW3) gave evidence of how while in the house of the appellant, the appellant pulled her to his bed i.e mattress, undressed her before undressing himself. that he then lay on her and defile her. That she felt pain, but could not scream as the appellant covered her mouth. The witness went further on how the following morning she had chest pains and fever. She also had pains on urinating. Both her grandmother, PW3 and their neighbor, PW4, Rachael Khakasa corroborated her evidence. These 2 witnesses examined the private parts of the child and noted that her vagina was swollen and she had difficulty walking. There was further evidence in the form of the medical examination reports produced by both PW2 Pacific Awuor Oriaro and PW7, Dr. Joseph Maundu. The post rape noted that on examination, the child had bleeding from the vagina among other injuries. And PW7 noted on examination, the child had a linear bruise to the left abdomen wall, inflamed genitalia, broken hymen and a tear on the vaginal wall.

38. In view of the evidence of these witnesses, PW1, 2, 3, 4 and 7 this court is convinced that the element of penetration was similarly proved by the prosecution. And the evidence points only to penal penetration.

39. The last ingredient that the prosecution were under a duty to prove was the identity of the assailant. On this, both sides were agreed that the complainant and the appellant were neighbours living in the same plot. There is therefore no doubt that the complainant knows the appellant well. The incident was inside the house of the appellant. She had been watching TV and the lights were on. Applying the standards set out in Republic Turnbull (1976)3WLR 445, the circumstances were clearly favourable



for positive identification. This court is accordingly convinced and persuaded that the complainant indeed identified the appellant as the assailant and one who defiled her.

40. I have otherwise considered the defence of the appellant during trial. In the said defence, the appellant gave evidence only on how he was arrested from his house to later be charged in court. He had absolutely on defence to the evidence levelled against him by the prosecution witnesses. I do not find any merit in the defence of the appellant.
41. The appellant has raised a number of issues in his submissions in court. First was that the *voire dire* examination done for PW3 was improper. I have perused the *voire dire* proceedings conducted on 7.11.2017. In the same trial magistrate asked the witness straight forward questions to test her intelligence, including whether or not she goes to church, and which between being truthful or telling lies is good. The court then made a finding that she was intelligent enough to give sworn evidence.
42. It is worth noting that at the time of testifying, the child was 12 years old. Section 2 of the *Children Act*, defines a child of tender years, thus;
- child of tender years means a child under the age of 10 years.”
43. PW3 was at 12 years, not a child of tender years. And in my view, putting PW3 to testify on oath even accorded the appellant the opportunity to cross examine the witness like any adult witness, which he did. I therefore I do not see or find any prejudice that this exposed the appellant to. The decision of the trial magistrate in fact resonates with the directions of the Court of Appeal in the case cited by the appellant, Joseph Opondo Versus Republic, Criminal Appeal, No. 91 of 1999, as seen above.
44. As to the issue raised on inconsistencies in the case of the prosecution, with respect, the appellant never pointed out any material inconsistencies that can affect the case of the prosecution. The decision in the Tanzanian case of Dickson Ella Nsamba Shapwata & Another Versus republic, Criminal Appeal No. 92 of 2007 (COA), cited by the respondent puts it aptly. That,
- In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”
45. In this case, I do not see any such material inconsistency or contradictions in the case of the state. This ground therefore fails.
46. The appellant has also raised the issue that certain exhibits were not produced in court. A case was cited of a blood stained panty. I do not find anywhere in the proceedings where the prosecution showed any intention to have the said panty produced as exhibit. It was never even identified or marked for identification. To me, failure to produce the same as exhibit would not make the well corroborated and strong case of the prosecution fail.
47. Section 8(2) of the *Sexual Offences Act*, states;-
- A person who commits an offence of defilement with a child aged 11 years or less shall upon conviction be sentenced to imprisonment for life.”
48. The appellant herein was sentenced to life imprisonment. This sentence is both legal and proper.
49. I do not therefore find any merit in the appeal of the appellant filed herein on 15.3.2019. I dismiss the same wholly. Orders accordingly.



HON. D. O. OGEMBO

JUDGE

27TH MARCH, 2023

COURT:

Judgment read out in court (on-line) in presence of the appellant (kamiti), and Ms. Chege for the Respondent.

HON. D. O. OGEMBO

JUDGE

27TH MARCH, 2023.

