



**Ogechi v Republic (Criminal Appeal E047 of 2023)  
[2023] KEHC 24295 (KLR) (30 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24295 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL APPEAL E047 OF 2023  
RN NYAKUNDI, J  
OCTOBER 30, 2023**

**BETWEEN**

**JOSHUA OGECHI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Leave to appeal against the judgment of the lower court  
by Hon. R. Odenyo in Criminal Case No E005 of 2020)*

**JUDGMENT**

1. The appellant was charged 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 offence were that on diverse dates between 8<sup>th</sup> August 2020 and 18<sup>th</sup> September 2020 in Kapsoya within Uasin Gishu County, the accused unlawfully caused his genital organ (penis) to come into contact with the genital organ (vagina) of MJ, a child aged 15 years. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars were more or less similar to those in the first charge.
2. The matter proceeded to full hearing and the prosecution availed four witnesses in support of their case whereas the accused did not have any witnesses.
3. PW1, the complainant, initially claimed that she did not remember what happened when she was put on the witness stand. She was reluctant to testify and sought that the matter not proceed. She was then remanded in custody. She was then recalled and testified that she was born in the year 2005. It was her testimony that she received a phone call from her boyfriend, the accused on 8<sup>th</sup> August 2020 and he told her to go with him to his residence. However, on the way there she was injured in a motorcycle accident and he took her to the hospital. From there they headed to his residence and she did not go home. She stayed at his place for one month they had sex. One day, her mother and her sister came



- with the accused accompanied by police officers. She was then escorted to Langas police station then to Moi Teaching and Referral hospital where she was examined and a P3 form filled. She identified the form as MFI-1. During cross examination, she stated that she is the one who called the accused and that they did not have sex on the day they reached his home. Further, that she had an identity card and that she was therefore over 18 years old.
4. The court cross examined the complainant and she stated that she has an identity card in her name which was seen by the court as ID No. xxxx
  5. PW2, MC, testified that she was the mother to the complainant who was born on 20<sup>th</sup> August 2005 and further, that she was 16 years. She stated that on 8<sup>th</sup> August 2020 she left the complainant at home but upon returning, she found that she was missing. She looked for her without any progress and reported the matter to Langas Police station after three days. They then traced the accused who had been said to have gone with the complainant and upon his arrest, he led them to where the complainant was. they then took them to the police station and the complainant was referred to Moi Teaching and Referral Hospital where they filled a P3 form after examining her. The witness produced the P3 form as an exhibit. It was her testimony that the complainant dropped out of school due to pregnancy and that she gave birth on 3<sup>rd</sup> August 2021 but the child passed away.
  6. PW3 was SM, the father to the complainant. He stated that on 10<sup>th</sup> August 2021 he got a phone call from PW2 informing him that PW1 was missing. They then traced PW1 to the house of the accused.
  7. PW4, Dr Irene Simiyu, produced the P3 form on behalf of Dr. Taban. She stated that the complainant was a 15-year-old female and further, that she had a hymeneal tear and bloody and vaginal discharge due to menses. She was negative for HIV or any venereal diseases and she was negative to pregnancy. She stated that the injuries were consistent with defilement. During cross examination, she testified that she did not see the complainant's birth certificate and that the girl is the one who said she was 15 years old.
  8. PW5 was the investigating officer, PC Esther Ndindi. The initial investigating officer had been transferred to Nandi County. She testified that the initial investigating officer received a report of a missing child on 11<sup>th</sup> August 2020 and on 18<sup>th</sup> September 2020 the accused was brought to the station and the child traced. The investigating officer was supplied with the birth certificate of the child showing that she was born on 25<sup>th</sup> August 2005 and the same was produced as exhibit 2.
  9. The court found that there was a prima facie case and explained section 211 of the Criminal Procedure Code to the accused person. He was placed on his defence and elected to keep quiet.
  10. Upon considering the evidence before the court and the testimonies of the witnesses, the learned trial magistrate convicted the accused person of main charge and sentenced him to three years' imprisonment on 30<sup>th</sup> May 2023.
  11. Being aggrieved with the sentence and conviction, the appellant instituted the present appeal vide a petition of appeal dated 2<sup>nd</sup> June 2023 premised on the following grounds;
  12. The honourable magistrate erred in law and fact in holding that the case had been proved to the requisite standard, beyond a scintilla of doubt
  13. The honourable magistrate erred in law and fact in holding that the age of the complainant had been proved and or resolved
  14. The honourable magistrate erred in law and fact in disregarding the fact that the complainant gave evidence in which she clearly stated that she was 19 years at the time of the alleged offence and she even had an identity card



15. The honourable magistrate erred in law and fact in failing to discharge his constitutional duty under Article 50 of *the Constitution* by explaining to the accused that he had right to legal representation
16. The honourable magistrate erred in law and fact in failing to reconcile the inconsistencies in the prosecution case in favour of the appellant
17. The honourable magistrate erred in law and fact in failing to capture the details of the National Identity card of the complainant.
18. The honourable court erred in law and fact in failing to reconcile the testimony of the complainant vis-a-vis that of the other witnesses.
19. The honourable magistrate erred in law and fact in proceeding with the hearing of the case despite the apparent handicap of the accused.
20. The proceedings, the conviction and sentence are unsafe and they ought to be set aside.
21. The honourable magistrate erred in law and fact in failing to satisfy himself that the accused understood what was going on in court.
22. The honourable magistrate erred in law and fact in not according the accused the benefit of doubt.
23. The honourable magistrate erred in law and fact in failing to ensure that the appellant understood the proceedings to enable him meaningfully and effectively participate in the trial.
24. The honourable magistrate failed to warn himself on the truthfulness or otherwise of the complainant's testimony.
25. The trial was as a whole improper and it ought to be set aside.

