



**Nyambegera v Republic (Criminal Appeal E019 of 2021)  
[2022] KEHC 16545 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16545 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CRIMINAL APPEAL E019 OF 2021  
JN KAMAU, J  
DECEMBER 20, 2022**

**BETWEEN**

**STEVEN MOMANYI NYAMBEGERA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon W. C. Waswa (RM) delivered at  
Nyamira Chief Magistrate's Court in SOA Case No 9 of 2021 on 22nd June 2021)*

**JUDGMENT**

**Introduction**

1. The appellant herein was charged with the offence of defilement contrary to section 8(1) and (3) of the [Sexual Offences Act](#) No 3 of 2006. He had also been charged with an alternative offence of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#). On April 14, 2021, the charge was amended and he pleaded “not guilty.”
2. It was not clear from the lower court file and proceedings what the amended charge was. Suffice it to state that the appellant tried and convicted on the offence of defilement contrary to section 8(1) and (3) of the [Sexual Offences Act](#) No 3 of 2006 by Hon WC Waswa, Principal Magistrate who sentenced him to fifteen (15) years imprisonment. The learned trial magistrate therefore made no finding on the alternative charge.
3. Being dissatisfied with the said judgement, on July 21, 2021, the appellant lodged the appeal herein. His petition of appeal was of even date. He relied on six (6) grounds of appeal.
4. His written submissions were dated and filed on April 20, 2022 while those of the respondent were dated and filed on December 6, 2022.
5. This judgment is based on the said written submissions which both parties relied upon in their entirety.



## Legal Analysis

6. 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.
7. 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.
8. Having looked at the said grounds of appeal, the respective parties' written 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 proved its case beyond reasonable doubt; and
  - b. Whether or not in the circumstances of this case, the sentence that was meted upon the appellant by the trial court was lawful and/ or warranted.
9. The court dealt with the two (2) issues under the following distinct and separate heads.

### I. Proof Of Prosecution's Case

10. All the grounds of appeal were dealt with together under this head as they were all related.

#### A. Age

11. The appellant did not submit on the issue of age. The respondent submitted that LMM (hereinafter referred to as "PW 1") testified that the complainant (hereinafter referred to as "PW 2"), was twelve (12) years as she was born in 2008. She produced a Birth Certificate which showed that she was born on October 3, 2008.
12. The defilement occurred on January 16, 2021. Going by the birth date of October 3, 2008, PW 2 was aged twelve (12) years at the material time. This court was thus persuaded that for all purposes and intent, PW 2 was a child.

#### B. Identification

13. The appellant did not specifically submit on the issue of identification, He relied on the contradictions in the prosecution's evidence to argue that he did not defile PW 2.
14. On its part, the respondent submitted that PW 2 positively identified the appellant through recognition. It added that PW 2 testified that she used to see the appellant along the road and on the material day she had gone to purchase soap from his shop when he told her to enter the shop through the back and he then locked her inside.
15. It averred that PW 2 further testified that while inside, the appellant switched on the lights. It contended that given the fact that there were only two (2) people in the said house that night there were no chances of possible mistaken identity. It added that it was the appellant who opened the door the following morning as PW 2 left. It was therefore its averment that PW 2 positively identified the Appellant as her perpetrator.



16. In his sworn evidence, the appellant stated that he saw PW 1 and PW 2 at his place the following morning. He added that he used to see her but did not know her well.
17. In his judgment, the learned trial magistrate found that the appellant was positively identified by PW 2. He was satisfied that PW 2 could not have been mistaken about who her perpetrator was because the lighting conditions were conducive and they had spent considerable time together that night.
18. As both the appellant and PW 2 were familiar to each other, this court did not find it necessary to interrogate the issue of identification any further. The question of whether or not the appellant defiled her was a different question altogether.

