



REPUBLIC OF KENYA



KENYA LAW
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**Chege v Republic (Criminal Appeal E158 of 2021)
[2023] KEHC 21905 (KLR) (Crim) (14 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21905 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CRIMINAL

CRIMINAL APPEAL E158 OF 2021

LN MUTENDE, J

AUGUST 14, 2023

BETWEEN

PETER KAMAU CHEGE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal arising from the original conviction and sentence in Criminal Case No. 611 of 2010 at the Chief Magistrates' Court Kibera by Hon. F.Mutuku – SRM on 29th May 2019)

JUDGMENT

1. Peter Kamau Chege, the appellant was charged with the offence of defilement contrary to section 8(1) (3) of the *Sexual Offences Act* No. 3 of 2006. Particulars being that on the 21st day of January 2010 in Kajiado North District within Rift Valley Province the accused intentionally and unlawfully committed an act by inserting his male genital organ (penis) into a female genital organ (vagina) of ML a girl aged 14 years which caused penetration.
2. In the alternative he faced a charge of committing an Indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. Particulars were that on the 21st day of January 2010 in Kajiado North District within Rift Valley Province the accused intentionally and unlawfully committed an Indecent Act by placing his male organ (penis) and fingers on the surface of female organ (vagina) to ML a child aged 14 years.
3. Upon being taken through full trial the appellant was found guilty, convicted for the alternative count of committing an Indecent Act with a child and sentenced to serve ten (10) years imprisonment.
4. Aggrieved, the appellant proffered an appeal on the grounds that: The trial court contravened Section 19 of the *Oaths and Statutory Declarations Act* in respect of reception and admissibility of evidence of



a child of tender years; and presiding over an unfair trial hence breaching the appellant's constitutional rights the charge was defective as it was at variance with evidence; no evidence of penetration or Indecent Act was presented; the defence put up was dismissed for no apparent reason; and, that section 333(2) of the Criminal Procedure Code (CPC) was not complied with.

5. Briefly, the prosecution's case was that the complainant ML and the appellant were friends. On 21st January, 2010, he took her to a house which belonged to an individual known as Isaac. They engaged in consensual sexual intercourse. In the meantime PW2 JL, her father received information that the complainant had not gone to school. He reported the matter to the police. They went in search of the complainant and found her. She was taken to Nairobi Women Hospital for examination and treatment. The appellant was arrested and charged.
6. Upon being placed on his defence the appellant said he was at home with his wife on 21st January 2010 when he heard a knock on his door. Upon opening he saw two (2) police officers who arrested him. It was alleged that he had defile the complainant. He called a witness DW2 Daniel Njuguna who testified that on the material date at 7.00 a.m. he met Isaack Gichuhi together with their neighbour the complainant and her father, PW2, JL who alleged that the appellant had defiled the complainant. This led to his arrest.
7. The trial court considered evidence adduced and the charge of defilement was not proved as the complainant did not have fresh injuries and medical evidence presented did not support her allegations. However, he reached a finding that the alternative count of committing an Indecent Act had been proved hence convicted the appellant and sentenced him to serve ten (10) years imprisonment.
8. The appeal was canvassed through written submissions. It is urged by the appellant that the court omitted to establish if the complainant, a child aged fifteen (15) years understood the nature of oath which was prejudicial to him. In this respect reliance was placed on the case of John Otieno Oloo Vs. Republic (2009) eKLR where the court held that failure to form an opinion on a *voire dire* examination occasioned a miscarriage of justice. That in the result, the trial court could not ascertain whether the witness was truthful pursuant to section 124 of the *Evidence Act*.
9. That the particulars of the offence were incomprehensible such that the charge could not be proved as required by Section 134 of the Criminal Procedure Code (CPC).
10. That the prosecution did not avail evidence to prove the act of penetration and that having been the case, no reasons were given why the trial magistrate opted to convict the appellant for the alternative count as required by section 169 of the CPC.
11. That the Prosecution was required to prove that there was an Indecent Act. That evidence adduced by the complainant was that she availed herself to the appellant and allowed him to touch her body. However, she did not allege that her vagina was touched by hand, finger or penis as implied in the charge.
12. On the sentence, it is submitted that, the appellant a young adult aged 24 years was in custody for 3 years and 8 months a period that was not considered by the trial court.
13. The respondent was granted time (21 days) to file submission, but, it failed and/or neglected to do so.
14. This being a first appellate court I must examine and analyze evidence adduced at trial afresh and reach independent conclusions bearing in mind that I had no opportunity of seeing and hearing witnesses



who testified. This duty of the court on a first appeal was stated by the court in *Okeno -vs- Republic* [1972] EA 32 as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R* [1957] E A 336) and to the appellate courts 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 function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts’ 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”.