### **Appellant's case**

26. Learned counsel for the appellant filed submissions on 31<sup>st</sup> August 2023. Counsel urged that the charge and the alternative charge stated the dates of the alleged offence to be between 8/8/2020 and 18/9/2020. The prosecution was therefore under a duty to prove that Firstly, the sexual encounter or indecent assault took place between 8/8/2020 and 18/9/2020. No evidence whatsoever was tendered in support of the date when the alleged defilement took place. Besides by 13/8/2020 the appellant had already been arrested. There is no indication whatsoever that he thereafter met the complainant. Further from the P3 form there is no knowing when the alleged hymen tear took place since it had healed and there is no connection between it and the alleged sex between the complainant and the appellant. Only the age of the alleged hymen tear could connect the tear to the incident which was the subject of the case.
27. Secondly, submitted counsel, it was upon the prosecution to rule out the possibility of the complainant being an adult so as to rule out consensual sex. The complainant testified and dearly indicated she was an adult and she even had an identity card indicating she was born on 25/8/2002. She therefore turned 18 on 25/8/2020. Further the subordinate court clearly and rightfully so observed that the complainant was 19 years old in 2021 when she testified a fact confirmed by her national identity card. Having so observed the court was not obligated to rely on the birth certificate. The prosecution therefore fell short of proving that the complainant was a minor between 8/8/2020 and 18/9/2020. The doctor who filled the p3 form did not assess the complainant's age.
28. Learned counsel urged that the court did not delve into the apparent age of the complainant and do its own assessment of the complainant's apparent age. Further, that the fact that the complainant had



been declared a hostile witness and therefore testified after being in custody for 6 days rendered her evidence useless and of no probative value. The same could not under the *Sexual Offences Act* and the *Evidence Act* be relied upon to convict the appellant.

29. Counsel submitted that there were serious inconsistencies in the prosecution case. Some of the obvious inconsistencies in the prosecution case lay in the dates of birth of the complainant and whether or not the complainant was an adult or a minor. Whereas the complainant said she was a minor she also with the same breath said she was an adult and even showed her identity card to the court. The court ought to have captured the details in the identity card, particularly the date of birth. The court failed to do so. Further, the court totally failed to reconcile the evidence of the complainant and the other witnesses especially her mother on her age. Had the court considered the inconsistencies it will have resolved the case in the appellant's favour. It would have entertained doubts on whether or not the complainant was capable of consenting to coitus.
30. The appellant was handicapped in the sense that he was unable to effectively follow proceedings in English. He had informed the court the language he understood was Kiswahili. However, on several occasions the court proceeded in English and there was no translation into Kiswahili. In view of the proceedings taken as a whole the conviction was unsafe and the appellant ought to have been acquitted. It was incumbent upon the court to ensure that the appellant understood what was going on in court. The honourable court did not bother to do so.
31. In a case in which the evidence tendered by an alleged witness, the court is under a duty to ascertain and make a finding on whether or not the witnesses or victim was truthful. Counsel submitted that it is clear that the evidence of complainant could not form a basis for the appellant's conviction as she appeared to be inconsistent and was to be declared a hostile witness. In other words, she had recanted her evidence such a kind of witness could not be the basis upon whom a conviction could safely follow. On the other hand, the court without legal basis committed the complainant to remand for 2 weeks to force her to tell the court what the prosecution wanted to hear. What the witnesses told the court while in remand was not voluntarily but under coercion and threats of imprisonment. What the court ought to have done was to allow the prosecution to treat the witness as a hostile witness. He ought to have allowed the prosecution to cross examine the complainant because that is what the law permits not committing to remand or prison.
32. Counsel urged the court to allow the appeal.
33. There were no submissions tendered by the respondents.

### **Analysis & Determination**

34. This being a first appeal, it is imperative to state the duty of the appellate court as set out in *Kiilu & Another vs. Republic* [2005] 1KLR 174 where the Court of Appeal stated that:
  - “ 1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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.
  2. 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. 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.”

