



**Kamau v Republic (Criminal Appeal E009 of 2020)  
[2022] KEHC 10732 (KLR) (25 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 10732 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CRIMINAL APPEAL E009 OF 2020**

**JN NJAGI, J**

**MAY 25, 2022**

**BETWEEN**

**SAMMY NJENGA KAMAU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The appellant was convicted of the offence of defilement contrary to section 8(1) as read with subsection 8(3) of the *Sexual Offences Act* No 3 of 2006 and sentenced to 20 years imprisonment. The particulars of the charge were that on diverse dates between the month of November 2014 to the 10<sup>th</sup> of August 2015 at [Particulars Withheld] estate, in Mathira East Sub county within Nyeri County, intentionally caused his penis to penetrate the vagina of EWW a child aged 13 years and 11 months. The appellant was aggrieved by the conviction and the sentence and filed the instant appeal on the following grounds:
  1. That the trial magistrate erred in law and fact in convicting the appellant even after appreciating that there were so many contradictions in the prosecution case.
  2. That the trial magistrate erred in law and fact in failing to appreciate the standard of proof in criminal cases (beyond reasonable doubt) and proceeding to convict where some doubts were obvious.
  3. That the learned trial magistrate erred in law and fact in ignoring the evidence of doctor that nothing of value could be detected and her observation were not conclusive proof of sexual activity.
  4. That the trial magistrate erred in law and fact in shifting the burden of proof to the accused by imputing that the accused was to explain to the court why he was in the vicinity PW1 house on the material date.



5. That, the trial magistrate erred in law and fact in ignoring the appellant's sworn evidence.

### Submissions

2. The appeal was canvassed by way of written submissions. The appellant submitted through her advocates, Kamuya Ng'arua Co Advocates that the prosecution failed to discharge the burden of prove to the required standard. That the case facing him was out of fabrication between the complaint and her mother. That the whole scenario was an entrapment by the complainant, PW3, who was all along under the instructions of her mother, PW1, and thus their evidence was unreliable.
3. It was submitted that the prosecution witnesses gave contradictory evidence on where the appellant was arrested. The complainant's mother said that she had locked the appellant in her bedroom where he had entered for an amorous encounter with her daughter. The complainant on the other hand stated that the appellant entered the house up to the sitting room and left the house when the complainant said that she did not want any session of sex with him. That her mother pounced on him outside the house and raised alarm whereupon he was arrested by members of the public and was thereupon locked inside the house.
4. The respondent on the other hand opposed the appeal through the written submissions of the prosecution counsel. Counsel supported the conviction and the sentence and submitted that the appellant has not dislodged the prosecution evidence to warrant this court to interfere with the judgement of the lower court. Further that the evidence of the doctor, PW6, corroborates the evidence of the complainant that the victim's hymen was broken. Counsel urged the court to dismiss the appeal.

### Analysis and Determination

5. This being a first appeal, this court is guided by the principles set out in the case of [David Njuguna Wairimu v Republic](#) [2010] eKLR where the Court of Appeal stated:-

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.

6. Similarly in the case of [Okeno v Republic](#) [1972] EA 32 where the Court of Appeal set out the duties of the appellate court as follows:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ([Pandya v Republic](#) [1957] EA 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. ([Shantilal M Ruwala v R](#) [1957] EA 570). 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 finding and conclusions. 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, see *Peters v Sunday Post* [1958]EA 424.” This was also set out in the case of *Kiilu & Another vs Republic* [2005] KLR 174.

7. From the appeal and submissions, the issues for determination by this court are:
  - a) Whether the prosecution has proved the offence of defilement to the required standard.
  - b) Whether the conviction and sentence meted out to the appellant should be upheld.
8. This being a case for defilement, the ingredients of the offence that the prosecution was obligated to prove are: the age of the victim, penetration into the genital organs of the victim and identification or recognition of the offender – see *George Opondo Olunga v Republic* [2016].
9. In this case the issue of identification and the age of the victim have not been challenged. Therefore, the critical element that had to be proved to sustain a conviction for the offence of defilement under the provisions of the law is the act of penetration.

Penetration is a term of art and is defined under Section 2 of the [Act](#) to mean -

“the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

10. The complainant, PW3, told the court that she used to have regular sex with the appellant from November, 2014 to August 2015. The doctor who testified in the case PW6 stated that there was no doubt that PW3 a minor was sexually active as she had a broken hymen. The complainant that the first time that the appellant defiled her, he went to their home and told her that they would be having sex with her. He removed his clothes and fished out condoms from his trouser pocket. He put the condom on and told her to sleep on the seat. He started kissing her and he then inserted his penis in her vagina. That when he finished he told her he would be coming every day at around 3:00pm. This continued during the school holiday until the day the appellant was caught by the complainant’s mother, PW1.
11. The evidence that the appellant used to frequently visit the house of the complainant was corroborated by a neighbor, PW4, who stated that she had seen the appellant leave PW1 house severally during school holidays and mid-term. She informed her mother, PW2, about the visits who later informed the complainant’s mother that there was a teacher who used to visit the house.
12. The doctor who testified in the case PW6 stated that there were no injuries on the labia majora and minora and in the vagina. That the cervix was inflamed. The doctor opined that the girl was sexually active as she had a broken hymen.
13. The trial court in its judgment held that there was medical evidence to corroborate the evidence of the complainant that she was sexually active as she had a broken hymen. However, the fact that the girl had a broken hymen did not by itself prove anything against the appellant. The issue before the court was not whether or not the girl was sexually active but whether the appellant defiled her. The Court of Appeal in in [David Mwingirwa v Republic](#) [2017]eKLR cited its decision in [PKW v Republic](#) where it was held that the mere absence of hymen is not decisive proof of defilement as the hymen can be broken by other factors other than sexual intercourse such as natural tearing or by vigorous physical activity like bicycle riding and gymnastics. In any case there was no evidence that the appellant is the one who made the girl lose her virginity. Considering that there were no injuries on the vagina the trial court erred in finding that there was medical evidence to corroborate the offence defilement.



