



REPUBLIC OF KENYA



KENYA LAW
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**Wanjiku v Republic (Criminal Appeal 41 of 2019)
[2023] KEHC 3597 (KLR) (25 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3597 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL APPEAL 41 OF 2019**

**FR OLEL, J
APRIL 25, 2023**

BETWEEN

JOHN KANJA WANJIKU APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal arising from the judgement of M.Kivuti (MS) SRM delivered
in Baricho SPM S.O Case No.49 of 2018 dated 9th July 2019)*

JUDGMENT

1. The Appellant herein John Kanja Wanjiku was charged with the offence of defilement of a girl contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offence Act*. The particulars were that on diverse dates between the month of April 2018 and August 2018 in Kirinyaga west Sub County within Kirinyaga County, he intentionally and unlawfully caused his penis to penetrate the vagina of PWC a child aged 11years.
2. The appellant was also charge in the alternative with the offence of committing an indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars were that on diverse dates between the month of April 2018 and August 2018 in Kirinyaga west Sub County within Kirinyaga County, he intentionally and unlawfully rubbed his penis against the vagina of PWC a child aged 11years.
3. At trial the prosecution called five (5) witnesses to testify as against the appellant. The appellant was put on his defence and opted to give unsworn evidence. Upon considering the evidence tendered the trial court did find the appellant guilty and sentenced to 30 years imprisonment.
4. The appellant being aggrieved by the said conviction and sentence did file this appeal vide his petition of appeal dated 19th July 2019 which raised several grounds of appeal namely that;



- a. The trial magistrate erred in law and in facts by failing to appreciate that the full ingredients of the offence was never proved.
- b. The trial magistrate erred in law and in fact by convicting me while relying on the evidence that was uncorroborated and in the absence of any tangible evidence that could link me the applicant directly to the evidence.
- c. That the trial magistrate erred in law and fact by failing to take into consideration that the evidence tendered was full of contradiction and inconsistencies.
- d. That the trial magistrate erred in law and facts by not considering that crucial witnesses were never called to testify.
- e. That the trial magistrate erred in law and fact by not considering that the evidence produced in court was insufficient to hold a conviction.
- f. That the trial magistrate erred in law and fact by arriving in judgement that is legally and procedurally defective in failing to appreciate that the prosecution did not prove the case beyond reasonable doubt.
- g. That the trial magistrate erred in law and facts by dismissing my defence

Evidence

5. PW1, PWC, underwent voire dire examination and was affirmed. She stated that she was a pupil in class 5 at [Particulars Withheld] Academy and she was born 12/12/2007. In April 2018 she was sent by her mother to their neighbour Mama Ciru to borrow a pan. She did not find Mama Ciru. On the way back, someone grabbed her by her waist area from the back and carried her to his house. He placed her on his bed and that is when she saw his face. The person was 'John' the accused.
6. The accused person was known to PW1 as a farm worker at their neighbour's home. The accused person removed his trouser and also removed PW1 pant and trouser and inserted his penis into her organ which she uses to pass urine. During the incident they were alone in the house and after he was done, she dressed up and went home. PW1 further stated the initially she did not tell her mother what transpired as she was afraid she would punish her, but felt pain in her private part at that time. On 2/6/2018 PW1 was taken to hospital due to pain in her private part and was given medication. She did not disclose to any person about the incident then.
7. In August 2018 during school holidays she was at their neighbour's home playing with her cousin PW. A lorry came to offload sand and out of curiosity, her sister N and cousin P went to see how the offloading of sand was being done. PW1 was left behind where she was initially seated. The appellants emerged from Mama Ciru farm and lifted PW1 on his shoulders. According to PW1 she had a stick which she used to hit the appellant, but he did not let go. He took her to his house and again defiled her. She heard Priscilla and N calling out for her. She dressed and left the accused house on being asked where she was she lied that he had gone to ask for water from Mama Ciru house.
8. Within the same month of August 2018, PW1 ran away from home as her father had threatened to beat her up for failing to do homework. She ran away to Mama Joe's coffee farm which was near the river. While at the farm she met the accused person, who started touching her private parts using her fingers. On the said date, the appellant did not defile her. In December 2018, PW1 finally gathered courage to open up and told her mother that the accused has been defiling her. The matter was reported at Baricho Police Station and she was treated at Baricho Health Centre. The accused was later arrested.



