



REPUBLIC OF KENYA



**Matata v Republic (Criminal Appeal 19 of 2019)  
[2021] KEHC 9811 (KLR) (26 May 2021) (Judgment)**

Neutral citation: [2021] KEHC 9811 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CRIMINAL APPEAL 19 OF 2019  
JN ONYIEGO, J  
MAY 26, 2021**

**BETWEEN**

**KENNEDY MUNYAO MATATA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment on conviction and sentence in Taveta Law Courts Cr. Case No. 23 of 2018 delivered by Hon. Khapoya(PM) on 14th May 2019)*

**JUDGMENT**

1. The appellant herein was on 12<sup>th</sup> February, 2018 arraigned before Hon. G. K. Kimanga Resident Magistrate Taveta law courts facing the charge of defilement contrary to section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* No 3 of 2006. Particulars were that on diverse dates during the month of July, 2018, at around 23 hours at [Particulars Withheld] village within Taitva Taveta County, unlawfully and intentionally caused his penis to penetrate the vagina of LM a child aged 15 years.
2. In the alternative, he was charged of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No 3/2006. Particulars were that, on diverse dates in the month of July, 2018 at around 23 hours at [particulars withheld] village touched the vagina of LM a child aged 15 years with his penis.
3. Having returned a plea of not guilty, the matter proceeded to full trial with the prosecution calling a total of four witnesses.
4. On 11<sup>th</sup> March, 2019, the appellant was put on his defence and subsequently elected to give unsworn testimony without calling any witness. In his judgment dated 2<sup>nd</sup> May, 2019 and delivered on his behalf by Hon. B S Khapoya (PM), On 14<sup>th</sup> May, 2019 Hon Kimanga found the accused guilty of the main count. He was consequently sentenced to 20 years imprisonment.



5. Aggrieved by the conviction and sentence, he filed a petition of appeal citing 6 grounds of appeal as follows.
  - (1) That the learned magistrate erred in both law and fact in convicting the appellant on uncorroborated evidence of the complainant.
  - (2) That the learned magistrate erred in both law and fact in failing to take into account that the complainant's evidence was produced under duress by the police and her mother.
  - (3) That the learned magistrate erred in both law and fact in failing to notice that the complainant was not truthful in her evidence.
  - (4) That the learned magistrate erred in both law and fact in failing to consider the current prevailing judicial decisions and precedents attendant to the offence and the circumstances under which it was committed
  - (5) That the learned magistrate erred in both law and fact in convicting the appellant on an offence whose essential elements were not proved to the required standard.
  - (6) That the sentence meted out against the appellant is harsh and excessive in the circumstances of the case.
6. When the matter came for directions, the court directed parties to file written submissions. Consequently, the appellant filed his through the firm of Elizabeth K Nzioka-Isika on 16<sup>th</sup> November, 2020. Equally, the respondent through the learned prosecution counsel Grace Mukangu filed theirs on 8<sup>th</sup> February, 2020.

#### **Appellant's submissions.**

7. It was the appellant's submission that the prosecution did not discharge its onerous duty of proving the charge beyond reasonable doubt as envisaged under Section 107 (1) of the *Evidence Act*. Reference was made to the case of *Miller vs Minister of pensions* (1947) 2 All ER 372-373 where Lord Denning made a finding as to what constitutes a burden of proof as follows;

“That degree is well settled. It needs not reach certainty, but it must carry a high degree of possibility. Proof beyond reasonable doubt does not mean proof beyond shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of ofcourse it is doubt but nothing short of that will suffice’
8. It was the appellants' contention that there was no proof that the appellant was responsible for the pregnancy as DNA was not done from the infant and matched with that of the appellant.
9. In respect of the first ground of appeal, M/s Isika contended that neither the essential elements attendant to the offence of defilement were proved to the required standard. On the first element on proof of penetration, counsel submitted that there was no medical evidence produced to show that the complainant was penetrated by the appellant and that he was responsible for the broken hymen which was of long standing or the pregnancy itself.
10. Learned counsel submitted that there was no evidence led by the prosecution to prove as to who opened the window from inside the house for the appellant to enter the house where the complainant was sleeping. She further contended that failure to prove penetration after the act was detrimental to the



prosecution's case. In support of that proposition reliance was placed in the case of *Badi Hamadi Hamisi vs Republic* Cr Appeal No. 19 of 2017 (2018)eKLR and *Julius Kioko Kavuva v Republic* (2015) eKLR where both courts emphasized that proof of penetration is key to establishing the offence of defilement.

