



REPUBLIC OF KENYA



**Kipkurui v Republic (Criminal Appeal E048 of 2021)
[2022] KEHC 12895 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12895 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E048 OF 2021**

**A. ONG'INJO, J
JULY 28, 2022**

BETWEEN

GEOFFREY KIPKURUI APPELLANT

AND

REPUBLIC RESPONDENT

((Being an appeal from judgment delivered on 17th June 2021 by Hon. Christine Kemuma Auka Resident Magistrate in Kwale SPM Magistrate's Court Criminal Case (S.O.) No. 51 of 2019).))

JUDGMENT

1. The Appellant Geoffrey Kipkirui was accused in Kwale Magistrates Court Sexual Offence Case No. 51 of 2019 with the offence of defilement of a girl contrary to Section 891) as read with Section 8(3) the *Sexual Offences Act* No. 3 of 2006.
2. The particulars were that Geoffrey Kipkirui on diverse dates between 8th April 2019 and 12th April 2019 at Diani Location in Kwale County within Coast Region, unlawfully and intentionally caused his penis to penetrate the vagina of PC of LM a girl aged 14 years.
3. The trial Magistrate considered the evidence of 5 prosecution witnesses and the unsworn statement of the Appellant and concluded that the prosecution had proved their case beyond all reasonable doubt and convicted the appellant. He was subsequently sentenced to serve 17 years imprisonment.
4. The Appellant was aggrieved by the conviction & sentence and he appealed on the following grounds:-
 - a) That the learned Magistrate erred in law & facts by not considering and evaluating the evidence on record.
 - b) That the learned Magistrate erred in law & fact by not considering that there was no corroborative evidence to suggest that the complainant went to the Appellant's house because the Appellant was at his place of work at the time of his arrest.



- c) That the learned Magistrate erred in law & fact by relying on the evidence of the investigating officer one P.C. Lilian Wangui who conducted investigations from the police station and didn't visit the scene to investigate if any corroborative evidence could be found.
 - d) The learned Magistrate erred in law & fact by relying on a medical report which was not of any probative value because the same stated that the Appellant had no injury in his private parts.
 - e) That the learned Magistrate erred in law & fact by suggesting that there was penetration yet the P3 report stated that there was no injury on the complainant's private parts and therefore the trial Magistrate erred by suggesting that because the hymen was absent, it was the Appellant who caused its absence. That the trial Magistrate did not consider that the complainant might have engaged in sexual activities before.
 - f) That the learned Magistrate erred in law & fact by stating that the Appellant was identified by the complainant yet there was another person known as Kigus who was known to the Appellant but was never questioned and/or called as a witness by the investigating officer. There was no identification parade to identify the Appellant.
 - g) That the learned Magistrate erred in law & fact by relying on insufficient evidence in a matter that which was weighty and which attracted severe punishment. There was no DNA test done at the very least to put the matter of guilt beyond any reasonable doubt.
 - h) The learned Magistrate erred in law & fact by not critically analyzing the Appellant's defence especially on the issue of the complainant being together with one Kigen who pointed out the Appellant away from his residence as the one who was with the complainant.
 - i) That the learned Magistrate erred in law & fact by not considering the Appellants submissions & the case law cited. It is CR. Application No. 32 of 2015 by Justice Chitembale thereby arriving at an erroneous judgment.
 - j) That the learned Magistrate erred in law & fact in convicting the Appellant and giving him a harsh sentence.
5. The Appellant's advocate prayed that the conviction is quashed & sentence set aside & appellant be released.
 6. The prosecution's case was that the Complainant PCM a girl aged 12 years went to the beach in Diani at 11.00am on 8th April 2019 and at 12.00noon the appellant approached and greeted her and asked for her name and she told him. That he asked if she was Kalenjin & she answered in the affirmative. That the Appellant then spoke to her in Kalenjin language and told her they go to his house but she refused.
 7. That when the Appellant persisted she gave in and they went to his house and he bought lunch and they ate. That in the evening the Appellant again bought supper and they ate after which they slept on the same bed and had sexual intercourse. The complainant said it is on Monday he went with the Appellant to his house.
 8. That on Tuesday the Appellant told her to remain in the house and not to go back to her brothers house as he was going for attachment. She said she remained at the Appellants house. That the Appellant told her they could go to his home in Bomet. That there again had Sex on Tuesday at night. That on Wednesday the Appellant did not return to the house at night.
 9. That on Friday the Appellant told her to go to the airstrip till evening so that the police could not find her in his house. The Complainant said she went to the airstrip upto 4.00pm and she was arrested



