



**Kinanga v Republic (Criminal Appeal 245 of 2019)  
[2023] KEHC 2858 (KLR) (Crim) (27 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2858 (KLR)

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

**CRIMINAL  
CRIMINAL APPEAL 245 OF 2019**

**DO OGEMBO, J  
MARCH 27, 2023**

**BETWEEN**

**DOUGLAS MOMMANYI KINANGA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence arising from Criminal Case No. 5807 of 2014 in the Chief Magistrate's court at Makadarai, Hon. A. R. Kithinji, SPM and Judgment and sentence delivered on 20.11.2019)*

**JUDGMENT**

1. The appellant herein, Douglas Momanyi Kinanga, was charged before the lower court with the offence of Defilement contrary to section 8(1) as read with Section 8(4) of the *Sexual Offences Act*, no 3 of 2016. That on 10.12.2014 in Njiru Sub-County within Nairobi County, he intentionally caused his penis to penetrate the vagina of EN , a child aged 16 years.
2. He faced an alternative charge of committing an indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act*, no 3 of 2006. That on 10.12.2014, in Njiru sub-county, within Nairobi county, he intentionally touched the vagina of EN , a child aged 16 years with his penis.
3. The appellant was convicted of the main count and sentenced to serve 15 years imprisonment. This was on 20.11.2019. He has now appealed against the said conviction and sentence. The petition of appeal filed by the appellant on 3.12.2019 lists the following grounds of appeal:-
  1. That the learned trial magistrate erred in law and fact failing to appreciate and establish that the cardinal ingredients of the offence of defilement were not proved beyond reasonable doubt as it is required under the law.



2. That the learned trial magistrate erred in law and fact when he convicted the appellant on the basis of contradictory, unsatisfactory and inconsistent evidence which undermine conviction.
  3. That the learned trial magistrate erred in law and fact in rejecting the appellant's plausible defence without giving any cogent reason as required by section 169© of the Criminal Procedure Code.
  4. That the learned trial magistrate erred in law and fact by convicting the appellant when there was no evidence to link the appellant to the offence.
  5. That the learned trial magistrate erred in law and fact when he applied and relied on inconsistent evidence to arrive at his decision in convicting the appellant.
  6. That the learned trial magistrate erred in law and fact by entirely casting as persons on the appellant defence thus shifting legal and evidential burden of proof to the appellant which is contrary to the established fundamentals of criminal justice.
  7. That the learned trial magistrate erred in law and fact by failing to warn himself on the special need for caution before convicting the appellant in reliance on the correctness of the identification.
4. The appellant has pleaded that his appeal be allowed, his conviction be quashed and the sentence be set aside and that he be set at liberty. The Respondent, on the other hand, opposes this appeal and urges that the same be dismissed.
  5. This appeal was canvassed by way of written submissions. It was submitted that neither the facts of age of the complainant nor penetration were properly proved. He also challenged the veracity of the P3 form which showed no sexual assault. Also that the post rape care form was not properly procedure in evidence. On alleged inconsistencies, the appellant submitted that the charge sheet was not properly framed as the appellant was not charged as alias Mogaka. Also that the initial report was of sexual assault and not defilement. That no document was produced to prove age of the complainant. Further, that complainant confirmed in evidence that she met the appellant on her own volition. And on the medical findings, it was submitted that none was noted. Even the identity of the appellant as the perpetrator was challenged in as far as the complainant referred to an alias and also why he was himself not examined. And while challenging the truthfulness of the complainant, the appellant also submitted that crucial witnesses were never called to testify. And finally, that the court did not give any regard to the defence of the appellant.
  6. On the issue of sentence, the appellant offered his mitigation and noted that the mitigating functus outweigh the aggravating factors herein. And that the period he spent in custody was not considered in the sentence in accordance with section 333(2) of the Criminal Procedure Code.
  7. From the Respondents' side, it was submitted that the charge of defilement was proved against the appellant beyond any reasonable doubt. While referring to section 8(1) of the Sexual Offences Act, it was submitted that the ingredients of the offence which ought to be proved are;-Proof of penetrationAge of the victimPositive identification of the assailant.
  8. That section 2(1) of the Sexual Offences Act, gives the definition of penetration. And the evidence of PW1 confirmed the act of penetration. And the same was corroborated by PW3 and PW4 who examined the complainant.
  9. On the second issue of age, it was submitted that the P3 form (Exh. 2) confirmed the age of the victim as 16 years at the time of the incident.



