



**AJB v Republic (Criminal Appeal E054 of 2021)
[2022] KEHC 14706 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14706 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E054 OF 2021
A. ONG'INJO, J
OCTOBER 27, 2022**

BETWEEN

AJB APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant was an accused in Shanzu RM's Court Sexual Offence Case No 28 of 2019 where he was charged for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#) No 3 of 2006.
2. The particulars of the offence were that AJB on diverse dates between November 2018 and February 5, 2019 at [Particulars Withheld] in Kisauni Sub-County within Mombasa County unlawfully and intentionally caused his penis to penetrate the vagina of MB a girl child aged 11 years.
3. In the alternative the Appellant was charged with the offence committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) No 3 of 2006.
4. The prosecution called 4 witnesses whose evidence raised a prima facie case and the Appellant was placed on his defence. When placed on defence the Appellant gave sworn statement and denied having committed the offence. The trial Magistrate however analyzed the evidence and weighed the prosecution and defence case and found that the prosecution had proved the offence of defilement against the appellant and he was convicted and sentenced to serve 20 years imprisonment.
5. The Appellant was aggrieved by the conviction and sentence and he lodged the appeal herein on the following amended grounds filed together with submissions on April 25, 2022:-
 - i. That there was non-compliance with Article 49 of the [Constitution](#) of Kenya 2010.



- ii. That there was contravention of Articles 25, 27, 28 and 50(1) of the *Constitution* of Kenya 2010 during trial in the subordinate court.
 - iii. That there was no positive identification of the Appellant by the complainant and the trial court erred in law & fact to rely on allegations from the prosecution to convict the Appellant without taking notice of any danger of prejudicial practice before doing so.
 - iv. That the prosecution case was full of contradiction that could not stand for safe conviction.
 - v. That the trial court failed in fact & law to adapt the fact that the evidence adduced by the doctor could not prove prosecution case beyond any reasonable doubt due to allegations of the offence charged.
 - vi. That there was irregular illegal, null and void trial process that could not be procured under Section 382 of the *Criminal Procedure Code*.
 - vii. That the learned trial Magistrate failed in fact and law by lightly allow defence and submissions of the appellant as recorded in the trial proceedings.
6. The Appellant prayed that the appeal be allowed. The state opposed the appeal by way of grounds of opposition to the effect that the identity of the Appellant was established; the age of the minor was proved; that penetration was proved and that the trial court guaranteed the Appellant right to a fair trial; that the Appellant's defense was considered by the trial court and a finding made on the same. That the prosecution proved its case beyond reasonable doubt and that the period spent by the Appellant in custody was considered during sentencing and sentence meted was lawful.
 7. The prosecution's case was that Appellant was uncle to the complainant/brother to complainants father. That Appellant did bad manners to her severally in his house in [Particulars Withheld] and also in their house in [Particulars Withheld]. She said the Appellant court come for her and take her to his house. The Complainant said the Appellant was sleeping on the same bed that she was sleeping on with her small sister.
 8. PW 1 said that the Appellant told her father that he did not have a place to sleep. PW 2 confirmed that the Appellant went to their house in [Particulars Withheld] and told them that his house had been locked for rent arrears. PW 2 the mother of the complainant said she was sleeping on the floor and the kids and the accused were sleeping on the bed.
 9. PW 2 said the Appellant stayed with them for around 3 months. PW 2 said that on the material day on February 5, 2019 she woke up at 5.00am to make chapatis as always to go and sell. That when she went back to their 2 bedroom house she found the Appellant putting on his trouser and the daughter was also putting on her panty. That she did not confront the Appellant but took the daughter to hospital and the complainant told her the Appellant had been defiling her. She said the complainants father took her to the hospital.
 10. She said that a P3 and PRC forms were duly filled in hospital. PW 2 said she saw the appellant kissing her daughter on the lips. She said that the Appellant ran away for 3 days upon being found kissing the child while also dressing up and the child also putting on her pant. PW 2 said she had never asked for relationship with the Appellant. The Appellant sought that PW 1 & PW 2 be recalled for cross examination & on January 28, 2020 an order allowing his application was granted.
 11. Upon PW 1 being recalled she was cross examination by the Appellant and she said that her mother did not tell her what to come & say in court and that all she said was true. She said it is her father who