- by Tekla and another man and they went to look for Geoffrey and they found him at Bidibadu. The complainant said she was staying with accused as husband and wife.
10. The complainant said she informed J and asked for permission to go for a walk. The complainant said she was studying in [Particulars Withheld] in class 8 but schools were closed. She said JK was her inlaw and was a student. The complainant said she was staying with the Appellant and not the appellants friend. She said that she went to Bidi badu Hotel with T and other students and the students arrested the Appellant.
 11. PW 2 JK testified that she was a student at [Particulars Withheld] of Mombasa and she was residing at Kona Musa. She said the complainant was her brother inlaw and she went to Diani on 29/03/2019 and was staying with her. She said she stayed with the complainant for one week. That on 8/04/2019 at around 8.00am the complainant went outside the house but didn't come back. That PW 2 tried to look for her but did not find her. She reported to the Chief on 9/04/2019 and Diani Police Station that the Complainant was missing.
 12. That on Friday 12/04/2019 PW 2's friend known as T called her and told her she had spotted the complainant on the beach road at Trademinds. That when they found the complainant she said she was staying at Bidibodu at Tanduri. That the complainant took them to a building where they found the accused persons friend and they asked where the accused was and he told them he had gone to the beach. That accused persons friend accepted to accompany them to the beach where the complainant identified the accused as the person she had been staying with.
 13. That they went back to the police station with the accused where both the accused and complainant were interrogated and P3 form issued and complainant taken to hospital near Kombani. That the complainant was examined and found to have had sex with the accused. PW 2 said the complainant was 14 years old PW 2 said that the accused used to stay with a friend but it was not the friend who defiled the complainant.
 14. PW 3 P.C. Benson Remor of Diani Police Station was on patrol as Tourist Police Officer when he got information that a girl who had gone missing had been traced and apprehended together with a suspect by members of public. That he escorted both to the police station. He said the girl had been missing for over 3 days.
 15. In cross examination by accused persons advocate he said it was true they arrested the accused in 2019.
 16. PW 4 P.C. Lilian Wangui of Diani Police Station investigated the allegations of defilement after the complainant who was booked as have gone missing was traced and taken to the station on 12/4/2019. She said the accused who was working as a Chef in Bidibodu met the Complainant at the beach and convinced her to go to his house.
 17. That when accused learnt that the Complainant was being traced he advised her to go to the airstrip and spend sometime there. That on her way back to accused house. She met members of public who had information she was missing. That on interrogation she said she was staying at accused persons place and she took them to Bidibadu.
 18. That the accused was arrested and escorted to the station and charged. PW 4 testified that P.C. Ramoi escorted accused and the Complainant to hospital where P3 form was filled and it was confirmed the complainant was defiled. PW 4 preferred charge of defilement against the accused. PW 4 also had complainant taken for age assessment and she was found to be 14 years.
 19. PW 4 said she contacted the complainants parents and they told her she was a pupil of [Particulars Withheld] primary school in West Pokot. She said she was not aware of any person who was intercepted



- with the complainant called Kigen & she didn't know at what stage the person was released. PW 4 said it is accused who gave his name as Geoffrey Kipkurui. She said accused was handed over to him by members of public.
20. PW 5 – Machage Cornelius Simion Clinical Officer at Kwale Hospital examined the complainant and filled P3 form – He said the complainant had a smelly discharge and her hymen was missing. He said lab tests conducted revealed pus cells, epithelial cells, in her urine and that showed that she had an infection. That the complainant had signs of depression and low self esteem. He also filled P3 form for the appellant (accused). He said the complainant could not have been traumatized if it was not 1st Sexual encounter.
 21. When the accused was placed on his defence he opted to give unsworn statement and said he came from Nyamira but was raised in Bomet. The appellant said he was a Chef at Bidibadu and he was at work when he was called outside. That when he went out he saw a youngman called Kigen who was in company of many people who had surrounded him. That Kigen then pointed at him and he was arrested.
 22. He said he didn't know why he was arrested. He said he didn't know the complainant prior to the incident. He said that he didn't stay and/or live with the complainant and he was not linked to the allegations of defilement. He said he used to live with Kigen.
 23. Mr. Birir Advocate for the accused (now Appellants) made oral submissions and said the prosecution had not proved its case beyond all reasonable doubt. It was submitted that complainant evidence is her word against the word of the accused because there was nothing else to link the accused with the statement. She made in court. That there was no right by the investigating officer to know where the accused lived.
 24. It was argued that the accused persons house ought to have been subjected to forensic examination to establish the link between him and the complainant. It was also submitted that medical evidence didn't connect the accused to the offences that the evidence of the other witnesses was not any better as investigation were poorly done in a matter that can land the accused to long term imprisonment.
 25. It was also submitted that the complainants age was not proved as it was merely estimated.
 26. The defence counsel referred the court to holding in *Martin Charo vs Republic* [2016] & urged the court to find that PW 1 engaged what she was doing with the accused person. Defence counsel submitted that it was not established that the complainant had not had sexual intercourse before. It was submitted that she was found to have an infection but there was no finding the accused had an infection.
 27. It was further submitted that the complainant was lose and she knew what she was doing and even if there was a relationship between her and the accused it would be unfair to convict the accused.
 28. This court gave directions for hearing of appeal by way of written submissions. The appellants counsel filed submissions on March 10, 2022 whereas the respondent filed grounds of opposition on 1May 9, 2022 and relied on them.
 29. In the appellants submissions, it was argued that Tekls who spotted the complainant and took her to where PW 2 was not called to testify. That appellants friend who was found in the house where PW 1 led Tekla and PW 2 was also not called to testify & the students who arrested the appellant were also not called to testify.