11. On the second ground, counsel argued that the evidence of the complainant was obtained through duress by the police and the mother. Counsel referred to the testimony of the complainant in which she stated in her evidence in chief that it was after she was beaten by the mother that she revealed the name of the person responsible for the pregnancy.
12. According to counsel, the complainant's reluctance at first in disclosing the person responsible for the pregnancy until she was beaten raises some doubt as to the creditworthiness of the complainant. That evidence obtained and given under duress cannot be trusted. In support of this assertion counsel made reference to the case of *Ndungu Kimanyi v Republic* (1979) KLR 281 cited with approval in *Eliud Waweru Wambui v Republic* Criminal Appeal No 102/2016(2019) eKLR where the court stated that;  

“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straight forward person or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence”.
13. Regarding the 3<sup>rd</sup> ground on whether the evidence of the complainant was worth trusting, counsel questioned the credibility of the complainant in not disclosing the name of the person who opened for the appellant and why she or her sister who was sleeping in the same room did not report to their grandmother who was in another room or their mother.
14. According to learned counsel, the complainant was sexually active and of age to the extent that she let open the door for somebody to enter and sleep with her. Concerning the fourth ground cited by the appellant regarding lack of corroboration, counsel submitted that although a court can convict on uncorroborated evidence under Section 124 of the *Evidence Act* on offences of sexual nature if the court is satisfied that the witness is telling the truth, in this case the victim was not a child of tender age hence her evidence ought to have been corroborated.
15. Counsel questioned prosecution's failure to call the sister to the complainant who is said to have been in the house when the alleged defilement took place. That failure to call a crucial witness like the complainant's sister will lead to an adverse inference against the prosecution that calling such witness would have been adverse to the prosecution's case. To buttress this proposition the court was referred to the case of *Juma Ngodia vs Republic* (1982-88) CA where the court held that a prosecutor has the discretion on what witness to call or not to call but cautioned that, failure to call a vital witness could as well imply that his evidence would have been unfavourable to the prosecution.
16. Lastly, counsel submitted that circumstances under which the offence was alleged to have been committed suggests that the complainant who was 16 years did behave like a person of age hence the appellant cannot be held liable. To justify this, counsel referred to the Cr Appeal No 102 of 2016(supra)

### **Respondent's submissions**

17. Through its submissions filed on 8<sup>th</sup> February, 2021 the respondent submitted that it had duly discharged its burden of proof by establishing that; the victim was below 18 years old; there was penetration as revealed by the victim's delivery of a baby the product of the said defilement and, the



appellant was the perpetrator. To support that position counsel relied on the decision in the case of *United States v Smith* 267 F 3d 1154, 1161 Dc 2001 (citing in *Re Winship* 397 V 5 358, 370,905 t 1068, 1076 (1970) to buttress the point that the burden is on the prosecution to prove beyond reasonable doubt that the defendant is guilty of the case charged and that the evidence must overcome any reasonable doubt concerning the defendant's guilt, but it does not mean that a defendant's guilty must be proved beyond all possible doubt.

18. Concerning the aspect of penetration, it was submitted that prosecution's proof that the complainant's hymen was long broken and subsequently conceived was sufficient enough to prove the element of penetration. To justify this argument, counsel quoted the case of *Julius Kioko Kivuva v Republic* (2018) eKLR where the court held that;

“evidence of sensory details such as what the victim heard, saw, felt and even smelled is highly relevant evidence to prove the element of penetration...”

