



REPUBLIC OF KENYA



**Wafula v Republic (Criminal Appeal 143 of 2019)
[2022] KEHC 13278 (KLR) (27 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13278 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL 143 OF 2019
EKO OGOLA, J
SEPTEMBER 27, 2022**

BETWEEN

NELSON WAFULA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original sentence and conviction in Eldoret Chief Magistrates' Court Case No. 93 of 2016 delivered on 23rd August 2019 by Hon. C. Obulutsa (CM))

JUDGMENT

1. The appellant was charged with the offence of gang defilement contrary to section 10 of the [Sexual Offences Act](#) No 3 of 2006. The particulars of the charge are that on the 23rd day of April 2016 in Eldoret West district within Uasin Gishu County in the Republic of Kenya, in association with another not before court intentionally and unlawfully caused his penis to penetrate the vagina of VM a child aged 16 years.
2. He was charged in the alternative with the offence of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) No 3 of 2006. The particulars of the charge are that on the 23rd day of April 2016 in Eldoret West district within Uasin Gishu County in the Republic of Kenya, in association with another not before court intentionally and unlawfully caused a contact with his penis to the vagina of VM a child aged 16 years.
3. The appellant was also charged with a second count of assault causing actual bodily harm contrary to section 251 of the [Penal Code](#). The particulars of the charge are that on the 23rd day of April 2016 in Eldoret West district within Uasin Gishu County jointly with others not before court unlawfully assaulted VM thereby causing her actual bodily harm.



4. The appellant pleaded not guilty to the charge and the matter was set down for hearing. The prosecution called six witnesses to prove its case. The appellant was convicted on both count 1 and count 2 and sentenced to serve 20 years' imprisonment in respect to count 1, and 18 months' imprisonment in respect to count 2 on August 3, 2019.
5. Being dissatisfied with the decision of the trial court, the appellant lodged the instant appeal against both the conviction and sentence on the following grounds;
 - a. The trial court erred in law and in fact as it failed to grant his case the provisions of a fair trial.
 - b. That the trial court erred in law and fact as it failed to evaluate the constant consistent contradictions on the witness evidence and rule this case in favour of the appellant.
 - c. That (he) is aggrieved the learned magistrate erred in law and in fact as he failed to hold that the medical examination findings did not hold the appellant guilty of the offences spelled out on the charge sheet.
 - d. That the trial court erred in law and fact as it failed to observe that the prosecution did not prove its case beyond reasonable doubt.
 - e. That (he) is aggrieved that the trial court erred in law and fact as it failed to hold that the evidence of identification and recognition was based on mistake identification.
 - f. That (he) is aggrieved the learned trial magistrate erred in law and fact as he failed to consider the appellants' defence evidence.
6. The appellant submitted that the prosecution established a *prima facie* case against him in the charge of gang defilement as set out in the charge sheet. The appellant cited High Court Criminal Appeal No 49 of 2017 *Francis Matonda Ogeto vs R* in support of his submissions. He submitted that since he was subjected to the mandatory minimum sentence it was a violation of his rights under article 10 of the [Universal Declaration of Human Rights](#) and his right to dignity under article 28 of the [Constitution](#). He asked that the court substitute his conviction and sentence to appropriate terms by setting him free.
7. The appellant contended that the prosecution evidence tendered by the witnesses was contradictory and the trial court therefore failed to evaluate the witness testimony contradictions in favour of the appellant. He submitted that the age of the complainant as indicated in the charge sheet was inconsistent with that contained in the charge sheet which was also contrary to what is indicated in the birth certificate. Further, he submitted that the witness evidence used to prove this case was manipulated because it is evident that the he was framed. He pointed out the inconsistencies as that;It is neither discussed how much the victim used to board a vehicle as compared to boarding a motorcycle.She neither disclosed to the court how many boda boda riders she found at the stage and why she chose to approach the appellant.PW4 does not state in her testimony whether she saw the appellant at the stage when she escorted PW2.
8. The appellant stated that it is never disclosed whether they knew each other before so as to prompt PW2 to approach the appellant to take her home on a motorbike. He stated that it is not indicated who was the first to defile the victim or how far from the road the offence took place. He questioned that despite the fact that the appellant stopped to carry another man it is not confirmed as to whether the alleged assailants knew she was going to her sisters' place so as to trap her.
9. The appellant contended that the victim was examined by two doctors, Dr Yatich and Dr Yabei. It is further revealed that she had old hymen tears in the P3 form found at page 79 which contradicted the testimony of PW1 which did not indicate how old the tears were. He further stated that the



