



**AHM v Republic (Criminal Appeal E043 of 2021)
[2022] KEHC 12773 (KLR) (31 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 12773 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E043 OF 2021
JM MATIVO, J
AUGUST 31, 2022**

BETWEEN

AHM APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal against Judgement, conviction and sentence in Wundanyi CMC SO Number 10 of 2020, R. v Abdalla Hassan Mgalla delivered by E. M. Nyakundi, RM on 1.10.2021)

JUDGMENT

1. On 1st October 2021 the appellant, AHM was convicted and sentenced to 15 years imprisonment in Wundanyi SO case number 10 of 2020 for the offence of defilement contrary to Section 8 (1) & (4) of the *Sexual Offences Act* (the Act). It was alleged that on diverse dates between the 1st day of January 2019 and 30th January 2019 at around 1200pm at Wundanyi township in Wundanyi sub-county within Taita Taveta County, he intentionally caused his penis to penetrate the vagina of SWL, a child aged 16 years old. There was no finding on the alternative count of committing an indecent act with a child contrary to section 11(1) of *the Act*.
2. As a first appellate court, this court has to determine, whether the appellant was correctly convicted and / or sentenced in respect of the offence. An appellate court will not interfere with or temper with the trial court's judgment or decision regarding either conviction or sentence unless it finds that the trial court misdirected itself as regards its findings of facts or the law.
3. PW1, the complainant testified that she was 17 years and in form 2. She recalled that in January 2019. She used to attend Madrasa, Ustadhi taught by the appellant, and he forced her to have sex with her. She also said he picked her from school and took her to a lodging at Wundanyi where had sex with her and she went back to school. It was her evidence that her father a one DL came to school and a teacher called Madam J told him that he was not her father because someone else had previously come



- and identified himself as her father took her, so she was not in school. She testified that the appellant told her to tell the teacher he was her father so that he could be allowed to pick her from school.
4. On cross-examination she said she was born on 29th May 2002. She also said the appellant gave her a bui bui to wear at Mwatate before they boarded a Matatu to Wundanyi which she returned to him after they were done. She also stated that her own father used force to have sex with her.
 5. PW2, JWM, a teacher at [particulars withheld] Secondary School recalled that on 5th February 2020 the students were sent home for fees, and a student from her class came back with a parent who wanted to talk to her. He said he wanted to inquire about her performance. He told her that the complainant's father (a different person) had come earlier also inquiring about her performance. She said the said person was the appellant and he requested to take the complainant to the mosque for dua and promised to bring her back after the prayers. She said the complainant he (the appellant) said he was her father. She said after refusing the said visitor to pick her, he went home only to return the following day accompanied by the complainant and her mother and requested to see the principal. The principal asked the complainant where she went with the appellant and she said they went to Wundanyi. It was at this point the said person identified himself as the complainant's father.
 6. PW3, DL, the complainant's father recalled that on 4th February 2020 he went to the complainant's school to pay her school fees, only to be told by the principal that there is someone who comes to pick his daughter from school claiming to be her father. He said the appellant took her to a lodging at Wundanyi. He said the complainant was born on 18th May 2002 and showed her birth certificate. He said it was not the first time the appellant was defiling her because on 19th November 2019, he reported him for defiling her at the mosque.
 7. PW4 William Sigei Birif, a Clinical Officer at Mwatate Sub-County Hospital produced the P3 form. He stated that the complainant had no lacerations or injuries, her hymen was broken, there was a white vaginal discharge usually caused by infection, and Pregnancy, VDRL and HIV tests were all negative but urinalysis had pus cells.
 8. PW5 PC 99516 Toitok Felista stationed at Mwatate Police Station was the investigating officer. She recalled that on 5th February 2020 the complainant accompanied by her parents reported a complaint of defilement by Madrassa teacher. She said they took the complainant to the hospital where she was examined. She said the appellant went to her school and identified himself as her parent and he was allowed to take her, but, instead, he took her to a lodging at Wundanyi where he had sex with her, then at around 4pm she went back to school. She produced her birth certificate in court.
 9. In his sworn defence, the appellant stated that on 17th February 2020 he was on holiday at Lunga Lunga and he came back on 21st February 2020, and on 22nd February 2020 he went to the Police Station together with the committee members of the mosque to resolve issues relating to the closure of the mosque but he was put in the cells until the following Monday when he was arraigned in court. He said the charges were actuated by hate and jealousy because he was receiving higher pay. He denied ever going to the school to pick her or defiling her or going to the lodge with her.
 10. The appellant called a one Afiz Nyambu Ibrahim as his witness. His testimony was that the OCS Mwatate asked them to avail the appellant to explain why the mosque was closed. He attributed all the problems to leadership wrangles in the mosque. DW3 a one Phibrona Mwachofi, the executive officer, Wundanyi Law Court produced certified copies of proceedings in SO No. 11 of 2020 in which the complainant's father was charged, tried and convicted for offence of incest and sentenced to serve 20 years in prison.



