



**Wangeci v Republic (Criminal Appeal E039 of 2022)  
[2023] KEHC 22631 (KLR) (27 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22631 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
CRIMINAL APPEAL E039 OF 2022  
AK NDUNG’U, J  
SEPTEMBER 27, 2023**

**BETWEEN**

**STEPHEN MUGAMBI WANGECI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From original Conviction and Sentence in Nanyuki CM  
Sexual Offences Case No E092 of 2021– V. Masivo, SRM)*

**JUDGMENT**

1. The Appellant in this appeal, Stephen Mugambi Wangeci, was convicted after trial of defilement contrary to section 8(1) as read with section 8 (3) of the *Sexual Offences Act*, No 3 of 2006. The particulars were that on diverse dates between the month of May 2021 and June 2021 in Laikipia East Sub County within Laikipia County, intentionally and unlawfully caused his penis to penetrate the vagina of L.K.R a child aged 15 years. On 09/05/2022, he was sentenced to twenty (20) years imprisonment.
2. The Appellant appealed to this court challenging the conviction and the sentence through his counsel vide an amended memorandum of appeal dated 13/04/2023. The conviction and the sentence are being challenged on the following grounds;
  - i. The learned magistrate erred by relying solely on the evidence of PW2 which evidence was contradictory, insufficient and inconclusive to warrant a conviction.
  - ii. The learned magistrate erred by failing to find that the testimonies of the prosecution witnesses contradicted the contents of the investigation diary produced in court by PW3.



- iii. The learned magistrate erred by allowing PW1 to testify and produce documentary evidence on behalf of Fidelis W without sufficient basis being laid down as to why the attendance of Fidelis could not be procured.
  - iv. The learned magistrate failed to note that PW2 presented herself as an adult capable of marriage due to the fact that she testified to have being engaged in multiple relationships.
  - v. The learned magistrate erred by accepting the prosecution evidence denying the possible exculpatory evidence of DNA test.
  - vi. The learned magistrate erred by accepting the medical evidence without observing that it was not credible in light of the delay in obtaining the same and the same contained inconsistencies in regards to the age of the pregnancy.
  - vii. The learned magistrate failed to note that the prosecution did not proof the case against the Appellant beyond reasonable doubt.
  - viii. The learned magistrate erred by failing to note that mandatory sentences are excessive and unconstitutional.
  - ix. The learned magistrate erred by shifting the burden of proof to the Appellant.
3. The appeal was canvassed by way of written submissions. In his written submissions, the Appellant argued that the P3 and PRC forms were produced by PW1 who was not the maker and PW1 did not provide any basis or reason as to why the attendance of the maker could not be procured and the trial magistrate was the one who tried to explain why the maker could not attend court. Hence, the production of the said evidence offended section 33 of the *Evidence Act* and should have been treated as hearsay. That it was crucial for the Clinician to testify based on the inconsistency on the age of the complainant's pregnancy.
  4. The Appellant submitted that the complainant's evidence was inconsistent, contradictory and contained half-truths since she did not mention her relationship with one Erick information which she had given to PW1 and the Investigating Officer. That she could only remember the date she had sexual intercourse with Erick and could not remember the exact dates she had sexual intercourse with Appellant. That the complainant failed to give clear recollection of what happened on the day the Appellant defiled her. That there was no evidence that was tendered to link the Appellant to the alleged defilement since DNA was not conducted and since the first report that was made to the police stated that the complainant was defiled on 14/08/2021 whereas the complainant testified in court that the relationship with the Appellant had ended by August.
  5. The Appellant's counsel further submitted that DNA was relevant given the fact that there was a contradiction on the age of the complainant's pregnancy in that it was stated that she was 28 weeks pregnant and another test indicated that she was 19 weeks and 6 days pregnant. That the age as highlighted could not have linked the Appellant to the pregnancy. Further, the evidence of the Investigating Officer was inconsistent with the Investigation Diary since the Investigation Diary indicated that the complainant reported to have been defiled on 14/08/2021 whereas the officer testified that the report made was that the complainant was defiled between end of May and June. Therefore, given the inconsistencies and the fact that a third party was named, DNA test was supposed to be conducted.
  6. That there was nothing to link the Appellant to the alleged defilement hence the prosecution failed to prove the case beyond reasonable doubt. Furthermore, the complainant testified that she used her



