



REPUBLIC OF KENYA



**Gikonyo v Republic (Criminal Appeal 048 of 2022)  
[2023] KEHC 21646 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21646 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
CRIMINAL APPEAL 048 OF 2022  
SC CHIRCHIR, J  
JULY 28, 2023**

**BETWEEN**

**ABDALLA MUNGAI GIKONYO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the Judgment of Hon. S. Mwangi (SRM) delivered  
on 1st September 2022 at Muranga in sexual offence case No. E006 of 2022)*

**JUDGMENT**

1. The Appellant herein was charged with defilement of a girl contrary to section 8 (1) as read with 8 (3) of the [Sexual Offences Act](#) No 3 of 2006. ( The Act)
2. The particulars of the offence were that on 22<sup>nd</sup> day of April 2022 at about 0400 hours in (particulars withheld) within (particulars withheld) county, he willfully and intentionally caused his penis to penetrate the vagina of MWW a child aged 14 years.
3. In the alternative, he was charged with committing an indecent Act with a child aged 14 years contrary to section 11(1) of the [Act](#)
4. At the conclusion of the trial, he was found guilty of the main charge and sentenced to 20 years' imprisonment
5. Being dissatisfied with the outcome, he lodged the present Appeal and set out the following grounds:
  - a). That the learned trial magistrate erred in Law and in fact in finding that the prosecution had proved its case beyond reasonable doubt in circumstances where the evidence presented was clearly inconsistent and inadequate to sustain and prove the charges preferred.



- b). That the learned trial magistrate erred in law and in fact on giving due credence to prosecution evidence which was full of contradictions and loose ends incapable of proving the charges against the appellant
- c). That the learned trial magistrate erred in law and in fact in finding the prosecution witness testimonies had been consistent when in fact there were glaring contradictions, exaggerations and misinformation in the whole case and evidence.
- d). That the learned trial magistrate erred in Law and in fact in reaching conclusions of facts and giving opinion not founded in or supported by the evidence tendered by any witness.
- e). That the learned trial magistrate erred in law and in fact by disregarding and failing to consider the sworn testimony of the appellant.
- f). That the learned trial magistrate erred in law by shifting the burden of disapproving the charges to the accused /appellant.
- g). That the learned trial magistrate erred in law and in fact by convicting the appellant of the charges by largely misconstruing the medical evidence to imagine an offence where none existed.

### **Appellant's submissions**

6. It is the Appellant's submissions that the medical documents admitted at the trial were not prepared as stipulated on the National Guidelines on Management of sexual violence in Kenya 3<sup>rd</sup> Edition ,2014. He pointed out for instance that the PRC form presented in court as EXB. 3 only had part A; Part B which should contain the Psychological wellbeing of the victim for a holistic assessment was missing; that effectively the expert evidence as represented by the said documents failed to comply with the provisions of section 46 as read with section 47 of the Act.
7. The Appellant urges the court to consider favorably the general position that in the absence of any proper medical examination and opinion that the sexual act had taken place, the court should not arrive at a conclusion that the appellant was guilty of the charge.
8. It is further submitted that expert witness PW3 and PW6 did not guide the court properly to form an opinion as to the commission of the offence He urges the court to adopt the position that where a medical practitioner does not express an opinion as to whether a sexual act has taken place then their evidence should not be used to support a conviction.
9. He argued that even after the test of defilement came out negative, a forensic analysis was not conducted to come up with an informed conclusion. To buttress his position, he relied on the case of Mutonyi Vs. Republic (1982) KLR 203.
10. The Appellant further contends that PW3 formed the opinion that PW1 had been defiled and yet he did not conduct the medical examination. He submitted that the evidence presented by PW6 does not conclusively indicate PW1 was defiled.
11. The Appellant argues further that the prosecution failed to prove the case beyond reasonable doubt and that the trial court erred in shifting the burden to the Appellant.



12. It is contended that the prosecution failed to avail all the witnesses that were needed to establish the truth and that this failure fatally weakened the prosecution's case. Reliance was placed in the case of *Bukenya & others vs Uganda* (1972) EA in this regard.
13. The Appellant further submits that there were glaring inconsistencies on the prosecution witnesses' testimonies.
14. He finally stated that the prosecution failed to establish beyond reasonable doubt that the accused was at the scene of the crime and that he was the one who committed the offence.
15. The Appellant has relied on other Authorities which I have perused.

