



**Maritim v Republic (Criminal Appeal 66 of 2019)
[2023] KEHC 20912 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20912 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL APPEAL 66 OF 2019
RB NGETICH, J
JULY 27, 2023**

BETWEEN

BENARD KIPKORIR MARITIM APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

Background

1. The Appellant was charged in count one 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 particulars of the charge being that the accused on the November 17, 2018 at around 1400hrs in Rongai sub-county within Nakuru County intentionally and the accused unlawfully caused his penis to penetrate the vagina of KJB a child aged 13 years old.
2. The accused was charged with an alternative count of indecent Act with a child contrary to section 11(1) of the *Sexual offences Act* No. 3 of 2006, the particulars of the offence being that the accused on November 17, 2018 at around 1400hrs in Rongai sub-county within Nakuru county the accused intentionally and unlawfully caused his penis to come into contact with the vagina of KJB a child aged 13 years.
3. The accused denied all the charges and the matter was set down for full trial with the prosecution calling 7 witnesses in support of the charges against the accused. Upon the close of the prosecution's case the court found that the accused had a case to answer and he was placed on his defence. He gave unsworn statement in his defence. He denied committing the offence blaming his wife. He told the court that he had quarreled with her in the morning because the wife wanted to go to her parents' home but he declined to allow her. He stated that the wife had promised not to sleep with him. He was arrested while at work and accused of defilement.



4. By judgment delivered on the October 7, 2019, the court found that the prosecution had proved beyond reasonable doubt the charges against the accused person in the main count and convicted him as charged and sentenced him to serve 10 years imprisonment.
5. Dissatisfied with the conviction and the sentence of the trial court, the Appellant filed a petition of appeal on the following grounds:-
 - i. That the Learned trial magistrate erred in law and fact by failing to note that the witness's evidence was contradictory and with inconsistencies hence could not support a just conviction.
 - ii. That the learned trial magistrate erred in law and in fact by failing to appreciate the Doctor's findings in the medical evidence that it did not incriminate the accused for the alleged offence.
 - iii. That the learned trial magistrate erred in law and in fact in failing to appreciate that the prosecution did not prove its case beyond any reasonable doubt.
6. On the January 18, 2023, the Appellant filed amended grounds of appeal pursuant to section 350(iv) of the Criminal Procedure Code and raised the following grounds of appeal:-
 - i. That the learned trial magistrate erred in law and in fact by failing to appreciate that the core ingredient of the offence termed defilement namely penetration was not proved beyond any reasonable doubt as prescribed by law.
 - ii. That the learned trial magistrate erred in law and in fact by relying on uncorroborated, incredible and unreliable evidence of single witness.
 - iii. That the learned trial magistrate erred in law and fact by failing to appreciate that the age of the complainant was not substantively proved as required of law.
 - iv. That the learned trial magistrate erred in law and in fact by failing to appreciate that crucial witnesses were not called upon by the prosecution to testify.
 - v. That the learned trial magistrate erred in law and fact by failing to appreciate that in totality the prosecution case was not proved beyond any reasonable doubt as prescribed by law.
 - vi. That the learned trial magistrate erred in law and in fact by failing to consider and thereof dismissing the defence adduced by the appellant in court without offering any cogent reasons thereof.
7. The Appellant prayed that his appeal be allowed, the conviction quashed and the sentence set aside and he be set at liberty. The appeal proceeded by way of written submissions.

Appellants Written Submissions

8. The appellant argues that one of the critical ingredients of the offence of defilement is the proof of penetration but was not proved beyond reasonable doubt in this case. Accused submitted that Pw1 gave scanty details of the heinous act and a court of reasonable jurisdiction cannot not convict the Appellant on the basis of such scanty details. That the court was duty bound to examine the credibility of the said evidence a task that the court abdicated.
9. He submitted that the complainant ought to have stated to the court her mental state, how she felt during the alleged act, what happened to her after the alleged incidence; did she bleed, feel pain and how she coped with the incident. That this and other details would have helped the court to test the credibility of the evidence adduced by the complainant in relation to the alleged offence and whether the evidence adduced revealed the act committed was that of defilement.



