Thiong'o v Republic (Criminal Appeal 46 of 2022)
[2023] KEHC 21645 (KLR) (28 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21645 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL 46 OF 2022

SC CHIRCHIR, J

JULY 28, 2023

BETWEEN

DOUGLAS MAINA THIONG'O ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the Judgment of Hon. J. Irura PM delivered on 31st August 2022 in Kigumo SO.6/2016)

JUDGMENT

1. The Appellant was charged and convicted of the offence of defilement contrary to Section 8 (1)(4) of the *Sexual Offences Act* No. 3 of 2006 (The Act), at the chief Magistrate's court at Kigumo.
2. The particulars of the offence were that on the 14th day of July, 2016 at ....., the accused person unlawfully and intentionally caused his penis to penetrate the vagina of MWN a child aged 16 years.
3. He faced an alternative charge of committing an indecent Act with a child contrary to section 11(1) of the *Act*
4. The appellant pleaded not guilty, was tried, convicted of the main charge and sentenced to 15 years in prison.
5. The appellant was aggrieved by the judgment and consequently filed this Appeal, against both the conviction and sentence.

Petition of Appeal

6. The Appellant has set out the following grounds of Appeal:

a. That the learned trial magistrate erred in law and in fact when she convicted the appellant based on contradictive and doubtful evidence adduced by the complainant.

b. That the learned trial magistrate erred in law and in fact by convicting on her own assumptions where the evidence was clear before the court.

c. That the learned magistrate erred on both law and in fact when she convicted the appellant whereas there was another person mentioned by the complainant as a perpetrator of the offence.

d. That the learned trial magistrate erred in law and in evidence by holding that the appellant was positively identified whereas the complaint talked of a strange man.

e. That the learned trial magistrate erred in both law and fact by convicting the appellant based on casting aspersions on the evidence of the appellants witness no. 3 and disregarding the evidence of witness number No. 5 hence leading to miscarriage of justice.

f. That the trial magistrate erred on both law and facts by making assumptions and not taking into account the evidence and exhibit produced by the appellant's witness no.5 hence leading to miscarriage of justice.

g. That the learned trial magistrate erred on both law and fact by convicting the appellant without corroborative medical evidence.

Appellant's submissions.

7. It is the Appellant's submissions that the complainant contradicted herself in regard to the identity of the person who allegedly raped her.

8. It is further submitted that there was no medical evidence to corroborate the evidence of the complainant; that she was unreliable as a witness and the court did not give reasons for relying on section 124 of the *Evidence Act*, to convict.

9. It is further submitted that, in any event, the complainant came out as untruthful witness and it was unsafe to convict the Appellant on the basis of her evidence.

10. The Appellant further faults the trial court for holding that a broken hymen was evidence of penetration, when there was evidence that the complainant had been sexually active for a period of 2 years prior to the date of the alleged defilement. That in any event a broken hymen is not evidence of defilement. He has relied on the case of *KW v. Republic* [2012] HCCRA No. 331 of 2008 and *Joash Ouma Randa v. Republic* [2022]e KLR , in this regard.

11. The Respondent did not file any submissions

Analysis and determination

12. This is a first Appeal and the duty of this court is to review and re-evaluate the evidence on record and come to its own conclusions, while paying attention to the conclusions made by the lower court as was held in *Okeno v. Republic* 1972 EA 32) the Court of Appeal for Eastern Africa stated that: "An appellant on a first appeal is entitled to expect the evidence as 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] E.A. 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) E.A. 424."

13. PW1 was the complainant. She told the court that on 14th July 2016, she took her sibling to a clinic in Maili. She met the accused who ferried her home. He then told her to go and get her clothes and come with him. She did as instructed, and they went to a lodging in maili. They then parted ways and she went to her grandmother's place. She had sex with him in the lodging. She went home and put the baby to sleep, she then went to kangari and met the accused. The accused handed him over to David. she slept with David for 4 days. On the 4th day, the accused saw him basking outside David's house, he called her and told her that her parents were looking for her. The accused called his father, who came and took her to the chief's office. She further told the court that the accused's father told her to tell the chief that she had run away from home because his father had failed to pay school fees for her. Her father was called and a pastor Priscilla. Her father came and took her to hospital.