10. On identification, counsel submitted that the appellant was well known to the complainant whom she referred to as Mogaka whom she had previously seen at her aunt's home. Counsel maintained that the prosecution duly proved the elements of the offence and that the prosecution's case had no inconsistencies or contradictions. And that under section 143 of the *Evidence Act*, the prosecution can call any number of witnesses to prove its case. Counsel also supported the sentence imposed. It was urged that this appeal be dismissed.
11. I have considered the submissions of the 2 sides. This being a first appeal, this court is enjoined to independently re-evaluate the evidence on record before the trial court and to come to its own conclusions (see *Okeno v Republic* (1972) EA). It is therefore mandatory that this court look at such evidence in totality before arriving at a determination of this appeal.
12. The evidence of the prosecution commenced with the testimony of EN, PW1, Form III student, that she was born on 21.3.1998. That she knows appellant well as Mogaka. That she met him at her aunt's home. That on 10.12.2014, the appellant entered the compound, held her and pushed her into the store. Her aunty was away. That when she tried to scream, the appellant closed her mouth. He proceeded to remove all her clothes before he removed his own. He then inserted his penis in her vagina and raped her for about 20 minutes. He then ran away with her. She proceeded to inform a neighbor, Mama Wambui who took her to the police station and thereafter to hospital. That the appellant was arrested on the same day on the road after she identified him.
13. RW was PW2. Her evidence was that on 10.12.2014. She had been away in the market when the police officer summoned her. On reaching the police station. She found both her niece PW1 and the appellant. She learnt that the appellant had defiled PW1. She confirmed that the appellant is known to her. And Maureen Akanga, PW3, a clinical officer, confirmed that her colleague Consolata Omukura had examined the complainant, born on 5.11.1998, on 10.12.2014. That on examination, she had discharge from her genitalia, no bruises were seen, and her hymen was with fresh tears. This witness from the record, was not cross-examined.
14. Dr. Kisi Shako, was PW4. His evidence was that she examined the complainant on 10.8.2011, a month after the incident. He noted that her genitalia was normal. She had old tears of the hymen. He filed in the PW3 form which he produced as exhibit (Exh-2). And APC George Maina of Sewage AP post, was PW5. His testimony was that on 11.12.2014, PW1 reported to him that she had been raped by a man who also stole her phone. That while going to the scene, PW1 saw the appellant on the road and pointed him out as the man who had raped her. He was about 10 meters away. The witness proceeded to arrest the appellant. The phone was not recovered from the appellant. That the incident was in fact on 10.12.2014.
15. Lastly, was PW6, the investigating officer, PC Okach Maureen. She took witness statements and later had the appellant charged in court.
16. The appellant gave a sworn evidence in defence. He testified that on 10.12.2014, as a herdsman, he had been looking for goats when a police officer suddenly held him and took him to Ruai, police station. That the police asked him for ksh 100,000/= to finish the case. He denied knowing the complainant, but that she used to know PW2. He called no witness. And that the police demanded ksh 100,000/= from him. This was a claim the appellant made only at the defence stages, and which he never raised with the arresting officer nor the investigating officer (PW5, 6), when the 2 witnesses testified in court. And while the appellant denied knowing PW1, he confessed knowing her aunty (PW2). This is the same aunt that the complainant was staying with. With respect, the defence of the appellant, is a mere denial and I do not find any merit in the same I dismiss it.



17. I have noted that PW3 was able to declare to both her neighbor, her aunty, and the police officers, that it was the appellant who had defiled her. She is the one who pointed out the appellant to the police leading to his arrest. In my view, these circumstances were favourable for positive identification of the appellant by PW1 which she properly did. I accordingly therefore find that element of identification of the assailant was also proved by the prosecution.
18. In the defence of the appellant, he testified as to how he was suddenly arrested by the police as he went about his work.
19. This basically is the evidence on record. It is important to discern the statutory provisions regarding the offence the appellant faced. Section 8(1) of the *Sexual Offences Act*, provides:-
- “ A person who commits an act which causes penetration with a child is guilty of a offence termed defilement.”
20. At section 8(4) of the same Act:
- “ A person who commits an offence of defilement with a child between the age of 16 and 18 years i.e liable upon conviction to imprisonment for a term of not less than 15 years.
- Penetration as a legal terms, is defined at Section 2 of the Act, as,
- “ Penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person.”
21. Section 8(1) of the *Sexual Offences Act* and indeed decision of the court (see *Pandya v Republic* (1957)EA 336, *George Opondo Olunga v republic* (2016)eKLR). Clearly stipulate on the ingredients of the offence of defilements as:-
- i. Age of the victims.
  - ii. Proof of penetration.
  - iii. Identification of the perpetrator.
22. In our instant case, it was the evidence of PW1 that she was born on 21.3.1998 and that as at the time of giving evidence, she was in Form III. The P3 form produced by PW4, Dr. Kisi Shako (Exh. 2) put the age of the complainant at 16 years. it is the same evidence that the aunt of the complainant (PW2) gave. PW3, the clinical officer, also put the age of the complainant at 16 years, having been born on 21.3.1998 with the evidence of these witnesses, I am convinced that indeed, the complainant was a minor aged 16 years at the time of this incident. The first element of the offence i.e age of the victim, was therefore, accordingly proved by the prosecution.
23. The 2<sup>nd</sup> elements on whether the prosecution proved penetration. On this issue, it is noted that there was no eye witness to this act and the prosecution’s case was based on the evidence of PW1. This is in no way strange in view of the fact that offences such as this one are ordinarily committed away from public glare. PW1, gave a detailed and graphic account on how the appellant appeared in their compound, pulled her into the store, undressed her, before undressing himself. that he then forcefully had sexual intercourse with her for about 20 minutes. It is also noteworthy that immediately the appellant abandoned PW1, she proceeding to tell at least 1 neighbour who proceeded to take her to the police station. She was then taken to hospital for examination and treatment. PW1 also disclosed what the appellant did to her aunt (PW2) when her aunt followed her up at the police station.



