



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kamau v Republic (Criminal Appeal E024 of 2021)  
[2023] KEHC 21273 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21273 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
CRIMINAL APPEAL E024 OF 2021  
SC CHIRCHIR, J  
JULY 28, 2023**

**BETWEEN**

**BEDAN KANGETHE KAMAU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal against the judgment by Hon. M. Kinyanjui  
P.M delivered on 20/9/2021 at Kigumo SO.67 of 2020)*

**JUDGMENT**

1. The appellant, was charged with the offence of defilement contrary to section 8 (1) as read with section 8(3) of the [sexual Offences Act](#) No 3 of 2006.( The Act).
2. The particulars of the offence were that on the July 26, 2020 at ..... town within the republic of Kenya intentionally and unlawfully caused his penis to penetrate the vagina of EWK a child aged 16 years.
3. He was charged with 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.
4. The appellant pleaded not guilty to the charges, and after a full trial he was convicted of the main charge and sentenced to 15 years in prison.

**Petition of Appeal**

5. He was aggrieved by the judgment and consequently filed the present appeal. He has set out the following grounds:
  - a). That the trial magistrate erred in law and fact by failing to ascertain the age of the alleged victim at the onset of the case.



- b). That the trial magistrate erred in law and fact by sentencing and convicting the appellant on a defective charge sheet.
- c). That the trial magistrate erred in law and fact in failing to consider the contradictory nature of the first prosecution witness.
- d). That the trial magistrate erred in law and fact by convicting the appellant on uncollaborated and unproven evidence of PW1.
- e). That the trial magistrate erred in law and fact by failing to appreciate the evidence of PW3 that the hymen was broken long ago and that no injuries or bruises were on the alleged victim.
- f). That the trial magistrate erred in law by allowing himself to be influenced by hearsay evidence of PW2, PW4 and PW5.
- g). That the trial magistrate erred in law in shifting the burden of proof, exemplified in his judgment by asking “why only in the whole village would the alleged victim choose the applicant”

### **Appellant’s submissions**

6. It is the appellant’s submissions that the complainant’s evidence was full of contradictions and gaps. The appellant submits that in view of complainant’s testimony that she lost consciousness after drinking a concoction of a soda and another drink, there is no way she could have known what happened to her thereafter. That it follows that what she told the court must have been what she heard from other people. In which case, the appellant states, her evidence was hearsay and hence inadmissible.
7. The appellant has also raised the issue of identification. it is argued that if indeed the complainant lost consciousness after the alleged drink, then there is no way she would have known who defiled her.
8. The appellant has further cast doubts on the veracity of the complainant’s testimony. He questions why the complainant did not use her cell phone to call for help, why her grandmother would call other people, but not the complainant? what the complainant fed on for the 6 days she allegedly spent alone in the house?
9. On penetration, the appellant submits that the medical evidence presented did not prove that there was penetration and the trial court simply convicted on the basis that the complainant’s hymen had been broken. The appellant contends however that a broken hymen is not a proof of penetration. The appellant has relied on the case of of *PKW v R* (2012)eKLR , *interalia* and urges the court to find that there was no evidence of penetration.
10. The appellant further argues that as for reliance on the provisions of section 124 of the *Evidence Act*, the evidence of one witness should not be solely relied on when there are gaps in the said evidence.
11. It is the appellant’s final submissions that the rest of the witnesses gave hearsay evidence ,which is not admissible.
12. The appellant has referred to a number of decisions which I have perused.

### **Respondent’s submissions**

13. On the age of the victim, it is submitted that the complainant’s birth certificate was produced showing that complainant was 16 years at the time.



14. On the identification of the appellant, it is submitted that both the complainant and PW2 knew the appellant, since they were neighbours and that the appellant knew PW1 as a student at the primary school; that PW2 knew the appellant as Bide Kamau, and finally that the appellant picked the victim at 10.30 am during the daylight. It is therefore asserted that identification was not an issue. The respondent further submits that this was a case of identification through recognition, which is more reliable than identification of a stranger.
15. On the contradictory nature of the victim's testimony, the respondent submits that a close scrutiny of the evidence would show that there were no gaps. As regard collaboration, the respondent has invoked the provisions of section 124 of the *Evidence Act*. The respondent further asserts that the trial court indeed gave reasons for believing the complainant, and thus the aforesaid section was complied with.
16. On the proof of penetration, the respondent submits that the medical evidence submitted did prove penetration and the appellant did not challenge the evidence.
17. On sentencing, it is the respondent submission that the sentence meted by the trial court is appropriate to the offence committed and this court should not therefore interfere with the discretion of the trial court.