complainant told the court she knew the appellant yet she later contradicted herself and said she knew him that day. He faulted the evidence of PW2 wherein it was stated that he broke the door and beat her sisters' husband whereas the evidence of PW4 was that the husband opened the door and people entered with her sister. The husband who should have been a crucial witness to this case was not included as a witness which is proof of a fabricated accusation.

10. The appellant denied that there was any penetration and based this on the submission that there was no evidence linking the appellant to having penetrated the complainant. The approximate age of the injuries was not observed which is indicative that there was no defilement. He stated that he was never taken for a medical test to prove that he was guilty despite the provisions of section 26 and 36 of the [Sexual Offences Act](#) providing that both persons involved need to be examined. He maintained that the conviction was unsafe and relied on [Hamisi Bakari & another vs Republic](#) (1987) eKLR in support of his submissions.
11. The appellant's case is that the evidence of PW2 was that she was assaulted by mob justice but PW4 only mentioned the appellant as having been among the crowd. Since PW4's husband was not among the witnesses it cannot be proved that the injuries sustained by the complainant were as a result of mob beating.
12. The appellant contended that identification was not reliable as the complainant testified to the identity of the perpetrator yet this was an issue of recognition. As the offence was gang related, the appellants' contention was that an identification parade was required for the purpose of avoiding a possibility of mistaken identity. Further, he contended that the trial court disregarded the appellants' defense as it was clear that he went to the station to report another matter and he was arrested and arraigned amongst other suspects upon reaching there. He learned of the charge while in the cells and these sentiments were never given any considerations. He was instead sentenced to 20 years imprisonment.

Respondent's Case

13. Learned counsel for the respondent, Ms Emma Okok, filed submissions dated June 15, 2022. Counsel submitted that the offence of gang defilement is provided for under section 10 of the [Sexual Offences Act](#). Further, that in order to prove the offence of gang defilement the prosecution must prove that there was defilement committed in association of two or more persons. She cited [Francis Matonda Ogeto vs Republic](#) [2019] eKLR where the court stated thus:

“Under section 10 of the Sexual Offences Act, the ingredients of gang rape are: rape or defilement under the Act; committed in association with others; or committed in the company of another or others who commit the offence of rape or defilement with common intention. It is therefore clear that defilement which is committed in association with others or with common intention notwithstanding the fact that the accused may not have defiled the victim amounts to gang rape according to the said section. It therefore matters not whether the offence was rape or defilement as long as the conditions under section 10 are found to exist.”

14. The prosecutions' case is that on the material date, the complainant who testified as PW2 went to PW4's place to assist her as she was unwell. PW4 is a sister to the complainant. The complainant stayed there until the evening hours when she left her sister's place to her parents' home. She boarded a motorcycle that was being ridden by the appellant. On the way, the appellant stopped to carry another pillion passenger whom he introduced as his brother. The appellant and his accomplice then turned on the complainant, dragged her into a bush and defiled her in turns. They tore her trouser and her pant in the process. They then turned against her accusing her of being a motorcycle thief. The appellant beat



