



**Juma v Director of Public Prosecutions (Criminal Appeal
E041 of 2021) [2022] KEHC 12888 (KLR) (25 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12888 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E041 OF 2021**

**A. ONG'INJO, J
JULY 25, 2022**

BETWEEN

MOHAMMED MWINYI JUMA APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

(Being an appeal against conviction and sentence in Sexual Offences No. E013 of 2020)

JUDGMENT

1. The appellant Mohammed Mwinyi Juma was charged and convicted with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* number 3 of 2016 in Shanzu Magistrates Court in Sexual offence case number E013 of 2020.
2. The particulars of the offence are that the appellant on the October 14, 2020 at [Particulars Withheld] area in Nyali Sub-County within Mombasa county intentionally and unlawfully caused his penis to penetrate the vagina of PNA a girl aged 12 years of age. The trial Magistrate upon considering the evidence of 5 prosecutions witnesses and appellant's sworn statement found the appellant guilty and he was convicted and sentenced to serve 20 years' imprisonment for the offence of defilement.
3. Being aggrieved by the conviction and sentence the appellant appealed on the following amended grounds of appeal filed on February 21, 2022 reproduced herein; -
 - a) That the trial Magistrate failed in law and fact by not noticing that the charge sheet was defective.
 - b) That the trial court erred in both law and fact when it failed to prove their case beyond reasonable doubt.
 - c) That the trial court erred in fact by failing to see that the conduct of the complainant was incompatible with that of a minor who had been defiled.



- d) That the trial court erred both in law and fact when it failed to see that complainant's evidence lacked corroboration.
- e) The appellant therefore, urged the court to allow appeal to quash conviction and set aside the sentence.
4. The brief facts about the prosecution's case is that the appellant and complainant's parents were neighbors. That on October 17, 2020, PW1 the complainant's father saw her eating samosa and when he asked where she got money to buy samosa and she when didn't respond he canned her and she revealed it was the appellant who had given her money to buy samosa. PW1 had also noticed that the complainant's walking style had changed. That when PW2 the mother to the complainant interrogated her she revealed that the appellant had defiled her in his house which is within the same compound and they shared a common gate with the appellant and his mother.
5. The complainant also testified and said she knew the appellant as Madinga who is their neighbor. She testified that the appellant signaled her on October 14, 2020 to go and take sweets when he threw a stone at her. That she went into appellant's person's house and he closed the door and gave her Ksh 50. That the accused pulled her hand and applied vaseline on his "dudu" and then put her on the bed and removed her clothes and did bad manners to her by inserting his "dudu" on her "susu". When she tried to scream the appellant covered her mouth and defiled her for more than one hour behind closed doors. That after appellant instructed her to leave and instructed her not to tell anyone. That when her father saw her eating samosa he beat her and that is when she opened up and told her mother that appellant had defiled her. PW1, PW2 and PW3 (complainant) went to report at Kadzandani police station where they were referred to Coast General Hospital for examination and treatment.
6. PW4 dr, Bikuu of Coast General Hospital produced a PRC form duly filed on October 19, 2020 in respect to injuries sustained by the complainant who had vaginal abrasions and her hymen was broken. She also produced P3 form which was filed by dr Mohamed Ali confirming injuries in the PRC form. It was established that there were signs of penetration and hymen was broken.
7. PW5 PC Cynthia Nekesa investigated the offence. She did effect arrest of the appellant who was a neighbor to the complainant and preferred charge of defilement. PW5 said the appellant told her that the girl (complainant) could be used by anyone.
8. The appellant in his defence testified that they were neighbors with the complainant for a very long time but that someone told PW1 that he was having an affair with his wife. He said PW2 was his friend but he had not disrespected her in anyway. He said police officers went to his house on October 10, 2020 at 8.00 pm and asked why he was having an argument with PW1. He said that at the police station he was informed he had stolen from PW2 and later the story changed that he had defiled PW3. The appellant argued that the police officer who was arrested him didn't testify.
9. This appeal was canvassed by way of written submissions. In the appellant's submissions he said charge was defective because the officers who arrested him said they had arrested him for stealing but when he got to the station it was alleged he had defiled a neighbor's child. He submitted that those officers who arrested him should have testified to clarify why he was arrested but didn't attend court.
10. He also submitted that the investigating officer; PW5 said she didn't carry out investigations and the court noted the inability of PW5 to answer whether she carried out investigations. The appellant argued that inference to be drawn from failure to avail the arresting officers is that the investigating officer committed to make inquiry of any underlying facts that could enable her ascertain the veracity of the claims. He relied on the holding in *Soki vs Rep* 2004 eKLR where the Court of Appeal cited the case of *Gabriel Kamau Njoroge VS Republic* (1982-1988) IKR 134 where it was held that , 'It is