9. PW2 PWS also underwent voire dire examination and was affirmed. She stated that PW1, was her cousin and neighbour, while the accused was a person known to her, having seen him around their home area. She testified that there was a time she, PW1 and N were playing on a road near their home. The accused came over and lifted PW1 and carried her to his house. They followed them from a distance and on reaching the house, they peeped through a gap in the wall and saw the accused covered the complainant with a blanket, “they were doing bad manners”. They went home and she reported to (‘Shiku Mum’ PW1 mum) that John was doing bad manners on Shiku. She later met Shiku (PW1) along the road and she told her that she and John were doing bad manners. According to PW2, John’s house was made of timber and the said house was within their neighbour’s home. In cross examination she said she was telling the truth.
10. PW3 FNM, (PW1 mother) testified that her daughter PWC was born on 12/12/2007 and was 12 years old. In May 2018 she noticed that she was walking abnormally and when asked she said when passing urine, she would feel irritation. She showed her how to bath properly but the irritation persisted then decided to take her to hospital at Baricho Health Centre on 02/6/2018 where she was treated by the doctor. On 28/11/2018 PW1 decided to tell her a secret, but withheld her story-secret until they had come back from Nyahururu. PW3 testified that she came back from Nyahururu the following Monday, PW1 opened up and told her that John had been defiling her.
11. PW1 told her that where she had sent her to pick a pan from their neighbour Mama Ciru, the accused met her and defiled her. The second time the accused defiled her was while PW2 and N had gone to observe as sand was being offloaded from a lorry in the neighbourhood, the appellant took advantage of that opportunity and carried her to his house where he defiled her again and chased her out of his house. The final occasion was in August 2018, the day she ran away from home to avoid being punished by her dad, PW1 met the accused, who held her and put his fingers inside her private parts, but she managed to free herself and went home.
12. PW3 stated that the following day she interrogated PW1 again and she repeated what she had stated earlier the previous night about being defiled by the accused. The same day in the evening she sought clarification from PW1 and she maintained that same story. The following day she took her child to Baricho Health Centre for examination after which she reported to Baricho Police Station. The appellant was lured by PW1 father to their house where he was arrested. PW3 confirmed that the accused is a person well known to her. He was their neighbour and a casual worker within the village. He lived alone in a timber house.
13. PW4 John Ngatia Githaiga, a clinical officer at Baricho Health centre testified that on 5/12/2018 he examined PW1 who visited their facility. The history was that she had been defiled by her neighbour between April and August 2018 and the said acts were done within the appellant’s house on genital examination her hymen was broken but not freshly. She had bruises on her labia minora. On laboratory examination HIV was negative, while urinalysis showed plus cells. He made a diagnosis of defilement and produced the lab results and P3 forms.
14. PW5 PC Jackline Wambui testified that she was stationed at Baricho Police station and was the investigation officer. On 5/12/2018 the complainant and her mother made a report of defilement which occurred on diverse dates between April and August 2018. PW1 had been defiled by her neighbour John Kanja. She booked the report and took the complainant for examination at Baricho Health Centre. PW1 narrated to the officer what had transpired in the same manner she had narrated to her mother (PW3) on 3/12/2018. The mother recalled that in June 2018, the complainant had complained of pain and irritation on her private part and she had taken her to Baricho Health Centre for medication.



