



**Wasike v Republic (Criminal Appeal 31 of 2019)  
[2022] KEHC 3369 (KLR) (25 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 3369 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL APPEAL 31 OF 2019**

**EKO OGOLA, J  
MAY 25, 2022**

**BETWEEN**

**JOSEPH MAKOKHA WASIKE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment, conviction and sentence  
delivered by Hon. N. Wairimu, Principal Magistrate in Eldoret  
Chief Magistrate's Court Case No. 215 of 2017 on the 13/02/2019)*

**JUDGMENT**

1. The appellant herein was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence are that on diverse dates between 15<sup>th</sup> July 2017 to 11<sup>th</sup> November 2017 in Eldoret West District within Uasin Gishu County intentionally and unlawfully caused his genital organ to penetrate the genital organ of one PM a girl child aged 16 years.
2. The appellant also faced the alternative charge of the offence of Indecent Act with a child contrary to section 11(1) of the *Sexual offences act* no.3 of 2006. The particulars of the offence are that on diverse dates between 15<sup>th</sup> July 2017 to 11<sup>th</sup> November 2017 in Eldoret West District within Uasin Gishu County intentionally and unlawfully caused his genital organ to come into contact with the genital organ of one PM a girl child aged 16 years.
3. The appellant faced a second count of assault causing bodily harm contrary to section 251 of the *Penal code*. The particulars of the offence are that on 9<sup>th</sup> November 2017 at [Particulars Withheld]village Matunda Location in Eldoret West District within Uasin Gishu County wilfully and unlawfully assaulted PM causing her actual bodily harm.



4. The appellant pleaded not guilty to all the charges and the trial proceeded. The trial court convicted the accused and sentenced him to 15 years' imprisonment in respect to count 1 and 3 years imprisonment in respect to count 2. The sentences were to run concurrently.
5. Dissatisfied by the said judgment, conviction and sentence, the appellant filed his petition of appeal based on the following grounds: That the trial magistrate erred in law and facts by failing to understand that the complainant's testimony is mired in contradictions and inconsistencies that cannot be gainsaid. That the trial magistrate erred in law and facts by failing to understand that the charge sheet was defective and was in sharp contrast with the evidence on record. That the trial magistrate erred in law and facts by failing to understand that the evidence adduced did not meet the threshold of beyond reasonable doubt as required in our criminal system. That the trial magistrate erred in law and facts by failing to acknowledge that the complainant was never forced to have sex against her consent. That the trial magistrate erred in law and facts by believing and interpreting that the complainant was honest and truthful in her uncorroborated evidence in complete violation of section 214 of the [Criminal Procedure Code](#). That the trial magistrate failed to understand that the expert report produced in court exonerated the appellant from blame and offered no nexus between the appellant and the offence. That the trial magistrate erred in law and facts by relying on the evidence of a single witness and not warning herself that the witnesses may be dishonest and untruthful. That the trial magistrate erred in law and facts by disregarding the defence of the appellant whose defence appears forthright, vivid, accurate and truthful and was in no way shaken by the prosecution case. That the trial magistrate erred in law and facts by relying on inconsistent evidence and erroneously making wrong conclusions that had no factual basis. That the trial magistrate erred in law and facts by failing to understand that the whole issue of defilement was hoax and lacks any legal jurisdiction.
6. The role of this Court as the first Appellate Court has been settled in various precedents. In the case of *Okemo v R* (1977) EALR 32 and in the Court of Appeal case of *Mark Oiruri Mose v R* (2013) eKLR it was held that this 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 demeanour of the witnesses and hearing them in evidence, and the Appellate Court should give allowance for this.

#### **The Case that was before the Trial Court**

7. PW1, a 17-year-old girl at the date of trial was put through a *voire dire* examination and the trial magistrate made a finding that she did not appreciate the nature of an oath and therefore gave unsworn evidence. It was her evidence that on 15<sup>th</sup> July 2017 at 2pm she was resting at home when a neighbour called S called her and asked her to go work at her shop. She declined the request and the neighbour left, but returned at 5pm and PW1's mother who was present, told her she could go with the neighbour.
8. PW1 arrived at S's house at 6m and at 7pm, and together with S's daughter, Rose they left for Kajiado via bus and alighted at Bulls' eye where R's husband called J took them to his house where they had breakfast. Rose asked her if she knew the reason she was there and she replied that she had come for a job. R revealed to her that she was there to live with a man who would open up a shop for her and make her his wife. She refused to be married to the man but Rose told her she did not have fare to give her to return home. That night, the accused came home and woke her up to eat. He asked her age and she told him she was 16 years old. She then slept on the floor with him. Whenever he would leave the house he would lock her in so she would not escape.
9. It was PW1s testimony that they used to have sexual relations but he never used to force her. She lived with him as his wife from July to December 2017. She further testified that one day the accused