- sister's phone to communicate with the Appellant and that the only person who saw her with the Appellant was the Appellant's sister but they were not called to testify.
7. As to the sentence, counsel submitted that the trial court erred in sentencing the Appellant to 20 years imprisonment without taking into account the circumstances of the case, the learned magistrate failed to apply his discretion as required and the sentence was harsh and excessive.
  8. The Respondent's counsel supported the conviction and the sentence. It is submitted that production of the documents by PW1 who was not the maker was to avert delay in the trial as the trial court held. Furthermore, the Appellant only requested for the maker to be present but did not explain the reason for the same to the court. That the Appellant did not oppose to the production of the documents and did not question the genuineness of the documents hence the trial court rightly assumed the originality of the documents in line with section 77 of the *Evidence Act*.
  9. As to the Appellant claim that the trial court erred convicting the Appellant solely on the complainant's testimony, counsel submitted that the trial court complied with section 124 of the *Evidence Act* by recording the reasons why he believed the complainant was telling the truth. On failure to conduct a DNA test, it is submitted that DNA test is not a determining factor whether there was defilement or not as the trial court duly considered the three elements of defilement. That DNA was not necessary as the complainant identified the Appellant as the person who defiled her. It is the Respondent's case that that the prosecution proved the elements of the offence to the required standard.
  10. On the sentence, counsel urged that exercise of discretion does not hinder the trial court to grant the statutory penalty. Furthermore, discretion should not be translated to an automatic right to leniency.
  11. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. (See *Okeno v Republic* [1972] EA 32.)
  12. I have had due regard to the evidence as recorded in the trial court. I have read and considered the learned submissions by counsel as well as authorities cited. In my re-evaluation of the evidence, I have borne in mind that I never heard nor saw the witnesses testify and I have given due allowance in that respect.
  13. There are three main ingredients in the offence of defilement which are-
    - i. The age of the complainant;
    - ii. Penetration; and
    - iii. Identity of the perpetrator.
  14. The age of the complainant is not in dispute. The same was proved by the birth certificate, Pexhibit 4. It shows that the complainant was born on 28/07/2006 hence she was 15 years old at the time the offence was allegedly committed in the month of May and June 2021.
  15. As to identity, the Appellant himself did not dispute the fact that the complainant knew him. He testified on cross examination that he knew the complainant and had known her for two months. He further testified that he had met the complainant once and she asked him to escort her to her grandmother's home but he declined. The complainant testified that the Appellant lived near her grandmother's home. It therefore follows that the complainant and the Appellant knew each other. The question that seeks answers is whether the Appellant defiled the complainant.



16. The prosecution called four witness to prove their case. The complainant testified as PW2. She gave sworn testimony and told the trial court that she got acquainted to the Appellant in the month of March 2021 and in the month of May and June, they had sex at the Appellant's home. She testified that she would meet him when she was sent to her grandmother's home who lived near Appellant's home. They had differences in the month of June 2021 and in August, the same year, she discovered that she was pregnant. She told her neighbour who told her mother and revealed that the Appellant was responsible. She testified that her mother reported the matter to the police and she was escorted to the hospital.
17. She reiterated on cross examination that she only slept with the Appellant.
18. PW1 was the Clinical Officer who produced the P3 and PRC Forms on behalf of Fidelis W.M who examined the complainant. He testified that the complainant reported to have had sexual intercourse with two people who were her boyfriends with one in the month of May and June 2021 and another on 14/08/2021. He testified that the complainant had no injuries on interior and exterior genitalia, the hymen was broken, there was evidence of infection on high vaginal swap, and the ultra sound report revealed that the complainant was 19 weeks and 6 days pregnant. He produced the ultra sound report as Pexhibit 1, PRC Form as Pexhibit 2 and P3 Form as Pexhibit3. He further stated that there was evidence of penetration.
19. PW3 was the Investigating Officer. She testified that a report was made on 25/11/2021 by PW4 who reported that the complainant was defiled by the Appellant in the month of May and June. She testified that PW2 informed her that she had another boyfriend by the name Erick whom she had sex with in the month of August, 2021. She testified that Erick was charged. She further stated that the Appellant was arrested on 03/12/2021 when he was pointed out by the complainant. On cross examination she testified that the complainant led them to Appellant's home.
20. PW4 was the complainant's mother. she testified that in November, 2021, she was informed by her neighbour that the complainant was pregnant and Stephen was responsible. She reported the matter and the complainant named Stephen as the person responsible for her pregnancy. She told the court that she did not know the Appellant.
21. That was the totality of the prosecution case.
22. The Appellant gave sworn testimony in his defence. He denied committing the offence and only stated that he was arrested on 03/12/2021 while at his home. On cross examination, he testified that he knew the complainant and he had known her for two months. He however denied that he was the complainant's boyfriend and that he did not know the complainant's grandmother. He stated that he once met the complainant who requested him to escort her to her grandmother's place but he declined. He denied ever talking to the complainant on phone.
23. As seen earlier, the crucial elements of defilement are age, identity of the perpetrator and penetration. Identity as stated earlier is not in dispute as the Appellant and the complainant admitted to have known each other. The only question that remains is whether the Appellant penetrated the complainant and whether penetration was proved.
24. The Appellant's counsel in the submissions took issue with the fact that the medical evidence was produced by a Clinician who was not the maker of the documents and that no basis was laid as to why the maker was not called to testify. Counsel also attacked the credibility of the complainant's testimony and termed it as inconsistent, uncorroborated and that her testimony had gaps and was not truthful. Counsel further submitted that there was no evidence to link the Appellant to the alleged offence since DNA test was not carried out to ascertain paternity of the complainant's child since there was evidence