11. In her judgment, the learned Magistrate framed three issues, namely, (a) the age of the complainant (b) proof of penetration, and (c) identification of the appellant all of which he found had been proved and he convicted the appellant and sentenced him to serve 15 years imprisonment.
12. The appellant seeks to upset both the conviction and sentence. Eventhough the grounds cited are overlapping in certain respects, the appellants' challenge may broadly be understood as follows: - (a) that the case was not proved beyond reasonable doubt; (b) his defence was not considered. (c) that the prosecution failed to call crucial witnesses, (d) that he was not properly identified.
13. First, I will address the question of identification. The appellant's counsel submitted that the appellant was not properly identified by PW2. He argued that an identification parade ought to have been conducted. He argued that the supposed description of the appellant by PW2 was not captured in her statement. He argued that PW2 had the opportunity of seeing the appellant in court and cited *Hassan Abdalla Mohamed v Republic* which questioned the value of dock identification.
14. On his part, the Respondent's counsel submitted that there was no need for identification because the appellant was personally known to the complainant.
15. True, the law requires clear evidence identifying the accused as the offender. Identification evidence is defined as evidence that a defendant was or resembles a person who was present at or near a place where the offence was committed, or an act connected with the offence. Admittedly, there is a special need for caution before accepting identification evidence. In *Charles O. Maitanyi v Republic*, it was held inter alia that it is necessary to test the evidence of a single witness respecting to identification, and that great care should be exercised and absence of collaboration should be treated with great care.
16. Evidence from eyewitnesses is often the starting point for police investigations and it is estimated that it plays an important role in all contested cases. Our system of justice is deeply concerned that no person who is innocent of a crime ought to be convicted. In order to avoid that, a court must consider identification testimony with great care, especially when the only evidence identifying the accused as the perpetrator comes from one witness. Because the law is not so much concerned with the number of witnesses called as with the quality of the testimony given, the law does permit a guilty verdict on the testimony of one witness identifying the accused as the person who committed the crime. A guilty verdict is permitted, however, only if the evidence is of sufficient quality to convince the court beyond a reasonable doubt that all the elements of the crime have been proven and that the identification of the accused is both truthful and accurate.
17. To determine whether identification is truthful, that is, not deliberately false, the court must evaluate the believability of the witness who made an identification. In doing so, the court may consider the various factors for evaluating the believability of a witness's testimony. Regarding whether the identification is accurate, that is, not an honest mistake, the court must evaluate the witness's intelligence, and capacity for observation, reasoning and memory, and be satisfied that the witness is a reliable witness who had the ability to observe and remember the person in question. Further, the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person, and whether the victim knew the accused before.
18. The appellant's attack on the trial court's judgment based on absence of identification collapses not on one but several fronts. First, it is common ground that the appellant was teaching Madrasa classes and the complainant was her student in the said classes. This confirms that the complainant knew the appellant and therefore the question of mistaken identity cannot arise. Second, the complainant is in on record saying that the "accused alikuwa akinisumbua" and he forced me to have sex with her (see page 99 of the record). This piece of evidence confirms that the appellant was previously known to



the complainant before the appellant went to pick her from school. Third, the complainant gave an account of how the appellant went to school, picked her and took her to a lodging at Wundanyi,

