



**Ngombo v Republic (Criminal Appeal E006 of 2022)  
[2023] KEHC 22994 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22994 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CRIMINAL APPEAL E006 OF 2022  
LM NJUGUNA, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**JAMES KANAI NGOMBO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal arising from the decision of Hon. Cheruto, C. Kipkorir (PM) in the Chief Magistrate's Court at Kerugoya Sexual Offence No. E016 of 2021 delivered on 17th March 2022)*

**JUDGMENT**

1. By petition of appeal filed on the 11<sup>th</sup> July, 2023, the appellant is seeking that the appeal be allowed, conviction be quashed, sentence set aside and the appellant be set at liberty. The appeal is premised on the grounds that the trial magistrate erred in law and fact by:
  - a. Failing to consider that prosecution failed to prove the case as required by law;
  - b. Convicting the appellant by relying on shoddy investigations;
  - c. Failing to consider that the prosecution evidence was contradictory and uncorroborated;
  - d. Failing to consider that the appellant was not medically examined; and
  - e. Rejecting the appellant's defense without cogent reasons.
2. The appellant faced the charge of defilement contrary to Section 8(1) and (2) as read together with Section 8(4) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that, on diverse dates between 18<sup>th</sup> December 2020 and 25<sup>th</sup> December 2020 at [particulars withheld] Village within Kirinyaga County intentionally and unlawfully caused his penis to penetrate the vagina of RNM a child aged 10 years.



3. The alternative charge was committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars for this charge were that on diverse dates between 18<sup>th</sup> December 2020 and 25<sup>th</sup> December 2020 at [particulars withheld] village within Kirinyaga County, the appellant intentionally and unlawfully did cause his penis to come into contact with the vagina of RNM a child aged 10 years.
4. The appellant pleaded not guilty and a plea of not guilty was duly entered. The prosecution called 5 witnesses in support of its case.
5. PW1 who is the victim, gave sworn testimony following *voire dire*. She stated that she lives with her grandmother and her sister within the same compound with the appellant who is her uncle. That on 19<sup>th</sup> December 2020, she went to the house of the appellant with her brother but the appellant asked PW1's brother to leave. That he gave her alcohol to drink and after drinking she got drunk, before he led her into his house, and the appellant removed his clothes and hers and defiled her. That she went away and did not tell anyone what had happened. That the Appellant called PW1 again on the 25/12/2020 in the guise of sending her to the shop, led her into his house and defiled her again.
6. That when the mother and sister of PW1 called her, she couldn't respond as she was still in the appellant's house and he had held her mouth and warned her that if she told anyone about the incident he would kill her. That eventually the appellant opened the door and she left and then told her mother of the defilement. That her mother screamed and a crowd gathered. That the incidences were reported to the police and she was taken to hospital for treatment and examination. On cross examination, she stated that the first time she was defiled, she cried but nobody could hear her from the appellant's house. That after she was defiled, she slept and did not feel pain but she bled in her private parts.
7. PW2 MWa, 14-year-old sister to PW1, was also subjected to *voire dire* and gave sworn testimony. She stated that on 25<sup>th</sup> December 2020, she was at home with her sister (PW1), her mother and the other siblings when the appellant called PW1. That soon after, they noticed that PW1 was missing. That their mother told her to look for PW1 and she looked in the appellant's kitchen but didn't see her. That when their mother started calling out the name of PW1, she (PW1) emerged from the house of the appellant saying "mum huyu, mum huyu". That her mother started screaming and then asked PW1 what had happened but she refused to say. That her mother beat her and asked her again and that is when she revealed that the appellant had defiled her. That their mother together with her elder sister took PW1 to hospital. On cross examination, she stated that they usually go to the appellant's house as he is their uncle.
8. PW3, GW, mother of the complainant (PW 1) stated that she has 7 children including PW1 and PW2. That on 25<sup>th</sup> December 2020 they were at home when the appellant called PW1 to send her to the shop. That after a while, another uncle of PW1 namely Uncle Sally called for her but she was nowhere to be found. That PW2 and PW3 called out for PW1 and when they looked in the appellant's kitchen, he wasn't there. That PW3 decided to go to check towards the river and that is when PW1 came out from the appellant's house saying "mum huyu, mum huyu" but she said nothing happened and she screamed thereby attracting a crowd. It was her evidence that the appellant was also inside the house. That after she threatened PW1 with a beating, she said that the appellant had defiled her and had threatened to kill her if she told anyone. That they went to Kagumo Police Station and then to Kagumo dispensary before going to Kerugoya District Hospital where PW1 was treated. On cross-examination, she stated that it was not unusual for her children to go to the appellant's house. That she does not know who opened the appellant's door from the inside and she was wondering what PW1 was doing in the appellant's house with the door locked.