- assaulted her because she wanted to wake up and he did not. She ran away to the neighbours' house and they took her to hospital. The accused was also arrested and taken to the police station.
10. PW2, RJ, a security officer who was a watchman at a school in [Particulars Withheld] testified that he met the accused once in November and he introduced the complainant as his wife. Further that on 11<sup>th</sup> November 2017 he heard someone saying 'he is killing me; and saw PW1. He called the neighbours to assist him and alerted boda boda riders that the accused had assaulted the complainant. They took him to the police station and the complainant was escorted to hospital.
  11. On cross examination, the witness stated that the girl's mouth was swollen and she had said that the accused had put her down and hit her.
  12. PW3, Hellen Ageri Mbone, a member of nyumba kumi, testified that on 11<sup>th</sup> November 2017 she was at home when she heard RJ call her. She went to where he was and found him with a girl who had been assaulted. She was swollen around her neck and face and was smelling badly. She told her she was 16 years old. They took her to hospital and on the way there boda boda operators identified the accused and took him to the police station.
  13. PW4, Tecla Nangei Deza, a village elder, testified that on 11<sup>th</sup> November 2017, she was called by Richard Juma, a fellow nyumba kumi member, at around 12pm. He informed her that there was a girl they had been investigating who had been injured by her husband. She met them at the boda boda stand and Hellen was also there. The girl had a swollen neck and face and complained that she was bleeding. As they were figuring what to do the accused was identified as the one who assaulted her and the boda operators arrested him and took him to Moi's bridge police station.
  14. On cross examination he stated that the accused used to lock the girl in the house and she never used to interact with members of the public.
  15. PW5, Benard Muturi Basweti, a clinical officer, testified that he examined the complainant on 12<sup>th</sup> November 2017. He noted that there was no evidence of tears on her private parts or any discharge but she complained that she had pain in her ear and that she had been hit by the accused while locked up in the house. She was forced to have sexual intercourse with him. He further stated that it was possible for her to have been defiled yet there were no scars, especially if she had been involved in sexual activity.
  16. PW6, Mildred Nabibia, the investigating officer stated that on 12<sup>th</sup> November 2017 the ladies went to her station with a young girl who they said had been assaulted and they suspected she had been defiled. She gave her a P3 form which she filled and the accused was charged with assault and defilement. The birth certificate of the complainant shows she was born on 8<sup>th</sup> August 2001 so she was 16 years old.
  17. Upon closure of the prosecution case, the appellant was put on his defence. The appellant stated that he would tender unsworn evidence and that he had no witnesses. It was his defence that he did not commit the charges and he did not understand them. He closed his case.

### **Submissions**

18. The appellant filed written submissions in support of his appeal on 9<sup>th</sup> August 2021. He submitted that the prosecution failed to establish a prima facie case against him and failed to discharge the burden of proving their case beyond reasonable doubt.
19. He submitted that children are not reliable witnesses and are prone to manipulation. That PW1 was not a credible witness as she was contradictory in her evidence. He gave the example of where the complainant stated in examination in chief that she declined to go with Salome until she was convinced



- by her parents. The birth certificate produced in court indicated that the complainant had no father. Her mother was a single mother. These contradictory statements clearly indicate a sign of framing.
20. The appellant submitted that the P3 form testified that nothing happened. That PW5 contradicted himself when he testified that the age of the injuries was 48 hours yet there were no injuries contained in the form. PW5 was only informed by the complainant about the pain.
  21. The appellant cited the case of *Richard Appella v Republic* CA No 45 of 1981 where the court held that; Two contradictory statements cannot be admitted in a court of law as evidence of truth. Either one of them is no or both of them are not true due to their contradictory nature hence no possibility for both of them to be admissible.
  22. He submitted that the evidence of PW1 with regard to the time of the offence being committed at 9am shows that she was a liar. That the investigation was shoddy and the medical report exonerated him. He maintained that the evidence fell far below the threshold of beyond reasonable doubt and that penetration was not proven.
  23. He further stated that the trial magistrate relied on the case of *Joseph Maina vs Republic* (2016) eKLR on the evidence of a child of tender years. In this case this was not the same as a child of tender age is one below the age of 10 years. He asked that the court allow his appeal and quash his conviction and sentence.

### **Respondent's Case**

24. Ms. Emma Okok, learned counsel for the State opposed the appeal by filing submissions dated 9<sup>th</sup> march 2022. She submitted that PW1's evidence was corroborated by PW5, the clinical officer who examined her. After examination he concluded that the complainant had been defiled based on her history even though she had no tears on her private parts or discharge. Further, that the complainant presented a history of being raped and so it was possible that the complainant had been defiled yet there were no tears especially if she had been involved in sexual activity before.
25. On the issue of the age of the complainant, counsel that it was confirmed by her birth certificate which she identified in court. It indicated that she was born on 8<sup>th</sup> August 2001. The offences were committed between 15<sup>th</sup> July 2017 and 11<sup>th</sup> November 2017. She was therefore 16 years old at the time of the incident(s).
26. With regard to corroboration, Ms. Okok submitted that PW1 testified that the evidence of assault was corroborated by PW2 who saw her on 11<sup>th</sup> November 2022 and took her to hospital for treatment. He clarified that her mouth was swollen and she had told him that the appellant had assaulted her. The same was confirmed by PW 3 who was a community policing member who saw her on 11<sup>th</sup> November. Further, PW5 assessed the degree of injury as harm and gave the age of the injury as 48 hours.
27. Ms. Okok submitted that PW5 was categorical that the absence of tears and lacerations in the complainants' private parts was due to the fact that the complainant may have engaged in prior sexual activity. This corroborates the complainant's evidence where she was categorical that she engaged in sexual activity with the appellant when she stayed with him for five months.
28. On the issue if witnesses called by the prosecution, Ms. Okok submitted that there is no law compelling the prosecution to avail a certain number of witnesses in response to the assertion that crucial witnesses were not called to testify. She cited section 124 of the *Evidence Act* with regard to the reliance of the testimony of the alleged victim and maintained the position is that the burden of proof was discharged, and the appellant was properly convicted and sentenced.