19. It is important to mention that this illicit affair, sad as it is, was to remain a secret between the appellant and the complainant. But as fate would have it, the complainant's father went to school and sought to know her performance. The teacher (PW2) evidently perplexed quickly told the "visitor" (who turned out to be her real father) that the students had been sent home for fees and she came accompanied by a man who claimed to be her father. She described the said person and was certain he was not the "visitor." Convinced that the "visitor" was not her father, he him that another person had been to school before also claiming to be the father and inquired about her progress and even sought and obtained permission to take her for prayers. PW2 dismissed this other "father." He got furious and returned the next day with her mother. At this point the complainant admitted that "she lied that the appellant was her father so as to be allowed to go with him." It turned out that the appellant was not the father and PW2 identified her as the person who had previously picked her from school claiming to be the father.
20. The appellant is challenging PW2's evidence that he was the one who had previously visited the school masquerading as her father, inquired her performance and even successfully asked for permission to take her for prayers. This attack on the evidence of PW2 collapses on the following grounds: - One. The common law recognized several categories of identification evidence because the potential dangers of identification evidence differ between the categories. One category is Positive Identification Evidence. This is evidence by a witness identifying a previously unknown person as someone he or she saw on a prior relevant occasion. Such evidence may be used as direct or circumstantial proof of an offence. PW2's evidence falls in this category. She recognized the appellant as the person she had previously seen at the school who had pretended to be the complaint's father. She granted her permission to go with him. In her testimony, she vividly gave an account of the appellant such that she was certain telling her real father when he visited the school that he was not her father because he was not the person she had seen before. This fact extinguishes the appellant's attack on her evidence.
21. Two, PW2's evidence was not stand-alone evidence. It is to be appreciated in light of all the other evidence. There is evidence that the appellant had been accused of having an affair with the complainant at the time she was attending his classes. Three, if there was any doubt, then the complainant's admission that she lied to the teacher so that the appellant could go with her clears it. There was nothing to suggest that the complainant lied that the appellant defiled her.
22. The other ground upon which the attack on PW2's evidence collapses is that it ignores the second category of identification evidence which is called "Recognition Evidence," which is evidence from a witness that he or she recognizes a person or object as the person or object that he or she saw, heard or perceived on a relevant occasion. Simply put, PW2 recognized the appellant as the person who had previously visited the school claiming to be the complainant's father and she allowed him to take the girl with her. The complainant added weight to this when she gave an account of how he gave her a bui bui to wear, then they boarded a matatu and ended up at a lodging at Wundanyi where he had sex with her.
23. I now turn to the other ground argued by the appellant's counsel which is that the evidence of PW1 on penetration was contradictory and it raised serious doubts. Counsel made reference to her evidence that the appellant used to defile her in the Madrasa and her evidence that he defiled her at the lodging for the first time. Counsel also argued that the trial court relied on medical evidence used in another case which is Sexual Offence Number 11 of 2020.



24. The Respondent's position was that all the elements of the offence were proved, that the production of the PW3 did not prejudice the appellant because both accused person had been charged with the offence of defiling the appellant.
25. As for penetration, there is on record the evidence of PW1. She gave an account of how the appellant started pestering her when she used to attend Madrasa classes, and even said he forced her to have sex with her. Again, on record is her account narrating how he went to pick her from school and took her to a lodging where they had sex. Her father also testified about similar instances when she was attending madrasa. Even without the medical evidence as explained later, her testimony as a single witness suffices under the *Evidence Act*. I find no reason to doubt it. The fact that the complainant was also defiled by her own father who was the accused in SO No 11 of 2019 does not render the charge against the appellant unsustainable.
26. Additionally, the appellant and the complainant's father were charged separately with the offence of defilement and incest respectively. The evidence tendered before the court in the incest case against her father (See PW2) was that as the Investigating Officer was interrogating the complainant, she also told her she had another problem, which was, her own father was also defiling her. The existence of two P3 forms one for each case does not mean that the appellant was convicted using a P3 form used in the other case. Even in the absence of medical evidence, the evidence of PW1 is sufficient to establish penetration. The issue before the court was not who broke the hymen, but whether the appellant committed an act which caused penetration. To me, sexual contact was proved to the required standard.
27. The other argument propounded by the appellant's counsel was that the prosecution evidence was full of contradictions. He argued that PW2 and PW3 evidence was contradictory on the dates PW3 went to pay school fees. Counsel argued that the Investigating Officer in the two cases was the same, that no visitors book or CCTV footages were produced to support the allegation that the appellant is the one who went to school as alleged.
28. The Respondent submitted that the evidence was not contradictory. He argued that the evidence adduced was credible.
29. The court's duty is to determine whether there were contradictions in the evidence tendered, and if so, whether the contradictions (if any), are so material that the trial Magistrate ought to have rejected the evidence. As was held by Ugandan Court of Appeal in *Twehangane Alfred v Uganda*, it is not every contradiction that warrants rejection of evidence. The court stated: -
- “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's case.”
30. Granted, inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected. The question to be addressed is whether the contradictions mentioned are grave and point to deliberate untruthfulness or whether they affect the substance of the charge. Defining contradictions, the Court of Appeal of Nigeria in *David Ojeabuo v Federal Republic of Nigeria* stated:-
- “Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of



evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."

31. In the above cited, it was held that contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. It is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case. Its only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from. The appellant's attempt to discredit the complainant's evidence citing inconsistencies does not pass the tests in the above cases. The issues raised are trivial and, in a way, misguided. The statement that "this is the first time we had sex" was picked in abstract and may also be construed at the first time she was taken to the lodging. This is because a reading of the entire testimony shows that the appellant started having sex with the complainant when he was teaching her at the Madrasa.
32. The appellant faulted the prosecution for alleged failure to call material witnesses and relied on *Bukenya & others v Republic, Mann Holdings Pte Ltd & another v UNG Yoke Hong* and *Elgin Finedays Lts v Webb*. He invited this court to make an adverse inference. To underscore this argument, counsel opined that the testimony of other students at the Madrasa and at the school ought to have been called.
33. On the alleged failure to call material witnesses, the Respondent's counsel submitted that the evidence against the appellant was cogent.
34. The starting point is that section 143 of the *Evidence Act* provides that "No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact." The Court of Appeal in *Julius Kalewa Mutunga v Republic* stated as follows:-

"...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."
35. The appellant's counsel placed heavy reliance on *Bukenya & Others v Uganda* in which the former East African Court of Appeal laid down the following principles: -
 - i. the prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.
 - ii. The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.
 - iii. Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.
36. However, counsel omitted to mention the fact that in the above case, the court was categorical that the prosecution is not expected to call a superfluity of witnesses. The adverse inference will only be made by the court if the evidence by the prosecution is not or is barely adequate. Accordingly, it will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case. As Mahoney J. said, the significance to be attributed to the fact that a witness did not give



evidence depends in the end upon whether, in the circumstances, it is to be inferred that the reason why the witness was not called was because the party expected to call him feared to do so. There are circumstances in which it has been recognized that such an inference is not available or, if available, is of little significance. This position was cited with approval by Miler JA in *Hewett v Medical Board of Western Australia*. It is stated in Cross on Evidence.

37. The rule only applies where a party is required to explain or contradict something. What a party is required to explain or contradict depends on the issues in the case as thrown in the pleadings or by the course of the evidence in the case. No inference can be drawn unless evidence is given of facts requiring an answer. This position was upheld in the following cases, namely; *Schellenberg vs Tunnel Holdings*, *Ronchi vs Portland Smelter Services Ltd* and *Hesse Blind Roller Company Pty Ltd vs Hamitovski* and its also reiterated in Cross on Evidence. When no challenge is made to the evidence of witnesses who are called, the principle in *Jones v Dunkel* cannot be applied to make an inference in respect of other witnesses who could have been called to give the same evidence.
38. A look at the record shows that the complainant's testimony on the involvement of the appellant is cogent and essentially unrebutted. Her evidence is complimented by the testimony of PW2. As explained in Cross on Evidence and the authorities cited above, the rule does not require a party to give merely cumulative evidence. I do not see what other value students from the Madrasa or CCTV cameras or registers could have added when PW1 and the appellant knew each other so well or when PW2 vividly recalled the appellant as the person who visited the school claiming to be the complainant's father such that when the real father turned up, she dismissed him. In order for the principle to apply, the evidence of the missing witness must be such as would have elucidated a matter. The appropriate inference to draw is a question of fact to be answered by reference to all the circumstances of the case.
39. In any event, it is established law that a conviction can be based on the testimony of a single-eye witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone. The Court of Appeal of Uganda in *Okwang Peter v Uganda* held as follows: -

“Subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect to identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it is circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from possibility of error”
40. It is always competent to convict on evidence of a single witness if that evidence is clear and satisfactory in every respect. The law is also clear that there is no particular number of witnesses required for proof of any fact. Further, it has not been shown that the evidence tendered had gaps which required to be filled.
41. Lastly, the applicant's counsel submitted that the trial court disregarded the appellant's defence and the testimony of DW2 and PW3 which attributed the appellant's tribulation to alleged leadership wrangles in the mosque. He argued that the appellant's submissions were not accorded due weight.



42. On his part, the Respondent's counsel submitted that the defence, his evidence and submissions were considered. On sentence, he argued that the same is not excessive and he urged the court to dismiss the appeal.
43. When evaluating or assessing evidence, it is imperative to evaluate all the evidence, and not to be selective in determining what evidence to consider. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable, and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored.
44. The facts found to be proven and the reasons for the judgment of the trial court must appear in the judgment of the trial court. If there was evidence led during the trial, but such evidence is not referred to in any way in the judgment, it is safe for a court of appeal to assume that such evidence was either disregarded or not properly weighed or even forgotten about at the time of delivering the judgment. The best indication that a court has applied its mind in the proper manner is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses.
45. By requiring the trial court to consider and weigh all evidence is not meant that the judgment of the trial court must also include a complete embodiment of all evidence led, as if it comprises a transcript of the proceedings. All it means is that the summary of the evidence led must indeed entail a complete embodiment of all the material evidence led. In order to apply the above-mentioned legal principles to the facts of this case, this court must determine, as regards the conviction in the first place, what the evidence of the state witnesses was, as understood within the totality of the evidence led, including evidence led on the part of the accused or defence, and compare it to the factual findings made by the trial court in relation to that evidence, and then determine whether the trial court applied the law or applicable legal principles correctly to the facts in coming to its decisions / findings or judgment.
46. In other words, this court must consider whether the magistrate considered all the evidence, weighed it correctly and correctly applied the law or legal principles to it in arriving at his judgment in respect of both the convictions and sentence. This exercise necessarily entails a close scrutiny of the evidence of each witness within the context of the totality of evidence, and what the trial court's findings were in relation to such evidence.
47. Stated differently, in order to determine whether there is any merit in any of the submissions made by the respective parties in this appeal, this court must consider the evidence led in the trial court, juxtapose it against the judgment by the trial court, and finally determine whether there is any basis for interfering with the said judgment.
48. In my view, this means that if a court of appeal is of the view that a particular fact is so material that it should have been dealt with in the judgment, but such fact is completely absent from the judgment or merely referred to without being dealt with when it should have, this will amount to a misdirection on the part of the trial court. The appeal court must then consider whether the said misdirection, viewed either on its own or cumulatively together with any other misdirection's, is so material as to affect the judgment, in the sense that it justifies interference by the court of appeal. I have gone through the submissions and evidence tendered before the trial court. I have also read the judgment, the evaluation of the evidence and submissions and the reasons for the decision. I am satisfied that the learned Magistrate considered all the material before him. I find no merit in the argument that the lower court did not consider the appellant's evidence and submissions.
49. In view of my analysis and determination of the issues discussed herein above, the conclusion becomes irresistible that this appeal fails. The upshot is that the judgment, conviction and sentence imposed by



the learned Magistrate in Chief Magistrate's Sexual Offence Case Number 10 of 2020, at Wundanyi, *Republic v Abdalla Hassan* Mgalla delivered by Hon. E. M. Nyakundi, RM on 1st October 2021 and the sentence of 15 years imprisonment is hereby up held. This appeal is hereby dismissed. I note that the appellant was released on bail pending the hearing of this appeal on 9th February 2022. I hereby order that the said bail be and is hereby cancelled and that the appellant be arrested and presented to prison immediately to continue serving his prison term to completion. Right of appeal.

SIGNED AND DATED AT VOI THIS 29TH DAY OF AUGUST 2022

JOHN M. MATIVO

JUDGE

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 31ST DAY OF AUGUST 2022

STEPHEN GITHINJI

JUDGE.