15. PW5 took the statements and visited the scene in Kiangiga village where she met the accused person and arrested him upon being identified by the complainant. The accused house was approximately 800m from the complainant parent house. It was a wooden House with iron sheet roof. She inspected the house and coffee plantation where the accused had indecently touched PW1. She also obtained PW1 birth certificate serial No 265xxx and produced it as Exhibit 3.
16. The accused was put on his defence. He stated that he was 22 years old (born on 2/1/1997) and was arrested as he was preparing to leave home to buy his mother medicine. The complainant father came and told him that he wanted to employ him to do some casual work. As they were walking outside the homestead, he found a police motor vehicle and was arrested. He stated that he had never even thought of defiling any child.
17. When the Appellant appeared before court on 19/1/2023, he stated that he would rely on his submission filed in court on 7/2/2023. This court did not find any written submissions on record. The deputy registrar kerugoya contacted the appellant to forward his submissions but non were availed. This court also during its virtual criminal session's requested Manyani prison officers to inform the appellant to avail his submissions but unfortunately he did not file the same. Be that as it may, the Appellant has a right to be heard as is enshrined under Article 50(1) of the *constitution* of Kenya 2010 and this court will analyse each ground of appeal independently and determine the same on merits.

Analysis and Determination

18. It is now well settled that a trial court has a duty to carefully examine and analyse all the evidence adduced a fresh to enable it come up with its own conclusion, while at the same time noting that it did not have the advantage of seeing the witnesses and observing their demeanour. See *Okeno v Republic* (1972) EA 32 and *Pandya v Republic* (1975) EA 366.
19. Further being the first appellant court, it must itself also weigh conflicting evidence and allow its own conclusion. In *Shantilal M. Ruwala v Republic* (1975) EA 57, it was held that;

“It is not the function of the first appellant court to merely scrutinize the evidence to see if there was some evidence to support the lower court findings and conclusion. The court must make its own findings and draw its own conclusion only then can it decide whether the magistrate’s finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.
20. Upon consideration of the facts of this case, the grounds of Appeal and the submissions made by the parties, the following issues are pertinent for consideration:
 - a. Whether the offence of defilement was proven to the required standard thereby warranting a conviction.(Grounds 1, 2, 5 & 6)
 - b. Whether the evidence tendered was full of contradiction and inconsistencies.(Ground 3)
 - c. Whether the trial magistrate erred by not considering that crucial witnesses were never called. (Ground 4)
 - d. Whether the trial magistrate erred in Dismissing the appellants defence,(Ground 7)Whether the offence of defilement was proven to the required standard thereby warranting a conviction.



21. It is trite that all criminal offences require proof beyond reasonable doubt. Lord Denning in *Miller v Ministry of Pensions* (1947) 2 All ER, 372 stated as follows;

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice.”

Section 8 of the *Sexual Offences Act* provides as follows:

- (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.

22. The ingredients for the offence of defilement can be summarized as follows;

- a. Age of the victim (must be a minor),
- b. Penetration and
- c. Proper identification of the perpetrator.

(see *Wamukoya Karani v Republic* Criminal Appeal No 72 of 2013 and *George Opondo Olunga v Republic* [2016] eKLR)

23. This court will look at each element exclusively starting with the first element which is age. The Court of Appeal in *Edwin Nyambogo Onsongo v Republic* (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

“... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim’s age, it has to be credible and reliable.” (emphasis added).

24. In this case, PW1 testified that she was 11 years old. She was born on 12.12.2007. PW3, who was PW1 mother also confirmed to court that the complainant was 12 years old, but as when the incident occurred she was 11 years. She also identified her Birth certificate as MFI 1. PW5, the investigating officer produced the birth certificate serial Number xxxx, which that indicated that the victim was born on 12.12.2007. The defilement occurred between April 2018 and August 2018. The complainant was then aged 11 years. The age of the minor was thus positively proved beyond and reasonable doubt.

25. The second element is penetration. Section 2 of the *Sexual Offences 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.”



26. Section 124 of the *Evidence Act*, Cap 80 provides as follows;

“Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declaration Act*, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other 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 offense, 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.”

27. The victim vividly testified how the Appellant, a person well known to her, grabbed her on two occasions and carried her to his house. She testified that

“The person who grabbed me carried to his house. He placed me on a bed and that’s when I saw his face. It was John, the accused. He was known to me as a farm worker at my neighbor’s home. He removed his pair of trousers. He removed mu pair of trousers and pant. He lay on me. He inserted his penis into my organ which I use to pass urine,. We were alone in the house. When he was done, I dressed up and went home.”