### **Analysis And Determination**

18. This is the first appeal and the role of this court is to review the evidence afresh, re-evaluate it and arrive at its own independent conclusions. This was stated in the in the case of *Okeno v Republic* (1972) EA where the Court of Appeal for Eastern Africa stated that: "An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya v R* 1975) E.A. 336 and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M. Ruwala v R* [1957] EA 570. It is not the junction of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings 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, see (*Peters v Sunday Post* 1978) EA 424."
19. Having considered the grounds of appeal the parties' submissions and evidence adduced in the lower court, I find that the following as issues arise for determination:
  - i. Whether the charge sheet was defective
  - ii. Whether there were material contradictions in the complainant's testimony.
  - iii. Whether the offence of defilement was proved beyond reasonable doubt.
  - iv. Whether the sentence was manifestly harsh and excessive

### **Whether the charge sheet was defective?**

20. The appellant has complained that the charge sheet was defective. He however failed to pinpoint the defect in the charge sheet.
21. However, the particulars of the charge sheet were as follows: defilement contrary to section ..... Bedan Kangethe Kamau On July 26, 2020 at ..... town, within the republic of Kenya, intentionally and unlawfully caused his penis to penetrate the vagina of E.W.K a child aged 16 years



22. Section 134 of the *Criminal Procedure Code* provides that “every charge of information shall contain and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”
23. All the ingredients for the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* No 3 of 2006 were present. I notice however that considering that the complainant was 16 years old, the offence fell under section 8(4) of the Act, yet the charge sheet reads section 8(3). However, there was no prejudice caused as the sentencing was passed pursuant to the correct section, that is section 8(1) as read with section 8(4) of the Act.

Whether there were material contradictions in the evidence of the complainant.

24. The appellant has taken issue with the complainant’s testimony to the effect that after she was given a drink at the bar, she lost consciousness yet she went on to state how they took a tuktuk to a house. He has also queried why the respondent would go for 6 days without calling for help, yet she had a phone; he has also questioned what the complainant was eating for those 6 days she was alone, yet according to her she did not even have money for bus fare. why her grandmother (PW2) failed to call her yet she had the complainant had a phone.
25. The pertinent question is, are these gaps and contradictions material? do they go into the substance of the prosecution’s case? On the issue of loss of consciousness, the complainant clarified during cross-examination that after consuming the drink, the next time she came around, she found herself in a house.
26. The other gaps in her evidence are however not explained. some of the gaps include:
  - a). If indeed the complainant had lost consciousness, how did she know that they travelled with a tuktuk to the alleged house. She also told the court that after the drink she came around at the house- this would mean she could not have known what mode of transport was used to get to the house.
  - b). She testified that the appellant defiled her and disappeared- the question that arise is was she defiled the same day, even subsequent day (s ), when did the appellant leave?
  - c). As correctly questioned by the appellant, why didn’t she call for help, yet according to her evidence in chief, she had a cell phone
  - d). She told the court that she stayed in the house for 6 days and that she could not go home as she did not have bus fare. What was she eating for the 6 days, if she did not even have pay for her transport home?
  - e). In her evidence in chief she told the court that she met the appellant at Kahunjo junction but in cross-examination she stated that the appellant came and picked her from home.
  - f). When she arrived home, it was her evidence that she went to the hospital 5 days later and the report to the police was also made 5 days later. Why did it take 5 more days after she was located before the report to the police was made?
27. How material are these gaps? They are material in the sense that they cast doubt on the credibility of the complainant’s evidence. In the case of *Eric Onyango v Republic*,(2014) e KLR contradictions, gaps and inconsistencies may be ignored unless they show some attempts at deliberate untruthfulness. I have carefully considered the testimony of the complainant and I cannot help but conclude that the



complainant was not forthcoming on what exactly transpired. Her lack of forthrightness, informed by the unanswered questions I have posed above, casts doubts on her credibility as a witness. The complainant was a 16 years old girl, not a not 5 -year old who may be said to confuse or may have forgotten some facts. The only conclusion is that she was being untruthful or was deliberately withholding some information.