30. It was also submitted that the version given by PW 1 as to how the accused was arrested had sharp contrast which was quite intriguing with version given by PW 2. appellants counsel submitted that at page 13 PW 2 said that appellant was arrested at the hotel when she went with T and students and there was also a police officer.
31. That at page 24 of proceedings. PW 3 said that they went to Appellants house and found the appellants friend (K) who took them to the beach. It was submitted that PW 2's evidence casts doubt as to who was actually staying with the complainant as PW 1 confessed to have stayed with appellant's friend – page 26 & doesn't have any evidence record. PW W's testimony is on page 19 of the proceedings.
32. It was submitted further that PW 4's evidence was hearsay as she did not do any investigations. She did not visit the house where PW 1 alleged she lived with the appellant neither did she investigate the person called Kigen who was mentioned by PW 1 & PW 2. It was submitted that evidence of PW 5 didn't add value to prosecution case since there was no DNA Report could have conclusively shown that the appellant had sexual intercourse with PW 1.
33. It was also argued that in the absence of an identification parade investigations were bungled and the wrong person arrested. That the appellants evidence in defence was not considered critically. It was submitted that if Kigen was called as a witness the truth would have been known. That Kigen knew the incident and covered it up so as to implicate the Appellant.
34. It was further argued that had the trial Magistrate properly evaluated and analyzed the evidence tendered she would have come to a different conclusion that is to say that the prosecution did not prove their case beyond all reasonable doubt.
35. The court was urged to consider the age of the appellant in light of the holding in *Martin Charo vs Republic* [2016] as it would be unjust and fair to sentence him to 17 years.
36. The respondents in their grounds of opposition to the appeal said the appellant was identified as the perpetrator, the age of the minor was proved and fact of penetration was also prove. It was also said that appellants right to fair trial was guaranteed by the court and his defence considered and a finding on the same was made. It was also the prosecutions position that the sentence was lawful.

Analysis and Determination

37. This being the appellant's 1st appeal, the role of this court is now well settled in the case of *Mark Oireru Mose vs Republic* (2013) eKLR. It was held that this court is duty bound to revisit the evidence tendered before the trial court afresh, re-evaluate it analyse it and come to its own independent conclusion while 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.
38. In consideration of the above mandate to have looked and re-evaluated the evidence on record in the trial court as well as Appellants unsworn testimony; the submissions by defence counsel as well as judgment of the trial court and coupled with consideration of the grounds of appeal the Appellants submissions and the responds grounds of opposition the issues that rise for determination are:-
 - a) Whether failure to call T, Kigen & the students were arrested the Appellant was fatal to the prosecution case.
 - b) Whether there were material contradictions and/or inconsistency in evidence of PW 1 & PW 2 that would vitiate the appellants conviction.