14. However, absence of medical evidence in support of defilement does not connote that there was no defilement as the offence can be proved in other ways such as the evidence of the victim or by way of circumstantial evidence -see [AML v Republic](#) [2012]eKLR and [Kassim Ali v Republic](#) [2006]eKLR.
15. In cases involving children, section 124 of the [Evidence Act](#) allows a court to convict on the sole evidence of a minor if the court is satisfied, for reasons to be recorded, that the child was truthful. In this respect I take guidance in the case of [John Mutua Munyoki vs Republic](#) [2017] eKLR, where the Court of Appeal observed that the court can in a sexual offence case against a minor convict on the sole evidence of the victim. The court held that:  
  
.....The medical evidence having failed to confirm that JM was defiled, the only other evidence of defilement was that of JM. It is trite that under the proviso to section 124 of the [Evidence Act](#), a trial court can convict on the evidence of the victim of a sexual offence alone. (See [Mohamed v Republic](#) (2008) KLR G&F, 1175 and [Jacob Odhiambo Omuombo v Republic](#) (supra). However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief.’
16. The same court also in [JWA v Republic](#) [2014] eKLR, the Court of Appeal observed that: -  
  
“We note that the appellant was charged with a sexual offence and the proviso to section 124 of the [Evidence Act](#), clearly states that corroboration is not mandatory. The trial court having conducted a *voire dire* examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error in law on the part of the High Court in concurring with the findings of the trial magistrate.”
17. In the instant case the appellant was charged with defiling the minor on diverse dates between the month of November 2015 and August 10, 2015. The trial court in its judgment held that the evidence of the complainant that the appellant used to visit her house was corroborated by the evidence of PW4 who used to see the appellant going into the house during school holidays and mid-term. That this was also corroborated by the complainant’s mother PW1 who witnessed the appellant enter into the house on the 16/8/15 whereupon on entering he hugged and kissed the complainant.
18. The appellant denied defiling the complainant. He stated that he had been on a leisure walk when he passed the complainant neighborhood when he heard shouts from a woman who was near her house. It made people to come at her premises and pushed him into the woman’s compound and threw him into the complainant mother’s bedroom.
19. The trial court considered the contradictions between the evidence of the complainant and her mother on whether the complainant’s mother locked the appellant in the bedroom after he entered into the bedroom and the complainant’s evidence that her mother arrested him outside the house as he went away. The trial court said that the contradictions were not material as to affect the credibility of the prosecution witnesses. The court found the appellant’s defence that he was just passing by when he was arrested to have been unbelievable. The court consequently found that the girl was telling the truth that she had had sexual intercourse with the appellant on several occasions.
20. The way to treat contradictions and inconsistencies in a case was stated in [Philip Nzaka Watu v Republic](#) [2016] CR APP 29 OF 2015, had this to say:  
  
“The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where



the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt.

However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

21. I'm also guided by the Court of Appeal decision in *Erick Onyango Odeng' v Republic* [2014] eKLR citing with approval the Uganda Court of Appeal case of *Twehangane Alfred v Uganda* Criminal Appeal No. 139 of 2001, [2003] UGCA, 6 in which it was held as follows:

"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 case."

22. The complainant gave candid detail of how the appellant defiled her on diverse dates between November 2014 and August 2015. PW4 used to see the appellant visiting into the house of the complainant in the absence of the complainant's mother. The fact that the appellant was visiting the house without the knowledge of the complainant's mother can only lend credence to the evidence of the complainant that the appellant was visiting the house for sexual intercourse sessions with the complainant. I am in agreement with the trial court that the complainant was a truthful witness and that she had no reason to lie against the appellant. I also agree with the trial court that the contradictions in the evidence of the prosecution witnesses were not material enough to affect the credibility of the witnesses.

23. In my view there was sufficient evidence to support appellant's conviction. The prosecution proved the guilt of appellant beyond reasonable doubt and met the standard of proof as stated in the case of *Miller v Minister Of Pensions* (1947) 2 ALLER 372 that:

"That degree is well settled it needs not reach certainty but must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law could prevail to protect their community if it admitted fanciful possibilities to deflect the cause of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed witnesses the sentence of course it is doubt but nothing short of that will suffice."

24. The upshot is that I find no merit in the appeal. The same is therefore dismissed.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 25TH DAY OF MAY 2022.**

**J. N. NJAGI**



**JUDGE**

**In the presence of:**

Mr Ng'arua.....for Appellant

**Mr. Mururu**.....for Respondent

Appellant : **present**

**Court Assistant- Kinyua**

