



REPUBLIC OF KENYA



**Omondi v Republic (Criminal Appeal E039 of 2021)
[2022] KEHC 13277 (KLR) (28 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13277 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E039 OF 2021
JN KAMAU, J
SEPTEMBER 28, 2022**

BETWEEN

FRANK ADOYO OMONDI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Judgment of Hon. F. Rashid (PM) delivered at Winam in
Principal Magistrate's Court in Sexual Offences Case No 56 of 2019 on 30th August 2021)*

JUDGMENT

Introduction

1. The appellant herein was charged with the offence of defilement contrary to section 8(1)(2) of the *Sexual Offences Act* No 3 of 2006. He was also charged with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. He was tried and convicted by Hon F Rashid (PM) and sentenced to life imprisonment.
2. Being dissatisfied with the said Judgement, on September 17, 2021, he lodged the appeal herein. His petition of appeal was dated September 14, 2021. He set out nine (9) grounds of appeal. On March 22, 2022, he filed a supplementary petition of appeal which set out one (1) ground of appeal.
3. His written submissions were dated March 21, 2021 and filed on March 22, 2021 while those of the respondent were dated April 25, 2022 and filed on April 27, 2022.
4. This judgment is based on the said written submissions which both parties relied upon in their entirety.



Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
6. This was aptly stated in the case of *Selle & Another v Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
7. Having looked at the appellant's and state's submissions, it appeared to this court that the issues that had been placed before it for determination were as follows:-
 - a. Whether or not the prosecution had proved its case beyond reasonable doubt.
 - b. Whether or not, in the circumstances of this case the sentence meted upon the appellant by the trial court was lawful and or warranted.
8. The court dealt with the two (2) issues under the following distinct and separate heads.

I. Proof of Prosecution's Case

9. Grounds of appeal Nos (1), (2), (3), (4), (5), (6) and (7) of the petition of appeal and ground of appeal No (1) of the supplementary petition of appeal were dealt with together under this head as they were all related. The court considered the same under the following sub headings.

A. Age

10. The appellant did not submit on the issue of age. On its part, the respondent submitted that the age of the complainant, Precious Grace Omondi (hereinafter referred to as "PW 3") was six (6) years old at the time she was defiled as the birth certificate indicated that she was born on November 19, 2013. It added that this was corroborated by the evidence of her mother, P A A (hereinafter referred to as "PW 1").
11. In the case of *Kaingu Elias Kasomo v Republic* Criminal Case No 504 of 2010 as was cited in *NNC v Republic* [2018] eKLR, the Court of Appeal stated that the age of a minor in a charge of defilement ought to be proved by medical evidence and documents such as baptism cards, school leaving certificates. It can also be proved by the victim's parents or guardian and observation or common sense as was held in the case of *Musyoki Mwakavi v Republic* [2014] eKLR.
12. In this case, PW 1 tendered in evidence a birth certificate showing that PW 3 was born on November 19, 2013. The appellant did not challenge the production of the said birth certificate and/or rebut this evidence by adducing evidence to the contrary.
13. This court was satisfied that the prosecution had proved that PW 3 was aged about six (6) years at the material time of the incident as the offence was said to have been committed on October 31, 2019.

B. Penetration

14. The appellant cited the case of *John Mutua Musyoki v Republic* [2017] eKLR where the court held that for the offence of defilement to have been committed, the prosecution had to prove each of the ingredients of age, penetration and identification beyond reasonable doubt. In the said case, the Court of Appeal found that the High Court failed to evaluate whether the complainant was a credible and



truthful witness and the veracity of all the contradictions and inconsistencies which were not minor and went to the root of the prosecution case and.