- c) Whether the appellant was properly identified as the one who cohabited with the complainant –PW 1 between April 8, 2019 and April 12, 2019 or it was his friend/Roommate Kigen – whether it was necessary to conduct ID parade.
 - d) Whether PW 4 properly conducted investigations before changing the Appellant.
 - e) Whether medical report corroborated PW 1’s evidence that she was defiled.
 - f) Whether appellants statement in defence was considered by the trial Magistrate.
 - g) Whether the sentence was harsh & excessive.
39. In the 1st issue – what is the effect of not calling a witness? How many witnesses are required to prove prosecution case? Did the witness who testified gave shame testimony the other witnesses would have given?
40. The ingredients of the offence of defilement are:-Age of the complainant. PW 4 took the complainant for age assessment and found she was 14 years. PW 2 said her sister-in-law was 14 years. PW 1 – said she was a class 8 pupil.
41. That the complainant was 14 years old was not and it was not rebutted at trial *Joseph Kieti Seet vs Republic* [2014] eKLR – Machakos Criminal Appeal No. 91 of 2011. It was held that age of a victim can be determined by medical evidence and other cogent evidence.
42. In *Francis Omwroni vs Uganda* - the Court of Appeal held:-
- “In defilement cases medical evidence is paramount in determining the age of the victim & the doctor is the only person who could professionally determine the age of the victim in absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, victims parents or guardian and by observation and common sense...”
43. In the proceedings on the lower court the appellant insisted on being given certificate of birth even after being given the age assessment report. He was given an opportunity to appeal against the decision of the trial court on that regard but he didn’t. He opted to proceed with trial.
44. This court finds that it was sufficient for the prosecution to conduct age assessment and produce the report as proof of age of the complainant in absence of certificate of birth or other proof.
45. The other ingredient was whether penetration was proved. The complainant said that when the appellant convinced her to go to his house on Monday she shared a bed with him and they had sexual intercourse. That the same happened on Tuesday night but that Appellant didn’t return home on Wednesday night when PW 2 together with her friend traced the complainant she was taken to hospital and PW 5 established her hymen was broken. The Appellants contention was that since no injuries were noted it is possible the complainants had engaged in sexual intercourse before with some one else who broke her hymen. However, PW 5 found Pus Cells and epithelial cells which were as sign of infection and which he said was proof of penetration.
46. PW 1 said she lived with the Appellant as husband and wife and Appellant told her they would go to his home in Bomet.
47. On whether appellant was properly identified as the perpetrator – PW 1 met the appellant at the beach at 12.00non on April 8, 2019 and the appellant convinced her to go to his house. She said that appellant lived with a friend known as Kegen but it is the Appellant who had sex with her and it is the Appellant who convinced her not to go back to her brothers house. The extent of identity of the appellant was



said to have told the complainant to go to the airstrip on Friday – 12th April 2019 to while away time so that police don't trace her to his house.

48. The complainant was spotted at 4.00pm on her way back to the appellant house. He led PW 2 & Tikla to the said house and they found Appellants friend Kigen who led them to where the appellant was and the complainant identified him as the one she had been living with and the one who had sex with her.
49. Whether or not the Complainant was lose and may have had sexual intercourse before did not entitled the Appellant to lure her into another sexual intercourse being that she is a child who cannot and should not give consent to sexual intercourse. The fact that Appellant told complainant to go and spend the day at the airstrip so she is not arrested from his house is proof he knew the complainant was a minor and he engaged her in sexual intercourse.
50. Being that the complainant led PW 2 & her friend T and other students to appellants house and the fact that complainant was with appellants friend when he took them to where the appellant was it would not be proper to conduct an identification parade as she already came into contact with him on arrest. More so she had been in contact with the appellant for more than 3days during the day and he had become an acquaintance not requiring identification.
51. Furthermore the appellant claimed that he was arrested and charged for an offence which somebody else committed but the complainant was categorical that it is the appellant who met her at the beach and convinced her to go to his house and it was the appellant who had sex with her and not anyone else.
52. The trial Magistrate was convinced of the credit worthiness of the prosecution witnesses and rightly so and at paragraph 127 to 130 the Appellants unsworn statement is considered and dismissed as it confirmed the Complainants evidence about the appellants friend Kigen and they lived together and that he led PW 1, PW 2, Tekla & Other students (members of public) to where the Appellant was and he was arrested.
53. This court therefore finds that there was no material contradictions in the prosecutions case that would vitiate the appellants conviction. The Appeal therefore stands dismissed for lack of merit save that the sentence is revised to run from April 15, 2019 when the appellant was arrested and detained during his trial. 14 days right of appeal explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 28TH DAY OF JULY 2022

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel - Court Assistant

Mr. Ngiri for Respondent

Appellant – Present in person

Hon. Lady Justice A. Ong'injo

Judge

Appellant

I pray for copy of judgment.

Order

Certified copy of Judgment to be supplied to appellant as soon as possible.



Hon. Lady Justice A. Ong'injo

Judge

