



REPUBLIC OF KENYA



**Ichoho v Republic (Criminal Appeal 9 of 2019)
[2023] KEHC 27062 (KLR) (21 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27062 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL APPEAL 9 OF 2019
CM KARIUKI, J
DECEMBER 21, 2023**

BETWEEN

JAMES NGURE ICHOHO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the Judgment of Hon J.Wanjala Chief Magistrate delivered on 18th January 2018 in the Chief Magistrate Court at Nyabururu SOA No. 85 of 2018)

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 and convicted.
2. The particulars of the charge are that on the 15th and 17th September 2016 at Nyandundo village within nyandarua county, unlawfully and intentionally caused his penis to penetrate the vagina of SNG a girl aged 16 years. he pleaded not guilty after the substance of the charge and every element thereof were read over to him on the language he understood. after trial he was convicted and sentenced to serve 15 years imprisonment.
3. He was aggrieved by the trial court verdict thus lodged instant appeal and set out seven grounds namely:
 - a. That, trial Magistrate erred and fact by failing to find that the prosecution did not prove that the Appellant caused his genital organ to penetrate the genital organ of the complainant.
 - b. That, the trial Magistrate erred in law and fact by failing to find that the prosecution evidence as full of glaring contradiction and discrepancies that could not sustain the charge facing the accused.
 - c. That the trial magistrate erred in law and fact by failing to find that the prosecution had not medically connected the Appellant to the offence.



- d. That, the trial magistrate erred in law and fact by not considering to order DNA test
 - e. That, the trial magistrate erred in law and fact by passing a heavy sentence against the weight of the evidence .
 - f. That the trial magistrate erred in law and fact by passing harsh sentence not considering the Appellant was the first offender and did not consider to seek presentence report.
 - g. That the sentence was too harsh hence pray that be quashed and set aside by this honourable court by considering the above narrated grounds.
4. The parties were directed to canvass appeal via submissions

Appellant Submissions

- 6. The prosecution presented five (5) witnesses to prove their case. The prosecution proved that the girls were in the defendants' house and no dispute on that. Appellant submit that the absolute value of the burden of proof remains a question; did the defendant penetrate the child? According to PW4 the complainant, there was penetration evidence, PW2 doctors' findings stated that there was no indication of recent penetration or injuries on the complainant except the broken hymen. Does the three days the defendant stayed with the complainant result in an old broken hymen? Given that PW 4 the complainant and defendant met for the first time, does an old broken hymen prove for penetration?
- 7. In The High Court of Kenya at Malindi, in the matter between *Karisa Katana Gona Versus Republic* [2015] eKLR Criminal Appeal No. 12 of 2014. Prosecution evidence was insufficient, and conviction was.
- 8. He submits that his Hon. Court be obligated to consider the period the Appellant spent in custody, reference to Article 333 (2) of the *Criminal Procedure Code* as adequate after that.

Respondent Submissions

- 10. Respondent submits that the three elements are required to prove a charge of defilement as stated in *daniel wambugu maina -vs- republic* [2018] eKLR.
 - a. Age.
 - b. Penetration.
 - c. Identity

Age

- 11. The charge sheet indicated that the complainant was aged 16 years old. PW I, the mother to the complainant, testified that the complainant was born on 05/11/1999 and showed a copy of the birth certificate, which indicated she was 17 years old, and PW5, the investigating officer, produced the birth certificate as Exhibit 1.
- 12. The Appellant never dislodged this piece of evidence.
- 13. In *mwalongo chichoro -vs republic* msa. c. appeal no. 24 of 2015 [ur] the court of appeal stated that: -

The question of proof of age has finally been settled by a recent decision of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism



card, or by any evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardians or medical evidence among other credible forms of proof.

14. Guided by the above evidence and authorities, it is submitted that the complainant's age was sufficiently proved beyond reasonable doubt that she was below 18 years at the time of defilement. Moreover, the trial court had the opportunity to observe the minor and believed that she was a minor based on the birth certificate produced in court.