- took her to the police station and that her mother took her to the station the 2nd time. PW 1 also said in cross examination that the Appellant went to their house and took her to [particulars Withheld].
12. PW 2 in further cross examination said it is her husband who reported the matter to police. She said that what she said in her statement to the police is what she said in court.
 13. The investigating officer – PW 3 PC Wilred Nyaga said that a report of defilement was received at Nyali Police Station on February 6, 2019 and when the child was taken for medical examination. It was confirmed that she had been defiled. PW 3 recorded statements of witnesses and that when accused was arrested by members of public he preferred charges herein. PW 3 produced certificate of birth for the complainant showing child was born on March 5, 2019 – ExP1.
 14. PW 4 Dr Bikula Salama produced P3 form that was filled by Dr Nafisa on March 4, 2019. Upon examination the doctor found the child's hymen was broken and there was foul discharge from the vagina. PW 4 produced PRC & P3 forms as exhibits EXP 3 & 2. In the PRC & P3 form the complainant identified the assailant as *Mjomba* who was known to her. PW 4 said that it is not normal for discharge to come out unless there is infection. She said P3 form was filled almost one month after the PRC form had been filled when placed on defence the Appellant gave sworn statement and said he used to be a businessman in Kongowea selling bananas. He said that he came to Mombasa on the morning of February 6, 2019 to sell his bananas but he was unable to sell and he waited to sell in the evening. That he didn't have a place to sleep and he remembered younger brother HJB called to ask if he could be accommodated. The brother told him he was [Particulars Withheld].
 15. That he was directed to a workshop in Bombolulu and as he was directed further he met a several people on the road. That on February 7, 2019 at 8.00pm the people started calling him a thief and started beating him and took his money and phone. That Appellant was taken to Nyali Police Station while unconscious. That on February 8, 2019 when he asked police to take him to hospital it was not possible. That he stayed at the station until he was taken to court and he was told his mistake. That his brother's wife faced him to admit the allegations that he didn't know about.
 16. He said he was accused of raping and he denied because he did not know where they were staying. Appellant said that his brother had hatred for him since their parents died and that is why he fabricated him. He said his brother even cut him on the forehead with a panga and he had a scar.
 17. That his brother sold the portion of land he had been given and started encroaching on the Appellants portion. That the brother also grabbed land belonging to their younger brother. Appellant said their brother had been frustrating them because he is the 1st born.
 18. He said that they moved out of the homestead to earn a living. That the brother send thugs to beat him. That his brother set him up. He said his brother's wife wanted a relationship with him. He said a brother who was supposed to be his witness died in June 2020.
 19. In cross examination the Appellant said that he did not know where his elder brother BJB stays. He knew the brothers wife AJR. He also knew his elder brother had 7 children but he only knew 4 of the children. He said his brother's wife wanted to have an affair with him. He said he didn't know if his brother was charged in court but he had 2 OBs. Appellant said he had never stayed in Mombasa and that it was not ture he stayed with his brother and shared a room with his children. Appellant said he had never disagreed with the brother's wife.
 20. This appeal was canvassed by way of written submissions. The Appellant filed his submissions on April 25, 2022 together with amended grounds of appeal whereas the Respondent relied on their grounds of opposition.



21. The Appellant's submissions were that issue of ingredient for the offence of defilement is not in dispute. He said it is the issues for determination which are in dispute and he set the issues in line with his grounds of appeal. The Appellant said his rights under Article 49 of the *Constitution*, was breached in that he was arrested on February 7, 2019 and arraigned in court on February 11, 2019.
22. The Appellant argued that the trial Magistrate was silent on breach to his fundamental rights and freedoms under Article 49(1) (9) (i)(ii) & (f) & (g). The Appellant relied on the holding of Makhandia J in *Mwangi vs Republic CR Appeal No 22 of 2007(2010) 1 KLR* where he held:-

' The police could only hold the appellant in custody for upto 24 hours before arraigning in court'.
23. Any prosecution beyond such time for a non-capital offence was null & void. In determining whether the police had flouted the constitutional rights of the appellant some had to determine whether the police provided a plausible explanation for the delay; if the explanation for the delay was reasonable no problem would have arisen. An unexplained delay in charging an accused person in court would lead to an acquittal irrespective of the weight of the evidence on record when appellants constitutional rights were breached, the appellate court had a duty to raise the issue on its own. Motion even if the appellant did not.
24. The Appellant argued that no explanation was given why he was not arraigned in court within 24 hours and therefore his fundamental rights were not secured by the trial Magistrate.
25. The Appellant argued that his rights under Articles 25(a) & (c)