## **II. Penetration**

19. A perusal of the proceedings showed that PW 1 testified that on the material day at about 6.30 pm, she sent PW 2 to the shop to buy milk but she did not return home. She asserted that she went to where she had sent her and the seller told her that PW 2 had left. She stated that she returned home and informed PW 1's father who reported to Nyumba Kumi the following day that PW 1 was missing. Her evidence was that he came back with PW 2.
20. She said that PW 2 informed them that she went to buy soap at Stephen's shop and he locked her inside the house. On being cross-examined, she said that Jane was the milk seller while PW 1 said Stephen was the one who locked PW 2 inside the shop.
21. PW 2 gave unsworn evidence. She testified that she used to see the Appellant along the road. She stated that on the material day, at about 4.00 pm, PW 1 sent her to buy milk and soap. She said that after leaving the milk shop, she went to buy soap at the Appellant's shop. She said that she arrived at the appellant's shop at 7.00p.m.
22. He asked her to enter the shop to pick the soap. He then closed the door behind her. She pointed out that when she arrived at the appellant's shop, it was not dark so the lights were off. She further stated that the appellant switched on the light later on that night.
23. She testified that the appellant forcefully removed her clothes and placed her on his bed. He wore a condom and inserted his penis into her vagina. She said that he threatened her with a knife when she tried to scream and she kept quiet. She told the Honourable court that she then asked him for water. He opened the door the following morning at 6.00 am and she left the shop.
24. Evans Atika, a Clinical Officer at Ekerenyo Sub –County Hospital testified on behalf of Justin Geke. He tendered in evidence the P3 form and clinical attendance card. His evidence was that there were no bruises or tears seen and that although the hymen was broken, no discharge or spermatozoa was noted. He was emphatic that the hymen was broken earlier and that the medical evidence showed that there was no penetration by the time PW 2 was brought to hospital and hence there was no defilement at the time.
25. No 259244 PC Stanley Wangechi (hereinafter referred to as "PW 4") told the Trial Court that PW 1 told her that PW 2 was defiled by Joseph (sic) who was brought by members of the Nyumba Kumi. She said that she escorted PW 2 to hospital where the doctors indicated that PW 2 had been defiled. On being cross-examined, she said that she sought interpretation from the doctor who confirmed that PW 2 had indeed been defiled.



26. The learned trial magistrate relied on the provisions of section 124 of the *Evidence Act* cap 80 (laws of Kenya). The same provides 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 (emphasis).

27. The learned trial magistrate observed that there was no medical evidence to prove penetration but pointed out that courts are still tasked with the duty to look at other evidence on record to determine whether or not there was sexual penetration. He found that the fact that the hymen had been broken meant that PW 2 had been defiled.
28. In this regard, he placed reliance on the case of *Kassan Ali v Republic* [2006] eKLR where it was held that the absence of medical examination to support the fact of rape was not decisive as fact of rape could be proved by oral evidence of a victim or by circumstantial evidence.
29. He also relied on the case of *Mark Ouiruri Moses v Republic* [2013] eKLR and that of *Eric Onyango Ondeng v Republic* [2014] eKLR where it was held that penetration did not need to be deep inside a girl's organ or need for presence of spermatozoa and that it was sufficient that there was penetration only on the surface.
30. This case hinged on PW 2's word against the appellant herein. She adduced unsworn evidence. Weighed against the appellant's sworn evidence, PW 2's evidence had less weight and had to be corroborated.
31. The fact that PW 2's hymen was broken was not proof that she had been defiled. Indeed, there are many causes for the breaking of the hymen. In addition, the fact that PW 2 had been defiled did not mean that she had been defiled by the appellant herein. She had a duty to demonstrate that indeed he was the person who defiled her on that material date.
32. Notably, section 108 of the *Evidence Act* cap 80 (laws of Kenya) states that:-
- “The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
33. Further, section 109 of the *Evidence Act* stipulates that:-
- “The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
34. According to PW 2, she left the house at 4.00 pm. She allegedly arrived at the appellant's shop at 7.00 pm. It was not clear where she was for three (3) hours. It was also not clear how far the shop PW 2 was to buy milk was or what time PW 1 went to the shop she had sent PW 2 to look for her.
35. PW 2's father was not called to testify to shed light where he met PW 2 so that he could back with her to the house. This lacuna was unexplained. Further, PW 4 seemed to have been referring to a Joseph