15. He further contended that the P3 form indicated that she was taken by a man known to her in the kitchen who forcefully removed her panty and penetrated her vagina yet she testified that she removed her panty herself.
16. He also averred that PW3 informed the court that she was wearing a shirt and a short on the material day and that if he was the one who caused the absence of the hymen, then her short or inner wear would have been bloodied. It was his contention that the clothes were not made available for medical examination or produced in court yet they could have corroborated her evidence.
17. He contended that the Post Rape Care (hereinafter referred to as “PRC form”) dated 1st November 2019, which was completed a day after the alleged incident indicated that the clothes were “changed and left at home”. He added that the said PRC form also showed that the outside genitalia and the vagina were normal with tenderness, the anus was intact but the hymen was absent.
18. He averred that although the P3 form indicated that the vagina was painful to touch, external genitalia was normal, hymen was absent and there was no presence of any discharge, it did not indicate the approximate age of the said injuries. He added that both Dr Ombok, a doctor at Jaramogi Oginga Odinga Training and Referral Hospital (JOOTRH) (hereinafter referred to as “PW 4”) and Keziah Tanui, a clinical officer at JOOTRH (hereinafter referred to as “PW 5”) were in agreement that no spermatozoa or any discharge were seen, there were no bruises on the genitalia and that several factors other than sexual intercourse could have caused the breaking of the hymen.
19. It was his case that had he defiled PW 3 as alleged and she was taken to hospital the same day as testified by PW 1 then at the very least bruises would have been found on her genitalia and the fact that there were no bruises and no spermatozoa seen on the very day of incident chances of defilement were remote. He was emphatic that despite having been present at home, he was not taken for medical examination.
20. He placed reliance on the case of *Michael Mugo Musyoka v Republic* [2015] eKLR where the court held that there was no evidence to prove that there was any contact between the genital organs of the appellant with that of the minor and that the case was based on suspicion.
21. He argued that the prosecution failed to call evidence of the alleged eye witness who could have corroborated the evidence of PW 3. In the absence of such evidence, he argued that the prosecution could only have placed heavy reliance on the available medical evidence which did not offer much help in that regard.
22. On its part, the respondent contended that penetration was proved by medical evidence and corroborated by PW 3’s evidence as was highlighted in *Charles Wamukoya v Republic* Criminal Appeal No 72 of 2013 (eKLR citation not given). It submitted that she testified that the appellant unzipped his trouser and put his penis inside her private parts while pointing for the court to see (sic).
23. It pointed out that PW 4 and PW 5 examined PW 3 and later filled the P3 form and PRC Form at JOOTRH Hospital and that the medical examination revealed that PW 3’s hymen was broken and her vagina was painful to touch which was proof that she had been defiled.
24. PW 3 testified that on the material day, she was playing with Alex near their house when Barrack called them and told them that Mercy had come and that he wanted them to greet her. She went with Alex but they did not find Mercy. However, the appellant was in the house.



25. It was her further evidence that the appellant gave Alex his phone and told him that he was going to do something with her, to prepare things in the kitchen. When they got to the kitchen, he told her to remove her clothes. She removed the pink short she was wearing and bent over. She added that he unzipped his trouser and inserted his penis into her vagina.
26. After he finished, Yvette called her, she wore her short and left. Alex also followed her to her house where she went to wash her hands and went to the sitting room where her brother was sitting. She told Yvette what had happened and Yvette and Shamin told PW 1 what had happened whereupon she took her to hospital. PW 1 corroborated her evidence.
27. A perusal of the P3 Form and PRC form that were produced by PW 4 and PW 5 corroborated PW 1's and PW 3's evidence that there was penetration of PW 3's vagina. Although the genitalia were normal and there was no discharge, PW 1 had no bruises and her hymen was absent.
28. Notably, as both PW 4 and PW 5 testified, several factors other than sexual intercourse could cause the breaking of the hymen. Further, it was not necessary that there be spermatozoa for defilement to have occurred and/or proven. In the absence of any other evidence to the contrary, the fact that there was tenderness in the vagina and it was painful on touch was proof that penetration had occurred. The prosecution therefore proved the second ingredient of the offence of penetration.
29. However, the question of whether penetration was caused by the appellant herein or not and/or whether the prosecution adduced sufficient evidence to prove that he penetrated PW 3 was a different case altogether.