14. On cross- examination she told the court that she was walking back home from hospital when she met the accused who was riding a motorbike. She was dropped at kinyona junction and walked the rest of the distance. She reached home at 2pm. At 3pm, the accused came for her at home and told her to carry her clothes. That she was with Ruth on that day at 10am at AICC to fix buttons on the aprons. They took time to do this. She still went to the hospital. She was with Ruth on the 4th and not 14th. That in her statement to the police, she talked about 4th and 14th. She mentioned 4th because that was the day the accused took her to the lodging. That after the accused took her to the lodging on 4th, she went to her grandmother's place. Her mother later came for her. That the accused took her to David on the 14th. That she was with the accused in the lodging on the 4th and not 14th ; that the accused and her went to a place called " stage ya mbocho", he left her there and came back with David; that she didn't know David. She went with David to his place. she stayed with David until the 18th. That she was never taken to hospital on the 16th. That she was not being held hostage at David's. On 18th the accused left her at a place called kangari and went and came back with his father. That she is the one who told the accused father that she had run away from home because her father had failed to pay school fees for her. That the accused father is not the one who told her to fabricate the story. That it is true that she left home because of being beaten and school fees not being paid; That the accused's father then took her to pastor Priscilla's shop, where her father came and picked her.

15. On re-examination she stated that the accused had sex with her twice, on the 4th and 14th; that she voluntarily stated that she was being beaten, because it was true that it was happening.

16. PW2 was the father of the complainant. He told the court that the complainant was born on 16th June 2000 and produced the birth certificate. That on the 14th when he arrived home at 9 pm, he was told that PW1 was missing. He went to the assistant chief and reported. The next day, he reported at the chief's office in kangari ; that on Thursday he got a call from pastor priscilla who told him that PW1 had been spotted at kangari with the accused's father. On the same day he passed by kigumo police station and filed a report. He then proceeded to the pastor's shop where he found PW1. That the accused father demanded that they go to the hospital together. She was examined in kigumo hospital and referred to Maragua. He went home while pastor priscilla took PW1 to maragua hospital. The two came back the next day. He knew the accused as a neighbour.

17. On cross- examination he told the court that pw1 got lost on 14th July 2016. That he did not know where she spent the night on the 4th July; that she was not going to school during that period. He reported to the police on the day she was found; that he filed the report on 1stJuly; that he was told

by pastor priscilla that pw1 had been found with the accused's father. He did not know if the accused father was a village elder. He made the report to the chief on the 15th and to the police on the 16th.That he did not talk to the chief but to a sergeant Kariuki. He did not know if the chief had asked the accused's as one of the elders to look for pw1. That the accused was arrested after 2 or 3 months. He never took the police to look for the accused.

18. PW3, was a clinical officer at Maragua Sub- county hospital. He had a p3 form which was filled on the 19th July 2016 and the treatment notes dated 16/07/16 from maragua hospital and another from kigumo dated the same day. On examining the complainant, he found that the genitalia were normal, the hymen was broken, vaginal swap showed presence of pus cells. The breakage of the hymen was old. The complainant reported that she had been having sex for 2 years with someone well known to her

19. On cross examination, he agreed that the notes from kigumo indicated that she reported that she had had sex with a strange man.

20. PW4 was an Administration police officer attached to kirere police post, but was initially attached to kangari. He told the court that on 16th /6/2016 pw2 came to the office and told him that he had made a report of his missing daughter at kigumo police station; that he had now spotted her and wanted them to interrogate her.He had suspected that the accused was having a relationship with her. He went with PW2 to maiiri and found pw1 with pastor priscilla. On interrogation, pw1 admitted to have been having a relationship with the accused. He never met the suspect. He asked priscilla to take PW1 to the police station then to hospital. He was not involved in the arrest of the accused.

21. On cross- examination, he stated that he found PW1 with pastor priscilla near PW2'S homestead. That the complainant was found on the 16th . That she was with priscilla when she was found; that pw1 reported that she had been at Thiongo's residence.

22. PW5 was the investigation's officer. He told the court that on 16th July a report of a missing person was made by PW2. That on 18th PW2 went back to the station with the complainant. He recorded her statement. She reported that she had been involved with the accused on 4th and 14th July. He further told the court that the accused was arrested on 8th September 2016.

23. On cross -examination he stated that the report of a missing person was made on 16th July and not 14th. The complainant was brought in on the 19th and a defilement report was made. They went to the station alone with the father (PW2). That he immediately sought the help of PW2 in arresting the accused. He gave him a note to take to CID offices. That he was not there when the complainant was arrested. That he knew the suspect before, though not by name; that the father of the complainant is the one who should explain why they took long(?). He denied asking for ksh. 200,000 so as to end the case.