' Freedom from torture & cruel inhuman or degrading treatment or punishment and (c) right to fair trial as well as Article 27 – equality & freedom from discrimination and Article 50(i) Right to fair trial was breached and the appeal should succeed. He also relied on Article 20(3) of the *Constitution* to argue that it is the duty of the court to enforce the provisions of the law otherwise there would be no need to the provisions of the law'.
26. On the issue of identification the Appellant argued that the trial Magistrate failed to allow the fact that this matter is all about identification/recognition. He relied in the holdings in several authorities including *Dziwa Jiwa vs Malawi CR Appeal No 6 of 2015* where it was held:-

' The court must then take time to weigh and consider the circumstance in which the identification was made. These will have a bearing on the equality of identification. The court has to regard the time of observation, the illumination observation, whether the defendant was seen or known by the witnesses, reasons for remembering the recognition'.
27. That in *Anjononi vs Republic [1980] KLR 54* pg 60 It was held that

' Recognition of an assistant is more satisfactory, more reasoning & more reliable than identification of a stranger because he depends upon personal knowledge of the assailant in some farm or other'.
28. The Appellant raised doubt as to his presence at scene of crime for reasons the mother and father of the child did nothing when they allegedly saw the appellants kissing the complainants lips. The PW 2 alleged that the appellant ran away for 3 days after committing the offence but same allegation is contradicted by the fact that he was arrested on February 7, 2019 and this raises questions as to whether he was directly implicated. He argued that complainants description of the assailant as Mjomba was



not enough to lend to the fact that it was the appellant who committed the crime since he hailed from Lungalunga. He said there was no evidence of any light in the house and thus fact nullifies the identification of any act allegedly committed.

29. The Appellant further submitted that evidence of PW 1 & PW 2 was contradictory in terms of what PW 1 said PW 2 saw & what PW 2 said she saw. That there was also contradiction as to where the appellant resided. The Appellant also claimed P3 form contradicted date of alleged offence in OB & could not be used to support the prosecution case. He said that the evidence relied on by the trial Magistrate was not water tight.
30. The Appellant claimed that the proper procedure is that P3 form is filled first before PRC & that the trial Magistrate ran away from the well-known procedural exercise to say otherwise in the judgment.
31. The Appellant alleged it was not clear when the offence was committed. He also argued that court did not consider the time he spent in custody under Section 333(2) *Criminal Procedure Code*. The Appellant claimed that the trial Magistrate did not consider his defence and the fact that he resided in Taita Taveta & not Lunga Lunga Kisauni.
32. The Appellant also contended that the evidence of the father of the complainant was most important and relevant to the fact that he was at the scene of crime on that night and the father escorted the complainant to the police station and hospital respectively.
33. That there was no corroboration of evidence by PW 4 that the complainant was 1st taken to Ziwa la Ng'ombe dispensary before being taken to Coast General Hospital.

Analysis and Determination

34. This being a 1st Appellate court the duties of this court as espoused in the case of *Killu & Another vs Republic [2005] 1 KLR 174* are:-

' An appellant as a 1st appeal is entitled to expect the evidence as a whole to be submitted to afresh and exhaustive examination and to the appellants courts over decision on the evidence. The 1st appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the 1st appellate court to merely to scrutinize the evidence to see if there was same evidence to support the lower courts findings & conclusions; it must make its own findings & draw its own conclusions. Only then can it decide whether the Magistrates findings should be supported. In doing so, it should make allowance for the fact that the trial court has hand the advantage of hearing and seeing the witnesses'.

35. Having considered the evidence on the trial courts record, the judgment of the lower court and the grounds of appeal as well as submissions filed by the Appellant, the issues that arise for determination are:-
 - a. Whether failure to produce the appellant in court within 24 hours of his arrest affected the prosecution's evidence materially & breached the appellants rights under Article 49 of the *Constitution*. 'Appellant was arrested on February 7, 2019 – Thursday and arraigned in court on February 11, 2019 – Monday. Did he raise issue of breach of right before trial?
 - b. Whether there was contravention of the rights under Article 25, 27, 28 and 50(1) of the *Constitution*. Breach/Failure to comply with Article 49 is contravention of Articles 25, 27 and 50(1)?