C. Identification

30. The appellant submitted that identification was key to the success of a case of defilement. He placed reliance on the case of *Mohamud Omar Mohamed* (sic) [2020] eKLR where the court quoted the case of *George Opondo Olunga vs Republic* [2016] eKLR and stated that the ingredients of an offence of defilement are identification or recognition of the offender, penetration and age of the victim.
31. The appellant denied that he defiled the complainant and submitted that there were a lot of contradictions and inconsistencies in the prosecution's case. He faulted the trial court for having found that identification was by recognition on the ground that the parties knew each other before the alleged incident yet pw 3 stated in her cross-examination that she never knew him before the alleged incident and that he was not in the house that day.
32. He was emphatic that the trial court did not apply its mind to the question of identification and the charge of defilement could not be said to have been proved in the circumstances for the reasons that no identification parade was held to test PW 3's capacity to identify him.
33. In this regard, he relied on the case of *Hassan Abdallah Mohammed v Republic* [2017] eKLR where the court held that identification parades are made to test the correctness of a witness's identification of a suspect.
34. He challenged the evidence of Christabel Onyango (hereinafter referred to as PW 2) to the effect that the appellant was a neighbour living a kilometre away of PW 3 and argued that in an urban setting such as Brilliant Estate in Kisumu, a kilometre was a very large area and would be more than the entire length of the estate.
35. He asserted that the only plausible scenario for his identification was that PW 3's parents told her his name and once in court an accused person is always easy to identify since they sit lonesome on the dock. He submitted that his identification had to be deemed to have been "dock identification".



36. He added that identification was also not proved because Alex and Barack who were vital witnesses were not called to corroborate her evidence. He questioned where Mercy was when PW 3, Alex and Barrack came to the house and where Barrack went to after he brought PW 3 and Alex to the house. He asserted that the prosecution did not adduce evidence to demonstrate that Barrack was capable of joining a conspiracy to lure PW 3 to his house.
37. He argued that it was trite that where there was a deliberate refusal to call vital witnesses an adverse inference had to be drawn to the effect that had such witnesses been called, they could have given evidence adverse to the prosecution's case. To buttress his argument, he relied on the case of [*Daniel Kipyegon Nge'no vs Republic*](#) [2018]eKLR where the court held that the unexplained failure by a party to give evidence or call a witness or tender certain documents may in appropriate circumstances led to an inference that the uncalled evidence would not have assisted the party's case.
38. He was categorical that PW 1 testified that she used to see the appellant pass her gate on his way to school was having not been at the scene of the alleged incident, her testimony was hearsay evidence which was inadmissible. He was emphatic that the case only revolved around the testimony of a six (6) year old and the calling of witnesses alleged to have been present at the scene would have gone along way in assisting to prove the charge.
39. He submitted that he gave an alibi defence which placed him several kilometres away from the scene of the alleged offence and argued that despite no rebuttal being offered to debunk the alibi defence, the trial court tossed it out without giving it much thought. He asserted that the only person who was in that compound that day was Eunice Atieno Ooko (hereinafter referred to as "DW 3") and she testified that she did not see any children in the compound on the material date.
40. In this respect, he relied on the cases, [*Charles Anjare Mwamusi v Republic*](#) Criminal Appeal No 226 of 2002 (eKLR citation not given) and [*Victor Mwendwa Mulinge v Republic*](#) (eKLR citation not given) where the common thread was that it was the duty of the Prosecution to disprove an alibi defence.
41. On its part, the respondent submitted that PW 3 testified that the appellant was in the house when they went in with Alex, then the appellant gave Alex the phone to watch movies and he took her to the kitchen where he defiled her. It argued that that meant that the appellant was a person she had seen before and could positively identified him. It added that she pointed the appellant in court as the person who had defiled her and hence the appellant was positively identified as the perpetrator.
42. On the issue of failure to call crucial witnesses, the respondent submitted that in cases involving a sexual offence, section 124 of the [*Evidence Act*](#) allows the trial court to convict on the evidence of a complainant so long as the trial magistrate records reasons for believing the evidence.
43. In this regard, it relied on the case of [*Bernard Kebiba v Republic*](#) [2000] eKLR where the court stated that in appropriate circumstances, where the trial court is satisfied that the complainant is speaking nothing but the truth, the court may convict without corroboration. It was emphatic that the witnesses called by prosecution were sufficient to prove the charges against the appellant.
44. It also submitted that the appellant raised the defence of *alibi* as an afterthought and therefore was properly dismissed. In this respect, it placed reliance on the case of [*Karanja v Republic*](#) [1983] KLR 501 where it was held that in testing a defense of alibi and in weighing it with all the beyond all reasonable doubt, one should take into account the fact that he had not put forward his defense, or his alibi, if it amounts thereto, at an early stage in the case, and so that it could be tested by those responsible for investigation and prevent any suggestion of afterthought.