9. PW4, Hezron Macharia, a clinical officer at Kerugoya General Hospital stated that on 25<sup>th</sup> December 2020, he examined PW1. That his findings were that the hymen was broken and there was active bleeding from the vaginal orifice. That the injuries were about one day old and she was treated. That there were no spermatozoa seen but he concluded that there was sexual penetration. He produced P3, PRC forms and other treatment notes as evidence. On cross-examination, he stated that he based his conclusions on the fact that blood was still oozing from the vagina indicating a fresh injury.
10. PW5, PC Jecinta Kanini of Kagumo police station stated that she was the investigating officer and that she accompanied PW1 and PW3 to the hospital following a report of sexual assault. That the appellant was arrested and charged with the offence. That she verified the age of the victim from her birth certificate and that at the time of the incident, she was 10 years 6 months. On cross-examination, she stated that the area chief, although not a witness in the case, stated that the appellant was an errant member of the society. That all the necessary witnesses recorded their statements.
11. Upon close of the prosecution's case, the appellant was placed on his defence.
12. DW1, the appellant, gave sworn evidence stating that on the 25<sup>th</sup> December 2020 it was alleged that he had defiled PW1. That he was at the shamba when he was told that they were looking for him. That he was arrested when he got to the house. He denied defiling the minor. On cross-examination, he stated that he did not get along with PW3 following a land dispute, but he was in good terms with her husband.
13. The defense case was closed and the court gave its judgment finding the appellant guilty of the offence and thereby convicting him. He was sentenced to life imprisonment.
14. In this appeal, the court directed the parties file their written submissions and both parties complied.
15. The appellant submitted that the element of penetration was not proved by the prosecution bearing in mind that this is the key element in the offence of defilement as was stated in the case of *Alfayo Gombe Okello v Republic* COA Cr. Appeal no. 203 of 2009 (Kisumu). That the hymen was not freshly broken and that no spermatozoa were found in the vagina even though there was blood oozing out. He argued that the hymen could have been broken by any other object and not the appellant. On this, he cited the cases of *Augustino Njoroge Vs. Republic* Cr. Appeal No. 99 of 1986 at Nairobi and *Chem Angong v Republic* [1984] KLR 611 among others. He submitted that the investigations carried out were shoddy and that the investigating officer never visited the crime scene and relied on hearsay evidence. That the prosecution failed to summon credible witnesses for instance, the chief, to clear any doubts in the case as was stated in the case of *Bukenya v Republic* [1957] E.A. 57.
16. The appellant further submitted that the charge was defective and the prosecution made no effort to amend it as it cited the wrong sections of the law. He submitted that there were massive variations and contradictions in the prosecution's case and that the court must warn itself before relying on the testimony of one witness, considering that there were no eye witnesses in this case. He urged the court to consider all the evidence and make its own finding as was the requirement in the case of *Okeno Vs. Republic* (1972) EA 32. That the trial court failed to consider the defense case that there was a dispute between the appellant and PW1. He stated that he was in the shamba and only came back to his house when he heard screams from the compound and he was then arrested by members of nyumba kumi initiative.
17. On its part, the respondent stated that all the elements of the offence had been satisfactorily proved beyond reasonable doubt. It stated that on the element of positive identification of the assailant, PW1, PW2 and PW3 squarely placed the appellant at the scene of the crime. That PW1's testimony on penetration was corroborated by the testimony of PW4 who gave medical evidence of penial



penetration. That the age of the victim is not in question as a birth certificate was produced to confirm that indeed she was a minor at the time of the incident.

18. From the foregoing, in my view, the issues for determination herein are:
  - a. whether the offence was proved beyond reasonable doubt;
  - b. whether or not the charge sheet was fatally defective; and
  - c. whether there were inconsistencies in the evidence adduced.
19. In order to determine whether the offence was proved beyond reasonable doubt, under Section 8(1) and (2) of the *Sexual Offences Act*, the elements making up the offence of defilement are as follows:
  - a. The age of the complainant- that the complainant was a child;
  - b. Penetration happened; and
  - c. The perpetrator was positively identified.
20. The age of the victim was ascertained through her birth certificate produced in court. The birth certificate is sufficient proof that the victim was indeed a child under the *Children Act* No. 8 of 2001 which defines a child as “.....any human being under the age of eighteen years.”
21. On the second element of penetration, PW1 stated that on the 18/12/2020 the appellant took her to his house, gave her alcohol to drink and then removed her clothes and defiled her. She described the act which is to insert his penis into her vagina. Further that on 25<sup>th</sup> December 2020, she was called by the appellant to his house with the purpose of sending her to the shop but when she went to him, he said that he had lost the money and then took her to his house. That he defiled her a second time. PW1 stated that she did not scream because the appellant had his hand over her mouth and had also warned her that if she told anyone of the ordeal, he would kill her. It is after the second incident of defilement that the appellant was apprehended. PW4 corroborated the testimony of PW1 by stating that there was indeed penial penetration and that there was a torn hymen (old) actual active bleeding in the vagina. The appellant submitted that the tear to the hymen was not recent and so it could have been caused by any other person or thing and not necessarily his penis. I find this hard to believe because the evidence available is that the defilement was done more than once and even if there is doubt as to who broke the victim’s hymen, on penetration these doubts are cleared as the appellant is placed at the scene of the crime.
22. This now leads me to the issue of positive identification of the assailant. PW1 stated that the appellant took her to his house on the 18/12/2018 and made her drink alcohol before defiling her. That on the 25/12/2020 after defiling her, the appellant opened the door and PW1 came out and said that “...uncle Kanai wanted to run away through the window....”. PW2 stated that she and her mother found PW1 in the house of the appellant and the defilement was discovered. Both PW1 and PW2 are clear on the identity of the appellant as he is their uncle and he lives a stone’s throw away from them. In fact, they both stated that it was not unusual for them to go to the appellant’s house and that he used to send them on small errands. PW3 stated that on 25<sup>th</sup> December 2020, when they had noticed that PW1 was missing, they (PW2 and PW3) found PW1 in the house of the appellant and when the door was opened from the inside, she came out saying “mum huyu, mum huyu”. That the appellant was also inside the house. That at first PW1 did not say what happened but when threatened with a beating, she said that the appellant had defiled her. With this series of events, I take the view that the appellant was indeed at the scene of the crime and he was positively identified.