Penetration

16. Penetration of the female genitalia in a defilement case is one of the core elements. The law does not envisage absolute penetration into the genitalia nor the release of spermatozoa or semen of the male organ for the act of penetration to be complete see *daniel wambugu maina -v- republic* (supra)
17. pw4 testified that after she had been suspended from school, she met the appellant and spent three (3) days at his home; the first day was on 15/9/2016 when they had sex once, and on 16/9/2016 they had sex thrice, which was against her will. They used protection, and she bled from her vagina. She felt much pain. It was her first time to have sex.
18. PW2 testified that he examined the complainant on examination and found that her hymen was missing and concluded that she had penetrative sex, and the P3 form was filled out on 20/9/2016. The Appellant did not cross-examine the doctor. He produced the treatment notes, P3, and PRC forms as Exhibits.
19. That penetration was sufficiently proved beyond a reasonable doubt.

(c) Identity

20. Regarding this question, the complainant testified that while in the company of her two friends, they met the Appellant, whom she had known before, and later proceeded to his home, where she spent three (3) days during which days then engaged in sex three times.
21. It is therefore evident that the complainant was able to recognize the Appellant, hence is no possibility of mistaken identity.
22. Similarly, in his defense, the Appellant confirmed that she knew the complainant and even that she had slept at his home.
23. In his defense, the Appellant gave a defense of mere denial, which the Honourable Magistrate found did not carry much weight and proceed to convict him, and proceeded to convict him, and since the complainant was found to be 17 years old, the Magistrate rightly sentenced him to 15 years imprisonment under section 8(4) of the *Sexual Offences Act* No. 3 of 2006.
24. The offence was fully proved and that the appeal was dismissed and the sentence be confirmed.
25. As regarding the mandatory sentences provided for, the current judgement in this case as delivered on 11th January 2018, and the decision outlawing the mandatory sentences in Sexual Offences Act was passed in the year 2022 hence I urge the court to find that the decision ought not to be applied retrospectively.
26. 21stAfter going through submissions and records, I found the issue of whether the ingredients of the offense of defilement were proved beyond reasonable doubt. Whether the sentence impugned was harsh or excessive.



27. The first appellate court has to subject the evidence of the trial court to fresh examination and make its determination based on evidence on record. See *Okeno vs R*(1972) E.A .32.
28. Spent three (3) days at his home, and the first day was on 15/9/2016, when they had sex once, and on 16/9/2016 they had sex thrice which was against her will. They used protection and she bled from her vagina. She felt a lot of pain. It was her first time to have sex.
29. PW2 testified that he examined the complainant on examination and found that her hymen was missing and concluded that she had penetrative sex and the P3 form was filled on 20/9/2016. The Appellant did not cross examine the doctor. He produced the treatment notes, P3 form and PRC forms as Exhibits.
30. The Appellant did not contest the fact that the victim spent night at his place and in fact concedes same which goes to the root of identification. Nor does he contest the age of the victim which was established via birth certificate production as an exhibit in court. What he contests is that he penetrated the victim. He alludes to the medical officer who testified to the effect that on examining the victim, he observed there was no indication of recent penetration or injuries observed on the complainant genitals except old broken hymen. This is crucial because the victim testified that, they met the Appellant whom she had known before, and later proceeded to his home where she spent three (3) days during which days then engaged in sex three times. The experience was painful and she bled as it was her first time to have sex. The question is the broken hymen evidence of a recent penetration? If she did bleed and it was her first time to have sex, the witness who examined her ought to have observed foot print in form of injuries emanating from forceful and painful penetration.
31. This is because the alleged penetration took place between 15th and 17th September 2016 and victim was examined on 19.9.2016 and p3 filled on 20.9 .2016. Two days span or thereabout could not have created an old broken hymen with no footprint in form of injuries.
32. This raises doubt whether the victim had been penetrated as alleged. This was a girl who had the reason not to tell the truth having been chased from school for having committed wrongs and thus not even willing to go home for the 3 days. The court finds victim's evidence insufficient and unbelievable and thus credits Appellant with benefit of doubt.
33. Thus the court finds the conviction unsafe and thus makes the orders;
 - i. The conviction is quashed and sentence set aside and Appellant shall be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT NYANDARUA THIS 21ST DAY OF DECEMBER 2023

C KARIUKI

JUDGE