- the complainant and alerted other people who came and continued beating her. The mob then escorted the complainant to PW4's house and when they entered the house, they beat PW4's husband and continued beating the complainant as well. PW4 called their mother PW3 and informed her of what had transpired. PW3 then went to the scene accompanied by PW5 who is a brother to the complainant. PW3 was categorical in her evidence that when she arrived at the scene, she saw the complainant being beaten and the appellant was also there. PW5 corroborated PW3's evidence and confirmed that he also saw the appellant beating the complainant. The appellant was insisting that the complainant has to state how many motorcycles she had stolen.
15. The respondent submitted that to prove the offence of defilement the following ingredients must be met: penetration, age of minority and identification of the accused.
 16. With regard to penetration, the respondent's case is that the complainant sustained injuries as a result and was rescued from the beating by police officers. PW6 was the investigating officer and among the officers who went to the scene. She arrested the complainant who was in pain as she had been beaten and her clothes were torn. It was also her evidence that the complainant informed her that she had been defiled. PW6 issued a P3 form and the complainant went to hospital and she was treated. M/s Okok submitted that the complainant's evidence on defilement was corroborated by PW1 Dr Rono who produced the P3 Form on behalf of Dr Yabei who examined the complainant. He confirmed that the complainant was found to have hymeneal tear. He produced the P3 Form as Prosecution Exhibit 1. During cross examination, he indicated that the injuries were said to be old meaning the complainant was not bleeding. PW1 was recalled for further cross examination and confirmed that on examination, the complainant had tears on her private parts and a whitish discharge that indicated there was an infection. He also stated that the complainant sustained injuries after being beaten. The evidence on penetration was therefore solid.
 17. On the issue of age, the complainant stated that she was 16 years old at the time of giving evidence. Her birth certificate that was produced as prosecution exhibit 2 indicated that she was born on December 10, 2000. The incident is said to have occurred on April 23, 2016. The complainant was therefore 15 years and 4 months old at the time of the incident. It is noted that the age of the complainant was indicated as 16 years in the charge sheet and the P3 Form. The respondent submitted that this is not a fatal error and the same is curable under section 382 of the *Criminal Procedure Code* as what the prosecution was supposed to prove was that the complainant was a minor at the time of the incident.
 18. On the issue of identification, the respondent's case is that the complainant was clear in her evidence that she was able to clearly identify the appellant as the incident occurred during the evening hours and it was not yet dark. During cross examination, she was categorical that the appellant was not known to her prior to the incident. The complainant had sufficient time to see the appellant who defiled her and in the company of others escorted her to her sister's house where the appellant was positively identified by PW3, PW4 and PW5. There was therefore no need for an identification parade and the respondent submitted that the evidence on identification was solid.
 19. The respondent submitted that to prove the offence of assault, the following ingredients must be met:
 - a) The complainant was assaulted
 - b) The assault occasioned actual bodily harm
 20. The complainant was clear in her evidence that the appellant assaulted her jointly with others who were never arrested and charged. M/s Okok submitted that this evidence is well corroborated by PW3, PW4 and PW5 who all saw the appellant beating the complainant. The P3 Form that was produced as prosecution exhibit 1 also indicated that the complainant had physical injuries to wit tenderness on



both thighs, multiple abrasions on both hands, tender whip marks on the back and laceration on the lower lip among other injuries.

21. The respondent contended that the defense of the appellant had not been strong enough to rebut the prosecution case as it was a mere denial. Regarding the medical evidence, the respondent stated that PW1 when recalled was categorical that the complainant had tears on her private parts. She was examined almost two days after the incident and this was a clear indication of penetration. The doctor indicated the age of injuries as the date of alleged defilement which was captured as April 23, 2016 between 6pm and 9pm. The complainant was examined on April 25, 2016 which is less than 48 hours from the time the incident occurred.
22. Regarding the appellant's assertion that a crucial witness to wit PW4's husband was not called to testify, the respondent stated that there is no law compelling the prosecution to avail a certain number of witnesses in order to prove its case. The prosecution is at liberty to avail the number of witnesses they believe will be crucial in proving their case. She relied on section 124 of the Evidence Act which provides thus:

“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 he recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

23. In this particular case, the trial magistrate was convinced that the complainant was telling the truth in addition to the corroborative evidence that was availed by the prosecution.
24. The prosecution maintained that all the ingredients of the offence of gang defilement and assault had been proved to the required standard. She urged the court to uphold the conviction.
25. With regard to the sentence the respondent submitted that the appellant was given a chance to mitigate and he asked to be pardoned stating that he had a family. There were no records provided to indicate that the appellant was a repeat offender and he was therefore treated as a first offender. Citing section 10 of the Sexual Offences Act and section 251 of the Penal Code, the respondent submitted that the 20 years imprisonment imposed by the trial court is sufficient.
26. Upon considering the record of appeal, the petition and the submissions of both parties, I have established the following issues for determination;
 - a. Whether the prosecution proved its case to the required standard
27. In *Okeno vs Republic* [1972] EA 32, the Court of Appeal set out the duties of a first appellate court as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya vs Republic* (1957) EA (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M Ruwala vs R* (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was



some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters vs Sunday Post* [1958] EA 424.”