35. See also *Okeno vs. Republic* [1972] EA 32 on the same subject.
36. Upon considering the petition of appeal and attendant submissions, the following issues arise for determination;
  1. Whether the prosecution proved its case to the required standard
  2. Whether the conviction and sentence ought to be set aside

### **Whether the prosecution proved its case to the required standard**

37. The Appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* which provides:  
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  - (1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.8
  - (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
38. The specific elements of the offence defilement arising from Section 8 (1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are:
  - i. Age of the complainant;
  - ii. Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*; and
  - iii. Positive identification of the assailant.
39. This was also set out in the case of *f Charles Wamukoya Karani Vs. Republic*, Criminal Appeal No. 72 of 2013 where it was stated that:
40. The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

### **Age of the Complainant**

41. 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.” (emphasis added).
42. The evidence pertaining to the age of the complainant was a birth certificate marked as PMFI-1. It stated the date of birth of the complainant as 25<sup>th</sup> August 2005. The offence was committed between



August and September 2020 and therefore, the age of the complainant at the time was 15 years. It follows that the age of the complainant was established beyond reasonable doubt.

### **Penetration**

43. Section 2(1) of the *Sexual Offences Act* defines penetration as:
44. The partial or complete insertion of the genital organs of a person into the genital organ of another person.
45. In the case of *Mark Oiruri Mose v R* [2013] eKLR the Court of Appeal stated that:
46. Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ." (Emphasis added).
47. From the medical examination report produced by PW4, the injuries sustained by the complainant were consistent with defilement. Notably, the report did not expressly state that there was penetration and further, the age of the injuries is premised on the date of the alleged offence as per the charge sheet and not based on the examination. Relying on the evidence given in court by the complainant, the date of the penetration is disputed as she testified that on the day they went to his house, they did not have sex, and this was the date of 8<sup>th</sup> August 2020. Section 124 of the *Evidence Act* provides that the evidence of a complainant or the victim in Sexual offences can on its own stand the test of law so long as the trial court for reasons to be recorded has basis to believe that the witnesses are speaking the truth, in this present case, the complainants were very clear and consistent in their respective testimonies. Taking this into consideration, it is my view that the evidence of the complainant that they did not have sex on 8<sup>th</sup> August 2020 brings into doubt the findings in the medical report. This is compounded by the fact that the doctor who examined the complainant is not the one who produced the report and therefore, even if she was to be subjected to cross examination, the veracity of her evidence would not be conclusive.
48. Therefore, it is not clear when the penetration occurred as the medical report findings on the date of the offence is premised on the allegations, and not on the examination of the complainant. It is my considered view that the prosecution failed to establish the nexus of the injuries to the appellant.

### **Identification**

49. The evidence of the complainant admitting that she had sexual intercourse with the accused and further, the evidence of PW2 and PW3 corroborates alluding to the identity of the accused person the identity of the accused person on scrutiny gives rise to contradictory and inconsistency evidence at what exactly took place on the diverse dates on the charge sheet. There was so much weight given to the victim evidence who seem to have submitted from her evidence to commit on legal act outlawed by the *Sexual Offences Act*. The testimony of the victim places her as a person of doubtful character given the inconsistencies in her testimony as what reliably and credibly happened. The testimony by the victim and that of the medical practitioner who produced the P3 as an exhibit in support of the prosecution case does demonstrate contradictions to the extent that a reasonable person will be left in doubt as to whether the charge as initiated by the prosecution has proved beyond reasonable doubt. The court in *Twehange Alfred v Uganda Crim App 139 of 2001 (2003) UGGA.6* made the following observations: "With regard to contradictions in the prosecution's case the law as set out in numerous authorities in 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 ins truthfulness or if they do not affect the main substance of the prosecutions' case.”

50. The inconsistencies and contradictions in this case displace lack of agreement between PW1, PW2 and the medical report. There shouldn't be a presumption unless with cogent evidence that the diverse dates chronology of events was for the benefit of sexual intercourse between the appellant and the victim for that matter. The victim being the star witness in this particular case is very candid and truthful as to which exact day of the diverse dates did the intentional and unlawful carnal knowledge by the appellant did take effect. The burden of proof of beyond reasonable doubt is as of necessity vested with the prosecution and it never gets to shift to the defence at any one time unless the evidence so tendered calls for particular matters under Section 111 of the *Evidence Act* to be rebutted by the defendant or accused person. I have placed the entirety of the evidence adduced by the prosecution on the defence and on evaluation the quality of the probative value of the witnesses for the prosecution is weak, in conclusive and more doubtful to establish the minimum proof of a serious offence like defilement. Therefore, the scale of justice tilts in favour of the appellant placing the prosecution case in reasonable doubt. That stipulates that the benefit goes to the appellant in so far as the indictment is concerned. The burden of proof by the prosecution to prove the guilty of the appellant beyond reasonable doubt fell short of that threshold as defined in the plethora of cases i.e Woolmington v. DPP (1935) AC 462. R v Adamu (Ibidi), Miller v Minister of Pension (Ibid at 373)
51. In the circumstances the appeal must be and is hereby allowed on both conviction. Therefore, the appellant shall be set free forthwith unless otherwise lawfully held as per the law established.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 30<sup>TH</sup> DAY OF OCTOBER 2023**

**In the presence of**

Appellant Present

Mr. Mugun for the State.

.....

**R. NYAKUNDI**

**JUDGE**

