



REPUBLIC OF KENYA



KENYA LAW
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**Naibei v Republic (Criminal Appeal 52 of 2019)
[2023] KEHC 17639 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17639 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL 52 OF 2019**

AC MRIMA, J

MAY 25, 2023

BETWEEN

RICHARD KANGI NAIBEI APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal arising out of the conviction and sentence of Hon. M.I.G.
Moranga (Senior Principal Magistrate) in Kitale Chief Magistrate's
Court Criminal Case (S.O) No. 84 of 2015 delivered on 24th May, 2019)*

JUDGMENT

Introduction:

1. The appellant herein, Richard Kangi Naibei, was charged with two counts under the [Sexual Offences Act](#) before the Chief Magistrates Court at Kitale in Sexual Offence No. 84 of 2015 (hereinafter referred to as 'the Criminal Case'). They are as follows:
 - i. Count I: Defilement contrary to section 8 (1) as read with section 8 (3) of the [Sexual Offences Act](#). The particulars of the offence were that on 29th day of April, 2015 within Trans-Nzoia County, the Appellant intentionally caused his penis to penetrate into the vagina of LNK, a child aged 12 years old.

In the alternative, the Appellant was charged with committing an indecent act with a child contrary to section 11 (1) of the [Sexual Offences Act](#). The particulars of the offence were that on the same day and in same place, the Appellant intentionally caused his penis to touch the vagina of LNK, a child aged 12 years old.
 - ii. Count II: Defilement contrary to section 8 (1) as read with section 8 (3) of the [Sexual Offences Act](#). The particulars of the offence were that on 29th day of April, 2015 within Trans-Nzoia



County, the appellant intentionally caused his penis to penetrate into the vagina of LNK, a child aged 13 years old.

In the alternative, the appellant was charged with committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. The particulars of the offence were that on the same day and in same place, the appellant intentionally caused his penis to touch the vagina of LNK, a child aged 13 years old.

2. The appellant denied all the charges and he was tried. After a full trial, the Appellant was found guilty of defilement on both counts and was convicted accordingly. He was then sentenced to a prison term of 20 years on each count. The twin sentences were to run concurrently.

The Appeal:

3. The appellant was utterly aggrieved by the conviction and sentence. He subsequently lodged an appeal against both through his Counsel Messrs. Chebii Cherop & Company Advocates. The appellant, however, appeared in person at the hearing of the appeal.
4. In his Petition of Appeal, the appellant challenged the convictions as without basis since the prosecution did not discharge its burden of proof to the required standard. In his view, the *voir dire* examination conducted was unreliable. He opined that crucial witnesses were not called to testify while those that testified were incredible. He was emphatic that the prosecution failed to discharge their burden of proof to the required standard. He cited the trial Court for relying on evidence not canvassed at trial. Finally, he decried that his cogent defence was improperly rejected.
5. In the premises, he prayed that the appeal be allowed, the convictions be quashed and the sentences be set aside and that he be set forthwith at liberty.
6. During the hearing of the appeal, the appellant relied on his written submissions. He argued that the offence was an afterthought as the complainant's mother only took the complainants to hospital 5 days after the offence. He submitted that the failure to interrogate as to whether the complainants understood the meaning of an oath and the consequences of lying discredited the *voir dire* examination. He added that it was incumbent upon the trial court to record the reasons it was convinced the minors understood the nature of an oath.
7. The appellant then accused the complainants of constantly changing their narrative. As such, they were not credible witnesses since their evidence were marred with inconsistencies and contradictions. Based on the medical evidence tailored before the trial court and the absence of crucial evidence, the appellant submitted that the elements of penetration and the complainants' age were not proved to the required standard.
8. The respondent on its part relied on the proceedings at trial.

Analysis:

9. This being a first appeal, it's the duty of this court to re-consider and to re-evaluate the evidence adduced before the trial court with a view to arriving at its own independent conclusions and findings (See *Okono v Republic* [1972] EA 74). In doing so, this court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial court and, therefore, it ought to give due regard in that respect as so held in *Ajode v Republic* [2004] KLR 81.
10. Having carefully perused the record, this Court is now called upon to determine whether the offence of defilement was committed, and if so, whether by the Appellant.



11. It is established by law and settled judicial precedents that the offence of defilement carries three components. They are the age of the victim, penetration and identification of the assailant.
12. Before dealing with the said aspects of the offence, this court highly appreciates the detailed manner in which the trial court summarized the evidence in the judgment. This court adopts that summary herein by reference.
13. Having said so, suffice to state that the prosecution availed 7 witnesses. PW1 and PW2 were the complainants. They testified on the events that befell them on April 29, 2015 in the hands of a sexual assailant when they had gone to look for firewood in a nearby bush. Their evidence was corroborated by their brother D who testified as PW5.
14. PW6 lived with the victims and together PW5. They all referred to PW6 as their mother which term included Aunty. PW6 confirmed examining the victims and ascertained that their vagina had been perforated.
15. PW3 was a Clinical Officer. He produced medical documents on the victims. He did not rule out possible penetration of the victim's vagina. PW4 conducted age assessment for the victims and PW7 was the investigating officer.
16. When the appellant was subsequently placed on his defence, he posited that he had been framed with the charges by the wife of his employer whom they were not in good terms. He denied committing the offences.
17. It is on the basis of the above evidence that this court is to establish if the charges of defilement were committed. The court will now look at the elements of the offence of defilement.