that a third party was involved. Further, he faulted the fact that the complainant could not remember the exact dates when she was defiled by the Appellant.

25. As to the first issue, Salat Guyo a Clinician at Nanyuki Teaching and Referral Hospital produced the P3 Form, PRC Form and Ultra Sound Report on behalf of Fidelis W.M. He stated that at the time the complainant visited the hospital, Fidelis was holding in for him and at the time he was testifying, she had already gone back to her department. He told the court that he was familiar with her handwriting and signature since he had worked with her for the past two years. The prosecution made an application for PW1 to be allowed to produce the documents but the Appellant told the court that he wished Fidelis to be called. The trial court however made a determination that a basis had been established for PW1 to produce the said documents in order to avert delays.

26. Section 77 of the *Evidence Act* state as follows:-

“77

- (1) In criminal proceedings any document purporting to be a report under the handwriting of a Government Analyst, Medical Practitioner or of any Ballistics expert, Document Examiner or Geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.
- (2) The court may presume the signature of any such document is genuine and that the person signing it or the office and qualifications which he possessed to hold at the time when he signed it.
- (3) When any report is so used the court may, if it thinks fit, summon the analyst, Ballistics expert, Document Examiner, Medical Practitioner, or Geologist, as the case maybe, and examine him as to the subject matter thereof”.

27. The section allows the court to presume the genuineness of a document and also states that the court may call the maker meaning that the document need not be produced by the maker. This means that the document is admissible whether or not the maker comes to court.

28. Section 77 is however read together with section 33 of the *Evidence Act* which states that;

Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases

- (a) ...
- (b) when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of



a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;

29. The provisions of Section 33 clearly give leeway for the production of documents/expert evidence if the makers cannot be found or whose attendance cannot be procured without an amount of delay or expense which in the circumstance appears unreasonable. The practice is that the prosecution or any party who wishes to rely on such evidence are required to get another expert witness from the same field and who is familiar with the handwriting of the author of the document to tender the evidence. However, a basis must be laid before such evidence is tendered.

30. As to whether a basis was laid in this case, it is to be noted that PW1 told the court that Fidelis W.M had gone back to her department. There was no mention that she could not be available to produce the documents. In the case of James Bari Munyoris-vs- Republic [2010] eKLR relied on by the Appellant's counsel, the court faced with a similar situation had this to say;

“It is not enough for a witness to state that he was familiar with the handwriting of a particular witness. The prosecution must show that it took due diligence on their part to secure the attendance of the maker of the document. It must be shown that the witness was absent for reasons beyond prosecution's control. The record shows that Dr. Mburu had been transferred to Kenyatta National Hospital. There was no evidence to show that the police attempted and failed to secure Dr. Mburu's attendance in court.....”

