



REPUBLIC OF KENYA



**Bunyasi v Republic (Criminal Appeal 90 of 2020)  
[2022] KEHC 3345 (KLR) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 3345 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL APPEAL 90 OF 2020**

**SN RIECHI, J**

**MAY 31, 2022**

**BETWEEN**

**PETER SIMIYU BUNYASI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal arising from the conviction and sentence by Hon G. Adhiambo  
(PM) in original Kimilili PMC's S.O No. 34/2020 delivered on 12th June, 2020)*

**JUDGMENT**

1. The appellant was charged in the subordinate Court with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offence Act*, 2006. The facts were that on diverse dates between 7<sup>th</sup> and 9<sup>th</sup> April, 2020 in Kiminini Sub County of Trans Nzoia County intentionally caused his penis to penetrate the vagina of PNW, a child aged 7 years.
2. He faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The facts being that on diverse dates between 7<sup>th</sup> and 9<sup>th</sup> April, 2020 in Kiminini Sub County of Trans Nzoia County intentionally touched the vagina of PNW, a child aged 7 years with his penis.
3. Upon arraignment, the appellant denied the charges whereupon the prosecution called a total of 6 witnesses.
4. PW-1 the complainant testified that on 7/4/2020 while at home with S and M, their mother having gone to weed maize, the appellant herein, a neighbour called her and gave Kshs 20 to S and M to buy mandazi. He then told the complainant that her father was calling her in the market but took her into another destination where the appellant instructed her to smoke some substance and later defiled her



- by the roadside at night. He abandoned her in some homestead and took off, the victim was taken in by some Samaritan before being taken to the village elder where her mother found her.
5. PW-2, EN, the complainant's mother stated that she left the complainant together with S and M on 7/4/2020 and went to work at the farm. When she came back at 5 in the evening, she could not find the complainant. Upon inquiring from a neighbour's child, she was told the complainant had left with the appellant.
  6. On 25/4/2020, she met the appellant who denied knowing where the complainant was. Upon interrogation by the police, the appellant took them to [Particulars Withheld] where the complainant was found still in the clothes she had worn at home.
  7. PW-3, Kipsang Maasai, a Clinical Officer from Kimilili Sub County Hospital filled and produced the P3 form 20 days after the incident. He noted the hymen missing, healing bruises and tears on the labia minora. He concluded that the complainant had been defiled.
  8. PW4 JW narrated how the complainant arrived at her compound around 1.30 am saying she had been sent by her father to look for her mother in the homestead. Cautious of her security, she directed the complainant to sleep in the store until morning when she fed her and took her to the village elders' house where the complainant stayed until she was found by her mother several days later. She stated that the village elder checked the complainant and found stains that resembled sperm.
  9. PW-5 Elizabeth Nyambura, the village elder [Particulars Withheld] stated that the complainant was brought to her house by PW-4. She took the child together with PW-4 to the police station where she was given custody of the child until 27/4/2020 when her parents arrived and took her home while PW-6 PC Richard Wambua, the investigating officer gave a chronology of events leading up to the arrest of the appellant.
  10. The appellant was put on his defence and opted to remain silent. Subsequently, he was convicted and sentenced to serve life imprisonment. He was dissatisfied thus the instant appeal which is anchored on the following grounds;
    - (1) That he pleaded not guilty to the charges.
    - (2) That the learned trial magistrate failed to notice the appellant was a lay man who needed representation by counsel.
    - (3) That there was no proper investigation from the prosecution to warrant such harsh sentence.
    - (4) That the learned trial magistrate erred in law and fact by convicting on the basis of uncorroborated, contradicting and weak evidence.
    - (5) That the learned trial magistrate erroneously weighed the appellant's defence and mitigation.
  11. The appellant also preferred a supplementary ground of appeal more or less similar to the above grounds save;
    - (1) His rights under article 25(2) of the *Constitution* were violated.
    - (2) Essential witnesses and evidence were not produced in proof of the case beyond reasonable doubt.
    - (3) That the trial magistrate violated the provisions of section 169 of the *Criminal Procedure Code*.
    - (4) The trial court erred by not finding that penetration had not been proved.



- (5) The trial court failed by not acknowledging that no forensic examination was conducted to connect him with the offence.
12. The appeal was disposed of by way of written submissions. Both parties filed their respective submissions. The appellant submits that the investigating officer carried out poor investigation by failing to take photographs at the scene of crime, failing to call the two girls; S and M who were allegedly with the complainant last, that the officer failed to adduce DNA evidence demonstrating the cause of the missing hymen. He submits that according to the evidence of PW-4, the complainant never mentioned being defiled by the appellant but that her father had sent her to the homestead to look for her mother thus the trial ran afoul section 214 of the [Criminal Procedure Code](#).
13. He submits that his rights under Article 50 of the [Constitution](#) were violated during the hearing. He cites the authority in [Albanus Mwansia Mutua v Republic](#) (2006)eKLR for the proposition that it is the duty of the court to uphold the provisions of the [Constitution](#).
14. On the issue of identification, he submits that the complainant was scared and could not understand well what happened to her. He submits that he left the complainant after shopping and being a minor, she miscalculated the distance from the shop to her home and it therefore became dark. He submits that the complainant stated that she recognized the voice as that of the appellant who was defiling her in the dark and his identity was not proved to the required standards.
15. On penetration, the appellant submits that the medical evidence adduced were sub-standard and could not sustain a charge of defilement since no spermatozoa were found, no wound was noted and no fluids seen.
16. The respondent in opposing the appeal submits on the issue of conviction that the essential ingredients constituting the offence were proved and the failure to call the 2 minors was not fatal since they did not witness the actual commission of the offence.
17. On the aspect of identity, counsel submits that there was sufficient visual and voice identification and the trial court's finding on this issue was proper. It is further submitted that the court properly warned itself on the provisions of Section 124 of the [Evidence Act](#) as relates to corroboration.
18. On the failure of the trial court to properly weigh the evidence, the respondent submits that this ground ought to struck out since the appellant elected to remain silent during defence and there was nothing to be weighed against the prosecution's evidence.
19. Lastly, on sentence, the respondent submits that the sentence meted out was minimum and therefore neither harsh nor excessive.
20. In a first appeal, the duty of the court was held in [Mark Oiruri Mose v R](#) (2013) eKLR thus; the Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.
21. Upon careful scrutiny of the record as well as the submissions, the only issue in this appeal is whether the prosecution proved its case to the required level.
22. This being a charge of defilement, the prosecution need to proof; identity or recognition of the offender, penetration and the age of the victim. See [George Opondo Olunga v Republic](#) [2016] eKLR.