- c. Whether the Appellant was properly identified by the Complainant and/or other witnesses the perpetrator of the defilement.
 - d. Whether the prosecutions evidence was full of contradictions.
 - e. Whether evidence adduced by the doctor corroborated the prosecution's case.
 - f. Was the trial process as envisaged under Section 382 of Criminal Procedure Code properly conducted?
 - g. Was the appellants defence and submission considered by the trial court?
36. As it stands the appellant has no issues with the sentence passed of 20 years imprisonment. He argues that the conviction should be quashed because his rights under Article 49 were breached.
 37. From the records he was arrested on February 7, 2019, which was a Thursday and thus he was due and entitled to be arraigned in court within 24 hours e.g his arrest. The time of his arrest is not specified in the charge sheet and in cross examination of PW 3 the investigating officer he didn't raise any complainants as to his prolonged incarceration.
 38. From the Appellants own testimony he said that in February 7, 2019 at 8.00pm, he met people who started calling him thief and started beating him & took his money and phone. That he was taken to Nyali Police Station while he was unconscious, if the Appellant was arrested on February 7, 2019 – Thursday at 8.00pm then he ought to have been taken to court anytime between the time of his arrested and 8.00pm on February 8, 2019. Subsequently the only time that he could go to court being it was a weekend is Monday February 11, 2019 which is the day that he was arraigned in court. The view of court is that the Appellants rights were not flouted and this ground and any others related to it that is ground 2 cannot stand and the appeal cannot succeed on these 2 grounds.
 39. Whether the Appellant was properly identified, the complainant said that the appellant is her uncle. He was known to her well and that he could come and take her to his house in [particulars Withheld] where he repeatedly defiled her. She identified him in court and answered his questions in cross examination.
 40. The 2nd prosecution witness also identified the Appellant in court as her brother-in-law. The Appellant also confirmed the relationship between him & PW 1 as well as PW 2. There was therefore identification by recognition of a person who was well known to PW 1 by virtue of being an uncle. There was no opportunity of mistaken identity.
 41. Whether the Appellant was fabricated because PW 2 wanted to have an affair with him was controverted in cross examination. Whether the complainant's father was frustrating & fabricating the Appellant because he wanted to grab land that he inherited from his parents was an issue that arose in appellants defence. It was not put to the prosecution witness especially pw 2 who could have confirmed or refuted. The Appellant did not also specify the particulars of land he alleged the elder brother wanted to grab from him.
 42. Contradictions referred to by the Appellant date of alleged offence in the OB and date on the P3 form. The police issued the P3 form and referred to the complainant for it to be filled on February 25, 2019 after the complainant had been examined, treated and PRC form filled on February 6, 2019. PW 4 produced P3 form which was filled by Dr Nafisa on March 4, 2019. PW 4 explained in her evidence that P3 forms are usually filled after the PRC form and that all the 2 documents must be filled for defilement cases.



43. This court finds that the appellant's submissions as to consequence of filling medical documents in defilement cases is mistaken. PW 4 was the expert who know how & what happens at medical facilities.
44. That the Appellant was at the scene is confirmed by PW 1 & PW 2. He is related to them by blood being an uncle to PW 18 by marriage being brother to PW 2's husband. PW 1 & PW 2 said he used to stay in [particulars Withheld] but went to their house and claimed his house had been locked due to rent. Allegations of fabrication could have been confirmed if the complainant by Dr Nafisa and found not to have been defiled. From the PRC & P3 she was found with an old scar in her vagina showing the hymen was broken.
45. PW 1 said that Appellant had severally defiled her when he took her to his house. The age of the complainant was not disputed. This court having found that Appellant was properly identified and that ground 2 of his appeal cannot stand and do consequently find that the offence of defilement was proved beyond reasonable doubt. The evidence of prosecution witness was corroborated that the complainant was defiled by the Appellant.
46. The trial Magistrate considered the Appellants defence and submissions and weighed it against the prosecution's case and concluded that circumstances of the case make the appellants allegations of malice extraneous and could not be linked to the case.
47. This appeal is therefore found to lack merit and is dismissed save that the appellant having been in custody during his trial should have his sentence of 20 years commence from February 11, 2019 under Section 333(2) Criminal Procedure Code.
48. Right of Appeal – 14 days explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 27TH DAY OF OCTOBER 2022

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel - Court Assistant

Mr. Ngiri for Respondent

Appellant – Present in person

Hon. Lady Justice A. Ong'injo

Judge