### **Respondent's Submission**

16. On whether the prosecution proved its case to the required standard, it is the respondent's submission, the three ingredients which constitute defilement, namely the age of the victim, proof of penetration and positive identification of the perpetrator were all proved.
17. On the victim's age it is the respondent's submission that age was proved by way of the birth certificate that was produced.
18. On the ingredient of penetration, the prosecution has submitted that the evidence of the victim was sufficient to prove penetration and relied on section 124 of the *Evidence Act*.
19. On the issue of identification, the Respondent submits that PW1 testimony showed that she knew the appellant well since they had met on Sunday and interacted for 2 day thereafter. Further that it was established by both the prosecution and the defence witnesses, that is PW2, Pw4, DW1 and DW3 and DW4 that the complainant was at the appellant's compound and that the Appellant admitted to seeing the complainant in his house.
20. On the issue of irreconcilable contradiction in the prosecution's case, the Respondent points out that the role of the appellate court is to assume the role of the trial court, reconcile these apparent contradictions and then determine whether they were prejudicial to the appellant and therefore fatal to the prosecution case, or were inconsequential to the appellant's conviction and sentence. The respondent urges the court to find that the discrepancies and contradictions were not prejudicial to the Appellant's case and hence not fatal to the respondent's case.
21. On the Appellant's defence, they submitted that the defence witness amounted to no discernable defence and they raised no doubt to the prosecution's case as the appellant admitted to knowing the victim and having accommodated the victim on the fateful night.
22. On the credibility of the evidence of the experts it is the respondent's submission that expert evidence is never considered in isolation and that the court considered it alongside the other pieces of evidence, before arriving at the conviction of the accused.

### **Summary of the Evidence**

23. PW1 was the complainant. She told the court that on April 19, 2022, she had gone to meet her friends and came back home late. She then had a confrontation with her mother on account of having arrived late. The next day, her friend, Hadijah, came to pick her and she went with her to Hadijah's home in mjini in makuyu area.
24. She further stated that Hadijah, who she described as the Appellant's sister received a friend and she decided to go to Abdalla's (The Appellant's) house to spend the night. She told the court that the



- Appellant came home at 7pm and told her that he was not sleeping there and would spend the night at Hamid's house.
25. She recalled that he left while carrying miraa. He returned at 4 am and told her to have sex with him and she refused, expressing fears that she could get pregnant. He went out and came back with 3 condoms and he wore one. That he removed her clothes and he removed his shirt and wore the condom and had sex with her. She told him that she was feeling pain and he told her that he had broken her virginity.
  26. She further told the court that the Appellant left at around 7 am but came back again at around 11 am and he told her to have sex with him again. He assured her that this time she would not feel pain. He wore another condom, put his penis in her vagina. When they were done, they slept.
  27. Later, the Appellant's father knocked on door and the Appellant instructed her to hide. His father inquired if he had a girl inside the house but he denied. The father then told him to get out and talk to a village elder.
  28. She stated that it was the village elder who told him to let the girl out and he came and told her to get out. She stated that she left the house and went to mjini chief who called the police. They went to police station where they recorded their statements. That after the police station, they were taken to the hospital by two police officers and her mother.
  29. Pw2 was the Assistant chief of mjini sub-location. He told the court that he received a call from his village elder, Haji Shaban (PW4) who informed him that there was a man who had a school girl in his house. He went to confirm and found that pw4 had already arrived at the Appellant's home. . He met with Appellant and a girl whose name he did could not recall. He stated that he took all of them to his office and Appellant told him that the girl was a friend to the sister. That the girl told him that she had a disagreement with her mother and she escaped from home.
  30. Pw3, was the clinical officer recalled that a child aged 15 years was bought to the hospital by her mother. On examination, there was no obvious bruising or lacerations on the vagina; but the hymen was broken; when the laboratory samples were taken, the VDRL was negative and the urinalysis was normal; vaginal swab showed pus cells; The pregnancy test was negative. the information was captured in the PRC form dated April 22, 2022. He produced the p3 form PRC form, the outpatient card and lab requests form. He concluded that from the history and the finding, the girl had been defiled.
  31. Pw4 was the village elder or member of Nyumba Kumi initiative. He testified that on April 22, 2022 at around 9 am while at the mosque Salma, Appellant's cousin came and told him that "children were being ruined". she accompanied her to the Appellant's house and when he got there he asked Appellant if he had a girl in the house to which he answered in the negative, but when he told him that he would call the chief, the Appellant released the girl.
  32. PW5 was the mother of the complainant. She told the court that the complainant was born on 28<sup>th</sup> February 2008 and produced her birth certificate. She confirmed that the complainant had run away from home.
  33. On Friday at around 9 am, she received a call from the chief who told her to go to his office. When she got there, she found the complainant, the appellant and others who were unknown to her. She was informed that the girl had been found by the village elder in Appellant's house.
  34. On cross examination she told the court that her daughter left home on Wednesday and was found on Friday
  35. PW6 was a clinical officer in Muranga Level 5 Hospital. He had the outpatient card for the complainant, lab tests which was done on April 24, 2022 and her PRC form.