23. On the identity of the appellant, it is the appellant's contention that the victim was scared and could not have recognized him well since it was also night time. However, the evidence on record points out the appellant was well known in the village and a neighbour to the complainant. PW-1's evidence was that the appellant came to their home where she was playing with M and S and appellant gave them twenty shillings to buy mandazi and asked the complainant that her father was calling her in the market and that is how he left with the complainant.
24. PW-2 stated that she inquired from a neighbour's child who informed her that the appellant had left with the complainant. Upon inquiring and prevailing on the appellant to tell where her daughter was, the appellant led them to [Particulars Withheld] where the complainant was found in PW-5's house.
25. In concluding this issue, there is no way the appellant could have known where the complainant was had he not taken her there. He led the police officers and PW-2 to Kiungani where the complainant was found. In his defence, the appellant elected to keep silent and opted not to poke holes on the prosecution's case regarding his identity. The court thus finds that the evidence taken wholly, the appellant is the perpetrator of the offence. The appellant failed to controvert the prosecution's evidence on cross-examination.
26. On the element of penetration, the appellant submits that no spermatozoa found, no wound was noted and no fluids seen and the prosecution failed to conduct DNA to determine the cause of the missing hymen.
27. The definition of penetration as accorded by Section 2 of the *Sexual Offences Act* is; the partial or complete insertion of the genital organs of a person into the genital organs of another person. PW-3, the Clinical Officer upon examining the complainant noted the hymen missing, healing bruises and tears on the labia minora while the complainant stated on her part that the appellant defiled her by the roadside at night.
28. PW-4 and PW-5 stated that they noticed a substance that resembled sperm before PW-5 washed her. Her dress was also soiled with blood like substance.
29. It is now trite law that an act of defilement need not only be proved by way of medical evidence. What the prosecution need to adduce is cogent evidence which when believed by the court, a conviction can properly be entered. In *George Kioji v Republic* Criminal Appeal no. 270 of 2012 (Nyeri) it was stated:

Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond any reasonable doubts that the defilement was perpetrated by the accused person. In deed under the proviso to section 124 of the *Evidence Act* Cap 80 laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone if the court believes the victim and records the reason for that believe.
30. In a similar finding by the Court of Appeal in *Williamson Sowa Mbwanga v Republic* (2016) eKLR, it was held:

The import of the proviso to section 124 of the *Evidence Act* is that the trial court can convict an accused facing a charge of defilement solely on the evidence of the victim, if for reasons to be recorded, the court is satisfied that the victim is telling the truth. Medical evidence is not mandatory under that proviso ....



31. Having analyzed the evidence on record, the court is satisfied that the complainant was defiled by the appellant as corroborated by PW-3, PW-4 and PW-5's evidence. As such, the appellant's contention that penetration was not proved is without merit and is hereby rejected.
32. On the complainant's age, there is no challenge by the appellant, however this being the first appellate court, the court is mandated to re-evaluate the evidence afresh and subject it to fresh scrutiny with a view of arriving at its own conclusion.
33. The complainant stated that she was 7 years old, PW-2 stated that her daughter was born on 1/2/2012 while the Baptismal Card indicated she was born on 4/6/2012. The importance of proving age conclusively was stated in the case of *Fappyton Mutuku Ngui v Republic* [2012] eKLR by the learned judge Joel M. Ngugi where he held;

... that "conclusive" proof of age in cases under Sexual Offences Act does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.

34. In the instant case, a copy of the baptismal card was produced which taken together with the oral testimony of PW-1 and PW-2 is at slight variance. The court however is of the view that the difference is not fatal since in both cases, it is apparent the complainant is under the age of 11 and a charge under Section 8(2) was proper.
35. On the sentence, the appellant was sentenced to life imprisonment pursuant to Section 8(2) of the *Sexual Offences Act*. This sentence is not excessive in my view considering that the complainant is a child of tender years within the meaning of Section 2 of the *Children's Act*, 2001. The court took into consideration the appellant's mitigation tendered.
36. The principles under which an appellate court can interfere with a sentence are well settled that unless the sentence is manifestly high in the circumstances. In *Bernard Kimani Gacheru v Republic* [2002] eKLR it was held:

It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.

37. The appellant was charged under Section 8(2) of the *Act* which provides;

A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

38. Considering the circumstances and the mitigation, I find no merit in the appeal which is hereby dismissed.

**DATED AT BUNGOMA THIS 31<sup>ST</sup> DAY OF MAY, 2022.**

**S.N. RIECHI**



**JUDGE**

