



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Abdi v Republic (Criminal Appeal E004 of 2022)
[2022] KEHC 13025 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13025 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
CRIMINAL APPEAL E004 OF 2022
JN NJAGI, J
SEPTEMBER 22, 2022**

BETWEEN

BAGAJA ABDI APPELLANT

AND

REPUBLIC RESPONDENT

((Being an appeal from the original conviction and sentence by Hon.E.K.Too, PM, in Moyale PM's Court Sexual Offence Case No.MCSO/E001 of 2021 delivered on 2/11/2021))

JUDGMENT

1. The appellant was convicted for the offence of defilement contrary to section 8(1) as read with section 8(3) of the [Sexual Offences Act](#) No 3 of 2006 and was sentenced to serve 20 years imprisonment. The particulars of the offence were that on diverse dates between May 1, 2020 and December 22, 2020 at Sololo Makutano location in Sololo Sub-County he intentionally and unlawfully caused his penis to penetrate the vagina of KKG (herein referred to as the complainant), a child aged 15 years.
2. The appellant was aggrieved by the conviction and the sentence and filed the instant appeal. The grounds of appeal are that:
 1. That the learned trial magistrate erred in law and fact by failing to note that a broken hymen is not proof of defilement.
 2. That the learned trial magistrate erred in law and fact by failing to note that key witnesses were not called.
 3. That the learned trial magistrate erred in law and fact by failing to take into the period spent in custody under section 333(2) of the [Criminal Procedure Code](#).
 4. That the learned trial magistrate erred in both law and fact by relying on uncorroborated and contradicting evidence tendered by the prosecution witnesses.



5. That the learned trial magistrate erred in both law and fact by failing to note that the investigation was shoddy.
6. That the learned trial magistrate failed to consider the appellant's mitigation.
7. That the learned trial magistrate erred in matters of law and fact by failing to consider the appellant's defence.

Case for prosecution-

3. The prosecution called 5 witnesses. It was the evidence of the complainant PW1 that she was at the material time a 15 year-old girl as shown by her birth certificate, Pexh1 She was attending [particulars withheld] School. That the appellant was from her village. That the appellant requested her to be his girlfriend but she declined. That one day she was at a neighbor's house when the appellant called her to the house of a person called Diko. She went to the house. The appellant held her and fell her to the ground inside the house. He removed her pants and inserted his penis into her vagina. She screamed and her brother called Fayo went there and beat her up while demanding to know why she had gone to the house. That she later on went home and informed her parents. Her parents warned the appellant but he continued to defile her. Later her brothers found her with the appellant. The appellant was arrested and taken to the police station. She went to the police station and recorded a statement. She was issued with a P3 form and a Post Rape Care form.
4. The father to the complainant, KG PW2, testified that the complainant went missing from home on December 22, 2020. He reported to the chief and deployed his sons to look for her. One of his sons found his daughter with the appellant and took her home. She later disappeared again. She was traced and taken to the police station.
5. A brother to the complainant, AJ PW3, testified that he was informed by his mother on December 22, 2020 that the complainant had disappeared from home. He looked for her. Later at night he saw her in the company of the appellant and two other people. The appellant ran away. With the assistance of his brother they got hold of the complainant and took her home.
6. Another brother of the complainant, JK PW4, told the court that he was asked by his mother to look for the complainant on December 22, 2021. He looked for her but did not get her. Later at night he was summoned by his brother. He went and found his sister with the appellant and some other people. The appellant ran away. He took his sister home and to the police station.
7. The investigating officer, PC Sammy Yaa PW5, of Sololo police station stated that the report was made at their station on December 24, 2020. He took the girl to hospital for examination. She was issued with a P3 form and a PRC form. They were completed by a clinical officer. He also took her for age assessment. He charged the appellant with the offence. During the hearing he produced the age assessment report as exhibit.
8. The P3 form and the treatment notes were produced in court by a clinical officer Pw6 on behalf of the clinical officer who completed them. According to the documents, there was no bruising on the genitalia and there were no remnants of the hymen seen. The documents were produced as Pexh 3 and 4 respectively.

Defence Case -

9. In his defence the appellant stated in a sworn statement that he was arrested by J and I on the December 31, 2020 at 8pm. He was taken to Sololo Police Station. He was charged in court. He denied the charges.



That before then he had differed with KG who had threatened to kill him. He said that the charges were fabricated by the witnesses so as to fix him. He denied that he committed the offence.

10. The appellant called 2 witnesses. Kula Golicha DW2 stated that the appellant was arrested on December 31, 2020. He was accused of defiling a child. The other witness, Guyo Kala DW2 stated that he was with the appellant on the day he was arrested.

