



REPUBLIC OF KENYA



**Okoth v Republic (Criminal Appeal 46 of 2020)
[2022] KEHC 10159 (KLR) (26 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 10159 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL APPEAL 46 OF 2020**

**DO OGEMBO, J
JULY 26, 2022**

BETWEEN

DENNIS OMONDI OKOTH APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the Judgment, conviction and sentence of the Hon. A. R. Kitthinji (SPM) in Makadara Criminal Case No. 5274 of 2014, delivered on 29.8.2019)

JUDGMENT

1. Dennis Omondi Okoth, the appellant herein was charged before the lower court on count I with the offence of Defilement of a child contrary to section 8(1)(2) of the [Sexual Offences Act](#), No. 3 of 2006. The particulars of this charge were that on diverse dates between 1st and 7th days of November 2014 within Nairobi County, he intentionally caused his penis to penetrate the vagina of LA, a child aged 8 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.
3. The appellant faced a 2nd count of Defilement of a child contrary to section 8(1)(2) of the [Sexual Offences Act](#), No. 3 of 2006. That on 5.11.2014 within Nairobi County, he intentionally caused his penis to penetrate the vagina of FA a child aged 10 years.
4. He faced an alternative charge (to count II), of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#), No. 3 of 2006. That on 5.11.2014 in Nairobi County, he intentionally touched the vagina of FA, a child aged 10 years with his penis.



5. The case of the appellant went through full trial. The appellant was eventually convicted on both counts I and II and sentenced to serve 15 years imprisonment on each count. The sentence were ordered to run concurrently. The appellant was sentenced on 29.8.2019.
6. The appellant has appealed to this court. The petitioner has raised upto 7 grounds of appeal as filed herein on 5.3.2020. The grounds are as follows;-
 1. That the learned trial magistrate failed to observe that the key ingredients of actual penetration and certainly of the actual perpetrator of the alleged offence of defilement was not well established.
 2. That the learned trial magistrate failed to thoroughly scrutinize the prosecutions evidence to notice that there were inconsistencies, contradictions and yawning gaps that needed to be filled to warrant conviction.
 3. That the trial magistrate misdirected and misapprehended the evidence when the evidence adduced was full of contradictions especially the medical report. That this evidence casted doubt in the issue of torn hymen and other injuries observed by the doctor. The absence of spermatozoa made the doubt move.
 4. That the trial court erred in law and fact by failing to find that the offence was never proved to the required standard based on contradictions and inconsistency of evidence provided in the court of law.
 5. That the learned trial magistrate failed to adequately consider the appellant's defence while at the same time blantly dismissing the same without any explanations of the verdict in violation of section 169 of the Criminal Procedure Code.
 6. That the learned trial magistrate erred in both law and fact by convicting the appellant on evidence which did not meet the standard of proof.
 7. That the learned trial magistrate failed to observe and appreciate that the burden of proof lies with the prosecution in a criminal trial and quickly shifted that burden on the appellant and failure to observe that the case lacked crucial witness.
7. The appellant has prayed that his conviction be quashed, the sentence be set aside and that he be set at liberty. The prosecution side has on the other hand opposed this appeal and pleaded that the same be dismissed for lack of merit.
8. By consent and agreement of the parties, this appeal was canvassed by way of written submissions. Both sides duly filed their set of submissions.
10. In the submissions of the appellant, it was submitted that on count I, only the ingredient of defilement not contested with regard to Count I, is that of age of the complainant. That penetration was not proved (evidence of PW1 at page 2) i.e inserting his genital in my genital or doing bad manners to me. Also the evidence of PW2.
11. The appellant submitted on the inconsistency in the evidence of PW1 and PW2 on whether there was penetration. Also on why PW2, did not tell her mother about the ordeal. That PW3, Dr. Maundu also found no evidence of penetration on the complainants. He relied on *Nyanamba v Republic* [1983] KLR 599, on the issue of relying on the evidence of a single witness, that there is greater need for the court to warn itself of the dangers of convicting on a sole evidence.