24. The Appellant was put on his defence and he opted to testify on oath. He told the court that on the alleged date, the 14th July 2016, he went to work with Simon Macharia and John Mwangi at mama Kimotho's home. At 10.00 am, he left with his motorcycle to buy some items that they needed and when he reached Mairi, he met the complainant who was with a small child and she asked for a lift. He told the court that he ferried her to Kinyona- Kangari junction, then went on to purchase the items. He returned to work and stayed on until 6.00 p.m. He stated that he did not meet the complainant again on the said date. On 7th September 2016 he was called by the police to go to the station, he sent his father as he was away. The following day he went to the station. He confirmed knowing PW1. That PW2 came to the station and he said he suspected him of having been with his daughter. He was taken to kigumo police station. That PW2 and corporal maina asked for ksh. 200,000 which he refused to

pay and he was therefore charged. He denied committing the offence, insisting that all he did was to give PW1 a lift.

25. On cross- examination he stated that he had known the complainant since she was young.

26. The next defence witness was one John mwangi (referred to as DW1 in the proceedings) . He told the court that on 14th July 2016, he went with the accused to a home in Kihoho and they started working until 10.00 am. The Appellant went to purchase some items which they needed for the work. He came back after 30 minutes and continued working up to 6pm

27. David macharia was the next defence witness. He told the court that he was working with the accused and DW1 on the day of the alleged incident. He repeated almost word by word what "Dw1" told the court.

28. Joseph Thiongo was the next witness. He was the accused's father. He told the court that he is a village elder. on 14th July he got a report from pastor Priscilla that PW1 was missing. On 16th she saw the complainant in Kangari town and he asked her where she has been as he had heard she was missing. The complainant told him she had been at her grandmother's house. He took her to kangari police post and he was told to take her home. On the way they met pastor priscilla. While they were still with priscilla he decided to call the head-man in charge of kinyona, who told him not to release the complainant. Shortly after, the complainant's father arrived with the Administration police (AP) officers and they went away with priscilla and the complainant. Two months later his son called him from thika and told him he had been summoned by the police. He requested him to go and check what the problem was. The following day, they went with the accused to the AP's office and they were taken to Kigumo police station The accused was asked for ksh. 200,000 so that the case would end but he refused. He was then charged

29. On cross- examination he told the court that he was the one who found PW1 at kangari and took her to the AP post.

30. The last witness for the defence was police constable Esther Ndungu. she was attached to kangari police post at the time of the incident. She told the court that on 16th July 2016 the complainant was brought in by the Accused's father who was a village elder of the area. He reported that he had found the complainant at kangari. She tried to reach the parents but she could not reach them on phone. PW4 offered to take the girl and he instructed them to report at kigumo police station. when she interrogated the girl, she said she had been at her Aunt's place.

31. On cross- examination she stated that a report of a missing child had earlier been made

32. I have considered the grounds of Appeal, the submissions as well as the record of the trial court. There is only one issue arising for determination, namely: whether the offence of defilement was proved.

33. Section 8 (1) (4) of the *Sexual Offences Act* provides as follows:

> " (1) Any person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (4) A person who commits the 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."

35. For a charge of defilement to be sustained, the prosecution must prove the age of the victim, the identity of the perpetrator and the act of penetration. All the ingredients must be present (see *George Opondo Olunga v Republic* [2016] e KLR).

36. On the age of the complainant, her birth certificate was produced. It showed that the complainant was born on 16th June 2000. Thus, she was 16 years during the incident. In any event the age of the complainant was not an issue in the trial court or in this appeal.

37. On identification, it was the evidence of the Appellant that he had known the complainant since she was young, that she had given her a lift on the material day. Identification was and is therefore not in dispute.

38. The last element, the one of penetration, is the one under contest. Section 2 of the Act defines penetration as "partial or complete insertion of the genital organ of a person into the genital organs of another person"

39. The evidence of the medical officer was that upon examination of the complainant, it was found that the hymen was broken; and there were no lacerations on the vagina. Save for a broken hymen, there was nothing to indicate that the complainant had had penetrative sex. According to PW4 however, the hymen had not been freshly broken and the complainant told him that she had been sexually active for the last two years. Courts have repeatedly held that a broken hymen is not a proof of penetration. There was no medical evidence therefore to corroborate the evidence of the complainant on the element of penetration.