28. PW1 further testified that in August 2018, the appellant once again defiled her. She testified that;

“The accused emerged from Mama Ciru’s side of the farm. He lifted me and placed me on his shoulders. He carried me to his house, he removed my cloths and removed his, and he lay on me and inserted his penis into my vagina. I heard P and N call me. I dressed up and left the house of the accused. I lied to them that I had gone to ask for water from Mama Ciru.”

29. PW2 also testified that she knew the appellant and had seen him around their home area, while PW1 was her cousin. There was a time she was playing with PW1 and N on a road near their home. The accused came over and lifted PW1 and carried her to his house. They followed them form a distance and peeped through a gap on the wall. She testified that;

“I saw a bed, a mattress and a blanket. The accused had covered the complainant with a blanket. They did bad manners.”

30. In addition to the above testimony, in June 2018, PW1 developed an infection and was taken to hospital due to pain in her private parts. PW5 the clinical officer also confirmed that PW1 hymen had been broken, though not freshly so. She had bruises on her labia minora and formed the opinion that PW1 had been defiled. The question of penetration was therefore proven.

31. Thirdly is identification of the perpetrator. The Victim positively identified the Appellant as the perpetrator. She confirmed that he was a person well known to her, he was a farm hand at their neighbour’s home. This fact was not disputed by the appellant at any point during the trial. In her testimony PW1 positively identified him and stated as follows;

“He placed me on the bed and that’s when I saw his face. It was John the accused,”



PW3 also positively identified the appellant as a neighbour and was a person well known to her. Further she identified him as the person who defiled PW1 in August. She peeped through the wooden wall as saw the appellant cover PW1 with a blanket and did bad manners.

32. I therefore find that all the elements of the offence were proven contrary to the Appellant's contention that the evidence of PW1 was not corroborated or that there was no tangible evidence linking him directly to the defilement. As to the issue of a crucial witness not being called, the appellant did not identify which crucial witness was not called. The complainant, and other witnesses positively and conclusively proved that indeed the appellant defiled the complainant and therefor as therefor no need other witnesses to be brought for.

The Evidence tendered was full of contradiction and inconsistencies

33. In *Philip Nzaka Water v Republic* CA Criminal Appeal No 29 of 2015 while relying in the decision of *Dickson Elia Nsamba shapwater & another v Republic* CA App No 92 of 2007 the Court of Appeal of Tanzania address the issue of discrepancies in evidence and conclude as follows

“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out one sentence and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradiction are minor or whether they go to the root of the matter.”

34. The question to be addressed is whether the contradiction mentioned are grave and point to deliberate untruthfulness or whether they affect the substance of the charge. While defining contradictions, the court of Appeal of Nigeria in *David Ojeabuo v Federal Republic of Nigeria* stated that;

“Now, contradictions means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains.”

35. Further in *Joseph Maina Mwangi v Republic* (2000) eKLR it was held that;

“In any trial there are bound to be discrepancies. An appellate court in considering these discrepancies must be guided by the wording of section 382 of the *Criminal Procedure Code* viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence.”

36. This court has gone through the entire evidence of all the five (5) witnesses who testified and does not find any contradiction with regard to the key evidence placed before court and used to convict the appellant. The appellant was the sole witnesses as to what transpired in April and October 2018. The April 2018 incident was corroborated by PW3 who testified that in May 2012 she noticed that PW1 was walking abnormally and complained of irritation while passing urine. When the irritation persisted, she was taken to Baricho Health centre on 02/06/2018 and given medication to treat the infection.

37. The incident which occurred in August was also witnessed by PW3 who peeped into the wooden/timber house and saw, 'John doing bad manners' with the complainant. The only inconsistent evidence presented is that she alleged to have told her mother PW3 about the incident, yet PW3 did not mention



the same. PW3 also testified that the accused was lured by her husband to her house where he was arrested, but the appellant contended that he was arrested as he walked out of his compound after being lured by PW3 husband who told him he had some work to give him and when he walked outside he was arrested. That piece of evidence can be said to be a discrepancy, as it delivers slightly more evidence than what the other piece of evidence contains.

38. There is no inconsistency or contradiction in the evidence presented, which would negate the conviction. To the contrary the evidence present was cogent and was adequately corroborated by other witnesses and does not warrant any interference by this court.