12. Appellant went on that his samples were never taken for DNA test to ascertain if he was indeed the perpetrator. He summed up that the prosecution failed to prove the case beyond reasonable doubt as required by the law.
13. The appellant also raised the issue that no Voire dire examination was conducted for the witness (PW1), and yet the witness was a child of tender age. That from the evidence, it was clear that PW1 did not understand solemnity of an oath. On this, he relied on *JGK v Republic* [2015] eKLR on the necessity of voire dire before a minor can testify. Also on the case of *Johnson Muiruri v Republic* [1983] KLR 445, on the importance and manner of taking of voire dire examination. That the trial court failed in this regard. That PW1's evidence lacked in any form of corroboration.
14. Lastly, the appellant submitted that the trial court failed to consider his defence. That it was not incumbent upon the appellant to explain into details how he was fixed.
15. On the side of the state Respondent, was submitted on the 3 ingredients of the offence of defilement, being
 - a) Proof of penetration.
 - b) Age of the victim.
 - c) Positive identification of the assailant.
16. He submitted on the definition of penetration under section 2(1) of the *Sexual Offences Act*, no. 3 of 2006,

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

And further that genital organs are defined as

“includes the whole or part of male or female genital organs and for purposes of this Act includes the anus.”
17. That in the case of *John Onzere Kambi v Republic* [2013] eKLR, partial penetration was held to be sufficient proof. That the evidence of PW1 proved penetration and the court correctly found her to be truthful. That, similarly, the evidence of PW2 proved penetration and there was corroboration in the form of the medical record (PRC form and the medical notes).
18. Counsel relied on *Kaingu Elias Kasomo v Republic*, MLD Criminal No. 504/2014, that;

“age is a key ingredient to the offence of defilement and failure to prove it beyond reasonable doubt amounts to failing to prove the offence.”
19. That the birth certificates produced, confirmed that the complainants were minors, 10 year and 7 months, and 9-10 years respectively.
20. Lastly, on identification, counsel relied on the case of *Regina v Turnbull* [1976] 3 WHR 445, on the circumstances to be considered for positive identification. And that in this case, the appellant was neighbor to both PW1 and PW2, their tutor, and one well known to them.



21. On the defence of the appellant, it was submitted that the same was a mere denial. It was pleaded that the court does not interfere with or alter the sentence as found in *Republic v Stephen Mweizela Mutuku & 2 others* [2020] eKLR, that

“The court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked same material factors.”

It was urged that this appeal be dismissed.

22. I have considered the submissions made herein by both the appellant and respondent sides. This court is sitting over this appeal as a first appellate court. The jurisdiction of the 1st appellate court is well settled. In *David Njuguna Kariuki Versus Republic* (2010)eKLR, it was held;

“The duty of the 1st appellate court is to analyse and re-evaluate the evidence which was before the trial court, and itself come to its own conclusion.”

23. It is therefore necessary that this court in determining this appeal considers and evaluate fully the evidence as given by the 2 sides before the trial court. The same was as follows;

24. PW1, FAO, gave evidence that she was 11 years (at the time) and in class 5. She identified her birth certificate. Her testimony was that the appellant Dennis is their neighbor at Mathare. That on 5.11.2014, at about 7:00pm, she had been at home watching TV in company of her sister V when the appellant called her to give her something in his house. She proceeded to his home where they ate food also in the presence of his father. That after his father left, he started pinching her playfully. He then carried her to his bed, removed her skirt and underpants, unzipped his trouser, removed his genital, lay on top of her and inserted his genital in her genital. That he was kissing her as he did bad manners to her. That on going home, she told her mother what the appellant did to her. That appellant was taken to the police station after he admitted to what he had done. The witness was also taken to a clinic where she was examined and medical forms filled for her.

25. The 2nd witness, LAO, on her part, testified that she was 9 years and that the appellant was their teacher, doing tuition at his house. That on 1.11.2014, she had gone for tuition at 5:00pm together with F. That appellant told F to go away, leaving her with the appellant. He then started touching her on the chest before carrying her to the bed. He removed her trousers and panty. He then removed his genital which he put inside her genital. Watery substance poured on the bed. As he did this, she felt pain and screamed, but he covered her mouth with his hands. The witness gave an account of a similar incident that happened on 7.11.2014. She however did not tell anyone. She only told her friend F later. The 2 of them then went and told the mother of the witness. On being asked, the witness answered that she had not told her mother at first out of fear.

26. Dr. Joseph Maundu was PW3. His evidence was that on 10.11.2014, he examined FA who had a history of being defiled on 5.12.2014. On examination, she had no physical injury, her external genitalia was normal, her hymen was intact and no discharges were noted. She had been treated at MSF. He produced the P3 form. And PW4, RAM, father to PW1 testified that appellant was known to him and coached his daughter. That on the evening of 8.1.2014, he was told that the appellant had defiled his daughter. That on being summoned by members of the public, the appellant felt sorry. He was then taken to the police station. And MAO (PW5) gave the same evidence as PW4.