40. However the complainant herein was 16 years of age . She was not a child of tender years (see the court of Appeal decision on *Samuel Warui Kanini v Republic*[2016] e KLR).Therefore her evidence did not need any corroboration.

41. Further in the in the court of Appeal decision in *Kassam Ali v R*, Criminal Appeal No. 84/ 2005, it was held that " the absence of medical examination to support the act of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence."

42. In the absence of medical evidence I will now turn to analyse the evidence of the complainant and any relevant surrounding circumstances. The pertinent questions are: was her evidence believable? was it safe enough to form a basis of conviction of the Appellant? were there surrounding circumstances that backed up her claims?

43. In her evidence in chief, the complainant told the court that she was from the hospital with her younger sibling when the Appellant came by and offered her a lift. That he told her to pick her clothes and meet him on the road. She took her clothes and went to mairi. After that she went to her grandmother's place. She had sex with him. she further explained that she went home, put the baby to bed and went on to kangari and met the accused. In cross- examination however, she told the court that the accused picked her from home at 3pm.

44. It was also in her evidence in chief that when she parted with the Appellant, she went to her grandmother's place, but later, still in her evidence in chief, she said that after he was done the accused handed her over to a David and she slept with the said David for 4 days. Curiously the complainant was never asked to clarify on this glaring contradiction. The "clarification' only came at cross- examination, where she then stated that in fact she had been talking of two different incidents which took place in two different days. What is instructive is that ,the allegation that she had earlier been defiled by the accused on the 4th was coming up the first time in cross- examination. To my mind, this was an important piece of evidence, that ought to come out during examination -in- chief.

45. Also in cross- examination, she brought up the name of a person called Ruth. She stated " I was with Ruth on that day at 10 am at AICC to fix the buttons on aprons. We took some time to do this. I still went to the hospital. I was with Ruth on 4th and not 14th." It raises the question as to whether the complainant went to the hospital on the 4th or 14thand which of these two days then did the Appellant gave her the lift?

46. In cross – examination again, she told the court that she stayed with David until the 18th, and that David did not take her to the hospital on the 16th, seeing that according to her testimony she was still with the David on the 16th. She further told the court in cross- examination that she was taken to the hospital on 18th by her father. But her treatment notes have a date of 16th. The investigation officer also told the court that a report of the complainant having been found was made on the 16th. How long did she spent time with David? was it for 2 days (14th to 16th) or for 4 days (14th to 18th) ?

47. In her evidence in chief, the complainant told the court that it is the Appellant's father who told her to tell the chief that she ran away from home on account of her parents failing to pay her school fees and being beaten. However, in cross- examination she admitted that she was the one who gave the accused's father the said information. she further stated that it was true that she had ran away from home for said reason. She went on to affirm this in her re- examination. It means then that she had been less than candid in her examination – in- chief.

48. Something else strikes me to be out of place. The complainant was 16 years old, far from being a child of tender years. It is not only odd, but disturbing that a child of that age would agree to be handed over (, to use her own words) by one man to another, (and the latter being a stranger to her) and she willingly goes along without raising any alarm. She was not held hostage by the Appellant. Indeed, it was her evidence that the Appellant left her at "stage ya mbocho" as he went to call the other man and therefore she was not under the control of the appellant the whole time. I pose this particular question without loosing sight of the fact that this is a case of defilement, not rape. My question is rather directed at her credibility as a witness.

49. This is not to say that the complainant's inactiveness could have lessen the crime allegedly committed by the Appellant, but it puts into question the truth of her allegations.

50. What do the above contradictions say about the complainant? That her credibility as a witness is in question, she came out as either withholding some information or deliberately misleading. The complainant was 16 years old at the time of the incident and when she was testifying. she was not a child of tender years so be assumed that she was mixing up events or situations.

51. In the case of *Ndungu kimanyi v Republic*[1979]KLR 282 it was held: " The witness in a criminal case whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straight forward 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 unreliable witness which makes it unsafe to accept his evidence"

52. There are also some gaps and other contradictions generally in the evidence of the prosecution that are notable. The complainant dwelt at length about a David who also had sex with her and whom she stayed with for 4 days. Despite featuring extensively in the complainant's testimony, the "David" did not seem to have aroused the investigator's interest. This is not to suggest that David should automatically be in place of the Appellant herein, for each must carry one's own cross. But interrogation of the David would have answered the questions such as: whether the complainant was actually with him for the 4 days alleged; did he know the Appellant and did he receive the Complainant from the him?, on what date did the complainant left his house?, was he the perpetrator of the crime?

etc . Even if the investigators were not keen on David as a suspect, they should at least have been interested in him as a witness. This is especially so because there is none among the prosecution witnesses who saw the accused with the complainant on the alleged date of 14th July 2016.