Whether the trial magistrate erred by not considering that crucial witnesses were never called.(Ground 4)

39. Section 124 of the *Evidence Act*, Cap 80 provides as follows:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other 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 offense, 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.”

40. Section 143 of the *Evidence Act* (Cap 40) laws of Kenya also provides that;

“No particular number of witnesses shall in the absence of any provision of law to the contrary, be required for the proof of any fact.”

41. In *Bukenya & others v Uganda* (1972) EA 549 the court also discussed this issue and held that

- a. The prosecution must make available all witnesses as necessary to establish the truth even if their evidence maybe inconsistent.
- b. That the court has a right and duty to call any person whose evidence appears essential to the just decision of the case.

42. Similarly in *Keter v Republic* (2007) 1EA 135 the court did hold inter alia that;

“The prosecution is not obliged to call a superfluity of witnesses but only such witnesses which are sufficient to establish the charge beyond any reasonable doubt.”

43. Considering the above citations and having considered the evidence presented in its totality it is the considered opinion of this court that all the crucial witnesses necessary to prove the offence were called, testified and their evidence was sufficient to convict the appellant. The appellant also when given a chance to defend himself did not raise any issue as to the adequacy of the witnesses. This ground of appeal to fails.

Whether the trial magistrate erred in dismissing the appellant defence

44. The accused when put on his defence stated that he was 22 years old (born on 2/1/1997) and was arrested as he was preparing to leave home to go buy medicine for his mother. The complainant’s father



came and told him that he wanted to employ him to do some casual work. As they were walking outside the homestead, he found a police motor vehicle and was arrested. He stated that he had never even thought of defiling any child.

45. The trial courts judgment at page 5, (page 21 of the record of Appeal) did capture the evidence of the appellant and considered the same at page 6 (page 22 of the record of Appeal). The court stated that, “However his evidence is incredible as the complainant’s evidence was corroborated by PW2 who on the second occasion saw the accused pick up the complainant. She followed them from behind, peeped through a gap in the wall of the house and saw a bed and blanket. The accused covered the complainant with a blanket and they did bad manners.” Further at the last paragraph the trial court did observe that “The evidence of the accused is neither here nor there. He was not arrested for no reason at all.”
46. In considering this ground of appeal what must be borne in mind is the conclusion which is reached by the trial court (whether to convict or acquit) must account for all the evidence. Some might be found to be false, some of it might be unreliable and some might be found to only possibly be false or unreliable, but none may simply be ignored. The facts found to be proven and the reasons for the judgment of the trial court must appear in the judgment. This gives the appellate court the best indication that a court has applied its mind in the proper manner as the reasoning in their judgment will include its reasons for accepting and rejecting of the respective witness Evidence. See *State v Singh* 1975(1) SA 227(N) at 228 , *State v Van der Meyden* 1999 (1) SACR 447 (W) at 450
47. The trial magistrate in this instant analysed the evidence presented by both the appellant and the prosecution and gave reasons why the appellant’s evidence was not credible. The court thereafter proceeded to convict and sentence the appellant. This ground of appeal therefor does not hold.

Conclusion

48. The appellant did not file any ground of appeal challenging his sentence and this court will not consider the same. Be that as it may, this court notes that the judgment of the trial court did not specify if the period the appellant spent in custody will be considered as part of his sentence. Section 333(2) of the [Criminal Procedure Code](#) obligates the court to take into consideration the time already spent/served in custody/ remand while sentencing. The appellant was arrested on 7/12/2018 and convicted/sentenced on 9/7/2019. This is a period of seven months.
49. The appellant has a right to equal treatment before the law and has a right to equal protection and equal benefit of the law as provided for under Article 27(1) of the [constitution](#) of Kenya 2010. The sentence period shall therefor be considered as from 7/12/2018.
50. Having considered all evidence present in this appeal is do find that this appeal is not merited. The appeal is there for dismissed
51. Right to Appeal 14 days.
Judgement accordingly

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF APRIL 2023.

RAYOLA FRANCIS

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 25TH DAY OF APRIL, 2023.

In the presence of;



.....for the Appellant

.....for O.D.P.P

.....Court Assistant