- as having been the perpetrator. There was no indication in the proceedings to show that the appellant was also known as Joseph.
36. PW 4 was the Investigating Officer and was required to adduce consistent evidence that was cogent. Her evidence that PW 2 was defiled was contradicted by PW 3 who was categorical that there was no evidence of penetration. Indeed, PW 3 was emphatic that there was no penetration or defilement by the time PW 2 was taken to hospital for examination.
  37. A perusal of the P3 form and filter clinic attendance card that were both filled on January 17, 2021 showed that there was no penetration, normal internal and external genitalia, no tears, no bruises, no discharge, no blood stains and no deposits. No injuries were indicated in the P3 form. Section B of the P3 form was blank.
  38. This court was therefore not persuaded by the learned trial magistrate’s reasoning that the fact that there was no penetration did not mean that there was no defilement. This is because PW 3 was very clear that as the time PW 2 was taken to hospital, there had been no penetration or defilement. Indeed, absence of defilement or penetration can also be proven by medical evidence.
  39. The understanding of this court was that the holdings in the cases of *Kassan Ali v Republic* (*supra*), *Mark Ouiruri Moses v Republic* [2013] eKLR (*supra*) and *Eric Onyango Ondeng v Republic* (*supra*) were that rape or defilement could be proven by oral and circumstantial evidence if there was evidence such as tears, bruises, discharges or blood stains that could be observed with the naked eye by any person.
  40. It could never have been the intention of the proviso to section 124 of the *Evidence Act* that any person could allege defilement or rape without any type of evidence to corroborate such allegation. Indeed, the purport of the proviso to section 124 of the *Evidence Act* is that the court can rely on the evidence of a single witness provided that it can be corroborated by some sort of evidence.
  41. The burden did not shift to him to prove that he did not defile PW 2. It was for the prosecution to prove that he defiled her. Peter Ongwenyi Kaburi (hereinafter referred to as “DW 2”), the appellant’s employer vouched for the appellant by stating that they ate food together, prayed and went to sleep. He was emphatic that the appellant never worked in his shop and that he only did house chores and farming. He was also categorical that no one visited their home that night and that PW 2, who was her cousin’s daughter, had never gone to his house.
  42. As blood is thicker than water, DW 2 would not have been expected to side with the appellant herein if indeed he had committed the offence. The prosecution did not demonstrate any malice on his part for proceeding in the manner that he did.
  43. Having analysed evidence that was adduced during trial, this court came to the firm conclusion that the prosecution did not prove its case to the required standard, which is proof beyond reasonable doubt and that it did not dislodge the appellant’s alibi for that material night. His defence outweighed the prosecution’s evidence because medical evidence also demonstrated that PW 2 had not been defiled by the time she was taken to hospital.
  44. Courts are called upon to be satisfied beyond reasonable doubt before convicting persons. In sexual offences, the sentences are quite stiff and restrict liberties of persons.



45. Notably, section 8(3) of the *Sexual Offences Act* provides that:-

“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

46. It would be better to acquit a person who had committed an offence due to insufficient evidence to sustain a charge than to convict an innocent person on insufficient evidence merely because a court held a strong view that that person may have committed the offence. Convictions must be based on proof beyond reasonable doubt and not on a balance of convenience which is the standard of proof in civil cases.

47. Having found that the learned trial magistrate erred in having convicted the appellant herein, it followed that the sentence that was imposed upon the appellant herein was unwarranted, illegal, lawful and had no legal basis.

### **Disposition**

48. For the foregoing reasons, the upshot of this court’s decision was that the appellant’s petition of appeal that was lodged on July 21, 2021 was merited and the same be and is hereby allowed. The effect of this decision was that the decision of the learned trial magistrate be and is hereby set aside and/or vacated and in its place it is hereby directed that the appellant’s conviction and sentence be and is hereby set aside and/or vacated as they were both unsafe.

49. It is hereby directed that the appellant be and is hereby released from custody forthwith unless he be held for any other lawful cause.

50. It is so ordered.

**DATED AND DELIVERED AT NYAMIRA THIS 20<sup>TH</sup> DAY OF DECEMBER, 2022**

**J KAMAU**

**JUDGE**