The offence with which the appellant was charged was gang rape contrary to section 10 of the *Sexual Offences Act* which states:

“Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who with common intention is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment to life.”

28. Under section 10 of the *Sexual Offences Act*, the ingredients of gang rape are:rape or defilement under the Act;committed in association with others; orcommitted in the company of another or others who commit the offence of rape or defilement with common intention.

Therefore, defilement which is committed in association with others or with common intention, notwithstanding the fact that the accused may not have defiled the victim amounts to gang rape according to the said section. It therefore matters not whether the offence was rape or defilement as long as the conditions under section 10 are found to exist.

29. It is trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the appellant. In *Charles Wamukoya Karani vs Republic*, Criminal Appeal No 72 of 2013 it was stated that:

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

Age of the complainant

The issue of age was proved by production of a birth certificate as exhibit 2 indicating she was born on December 10, 2000. The incident occurred on April 23, 2016. The complainant was therefore 15 years and 4 months at the time. The indication of the complainant as being 16 years in the P3 form is not fatal. I find that the element of age was proved to the required standard.

Proof of penetration

Medical evidence is key in proving penetration. The evidence of PW1, Dr Rono, who produced the P3 form on behalf of Dr Yabei was that the complainant had old hymeneal tears. Further, he elaborated that the description of them being old meant that they were not bleeding. I therefore find that penetration was proved.

Identification of the assailant

I note that the respondent's case is that there was no need for an identification parade as the complainant was able to see the accused clearly. With regard to the issue of the time of the attack, PW4 testified that he gave the complainant fare at 6pm when she said she was going home.



In *Wamunga vs R* [1989] KLR 424 it was held;

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction”.

In *Peter Musau Mwanzia vs Republic* [2008] eKLR, the Court of Appeal expressed itself as follows:

“We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident. It is not clear whether that is what Mr Mutuku refers to as basis for recognition.”

30. The incident occurred in the evening at 6pm or thereabout and it is my view the complainant was able to see the assailant(s). Section 124 of the *Evidence Act* states;

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.

31. A proper reading of the whole of section 124 of the *Evidence Act* shows that corroboration is still required on evidence by minors, but not mandatory in sexual offences as long as the witness was truthful and reasons are recorded. Further, proof in sexual offences can still be achieved through the victim’s evidence, medical evidence, circumstantial evidence or a combination of any or all of them. In my view, the evidence of PW3, PW4 and PW5 corroborated the assault and the presence of the assailant throughout the events of the material date. Given that the appellant was identified as the perpetrator of the assault, and the evidence of the assault is corroborated, I find that he was correctly identified as the one who defiled the complainant.

32. On the issue of assault, in order for the offence to be proved I concur with the respondent that there two ingredients;The complainant was assaultedThe assault occasioned actual bodily harm.

Considering the evidence of PW3, PW4 and PW5 who saw the appellant beating the complainant, the same sufficiently corroborates her testimony. Further, the P3 form produced as exhibit 1 confirmed that the complainant was occasioned bodily harm. I find that the evidence of assault was to the required standard.



33. With regard to the calling of PW4s husband as a witness, the same is an issue of discretion to the prosecution as was held in *Julius Kalewa Mutunga vs Republic*, Criminal Appeal No 32 of 2005, where the court stated:-

“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.”

Therefore, the issue of not calling the witness had no effect on the prosecution’s case.

34. In the premises, it is evident that the offence of defilement was proved to the required standard. Further, the sentence meted out is proportionate to the offence as provided by statute and I find no reason to disturb the same. The appeal is dismissed in its entirety.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 27TH OF SEPTEMBER 2022.

E. K. OGOLA

JUDGE