31. In Kenneth Mwenda Mutugi v Republic [2019] eKLR where the court held that;

“In line with the above jurisprudence, it is clear that the prosecution in this case made no attempts to lay any basis why the maker of P3 form could not be availed and this court stem from bad practice where medical experts think that all that is required to tender evidence of a colleague is familiarity with their handwriting. This practice and obviously flies in the face of legal requirements as stipulated under Section 33 that demands that basis for non-availability of the authors/makers of any opinion written or oral be laid before another expert familiar with the handwriting of the expert can be allowed to tender the evidence. It is on that basis that this court finds that the appellant's ground of appeal in that regard is well taken.”

32. On proof of penetration, the Clinician testified that that the hymen was torn but the outer and inner genitalia was normal. The complainant was however pregnant. The complainant also confirmed that she was pregnant and she was due on 23/04/2022. This confirms indeed that the complainant, a minor, was indeed defiled. The question that follows is to determine whether the Appellant defiled the complainant. In her sworn testimony, she testified that;

“...in May and June, we slept together (with accused). I mean during these 2 months we engaged in sexual intercourse...we engaged in sex with him at their home”.

33. The complainant did not explain in graphic detail what transpired between her and the Appellant. She only stated that she slept and had sex with the Appellant. She did not explain whether the act of sleeping with the Appellant meant that he penetrated her vagina or the act of sex meant that the



Appellant penetrated her vagina. To me, her testimony was vague and I am saying this guided by the case of Julius Kioko Kivuva v Republic [2015] eKLR where Nyamweya J stated that;

“Penetration” under section 2 of the Act is defined to mean “the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

The complainant (PW1) testified as follows in this regard:

“The accused removed my pant and my skirt. I also had a black biker which he also removed. He did not use a condom. We had sex twice that night. We slept upto 9.00 a.m the following day”

PW1’s testimony in this regard was not specific as to the act of penetration; and her evidence of having sex does not necessarily prove that penetration took place, in the absence of further evidence and details as to what actually happened in the act of having that sex. Evidence of sensory details, such as what a victim heard, saw, felt, and even smelled, is highly relevant evidence to prove the element of penetration, as a victim’s testimony is the best way to establish this element in most cases. The specificity of this category of evidence, even though it may be traumatic, strengthens the credibility of any witness’s testimony, and is particularly powerful when the ability to prove a charge rests with the victim’s testimony and credibility as it does in this appeal.”

34. Kemei J in P M M v Republic [2017] eKLR stated that;

As noted in the case of Julius Kioko Kivuva =vs= Republic (Machakos HCCRA NO. 60 OF 2014) that evidence of sensory details such as what a victim heard, saw, felt and even smelled is relevant to prove the element of penetration. I share the same findings of the learned justice Nyamweya in the above stated case. It was necessary for the Complainant to provide the vivid details of the sequence of how the rape ordeal took place. Even though the doctor noticed the presence of whitish discharge and semen as well as a rugged vagina it was only the Complainant to present sufficient details as to whether penetration did occur. Hence, I find the evidence clearly established the alternative charge of committing an indecent act with an adult contrary to section 11A of the *Sexual Offences Act...*

35. PW1’s testimony in this regard was not specific as to the act of penetration; and her evidence of having sex does not necessarily prove that penetration took place in the absence of further evidence and details as to what actually happened. Even though she informed the court that she was pregnant and the medical evidence revealed that the complainant was pregnant hence proof of penetration, there was nothing else to link the Appellant to the commission of the offence given the fact that the complainant explanation as to what transpired between her and the Appellant was vague.

36. Furthermore, even though DNA evidence is not mandatory, it was necessary in this case given the fact that another person was linked to the defilement and the fact that the complainant did not explain in clear terms her encounter with the Appellant. Lack of this explanation gives room to doubts as to who between the Appellant and the other named person defiled the complainant. Therefore, the prosecution failed to prove that the Appellant indeed defiled the complainant as alleged.

37. In light of the foregoing as informed by my re-evaluation of the evidence and for the reasons above stated, I reach the finding that the prosecution fell short of achieving the threshold of proof required in a criminal trial which ought to be beyond reasonable doubt. The appeal thus succeeds. The conviction and sentence by the trial court is set aside and substituted thereof with an order of acquittal of the Appellant. He is set at liberty forthwith unless otherwise held under another warrant.



DATED, SIGNED AND DELIVERED AT NANYUKI THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2023

A.K. NDUNG’U

JUDGE