36. He told the court that on examination, the complainant was found to be stable and fragile. On vaginal examination, it was found that the hymen was broken and there was no any other discharge found; on urinalysis, there was nothing significant; and the pregnancy test was negative; the high vaginal swab showed no spermatozoa; that epithelial cells were noted together with pus cells and there was no venereal disease. she had an old scar of the broken hymen. He produced the PRC form outpatient card and lab request form.
37. PW7, was the investigating officer. She recalled that on 22<sup>nd</sup> April 2022, he received a call from the assistant chief (PW2) who informed him that there was a man who had locked a school girl in his house and the girl was now at the chief's camp in mjini. When they went to the chief's office he found the appellant and the complainant. They were taken to the station and a report was entered in the occurrence book (OB).
38. The Appellant was put on his defence and opted to give a sworn testimony. He told the court that the complainant had come to see Hadija, at his grandmother's house, which is in the same compound as his; That the village elder came and told him to call the girl he was with and since she was sited outside he went and called her. He was told to go with the girl to the chief's office. That it was Ramadhan period and hence they were not supposed to be with a girl. He asserted that if he had broken her virginity as alleged, the breakage of the hymen would have been fresh. He further stated that the complainant was just in the compound when he went to visit his mother. He said he was not home at the time he was alleged to have defiled the girl; that he slept at Hamidi's ( DW2) ;That he does not know anything about her, that she was just found in his compound and not his house. He insisted that the girl was framing him; That he never even used to talk to the girl who was a friend to his friend; That he does not have a good relationship with his cousin Salma ; that the village elder (PW4) too had sworn to have him arrested someday.
39. On cross- examination, he told the court that when he went to get his things at 8pm, the complainant was standing outside with Njeri. That on Friday, he left Hamidi's house at 7.30 am and went to his home and when he arrived he was called by the village elder (PW4). He met the village elder and his boss on the road and they went to the Appellant's home. The time was 8am and not 10am. That he did not know the complainant but she used to know her boyfriend.
40. DW2 was Hamidi. He testified that the 21<sup>st</sup> April was Ramadhan night. The Appellant had come to his house to eat and sleep. That the Appellant left at 1am and then he returned. In the morning he left for his home at about 7am. In the afternoon he came back to Hamidi's house and thereafter slept there. He woke up and left at 7am the following day. At 10am he heard that the Appellant had been arrested.
41. On cross- examination, he told the court that the appellant came to his house at 7am on the 21<sup>st</sup> April. The day was Thursday; that when he left at 1am, and he was away for 30 minutes.
42. DW3 was the father of the Appellant. He told the court that on Friday the 22<sup>nd</sup> April, the village elder ( PW4) went to his home and told him that his son had a girlfriend inside his house. They both went to the Appellant's house and knocked. The Appellant opened the door and on going inside they did not see a girl. The elder left and after 45 minutes, he came back with the chief (pw2) and a Mr. Muchiri. They said they had seen the girl in the compound. They went with the girl to the chief's office. He however insisted he did not know where the girl had come from. That the girl's mother was called to the chief's office. He further stated that the chief forced the complainant to record her statement. That on the Sunday following, he went to ask the complainant's mother if they could talk as she was the one who had caused the whole problem by chasing the girl out of home. The girl's mother refused saying that her family would bring problems as a similar incident had occurred to her other daughter in the past. That the complainant's mother demanded to be paid ksh. 20,000 but the Appellant refused.