23. If there were instances where the evidence could not be tied together, I find that the various pieces of evidence were well corroborated. In terms of proving the offence beyond reasonable doubt, it is my view that the requirement has been fulfilled. The trial court cautiously applied Section 124 of the Evidence Act which provides:

“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.” Emphasis added.

24. Similarly, in the case of Wamunge v Republic, [1980] KLR 424 it was held;

“It is trite law that where the only evidence against a defendant evidence of identification or recognition a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it a basis for conviction”

25. On the issue of whether or not the charge sheet was fatally defective, the appellant submitted that the charge sheet did not refer to the relevant sections of the law. The elements of a proper charge sheet are provided for under Section 134 of the Criminal Procedure Code which states:

“Every charge or 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.”

26. A charge sheet is fatally defective when the substance of the offence is incomprehensible and can impede justice. This is the spirit of Section 382 of the Criminal Procedure Code which provides:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings. It follows therefore that the court in determining whether a defect caused injustice has to have regard whether the objection should have been raised at an earlier stage in the proceedings.”



27. The courts have also interpreted the fatality of a charge sheet as in the provisions above. In the case of *MG v Republic* (Criminal Appeal E051 of 2021) [2022] KEHC 14454 (KLR), the court was guided by Court of Appeal decisions in the case of *Benard Ombuna v Republic* [2019] eKLR where it was held:-

“In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence.”

In the case of *Daniel Oduya Oloo v Republic* [2018] eKLR the court held that:-

“On the same issue the Appellant submitted that the particulars of the offence were fatally defective as they failed to disclose that the act of defilement was unlawful. It is true that the word unlawful was not included in the particulars of the offence. The offence of defilement represents a situation in which the key elements requiring proof are age of the victim, identification of the perpetrator and penetration. It is an offence perpetrated to children. Given the fact that children cannot consent to the acts that form the basis of the offence implies that as long as the elements of the offence are proved, the offence itself is deemed unlawful. Therefore, the mere omission of the word “unlawful” does not, in the circumstances, render the charge sheet defective.”

28. In the case of *MG v Republic* (supra) the court stated thus:

“Applying the test above, the appellant participated in his trial in a manner to suggest he understood the charge. He cross examined the witnesses well and was able to put an appropriate defence. This is an indication that the appellant understood the particulars of the charge he faced. Further, the appellant did not at the first instance raise an objection or rather contend that the charge sheet was defective. He in the circumstances cannot be said to have been prejudiced. It is noteworthy that an unlawful act cannot cease to be so through the omission of the word ‘unlawfully’ in the charge sheet. This ground therefore fails.”

29. It is my considered view that although the charge sheet cites “...Section 8(1) and (2) as read together with Section 8(4) of the *Sexual Offences Act* No. 3 of 2006....” the citation of Section 8(4) indeed is an error on the charge sheet. However, the correct sections of the law have been cited as Section 8(1) and (2). I do not think that the error changes the interpretation of the particulars of the offence, neither did it impede the appellant’s participation in the trial.

30. The appellant stated that the evidence was contradictory and uncorroborated. As discussed earlier, the evidence produced relating to proving the offence beyond reasonable doubt is well corroborated and consistent. In my view, the evidence created a sequential chronology of events that led to conviction at the trial court. However, if there were any contradictions the same did not impede issuance of justice and do not affect the substance of the case itself. In the case of *Erick Onyango Ondeng’ v Republic* [2014] eKLR the Court of Appeal cited with authority the Ugandan case of *Twehangane Alfred Vs. Uganda*, Crim. App. No 139 of 2001, [2003] UGCA, 6 where it was held:

“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor



contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”

31. In light of the foregoing and considering the petition of appeal and the submissions in this appeal, I find no reason to interfere with the findings of the trial court on conviction and since the appeal was on conviction only, I hereby dismiss the appeal and uphold the conviction.

32. It is so ordered.

**DELIVERED, DATED AND SIGNED AT KERUGOYA THIS 29TH DAY OF SEPTEMBER, 2023.**

**L. NJUGUNA**

**JUDGE**

.....for the Appellant

.....for the Respondent