53. The trial magistrate posed some questions too around the mysterious person of David. she even questioned whether "David" existed in the first place. The questions were indeed material. However, after posing these questions, she went on to err in her conclusions. She posed for instance: "The question this court is left pondering is, if indeed this David existed why didn't the complainant lead the police to where this David had kept her? Why was he not called for interrogation as to where the complainant had been for the for past few days before she resurfaced? Is it because there was no such person in the first place and the accused knew where he had kept the complainant and feared he would be found?"

54. The trial Magistrate conclusion is wrong in 2 ways: Firstly, she seemed to have forgotten that "David "was the creation of the complainant, not the Appellant. At no time did the accused mention a "David". It was the complainant who mentioned David, and it was her responsibility to lead the investigators to him, if the investigators had wished to.

Secondly failure by the prosecution to look for and interrogate the David, or establish whether such a person existed cannot, and should not be used against the accused person. It was simply a reflection of the prosecution's failure to gather evidence required to tighten their case. By tying and trying to blame the Appellant for the questionable existence of the David, the trial Magistrate was effectively shifting the burden of proof to the defence. That was an error on her part. It is not for the defence to fill gaps on the prosecution's case and indeed any material gaps and contradictions must be resolved in favour of the accused person.

55. It is also evident that the trial court reached some conclusions that were not founded on evidence, was contrary to the evidence presented or ignored the Appellant's response. She stated for example that the complainant was being coached, apparently by the accused's father on what to say, but she completely ignored the complainant's admission that the information initially came from her. She also ignored the complainant's own admission both in cross- examination and re- examination that she actually left home for the said reasons. The trial Magistrate also doubted the Appellant's father's evidence to the effect that he was a village elder and only looked out for the complainant in that capacity. Now this fact of being a village elder was not contested at all in cross- examination. The last defence witness (the AP officer) too told the court that the Appellant's father was indeed a village elder. This evidence was not controverted and the court had no reason to discredit it. The Magistrate further faulted the Appellant's father for failing to record a statement following his "good Samaritan deeds" . Again, this was an erroneous observation for the reason that it was the work of the prosecution to look for and record witnesses' statements from the witnesses. If the prosecution has no interest in a witness, the witness could not be expected to force his way into the witness list.

56. Thus there were serious gaps and contradictions in the prosecution's evidence. In the case of *Eric onyango Ondeng v Republic*[2014] e KLR it was held that minor contradictions may be ignored but not so those which go into the substance of the case or that which demonstrate some acts of deliberate untruthfulness on the part of a witness. The complainant testimony has created doubts as to her truthfulness.

57. Something else and for which no explanation was given by the prosecution is the fact that it took two months for the Appellant to be arrested. The delay in arresting the accused was not explained. Was it then an afterthought? It is also instructive that on two occasions, the complainant's father mentioned

that he suspected the Appellant to be in some relationship with his daughter. Is it this suspicion that led to the arrest of the Appellant?

58. 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."

59. There were some witnesses whom in my assessment would have shed more light on what transpired. Pastor priscilla featured prominently in both the testimonies of both the prosecution and defence witnesses. It was pastor priscilla according to DW4 who first informed him that the complainant was missing and it was the same priscilla who allegedly received the complainant from DW4 after PW4 allegedly found her in karangi. The same pastor is also the one who, according to PW2 took the complainant to the hospital. Also considering this apparent frequent interaction with the DW4, she will have been able to confirm if the Accused's father was indeed carrying his duties as a village elder or was on a mission to cover up for his son's crime.

60. The burden of prove in criminal cases must and always belong to the prosecution. The standard is beyond reasonable doubt. Any doubts must go to the accused. It is my finding that the prosecution failed to prove the charge of defilement beyond reasonable doubt and the accused was wrongly convicted.

61. Consequently the conviction of the Appellant is hereby quashed and sentence set aside. He is to set free forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 28TH DAY OF JULY 2023.

S. CHIRCHIR

JUDGE.

In the presence of:

Susan- Court Assistant

Appellant- in person

Ms Muriu for the Respondent.