27. PW6, Barbra Salono Kele, a clinical officer with MSF, France Gender Violence Recovery Centre, Mathare, confirmed that LA was seen on 9.11.2014 at about 1:30AM. That on examination, her anatomy was normal, vagina was normal. Her hymen was oval shaped with smooth regular margin.



- She produced the PCR form as exhibit (Exh. 2). She confirmed that by the time of examination, time of the offence had passed.
28. And Celina Nyambu, PW7, also a clinical officer with MSF Kenya, confirmed that FA was examined at their facility on 9.11.2014. That on examination, she had no physical injuries. Vagina had white discharge. Inner walls of labia minora had abrasions. Hymen was annular with smooth regular margins. She produced the PCR forms as exhibit (Exh. 6, 7).
29. And PW8, FAO, recalled that on 8.11.2014, at about 5:00pm, her child F told her that her tuition teacher had defiled her. That on summoning the appellant, the appellant admitted defiling the child and asked for forgiveness. That the child was born on 15.4.2004.
30. The last prosecution witness was PC Daniel Owiang (PW9), the investigating officer. He visited the scene and took witness statements. He later charged the accused before the court. In court, he produced the birth certificates of 2 complainants as exhibits.
31. When put to his own defence, the appellant gave an unsworn defence. He testified that he used to teach children from nursery to class 8 as a volunteer. That there was a plan to fix him.
32. This is a case of defilement and it is necessary that this court discerns the issues for determination herein. In my view, the following issues are up for determination;
- i) Whether PW1 and PW2 were defiled.
 - ii) Whether the appellants was identified as the assailant.
 - iii) The defence of the appellant.
 - iv) Whether the prosecution discharged its burden and proved the case against the appellant beyond any reasonable doubt as required by the law.
 - v) The issue of sentence.
33. On the 1st issue, both sides are agreed on the 3 ingredients that the prosecution must prove in an offence of defilement. The same as aptly captured in many decisions of the superior. In *Charles Wamukoya Karani v Republic Criminal Appeal No. 72/2013*, the court held;
- The Critical ingredients forming the offence of defilement are, age of the complainant, proof of penetration and positive identification of the assailant.”
34. Regarding this matter, there is no dispute as to whether or not both PW1 and PW2 were minors at the time of the alleged commission of the offence. Relevant certificate of birth were produced in court showing that FA Adongo was born on 14.4.2004 (Count II). For LA (Count I), an age assessment report (Exh. 8) was aged 10 years old. The appellant has also conceded to the fact that the 2 complainants were minors. This court is in the circumstances convinced that prosecution sufficiently proved that both PW1 and PW2 were minors at the times of the commission of the alleged offence.
35. Similarly, there is no doubt as to the issue of whether both PW1 and PW2 know and properly identified the appellant. There is overwhelming evidence given by prosecution witnesses PW1, 2, 4, 5 and 8 that the appellant was a neighbor and well known to the complainants. And that he routinely offered tuition to both PW1 and PW2 and other pupils in his house. The appellant has admitted the same both in his defence therefore, I am persuaded that the identification of the appellant by both PW1 and PW2 was accurate and proper.



36. The only issue that the appellant has raised in this appeal is whether the prosecution side proved the element of penetration. Section 2 of the sexual offence Act, No. 3 of 2006, defines penetration in the following words:
- “Penetration means partial or complete insertion of the genital organs of a person into the genital organs of another person.”
37. Regarding the 1st complainant, LA evidence in support of the charge was by the complainant (PW1) that the appellant carried her to his bed, removed her clothes, unzipped her trousers before inserting his genitalia in her genitalia. The medical documents produced in support of this charge did not show any positive finding. In effect therefore the evidence of the evidence of this witness, a minor lacked any corroboration.
38. The issue therefore is whether the incorroborated evidence of the minor can form score, I have noted that the learned trial magistrate relied on section 124 of the Evidence Act, that;
- “... Provide 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 victims is telling the truth.”
39. The above section clearly declares that the court may convict (in sexual offence), based on uncorroborated evidence of the victim. The only rider to this is that the court must be satisfied that the witness is telling the truth and that the court must put in the proceedings the reason for holding that the witness is truthful.
40. I have noted the evidence of this witness as it is reflected in the lower court proceedings. The witness was very eloquent and elaborate in her evidence. She gave detailed account of how the appellant undressed her, placed her on the bed, undressed himself, before having sexual intercourse with her. She was subjected to cross examination, which cross examination did not in any way derail or challenge her evidence. In the circumstances, I find no reason to depart from the finding of the learned trial magistrate that PW1 was truthful in her testimony and I reach the finding that in this case, it is safe to convict based on the uncorroborated evidence of PW1.
41. Suffice it to say that the learned trial magistrate duly stated, in the proceedings, the reasons why he believed the minor witness to have been truthful in her testimony. That is what the law required of the trial court. And that is what the trial court accomplished.
42. Regarding court II, the complainant’s (FA, PW1) evidence was to the point that the appellant carried her to his bed, removed her clothes, unzipped his trousers, lay on her and inserted his genital organ into her genital organ. The evidence of this witness got corroboration in the form of the medical findings as enumerated by PW7, Celina Nyambu, that on examination, her vagina had whitish discharge and her inner walls of labia minora had abrasions (Exh. 6-7). It is worth noting that this witness was examined within hours of the alleged offence.
43. Taking into account the totality of the evidence of this witness and the medical finding, this court is convinced that the elements of penetration was sufficiently proved by the prosecution in respect of count II.