the duty of the 1st appellate court to remember that parties are entitled to demand of it a decision on both questions of law, and fact and the court is required to weigh conflicting evidence and draw its own inference and conclusions bearing in mind that it has neither seen nor heard the witnesses and make allowance for this.”

11. On the 2nd ground the appellant submitted that at the same point the complainant was unable to say what happened and that her unwillingness was obvious that she didn't want to give false testimony against the appellant.
12. On the 3rd ground the appellant submitted that complainants conduct was highly questionable as it was only after she had been canned that she revealed she had allegedly been defiled. He relied in the holding in *David Jairo and Another vs Republic* (Cr Appeal No 515 of 2007) to support his position.
13. On the 4th ground the appellant argued that PW3 testimony was not corroborated as there was no independent witness to the offence or even material evidence as per section 124 of *Evidence Act*. He submitted that it was not enough to find that the complainant had been defiled and that it was the accused person who did it. Appellant argued that complainant said she was defiled on October 14, 2020 and her parents said that she was defiled the previously day before October 17, 2020 when they discovered she had been defiled. He said it is possible the incident of 14th is different from the one of 16th. He said that the PRC form didn't have date the offence was committed but only date the complainant was examined. He said this compounds the confusion allegedly posed in the prosecution case. He submitted that none of the witnesses gave precise date of the alleged incident of defilement apart from PW3 who gave contradictory dates and her testimony failed the threshold of section 124 of the *Evidence Act*. The appellant questioned criteria used by the trial court to be satisfied that PW3 was a truthful witness when she gave contradictory evidence. The appellant relied on the case of *Ndegwa Kimani vs Republic* (1979) KLR 282 where it was held that; “A witness whose evidence is to be relied on should not create an impression that he/she is not a straight forward person”
14. The respondent on the other hand filed their submissions on March 19, 2022 in which it was argued that all the ingredients of the offence of defilement had been proved by the prosecution in their case.
15. For the age of the complainant it was submitted that a certificate of birth Ex P3 was produced showing the complainant was born on 3/12/2007 and was therefore a minor when the offence was committed.
16. For the ingredient of penetration, the definition provided under section 2 of the *sexual offences Act* is quoted to mean partial or complete insertion of genital organs of a person into the genital organs of another person. To this it was submitted that the compliant – PW3 was sufficient. However, it was argued that a part from evidence of PW3 there was also a detail report that corroborated PW3 evidence that she was defiled. The respondent relied on the Court of Appeal authority of *George Kionji VS Republic* in CR Appeal No 270 of 2012 where it was held that penetration is proved by evidence and it implies that the charge is proved by evidence of the complainant/victim who gives testimony that she was defiled. The respondent also argued that the contention that it was not properly established when the complainant was defiled does not cast doubt in the prosecution's case. It was argued that it was clear from PW3 that the offence took place on 14th 10 2020 and the appellant didn't challenge that fact.
17. The prosecutions supported its position in the holding of the Court of Appeal in the case of *Willis Ochieng Odeli VS Republic* 2006 eKLR where it was held that minor contradictions are not grounds for quashing convictions in view of section 382 of the *Criminal Procedure Code*.
18. The state/respondent also submitted that section 124 of the *Evidence Act* removed the requirement of corroborations of evidence by children who are victims of sexual offences and the trial magistrate



have had a chance to see the complainant and observe her demeanor found that she was truthful and properly relied on her evidence to the convict the appellant.