45. The testimony of a minor of tender age must be approached with care. In this regard, this court fully associated itself with the holding in the case of *Musikiri v Republic* [1987] KLR 69 where it was held as follows:-

“The necessity of material corroboration of the evidence of a child of tender years is, under section 124 of the *Evidence Act* (Cap 80), an indispensable condition to a conviction of a person charged with an offence.”

46. Be that as it may, section 124 of the *Evidence Act* Cap 80 (Laws of Kenya) stipulates as follows:-

“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.”

47. Even so, the evidence of a victim as the sole witness must not be contradicted by other evidence. It was clear to this court that although there was evidence to suggest that PW 3 was defiled, it was not fool proof that she was defiled by the appellant for the reason that her evidence was inconsistent and contradictory.

48. Notably, whereas she pointed at the appellant as the person who defiled her while he was in the dock, he did not appear to have been a person she was acquainted to before the alleged incident. When she was cross-examined, she told the trial court that she did not know him prior to this incident, a fact that she also asserted during her examination-in-chief. She also added that he was not in the house on the material date. However, on being re-examined, she stated that he was in the house and he defiled her.

49. The failure by the prosecution to have called Alex and Barrack to have testified was also fatal to its case as they would have corroborated PW 3’s evidence. It was unclear to this court how the appellant described PW 3 to Barrack so that Barrack could lure her to his house when he lived almost a kilometre away. Barrack would have assisted the court in closing the gap of how PW 3 found herself in the appellant’s house.

50. Had PW 3 been an immediate neighbour to the appellant herein and it was proven that they were familiar to each other, the court could have perhaps been persuaded to find and hold that she may have identified him by way of recognition.

51. This court therefore found and held that the trial court erred in having found that PW 3 knew the appellant before the incident because her evidence was not consistent on when she knew him or if he was in the house on the material date. In both in her examination in chief and cross-examination, PW 3 had stated that she did not know the appellant before the alleged incident.

52. Going further, PW 1 told the trial court that the appellant was her neighbour which was less than a kilometre from her house after the incident. She pointed out that she knew his house after the incident herein. Her evidence did not shed light on how she knew where the appellant stayed or that it was him who defiled PW 3. Indeed, when she was re-examined, she stated that she did not speak to PW 3 before they went to hospital.