### **Whether The Prosecution's Case Was Proved Beyond Reasonable Doubt.**

28. The offence of defilement is founded on three main ingredients, that is, the age of the victim (must be a minor), penetration and the positive identification of the perpetrator.
29. Section 8(1) of the [Sexual Offences Act](#) provides as follows:
  8.
    - (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
    - (2) .....
    - (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
    - (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.
30. The first element is age. The complainant's birth certificate was produced which certificate showed that the complainant was born on June 10, 2004 The age of the complainant was therefore proved.
31. The second ingredient is the identity of the perpetrator. The appellant was positively identified by both PW1 and PW2. The complainant told the court that the appellant who stopped her on her way to church. They went for a drink. She told the court that the two were neighbours a' though they never used to talk. It is evident therefore that the two knew each other before the alleged incident. This was therefore a case of identification by way of recognition.
32. The last ingredient is one of penetration. Penetration is defined under section 2 of the [Sexual Offences Act](#) as follows:

The partial or complete insertion of the genital organ of a person into the genital organs of another person.”
33. Penetration is proved through the evidence of the victim corroborated by medical evidence. The Medical evidence was provided by (PW3), the clinical officer who examined the complainant on August 4, 2020. He testified that the victim's vagina was normal with no bruises and lacerations. That her virginity was broken but not freshly. During cross examination he stated that the absence of any injury may be attributable to the fact that the incident had occurred the week before. The medical evidence in this case did not prove penetration and the only available evidence is that of PW1 and other circumstances if any.
34. It was the complainant's testimony that she met the appellant while she was going to church and he convinced her to go to thika town with him. They went to a club where he took her to a club and asked her to drink but she refused only for him to mix the drink with soda thereupon which she agreed



- to drink it. she stated that she lost consciousness upon taking the drink. They took a tuktuk (three-wheeled motorbike) to a house where the appellant defiled her and disappeared.
35. However as demonstrated in my earlier analysis, there were too many gaps in the complainant's testimony which gaps cast her as unreliable witness.
36. In the case of *Pius Arap Maina v Republic* (2013) e KLR the court stated:
- “It is gainsaid that the prosecution must prove a criminal charge beyond reasonable doubt. As a corollary, any evidential gaps in the prosecution's case raising material doubts must be in favour of the accused”
37. In *Ndung'u Kimanyi v Republic* [1979] KLR 282, it was held:
- A witness in criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence”
38. In the absence of medical evidence corroborating the act of penetration, I consider it unsafe for the appellant for the appellant to be convicted on the evidence of the complainant alone. Am not satisfied therefore that penetration in this case was proved.
39. For the prosecution to sustain the charge of defilement all the ingredients of the offence as aforesaid must be proved. The element of penetration is missing in this case and therefore defilement has not been proved.
40. In the English case of *Woolmington v DPP* (1935) A C 462 where the court stated: -
- Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt, subject (to the qualification involving the defence of insanity and to any statutory exception). If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether (the offence was committed by him), the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”
41. On the issue of sentencing, it remains pre-eminently within the discretion of the sentencing court but such discretion must be exercised judiciously and not capriciously.
42. In considering the sentencing, the court should consider the severity of the offence, the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, the mitigating and aggravating factors, and the scar the incidence left in the life of the victim. The minimum sentence provided for defilement for a girl aged 16 years under the law is not less than 15 years. The sentence is founded in law and I would have had no reason to interfere with it, if I had upheld the the conviction.
43. In conclusion, it is my finding that the prosecution has failed to prove its case beyond reasonable doubt and the conviction of the appellant was erroneous.
44. Consequently the conviction of the appellant is hereby quashed and sentence set aside. The appellant is hereby set free forthwith unless otherwise lawfully held.



**Dated signed and delivered virtually at kakamega this 28<sup>th</sup> day of July 2023.**

**S.Chirchir**

**In the presence of:**

Susan- Court Assistant

Appellant appearing in person.

Ms Muriu for the Respondent.