19. It was also submitted that the appellant had the opportunity to cross examine witnesses on allegations he was arrested for a different offence but he didn't raise them. The respondent cited and relied in the holding of a *Ugandan authority Bassite VS Uganda* SC Criminal Appeal No 35 OF 1995 where the Supreme Court held that, "The act of sexual intercourse or penetration may be proved by direct 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 victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse on 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."
20. The prosecution/respondent further submitted that where a minor is victims of sexual assault what the court need to do is establish they are truthful as was observed by the Court of Appeal *JWA vs Republic* 2014 eKLR., "We note that the appellant was charged with 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." The respondent submitted that the court examined PW3 and she was competent in the eyes of the court and the court made a finding after due consideration of the evidence of the prosecution and the appellant. It was further argued that the discrepancies referred to by the appellant were minor and could and could not valet the conviction as held in *Joseph Maina Mwangi vs Republic* 2000) eKLR.
21. On identity of the perpetrator it was submitted that the appellant was known to the complainant. That PW3 confirmed that he had been residing with the appellant as neighbour's at the time it was reported and that appellant didn't dispute these facts and it was proved he was the perpetrator. In *Anjoni VS Republic* (1976-1980) KLR 1566 it was held: "When it comes to identification, recognition of an assailant it is more satisfactory more and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in same form or other."
22. The respondent urged the court to dismiss the appeal.

Determination and Analysis

23. This being the first appeal I have considered the evidence on record in the trial court, the judgment of the trial magistrate, the grounds of appeal and submissions by the appellant and the respondent and issue that lies for determination is whether the appellant has satisfied this court that his appeal should be allowed.
24. The appellant having being charged with the offence of defilement contrary to section 88(1) as read with section 8(3) of the *sexual offences Act* the prosecution had the onus of proving the age of the complainant, fact of penetration and identity of the assailant/perpetrator.
25. There is no dispute to complainants age was proved by the prosecution and therefore proper section of the law compatible with her age are indicated in the charge sheet. The complainants certificate of birth was produced by the prosecution.
26. As to whether or not there was penetration PW3 said the appellant who is their neighbour signaled her to go and get a sweet from him by throwing a stone at her and when she went to appellants house he locked the door and gave her Ksh 50 and defiled her for over one hour. That when she felt pain and



wanted to scream the appellant covered her mouth. After defiling her the appellant told her to leave and warned her not to tell anyone lest he beats her. When PW1 saw PW 3 eating samosa and could not explain where she got money to buy samosa he caned her. PW1 and PW2 also saw their daughter had changed her style of walking and they got concerned. After being caned PW3 opened up and told her mother PW2 that the appellant had defiled her. Evidence by PW3 that she was defiled was confirmed when she was examined at the Coast General Hospital and it was established she had vaginal abrasions and her hymen was broken. Evidence as to penetration was therefore proved beyond reasonable doubt.

27. On identity of the perpetrator PW3 said it was the appellant who was their long time neighbor who defiled her. The appellant didn't deny or admit that he defiled the complainant. He didn't say where he was at the time he was alleged to have defiled he complainant. Appellant's allegations that he was arrested for having committed another offence is an afterthought as it didn't come out in his cross examination of the prosecution witnesses. In any event even if it is the true that PW1 got annoyed because he learnt the appellant had an affair with his wife or that he was arrested for stealing from PW2, the evidence of vaginal abrasions and broken hymen established by the doctor on PW3 would not have been positive.
28. In light of the foregoing this courts finds that the appeal has no merit and is dismissed with costs. appellant has right to appeal on points of law within 14days.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 25TH DAY OF JULY 2022.

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:

Ogwel – Court Assistant

Accused – Present in person

Ms. Musyoki Advocate holding brief for Ms. Kipsang Advocate for Accused

Mr. Ngiri for State

***HON. LADY JUSTICE A. ONG'INJO**

JUDGE

19/05/2022