29. On the issue of sentencing, Ms. Okok cited section 8 (4) of the [sexual offences act](#) and section 251 of the Penal Code and submitted that the 15 years imprisonment was a sufficient and deterrent sentence.

### **Determination**

The following are the issue for determination:

1. Whether the prosecution proved its case beyond reasonable doubt
2. Whether the sentence was excessive

### **Whether the Prosecution Proved its case beyond Reasonable Doubt**

30. Section 8 (1) of the [Sexual Offences Act](#) provides;
- 1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
31. The key ingredients of the offence of defilement as held in see *George Opondo Olunga v Republic* [2016] eKLR are;proof of the age of the complainant,proof of penetration andproof that the appellant was the perpetrator of the offence.)
32. The complainant identified her birth certificate which was produced as prosecution exhibit 1. It indicated that she was born on 8<sup>th</sup> August 2001. The incidents are claimed to have occurred between 15<sup>th</sup> July 2017 and 11<sup>th</sup> November 2017. She was therefore 16 years at the time of the incident. The issue of the age of the complainant was therefore proven beyond reasonable doubt.
33. Section 2 of the [Sexual Offences Act](#) defines penetration as:
- ‘the partial or complete insertion of the genital organs of a person into the genital organ of another person.’
34. The key evidence that courts rely on in rape and defilement in order to prove penetration is the testimony of the complainant which is usually corroborated by the medical report presented by the medical officer. In the present case, since the complainant was a minor, the evidence of the Clinical Officer is key so as to corroborate her testimony.
35. The complainant testified that they used to have sexual relations but she did not know what was happening and that he never used to force her. However, the issue of consent is not applicable to the offence of defilement as a minor cannot consent to sexual intercourse. She further testified that she lived with him from July to December 2017.
36. I have analysed the evidence of PW5 the clinical officer who testified herein. It was his testimony that the complainant had been defiled despite there being no tears on her private parts or any discharge, it was possible that the complainant had been defiled, especially if she had been involved in sexual activity before. He also testified that she had injuries to her head neck and shoulder and that her injuries were classified as harm.
37. In the case of *Bassita v Uganda* S C Criminal Appeal No 35 of 1995 where the Supreme Court held:
- “The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victims evidence and medical evidence must always be adduced in every case



of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt.”

“For evidence to be capable of being corroborated it must:

- (a). Be relevant and admissible *Scafriot* {1978} QB 1016.
- (b). Be credible *DPP v Kilbourne* {1973} AC 729
- (c). Be independent, that is emanating from a source other than the witness requiring to be corroborated *Whitehead* J IKB 99
- (d). Implicate the accused

38. The issue of penetration presents a challenge in this case as the presence of tears is often the proof of defilement. However, PW5, being an expert witness gave his testimony with regards to the absence of tears based on the history of the complainant. I find that penetration was proven beyond reasonable doubt. I also find that the offence of assault was proven by circumstantial evidence and corroborated by the evidence of the witnesses.

39. Identification of the accused was by recognition as she had lived with appellant for five months. The issue of recognition has not been disputed.

Section 124 of the [Evidence Act](#) provides that: -

Notwithstanding the provisions of section 19 of the [Oaths and Statutory Declarations Act](#) (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

40. The appellant had raised the issue of a child of tender years, however the section was amended to delete the words tender years and replace it with ‘alleged victim’. I believe this ground of appeal is well settled and needs no further elaboration.

41. In the premises I find and hold that the trial court was correct in finding that the offence of defilement was proved.

42. The appellant did not appeal the conviction of the offence of assault contrary to section 251 of the [Penal code](#)

### **Whether the Sentence was Excessive**

43. I note that the appellant did not submit on the issue of the sentence. However, the appeal is against the conviction and sentence and therefore I shall proceed to address the same.

Section 8(4) of the [Sexual Offences Act](#) provides;

A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.



44. The appellant has not laid anything before this court to convince it that the sentence was unlawful or excessive. I have also considered that the act was not a single event but he repetitively defiled the complainant and even held her against her will akin to keeping a slave.
47. However, on sentencing, the same was based on mandatory premises, which, according to me is unconstitutional for failure to give discretion to the trial Court.

**Court on Sentencing**

48. I therefore sentence the appellant to ten (10) years which I believe is sufficient punishment. The 10 years shall run from the date of arrest.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 25<sup>TH</sup> OF MAY 2022.**

**E. K. OGOLA**

**JUDGE**