15. The appellant complains that *voire dire* was not conducted in the instant case. This is a process where a witness of tender age is taken through interrogation by the court to establish if she understands the nature of the oath to be administered or if she is seized of sufficient intelligence to testify and speak the truth. section 19 of the [*Oaths and Statutory Declarations Act*](#) provides thus:
 1. 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 (Cap. 75), shall be deemed to be a deposition within the meaning of that section. [Act No. 42 of 1954, s. 2, Act No. 46 of 1963, Second Sch.]
 2. If any child whose evidence is received under subsection (1) willfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be guilty of an offence and liable to be dealt with as if he had been guilty of an offence punishable in the case of an adult with imprisonment.
16. When the offence was alleged to have been committed the victim was stated to be fourteen (14) years old. Prior to receiving her evidence the trial court took her through *voire dire* examination. Both questions posed and answers given were recorded. In the result the trial magistrate opined that the witness was intelligent enough to understand the meaning of oath. Consequently, the court administered the oath to the witness (complainant).
17. The law on defilement is provided for by the [*Sexual Offences Act*](#) (SOA) Section 8 (1) of the Act provides thus:

A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
18. Therefore to prove the offence of defilement the prosecution is required to prove the following ingredients.
 - i. The age of the victim.
 - ii. The act of penetration



iii. Positive identification of the assailant.

(Also see the case of Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 12 of 2013)

19. In the case of Kaingu Kasomo Vs. Republic, Criminal Appeal No. 504 of 2020; the Court of Appeal stated that:

“Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.”

20. In the case of Francis Omuroni Vs. Uganda; Criminal Appeal No. 2 of 2000. The Court of Appeal stated that:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence, apart from medical evidence, age may also be proved by birth certificate, the victim’s parents or guardian and by observation and common sense...”

21. In the instant case the Prosecution adduced in evidence a child Health Card for the victim indicating that she was born on 6th January, 1996. This is undisputed proof that at the time of the incident she was fourteen (14) years old. In the case of Kabageny Arap Korir Vs. Republic (1959) EA 92, the court stated that a child under fourteen (14) years is a child of tender years where *voire dire* is necessary to establish the child’s competency in giving evidence before court. It is notable that at the time of testifying the child herein was fifteen (15) years old hence not of tender age therefore argument raised by the appellant that the court fell into error is not tenable.

22. Penetration is defined by section 2 of the *Sexual Offences Act* as:

The partial or complete insertion of the genital organs of a person into the genital organs of another person;

23. The complainant did allude to having had consensual sex with the appellant, an allegation vehemently denied by the appellant. She was subjected to medical examination where it was established that she had a torn hymen but she was not bleeding. The hymen was described as old with tags. No injuries were noted. Following the nature of medical evidence tendered the learned trial magistrate found that there was no proof of recent penetration.

24. The only significant finding following medical examination was the fact of the complainant’s hymen having been torn. In the case of PKW Vs. Republic (2012) eKLR, it was stated that:

“Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury and medical examinations can also rupture the



hymen. When a girl engages in vigorous physical activity like horseback ride, bicycle riding and gymnastics, there can also be natural tearing of the hymen.”

25. From the aforesaid, the trial court’s finding was apt.
26. On the alternative charge of committing an Indecent Act with a child; an indecent Act is defined by Section 2 of the *Sexual Offences Act* thus:
 - a. Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;
 - b. Exposure or display of any pornographic material to any person against his or her will;
27. According to the particulars of the offence the appellant placed his male organ (penis) and fingers on the surface of the complainant’s female organ. In her testimony the complainant stated that the assailant used his hands to touch her body while her clothes were on. In his finding the court stated that:

“I however find the evidence presented by the Prosecution supports the alternative charge of Indecent Act with the child.”
28. Section 169(1) of the Criminal Procedure Code provides thus:
 1. Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.
29. The finding of the court on the main charge of defilement was based on the fact of the act of penetration having not been proved. Evidence tendered was of a single witness. The court did not venture into admissibility of such evidence. It therefore behoved the court to state the legal basis upon which the conviction for the alternative charge was based. Evidence adduced by the complainant fell short of proving what was alleged in the particulars of the offence.
30. In the premises I find the appeal being meritorious and it succeeds. Therefore, the conviction is quashed and sentence meted out set aside. The appellant shall be released forthwith unless otherwise lawfully held.
31. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 14TH DAY OF AUGUST, 2023.

L. N. MUTENDE

JUDGE

In the presence of:

Appellant

Mr. Mutuma for ODPP

Court Assistant - Mutai