And her evidence was corroborated by that of PW3, the clinical officer, whose evidence was that on examination, she had discharges from her genitalia and her hymen was freshly torn. The evidence of PW1 was consistent and remained unshaken even in the face of the cross-examination. And with the corroboration in the form of the medical findings as confirmed by PW3, this court is convinced that the element of penetration was similarly proved by the prosecution.

24. Lastly, on the issue of identification of the assailant, the evidence of PW1 is again very material. That she knows the appellant whom she called out as Mogaka, having seen him before with her aunt at their home. That this incident occurred during broad daylight. That she reported the incident to the police the same day leading to the arrest of the appellant on the same day. She was never cross-examined by defence. The record of proceedings show that after PW3 had fully given evidence and produced the medical record, the defence counsel stated that the defence would not cross-examine the witness as she was not the maker of the document. This objection seems to have come late as same was made after the witness had already summed up her evidence and produced the exhibit. Had the defence intended to raise the objection, they ought to have raised the same before the witness could produce the exhibit. As it were, the exhibit produced by the court was not objected to similarly, it was not expunged from the record. In the circumstances, I am persuaded that the evidence of this witness is properly on record and that the defence had no issues to raise with this witness.
25. The appellant, when put to his own defence, gave a sworn testimony. He testified that she is a hearsman and was arrested on 10.12.2014 while looking after goats. That on being taken to Ruai police station, the police asked for ksh 100,000/= from him to conclude the matter which he did not have. He maintained that he does not know the child's aunt (PW2). He called no witness.
26. I have considered the defence of the appellant. Whereas, the appellant testifies that the police had him charged in court only after failing to give out ksh 100,000/=, it is worth noting that both the arresting officer (PW5) and the investigating officer (PW6) gave evidence herein. The appellant never raised this issue with either of them during cross examination, leaving his evidence as mere afterthought. And the testimony that the appellant does not know PW2 is a mere denial in view of the corroborated evidence of both PW1 and PW2, that they both know the appellant and that the appellant had previously been at the home of PW2 where PW1 also saw him. I therefore do not find any merit in the defence of the appellant. I dismiss the same.
27. The upshot is that I reach the same conclusion as that of the trial court, that based on the standards set out both in the cases of *Woolmington v DPP* (1935) AHER, and *Miller v Minister of Pensions* (1947) ZAHHER 372, that the prosecution herein proved the case against the appellant beyond any reasonable doubt as required by the law.
28. As regards the issue of sentence, as already observed above, section 8(4) of the Act provides for a sentence of not less than 15 years imprisonment. The appellant was accordingly sentenced to served 15 years imprisonment. This sentence is both legal and proper and I have no reason whatsoever to interfere with the same.
29. The record otherwise shows that the appellant was released on bond on 17.12.2014 barely 2 days after being arraigned in court. The plea of the appellant for account of the period spent in custody in the sentence under section 333(2) of the *Criminal Procedure Code* is therefore misplaced and is dismissed.
30. The sum total is that this appeal of the appellant filed herein on 3.12.2019, totally lacks in merit. The same is dismissed wholly.

It is so ordered.

**D. O. OGEMBO**



**JUDGE**

**27<sup>TH</sup> MARCH, 2023**

**Court:**

Judgment read out in open court (on line) in presence of the appellant (Machakos Prison) and Ms. Chege for the state.

**D. O. OGEMBO**

**JUDGE**

**27<sup>TH</sup> MARCH, 2023**