10. He submitted that details of occurrence of the offence was necessary to test credulity of the witnesses and referred to the case of Julius Kioko Kivuva vs Republic [2015] eKLR in support of his argument on the sensory details and submitted that absence of such details and specificity in the evidence of PW1 rendered it incredible and could not be used to secure a safe conviction.
11. He submits that further to the above, it is worth noting that the evidence of Pw 1 although sworn lacked the element of corroboration. That whereas the decision by the appellate court in the case of Johnson Muiruri Vs Republic 1983 KLR 445 held that where a child of tender years gives sworn evidence no corroboration is required, the same decision in part also held that the assessors must be directed that it would be unsafe to convict when there was no corroboration.
12. That the medical evidence produced by PW 4 in form of p3 form issued on November 22, 2018 and filled on November 23, 2018, PRC Form filled on November 22, 2018, Lab Test request Form dated November 23, 2018, Clinical notes dated November 22, 2022 have glaring contradictions. That the P3 Form is indicated to have been issued on November 22, 2018 at 5:30 p.m and is indicated that the child was sent to hospital the following day on the November 23, 2018. That the clinical notes and the PRC Form indicate that the examination was done on November 22, 2018 and not November 23, 2018 as indicated at the P3 Form; and on the other hand, the lab result for m indicates that the examination was done on November 23, 2022. He submitted that the contradictions grossly affected the credibility of these medical documents and referred to the case of Augustine Njoroge Vs Republic Criminal Appeal No. 185 of 1982 where the court of appeal held that contradictory evidence is unreliable.
13. He submits that Pw 4 testified that her hymen was broken within 72 hours while the complainant said she was defiled on November 17, 2018 at around 2p.m, the medical examination was conducted on November 22, 2018 being 5 days after the alleged offence. He questions how the medical practitioner would place the injuries to be within 72 hours. He submits that he objected to these medical documents on page 22 of the typed proceedings by stating that the name of the complainant was changed and no proper explanation was given.
14. The Appellant submits that trial court in attempting to justify its finding on the penetration relied on the findings of the absence of the hymen but courts of appellate jurisdiction have held time and again that the absence of hymen should not conclusion that penetration occurred and referred to the case of PKW Vs. Republic [2012] eKLR.
15. And further if the complainant was defiled, her clothes would have been stained and taken for analysis but there was no evidence as to whether clothes were soiled or not; further that no spermatozoa or any other form of masculine discharge was seen; and submitted that medical evidence adduced did not create a nexus between him and the alleged offence.
16. The appellant submit that the whole case revolves around the evidence of a single witness the complainant herein but her evidence was incredible and not corroborated; an example being that the clinical notes indicates that the complainant gave a history of having been sexually abused four times prior to the last one but she did not indicate the same and under what circumstances it happened. Further, the complainant said the accused had sent the other children to fetch water but none of the children was called to testify, neither did the prosecution through the investigations officer or any other witness ascertained the existence of such a river and the proximity thereof.
17. The accused submitted that evidence of Pw 1 was not corroborated and was therefore a clear act of relying on evidence of a single witness. He submits that the trial court grossly erred in law and in facts by relying on uncorroborated and incredible evidence of the complainant which did not meet the thresholds of admissibility and credibility to convict the Appellant.



18. The Appellant submit that the trial court erred in relying a document from the civil registrar of persons that indicated that the child was born on September 24, 2005. on ground that it was not challenged by prosecution and by holding as such shifted burden of prove to the accused. Further, that the letter from the civil registrar of children was not corroborated by the oral evidence of PW 1 the complainant and Pw 3 the father. That the complainant indicated that she was born on March 2, 2005 whereas the said letter indicated that she was born on September 24, 2005; and in view of the discrepancy, the letter should be rendered void, contradictory and incredible and how the said letter was acquired is in question as the investigations officer PW 7 did not involve either the parent nor the complainant in sourcing the letter.
19. The appellant submits that section 143 of the *evidence Act* cap 80 laws of Kenya does not relieve the prosecution of its responsibility in criminal matters to call critical witnesses to testify in court and where such witnesses are left out, it is very sound to conclude that if such evidence was adduced, it could have been adversarial to the prosecution's case ;same to failure to call children who complainant alleged had been sent by the accused.
20. The appellant further submit that the trial magistrate erred by failing to invoke the requisite provision of law to call these critical witnesses despite their evidence being so material a failure that caused doubts.
21. The accused submitted it was his defence that the matter emanated from a family feud between him and his wife who came up with the fabrication in order to settle scores; and his plausible defense cast doubt on the prosecution's case and the prosecution was duty bound to rebut or displace the same by invoking the provisions of section 309 of the Criminal procedure code but failed to do so.
22. It is the Appellants humble plea that this Honourable court will find that his defense was meritorious and required adequate consideration and if so considered it would have led to the acquittal of the Appellant. The Appellant calls upon this court being the first appellate court to subject the evidence tendered to a fresh evaluation and arrive at a different, independent conclusion other than that which was arrived at by the trial court as was held in *Pandya Vs Republic* [1957] EA 336.
23. When the matter came up for hearing on the May 31, 2023, the Appellant told the court that in addition to his written submissions, the lab result was written Irene but it was changed to read Karen. That on November 21, 2018, he was taken with his wife to be tested and the P3 form that was used is for his wife Daisy Maritim and not for Karen. He stated that the P3 Form produced in court was for Irene, that on February 12, 2019, the complainant Karen Cheronon said he did not do anything to her and she went to hospital because she had chest problems. He submitted that Karen Cheronon was not tested in Hospital.

Respondent's Submissions

24. The state counsel Ms. Ratemo submitted that the accused has submitted on three grounds; the 1st ground being the witnesses adduced contradictory and inconsistent evidence. She submitted that it is trite law that evidence given in sexual offences matters need not be corroborated and the court can rely on the sole evidence of the complainant if it believes that the complainant is telling the truth but, in this case, the complainant's evidence was consistent; that the complainant narrated the ordeal between her and the Appellant.
25. The state counsel further submitted that during cross examination, the complainant said the appellant threatened to harm her if she told anyone about the incident and evidence of the Doctor pointed to the fact that indeed the complainant was defiled; that P3 form was filled by Dr. Rachel Chesire and it is not cancelled anywhere. The name is indicated as Karen Cheronon and the findings of the Doctor



was that her hymen was torn, had inflammations and lacerations with pus cells and several epithelial cells. The doctor's finding was defilement.