53. In addition, although PW 2 corroborated PW 1's evidence regarding the distance between the appellant's and PW 3's house, it was unclear how she knew that PW 3 and the appellant herein were neighbours as she was a police officer at Kondele attached to the Gender Office desk.
54. This court found and held that both PW 1's and PW 2's evidence was not useful to this court as they did not explain how PW 3 led them to the appellant's house.
55. Turning to the defence evidence, DW 3 told the trial court that she opened the gate for the appellant who stayed in a compound with three (3) houses at 8.00 am and again at 7.00pm. This was also his evidence as well as that of his mother, Roseline Achieng (hereinafter referred to as "DW 2") who stated that the appellant went to her house at 9.00 am and left at 5.30 pm to go to where he stayed at Brilliant.
56. It was clear that the evidence by the appellant, DW 2 and DW 3 was consistent and was not necessarily an afterthought as had been submitted by the respondent herein. The prosecution still had an opportunity to disprove the same.
57. Notably, inconsistencies and/or contradictions in testimonies in a trial are expected because each witness will normally testify as to what he perceived and/or observed at any given time. However, these inconsistencies and/or contradictions must not be so glaring as to lead a trial court to entertain doubt as to what really transpired at any given time. The version of unfolding events must more or else be similar so as to render the inconsistencies and/or contradictions immaterial and irrelevant.
58. The inconsistencies and contradictions in PW 1's case and failure by the prosecution to have called Alex and Barrack led this court to conclude that the prosecution did not disprove this *alibi* evidence. The trial court may not believe the appellant's *alibi* evidence which it termed the same as a mere denial for the reason that it had arrived at an incorrect conclusion that PW 1 knew the appellant before the incident occurred.
59. Indeed, section 309 of the [Criminal Procedure Code](#) Cap 75 (Laws of Kenya) provides as follows:-
"If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it."
60. Having failed to re-open its case, this court thus came to the firm conclusion that the prosecution failed to disprove the appellant's *alibi* defence and the trial court therefore ought to have given him the benefit of doubt. This court agreed with the appellant that in the circumstances of the case, an identification parade was necessary.
61. In the case of *R v Turnbull & Others* [1976] 3 All ER 549 the court stated:-
"Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."
62. All the three (3) ingredients being complainant's age, proof of penetration and identification of the perpetrator must be proven to sustain a conviction in a charge of defilement. If any of these ingredients are not proven, the accused person must be given the benefit of doubt.
63. This court found and held that the identification of the perpetrator was not proven to the required standard which in criminal cases is proof beyond reasonable doubt as there was doubt in the mind of this court how the appellant was identified as having been the person who defiled PW 3 herein.



64. This court found and held that the trial court came to a wrong determination that the prosecution had proved its case against the appellant beyond reasonable doubt.
65. In the circumstances foregoing, grounds of appeal Nos (1), (2), (3), (4), (5), (6) and (7) of the petition of appeal and ground of appeal No (1) of the supplementary petition of appeal were merited and the same be and are hereby allowed.

II. Sentence

66. Ground of appeal Nos (8) and (9) of the petition of appeal were dealt with under this head as they were all related.
67. The court noted the respective submissions on the question of the sentence. However, having come to the aforesaid conclusion, it did not find it necessary to analyse the same.
68. Suffice it to state that PW 3 was of six (6) years old at the material time. Section 8(2) of the *Sexual Offences Act* provides that:-
- “A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”
69. Having convicted him, the trial court did not therefore err when it sentenced the appellant to life imprisonment. However, having found that the prosecution did not prove its case beyond reasonable doubt, the sentence that was meted upon the appellant herein was unlawful, unjustified and had no legal basis.
70. In the premises foregoing, ground of appeal Nos (8) and (9) of the petition of appeal was merited and the same be and are hereby allowed.

Disposition

71. For the foregoing reasons, the upshot of this court’s decision was that the appellant’s petition of appeal that was lodged on September 17, 2021 was merited and the same be and is hereby allowed. The effect of this decision is that decision is that the decision of Hon F Rashid on August 30, 2021 be and is hereby set aside and/or vacated and the same be and is hereby replaced with the decision of this court that the conviction and sentence of the appellant herein be and is hereby set aside and/or vacated as it was unsafe.
72. It is hereby directed that the appellant be and is hereby released from custody forthwith unless be held for any other lawful cause.
73. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF SEPTEMBER 2022

J. KAMAU

JUDGE