44. In any case, penetration can either be complete or partial (Section 2 of the Act). See also the cases relied on by the trial magistrate i.e Mark Oiruri Mose Versus Republic (2013)eKLR, and Erick Onyango Odeng Versus Republic (2014)eKLR.
45. In the submissions, the appellant has raised the issue that the trial court did not conduct any *voire dire* examination to PW1 prior to the witness giving evidence. On this, it must be noted that *voire dire* examination is conducted on a minor of tender years so as the court may ascertain whether or not the minor understands the nature of the oath (also J.G.K Versus Republic (2015)eKLR), quoted by the appellant). If such a minor satisfies the court that he/she understands the nature of the oath, the minor would proceed to give evidence on oath. If, on the other hand, the court is not satisfied that the minor understands the nature of the oath, the minor would still proceed to give evidence, though not on oath. The evidence of the minor, whether given on oath or not, would still be admissible. It is therefore the position of this court that failure to administer *voire dire* examination on a minor witness, per se may not render the evidence of such a witness inadmissible.
46. In our instant case however, the witness (PW1) was 11 years at the time of giving evidence in court. The issue therefore is whether the witness was a child of tender years in the first place. Section 2 of the [Children Act](#), No. 8 of 2001, defines a child of tender years as;
- “Child of tender years means a child under age of 10 years.”
47. PW1 was therefore not a child of tender years at the time of giving evidence. The submission of the appellant that this witness ought to have first been subjected to *voire dire* examination first before her evidence could be taken, and that failure to do so would be fatal to the prosecution’s case, flies in the face of the law and fails. I so find.
48. In the circumstances, I am convinced that the prosecution discharged its burden of proof and proved both count I and II beyond any reasonable doubt as required by the law.
49. On the defence of the appellant, it is worth noting that the appellant has admitted knowing both PW1 and PW2 and that indeed he was their private tutor. He otherwise maintained that he had been fixed regarding the charges. This court notes that the appellant never raised this issue with any of the prosecution witnesses while they testified in court. In his defence, the appellant did not shed any light on how or by whom he had been fixed. I am not convinced that doing so would amount to shifting the burden of proof from the prosecution side. In all, he offered no defence at all to the evidence laid against him. His defence, I must say, lacked in any merit and was rightly dismissed by the trial court.
50. Lastly, on the issue of sentence, the case of [Republic v Stephen Mweizela Mutuku and 2 others](#) [2020] eKLR, guides this court, that:
- “The court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”
51. Section 8(2) of the [sexual offences Act](#), No. 3 of 2006, prescribes the sentence herein, this;
- “A person who commits an offence of defilement with a child aged 11 years or less, shall upon conviction be sentenced to imprisonment for life.”
52. The appellant herein was sentenced to serve 15 years imprisonment on each count, to run concurrently. I find this sentence proper and legal and I have no reason to interfere with the same.



53. While in the course of writing this judgment, it came to the notice of this court that the appellant had, while this appeal was pending, filed a similar appeal being, High Court Criminal Appeal No. 187 of 2019, Denis Omondi Okoth Versus Republic. I find this to be an abuse of the process of the court and the said appeal No. 187/2019 has been summarily dismissed accordingly.
54. Finding no merit in the appellant's appeal filed herein on 5.3.2020, I hereby dismiss this appeal wholly. It is so ordered.

D. O. OGEMBO

JUDGE

26.7.2022

Court:

Judgment read out in open court in presence of the appellant and Ms. Chege for the state.

D. O. OGEMBO

JUDGE

26. 7.2022