Ages of the Complainants:

18. The Appellant lamented that the ages of the Complainants had not been established. However, from the Age Assessment Reports, the ages were settled at 12 years old and 13 years old respectively. The production of the reports was not challenged.
19. Accordingly, the complainants were children within the meaning ascribed to the term under section 2 of the *Children's Act*.

Penetration:

20. Section 2(1) of the *Sexual Offences Act* defines "penetration" to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person."
21. This position was fortified in *Mark Oiruri Mose v R* (2013) eKLR when the Court of Appeal stated thus: -

... Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.... (emphasis added).
22. Later, the Court of Appeal, then differently constituted, in *Erick Onyango Ondeng v Republic* (2014) eKLR held as such on the aspect of penetration: -

In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.



23. The Appellant herein vehemently argued that the prosecution failed to establish penetration.
24. From the definition of penetration and the guidance by the Court of Appeal, it is the position that penetration may only be 'slightest and to the surface' to suffice in law. It, therefore, means that there may be instances where the slight penetration, depending on other factors including passage of time, may not be possible to be ascertained by way of medical evidence. Therefore, the failure to prove penetration by medical evidence does not *ipsa facto* mean that there was no penetration. It all depends on the peculiar circumstances of a case and the extent to which the trial court believes the victim. However, in such instances, the court must exercise extreme caution as to weed out miscarriage of justice including instances where a victim is framed up for ulterior motives.
25. This court has, with care and caution, reviewed the evidence on record. The victims were taken to hospital where they were examined around 6 days post the alleged incident. The Clinical Officer, PW3, examined both victims. He found that although the victim's external genitalia were normal, the hymen were torn and not fresh looking. The vaginal walls were also hyperemic.
26. According to an American Medical Journal, hyperemia is a medical term to mean the increase of blood in one's organs. It may be caused by exercise, digestion, fever, hot flashes, injury, infection, heart failure, thrombosis among others. In this case, therefore, the victims had increased flow of blood to their vaginal organs. Both also suffered bloody diarrhea. It may be the case that the cause of that hyperemia was the stomach infection.
27. According to PW6 who lived with PW1 and PW2 ('the complainants' or 'the victims'), they both complained of stomach pain all night long. In the morning, the victims' brother, PW5, told PW6 that the Appellant had slept with the victims the day before. PW6 examined the victims' genital organs and remarked as follows: -

... I examined Lilian, her genital had a gapping hole in her vagina which was fully open, but the vagina of Lydia was partially open....
28. In her testimony, PW6 further demonstrated to the trial court by the use of fingers how the victims' vagina looked. She also took the victims' soiled underpants to the police but, for unknown reasons to her, they were returned back to her.
29. The trial court heard the witnesses testify and observed their demeanors. The court severally noted such in the course of the proceedings. The court did not make any adverse findings on the demeanour of any of the witnesses. The court further believed their testimonies.
30. Therefore, by considering the evidence of the victims, PW3, PW5 and PW6, the trial court seems to have correctly settled the issue of penetration well.
31. This court, thus, finds no difficulty in affirming the position that penetration in respect to both victims was proved to the required standard.

Identity of the Perpetrator:

32. The prosecution had to lastly positively identify the perpetrator of the offence. The prosecution relied on the complainants' testimonies as well as that of PW5.
33. On review of the evidence on the identification of the assailant, this court, once again, agrees with the trial court that the appellant was positively identified as the perpetrator of the offences. The evidences of the complainants' and PW5 placed the appellant at the scene.



34. In respect to the contention that the appellant was with workers at the farm, witnesses stated that incident took place in the evening after the victims and PW5 had returned home from school at 4:00pm. The appellant also stated that he paid the workers at around 2:00pm and they left. He then went herding the cows up to 6:00pm. Therefore, the contention that the appellant could not have been at the scene after 4:00pm could not be established by the evidence of the appellant including the record of workers he produced in evidence.
35. On the inconsistencies in respect to the evidence, the trial Court, correctly so, dealt with the matter. The issue was rightly resolved to the extent that such were reconcilable inconsistencies. The court also referred to a binding decision of the Court of Appeal in buttressing its position. This court cannot, hence, fault the trial court on the issue.
36. There was also the issue of the *voir dire* examination. The court has considered the manner in which the trial court dealt with the issue. Such examination is aimed at establishing two issues. The first one is whether the child is and knows the meaning of being truthful, and, the other one being whether the child knows the meaning of an oath.
37. In this matter, the court addressed both aspects and rightfully settled that the necessary witnesses be sworn or affirmed as the case was.
38. The issue of grudge was also raised. This court does not agree with the appellant that he was framed through the wife of his employer. Surprisingly, the issue only arose at the time the appellant gave his defence and no one was examined on it. Such can only be an afterthought and is for rejection.
39. Having considered the evidence in totality, this court is persuaded that the appellant was correctly placed at the scene as the perpetrator. He was well known to the victims and PW5 who referred to him as 'kuka', out of respect.
40. On sentence, the same is lawful. The court considered the mitigations tendered and safely arrived at the sentence. Such cannot be faulted.

Disposition:

41. This court now finds that it was the appellant who defiled both victims. As a result, the following orders do hereby issue: -
 - a. The appeal is hereby dismissed.
 - b. Since the appellant filed High Court Review No. 293 of 2022, he shall so pursue it.
 - c. File marked as Closed.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 25TH DAY OF MAY, 2023.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Richard Kangi Naibei, the Appellant in person.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.



Regina/Chemutai – Court Assistants.