26. She submitted that the cancellation was on treatment notes at Mogotio where the first name was cancelled/altered and the doctor who testified as PW 4 upon being cross examined by the appellant on cancellation said that the name was cancelled after she got proper name of the child. She said the child was presented to the hospital by the chief and not the parent. That the evidence tendered in respect of defilement of the minor was believable and the court could have used her sole evidence to convict the appellant.
27. The state counsel further submits that penetration can be proved circumstantially as held in the case of *Kasim Ali vs Republic* [2006] eKLR.
28. She submitted that the 3 ingredients of the offence of defilement being identification, penetration and age of the complainant were proved; that identification was not in doubt since the complainant stayed with the Appellant; the Appellant was the husband to her sister and it happened during the day.
29. On penetration, the respondent submits that the P3 Form was produced together with the PRC Form and treatment notes as Exhibits 1, 2 and 4 and in respect to the age of the complainant, a letter showing that the complainant's birth certificate was being processed was produced in court and the date of birth indicated was September 24, 2005 which means that the complainant was aged 13 years at the time of the offence.
30. The state counsel submitted that although the accused has not submitted on sentence, the trial court indicated that the mandatory nature of the sentence was unconstitutional and proceeded to impose 10 years imprisonment. She submits that the sentence is lenient and mandatory nature of the sentence was not unconstitutional; that the state did not file notice of enhancement but prayed that the sentence be upheld; that the child was aged 13 years and was in the care of the Appellant and he had the responsibility of offering care to her but he instead defiled her.

Analysis And Determination

31. This being the first appellate court. I am expected to subject the entire evidence adduced before the trial court to fresh evaluation and analysis. This I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demeanour. The principles that apply in the first appellate court are set out in the case of *OKENO VS REPUBLIC* [1972] EA 32 where it was stated as follows:-

“The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala v. Republic* [1957] EA 570.) It is not the function 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*, [1958] EA 424.)”
32. In view of the above, I have considered evidence adduced before the trial court and the submissions by the parties herein. I wish to consider the following issues: -
 - i. Whether ingredients for the offence of defilement were proved beyond reasonable doubt
 - ii. Whether this court should interfere with sentence imposed.



i. Whether ingredients for the offence of defilement were proved beyond reasonable doubt

33. The ingredients for the offence of defilement are prove of age of the victim, penetration and identification of the perpetrator.
34. In respect to age, PW1 testified that she was born on March 2, 2005. PW 7 the investigations officer produced in court a letter dated February 7, 2019 from civil Registrar of person Molo Kuresoi which indicates that the child's birth certificate was under process and birth certificates were out of stock. The letter indicate that the child's date of birth is September 24, 2005. He produced the letter before court as Exhibit 5.
35. The Court of Appeal in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

“... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.”
36. The letter produced in court indicate that birth certificate was in process. The child said she was 13 years. Though the exact dates by the child differ with the dates in the letter, there is consensus on the year of birth being year 2005. In my view age of the minor was proved.
37. In respect to Penetration, Section 2 of the [Sexual Offences Act](#) define penetration as follows: -

“The partial or complete insertion of the genital organ of a person into the genital organs of another person.”
38. The accused argued that the trial court relied on evidence of a single witness. The Court of Appeal in Chila v. Republic (1967) E.A 722 articulated this position and held that:

“The Judge should warn ... himself of the danger of acting on uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless court is satisfied that there has been no failure of justice.”
39. Record show that evidence of pw1 was corroborated by pw 2 her sister, Pw 3 her father, and Pw 4 the medical officer who examined the complainant confirmed that she was defiled.
40. The appellant argue that the prosecution failed to call key witnesses, the Appellant's children who were with the complainant before being asked by the appellant to go and fetch water. The age of the children is however not indicated. The court can however rely on evidence of a single witness if the court finds the witness truthful as observed in paragraph 38 above.
41. From the foregoing I find that the ingredients for the offence of defilement were proved beyond reasonable doubt

(ii.) Whether this court should interfere with sentence imposed.



42. I note that the trial magistrate in sentencing indicate that mandatory nature of sentence was unconstitutional and imposed sentence of 10 years. The minimum sentence under section 8(3) of the [sexual offences Act](#) provide for a minimum of 20 years imprisonment. I take note of the fact that the prosecution admitted that they did not issue notice for enhancement of sentence and I will not interfere with the sentence imposed.

Final Orders

1. Appeal On conviction is dismissed.
2. Sentence imposed by trial court is hereby upheld.

JUDGMENT delivered, dated and signed Virtually at Kabarnet

This 27th Day of July 2023.

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RACHEL NGETICH

JUDGE

In the presence of:

Mr. Kemboi - Court Assistant.

Ms Ratemo for state.

Appellant present.