43. On cross-examination, he told the court, that his home compound is fenced off, and that the Appellant has his own house within the said compound; that the Appellant was in his house at 7.30 am on Friday. That the Appellant and the elder (PW4) met in the Appellant's house and not the road. That the girl was in his compound, but did not know exactly which part as he met them when they were leaving the homestead.. That Hadija Njeri was his cousin's daughter and they reside in- the same plot but not same compound. He did not know what time the Appellant got back to his house. He would not also know when he has someone in the house. he stated that he has no differences with hadija's mother or Hadija herself. That hadijah had no differences with the Appellant.
44. DW4 was Omar Muchiri. He told the court that the Appellant was his caretaker at mjini. On 21<sup>st</sup> he was told by the Assistant chief (PW2) that an issue had arisen concerning his care taker (the Appellant). He went towards the Appellant's home and stood outside the compound. That the Appellant's father and the village elder went into the compound and came out with the girl. On questioning the girl, she said that she had come to seek refuge as her mother had chased her with a knife. He offered to pay school fees, when the girl reported that her mother could not afford to pay fees. He followed up the case all the way to the police station, where the police chased him away telling him to wait for the case in court.
45. On cross examination, he told the court that he owned the house where Hamidi (DW2) lives; that the house is about 3 minutes' walk to the home of the appellant; that the girl was brought out from the homestead but he could not tell if the girl was from a house; that it is the chief and village elder who went into the compound and came out with the girl.

### **Analysis and determination**

46. This is the first Appeal and the mandate of this court is to review the evidence, re-evaluate it and arrive at its own determination while not ignoring the determination of the trial court. This court will also bear in mind that the trial court had the benefit of hearing and seeing the witnesses ( see Okeno vs Republic (1972) EA 32 ))
47. From the proceedings and submissions herein the following issues are identifiable for determination: -
  - a) Whether the medical evidence was reliable
  - b) Whether the prosecution's case was proved beyond reasonable doubt.
  - c). whether the sentence was excessive.

### **Whether the Medical Evidence Submitted was Reliable**

48. The Appellant's contention in this regard is that the manner in which the medical evidence was obtained was not in tandem with the National Guidelines on management of sexual violence in Kenya. It also went against the policy guidelines of the Respondent on the prosecution of offences related to gender violence and that overall, it went against the provisions of section 46 and 47 the *Sexual Offences Act*.
49. what was the conclusion of this medical evidence as presented by PW3 and PW6? The hymen was broken, but not freshly, there were no bruises or lacerations. In a nutshell, save for a broken hymen there was no other evidence of penetration. However, it is now trite law that a broken hymen, even if it was a fresh breakage is not evidence of defilement as there are many other things and lifestyles that can cause a hymen to break.
50. The trial court made similar observations, and it is clear from the judgment that she did not use the medical evidence to arrive at the conclusion that the complainant had been defiled. It is equally my finding that the medical evidence did not prove penetration. Consequently, to the extent that the said



evidence has not been relied on, the manner in which it was procured or processed was and is irrelevant and there is no need to delve into it.

### Whether the prosecution's case was proved

51. The necessary ingredients for the offence of defilement are set out under Section 8 of the *Sexual Offences Act*. The said section provides as follows: -

8. Defilement

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

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

52. Section 2 of the *Act* defines penetration as follows:

“penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

53. Section 2 of the *Act* and also section 2 of the children's Act defines a child a child as “any human being under the age of 18 years.”

54. The age of the complainant was not contested either in the trial court or on this Appeal. Nevertheless, the Respondent produced a birth certificate showing that the complainant was born on February 28, 2008 and hence was 14 years at the time of the incident.

55. On the matter of identification of the Appellant, the complainant was able to identify the Appellant as the brother to her friend Hadijah. They spent two days together. On cross examination the complainant told the court that she was a friend to both the Appellant and his cousin Hadijah. However, and more significantly, the complainant testified that upon arrival at the chief's office, he was told to go and call the complainant's boyfriend, and off he went but did not find him. How then did he know the complainant's boyfriend if he did not know the complainant in the first place? Also at paragraph 2 of page 45 of the proceedings he told the court: “I never even used to talk to the girl who was a friend to my friend”. It is evident therefore that the two knew each other prior to the incident. This was a case of identification through recognition. Am satisfied that the Appellant was positively identified as the perpetrator.

56. On penetration, I have already found that the medical evidence did not prove penetration and therefore the evidence of pw1 was not corroborated by any medical evidence.

57. On the evidence of children of tender years, section 109 of the *Oaths and statutory declarations Act* provides as follows:

“Evidence of children of tender years

(19) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty



of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code shall be deemed to be a deposition within the meaning of that section.”

58. Section 124 of the *Evidence Act* provides as follows:

“ 124. Corroboration required in criminal cases.

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.”