Submissions –

11. The appeal was canvassed by way of written submissions. The appellant submitted that there was no evidence of penetration nor that he penetrated the complainant. That the medical evidence produced in the case was insufficient to prove a charge of defilement as there were no bruises in the genitalia. That the trial magistrate misdirected himself in relying on the medical evidence as the basis of a conviction.
12. The appellant submitted that the brother to the complainant who was said to have found her in the house of Diko was not called to testify in the case. He further submitted that the trial magistrate did not give any reason for dismissing his defence that supported an acquittal.
13. The state through the prosecution counsel, Mr Ngigi, submitted that the evidence of the complainant on penetration was unchallenged. That though no injuries were noted in the P3 form the complainant was categorical as to how the appellant used to defile her. That the trial court did analyze the appellant's defence vis a viz the prosecution evidence and came to the conclusion that the prosecution case outweighed the appellant's defence. That the issue of a grudge does not arise. Therefore, that the conviction of the appellant was proper and lawful.

Analysis and determination -

14. This being a first appeal, this court is guided by principles set out by the Court of Appeal that govern the hearing of appeals by a first appellate court. In the case of *Okeno v Republic (1972) EA 32* the court set out the duties 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 v 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. 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 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.

15. The appellant challenged the judgment of the lower court on the ground that the elements of the offence of defilement were not proved beyond reasonable doubt.
16. The elements of the offence of defilement are: proof of the age of the victim, proof of penetration and proof of the identity of the perpetrator – see *Charles Wamukoya Karani v Republic*, Criminal Appeal No 72 of 2013 In the instant case the age of the complainant was proved by the production of the birth certificate, Pexbt.1, that indicated the age of the complainant at that time to have been 15 years. The same was also proved by the age assessment report, Pexh.6, that recorded her age at the same number. The age of the complainant was therefore proved at 15 years.
17. The appellant submitted that the medical evidence adduced in the case was insufficient to prove the charge. The clinical officer who examined the complainant found her with a missing hymen and a normal



genitalia with no injuries. The trial magistrate in his judgment held that the complainant had been defiled as she was found with a missing hymen when she was examined by the clinical officer. However, the law is that absence of hymen does not prove defilement. This is because it is not everybody who is born with it. It is also a fact that the hymen can be broken by other factors such as vigorous exercise – see the Court of Appeal decision in *PKW v Republic* (2012)eKLR. The magistrate therefore misdirected himself on that point of law. Going by the findings as contained in the medical reports, there was no medical evidence to support defilement.

18. However, absence of medical evidence is not fatal to a charge of defilement as the charge can be proved by other relevant evidence. In *Kassim Ali v Republic* [2006] eKLR the Court of Appeal held that:

“The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.”

19. Section 124 of the *Evidence Act* allows a court to convict on the sole evidence of the minor where the court is satisfied that the child is telling the truth. The question then is whether there was other evidence, other than medical evidence, to satisfactorily prove the charge of defilement.

20. I have keenly examined the evidence of the complainant and that of the other prosecution witnesses. The appellant was accused of defiling the complainant on diverse dates between the months of May and December 2020. In those dates she only mentioned the appellant defiling her on one occasion when the appellant defiled her in the house of a person called Diko. She stated that her brother called F found her in the said house. However, the said brother was not called to testify on the issue. There was no explanation given as to why he was not called to give evidence on the incident. There was thereby insufficient evidence on the incident.

21. The complainant testified that she was with the appellant on the day that he was arrested. She however never stated that the appellant defiled her on that day. Her brothers who arrested her on that day, PW3 and PW4, never said that they found the appellant defiling her. They in fact stated that the complainant and the appellant were in the company of other people when they found them. There is then no evidence that the appellant defiled the complainant on that particular day.

22. Looking at the evidence of the complainant, I did not get the impression that she was a credible witness. Though the trial magistrate stated in his judgment that she appeared a forthright person, her evidence was so shallow in detail that it was difficult to form her demeanor. Whereas she claimed that the appellant defiled her on many occasions, there was no evidence on the places where he used to defile her, safe for the occasion alleged to have been at Diko’s house which evidence the court has found wanting. There was no evidence of the various dates when he did so. In the premises, I do not find sufficient evidence that the appellant defiled the complainant.

23. The end result is that conviction on the appellant was not safe. Consequently, the conviction is quashed and the sentence imposed on him set aside. I order that the appellant be set at liberty forthwith unless lawfully held.

DELIVERED DATED AND SIGNED AT MARSABIT THIS 22ND DAY OF SEPTEMBER 2022.

J. NYAGA NJAGI

JUDGE

In the presence of:

Mr. Ochieng for Respondent

Appellant:- Appearing in person – virtually from GK Prison, Meru



Court Assistant:- Peter

14 days R/A