59. The complainant herein was 14 years of age. Even though she was a child of tender years, her evidence was taken under oath. But even if her evidence was not under oath, pursuant to the provisions of section 124 of the *Evidence Act*, her evidence would suffice for purposes of conviction as long as the court gives reason as to why it believes that the child is telling the truth.

60. Further in *Kassim vs Republic*- Criminal Appeal No 84 of 2005 it was held

QUOTE

“the absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of the victim of rape or circumstantial evidence” .

61. What was the evidence of the victim in this regard? It was her testimony that prior to the day of the incident, she had a quarrel with her mother who had threatened her with a knife for coming home late and that she opted to spend the night at her friend’s house going by the name Hadija’s . She further told the court that the same evening Hadijah got a visitor and she was asked to spend the night at the appellant’s house, and she went there. The Appellant came in at 8pm and left but came back at 4am. That when the appellant came to his house, he asked to sleep with her but she refused for fear of falling pregnant. He then told her he will use condoms. She went on:

“He went out and came with 3 condoms and he wore one. He then removed my clothes and he also removed his shirt as he remained with the trouser. He put the condom on his penis which he had removed from his trouser. we slept with him and so I told him I was feeling pain. He told me he had broken my virginity.... he left at around 7.30 am and came back at around 11am, He told me if he slept with him again I was not going to feel pain and so he wore another condom, put his penis in my vagina and when he finished we slept”

62. The complainant’s testimony was simple, straightforward and remained firm under cross-examination. Her testimony gives me no reason to doubt her. The surrounding circumstances also give credence to her testimony. For instance, she told the court after they went back to sleep, at about 11am, someone knocked on the door and the Appellant told her to hide, which she did. This tallies



with the testimony of the Appellant's own witness that when he was told that the Appellant had a girl with him inside his house, he went and knocked but saw no one else apart from the Appellant when he opened the door. Further even though the appellant told the court that he was not in his house at that hour, this contradicts his own witness, who was his own father who testified that indeed it is the Appellant who opened the door when he knocked. The presence of the Appellant in the house at that hour was also confirmed by the village elder (PW4) who had accompanied the Appellant's father when the Appellant opened the door. The fact that the complainant had ran away from home was confirmed by her mother; the fact that she was traced to the compound where the Appellant's house was confirmed by the "nyumba kumi elder", pw7, and the Appellant's own father. The Appellant's father told the court that at the chief's office he sought to have a discussion with the complainant's mother to resolve the issue since she had partly caused it, by making the complainant go away from home. If the appellant had not defiled the complainant, what then is the issue that would make the Appellant's father get involved? Certainly not the issue of the complainant running away from home, for that would have been the work of the Administrators like the chief and the village elder.

63. What about the Appellant's defence in this regard? While denying that he didn't know the Appellant he did admit that when he went to his house at 8pm, he found the complainant standing outside, with his cousin Njeri. He also knew the complainant's alleged boyfriend, yet he alleged that he did not know the complainant herself. At one point he also stated that he never used to talk to her, yet at the same time claimed that she did not know her. Also, whereas he told the court that he was not in his house on Friday at about 10 am, his father told the court that he his house and he was the one who opened the door when his father and the elder ordered him to open the door. Further whereas he alleged that it would take about 30 minutes to walk from Hamid's house where he had spent the night to his house, Hamid's own landlord (pw7) and who happened to have been the Appellant's Employer told the court that the two residences can be covered by a 3 minutes' walk. The Appellant not only contradicted himself but also contradicted his own witnesses.
64. What does this say about him? That he was not a credible witness.
65. Going by the testimony of the complainant and the circumstances surrounding as aforesaid, am satisfied that penetration was proved, and consequently the charge of defilement was proved beyond reasonable doubt.

#### **Whether or not the Sentence Meted Out was Excessive in the Circumstances of the Case.**

66. Section 8 (3) of the Act under which the Appellant was charged provides as follows:

"A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."
67. It was proved that the complainant herein was 14 years at the time of the offence. The sentence of 20 years is prescribed by law, is the minimum and is mandatory. Neither the trial court not this court could have or can mete out any lesser sentence.
68. In conclusion this Appeal fails both on conviction and sentence and it is hereby dismissed.

**DATED , SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 28<sup>TH</sup> DAY OF JULY 2023.**

**S. CHIRCHIR.**

**In the presence of:**



Eric- Court Assistant

Ms. Muriu for the Respondent

Mr. Achapa for the Appellant