19. Concerning identification of the appellant, counsel submitted that the complainant knew the appellant before as a friend to the father and that she recognized him through his phone's torch light.
20. Regarding the claim that the evidence from the complainant was obtained through duress, counsel submitted that during the trial, the accused did not complain of having been harassed or subjected to duress. That the victim was only punished for the acts committed and not forced to implicate the appellant whom she knew very well before.
21. Concerning lack of corroboration, it was submitted that the act of penetration was corroborated by the pregnancy whose DNA at that moment was not possible. As to age, it was contended that the birth certificate was sufficient proof. To that extent, the court was referred to the decision in case of Cr Appeal No 504/2020 *Kaingu Elias Kasomo v Republic*.
22. As to the failure by the prosecution in calling the sister to the complainant who was sleeping in the same room with the complainant, counsel submitted that prosecution is not bound to call a specific number of witnesses in order to prove its case. In support of that proposition, the court was referred to the case of *Keter v Republic* (2007) E.A 135 where the court stated that;

“the prosecution is not obliged to call superfluity of witnesses but only such witnesses as are supposed to establish the charge beyond any reasonable doubt”.

23. Touching on the claim that the victim behaved like a grown-up, counsel submitted that there was no proof of such behavior.

### **Evidence before the trial court**

24. As the first appellate court, I am duty bound to re-examine, re-evaluate, re-analyze the evidence tendered before the trial court and then make an independent conclusion and or determination bearing in mind that I did not have the advantage of seeing, hearing or assessing the witnesses' demeanor. See *Okeno v Republic* (1972) E.A 32
25. It is the prosecution's case that on diverse dates during the month of July 2018, at 11.00 pm, the complainant (Pw1) was together with her sister sleeping at their grandmother's house on separate beds. That on a Saturday during the month of July 2018, the appellant arrived and entered into the house they were sleeping through the window, touched her breasts, had sex with her and then left after warning her not to disclose to anybody. That the following Wednesday again he defiled her after gaining entry into the same house through the window.



26. She claimed that after her stomach started swelling, her grandmother who suspected that she was expectant informed her mother. The mother questioned her and later took her for a pregnancy test which turned positive. When her mother informed the father, she was beaten up thus forcing her to disclose that she had had sex with one Kennedy the appellant herein who turned out to be a friend to the dad.
27. The complainant's father (Pw2) told the court that he received a call from his brother who informed him that his daughter was pregnant. When he interrogated the daughter (Pw1), she confirmed that one Kennedy (appellant) was responsible for the pregnancy. He took her to Taveta police station from where P C woman Stella (not a witness) escorted her to Taveta District hospital where a pregnancy test was done and confirmed to be positive. The scan test revealed that the pregnancy was 21 weeks old.
28. Pw3 George Ombayo a clinical officer confirmed that the complainant had a broken hymen of long standing with a 21 weeks' old pregnancy. Pw4 the officer who took over from PC Stella merely preferred the charges before court.

### **Analysis and Determination.**

29. I have considered the grounds of appeal and submissions before this court by both counsel against the evidence tendered before the trial court. The appellant argued the appeal on four grounds. There are six issues of concern which the appellant has specifically raised in advancing his appeal inter alia; failure by the prosecution to prove each element of the offence in particular penetration; lack of corroboration; lack of positive identification and or recognition of the appellant; evidence obtained by duress from the complainant by the police and the mother; failure by the court to find that the victim had behaved like a person of age and, sentence was excessive in the circumstances.
30. According to the appellant, prosecution did not discharge its burden by proving each and every ingredient of the offence to the required standard. The appellant was charged and convicted of the offence of defilement contrary to Section 8 (1) and (3) of the *Sexual Offences Act*. Section 8 (1) provides as follows;  
  
“a person who commits an act which causes penetration with a child is guilty of the offence termed defilement.  
  
Section 8 (2), goes further to provide 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.  
  
Section. 8(3) provides: 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 not less than 20 years”.
31. Based on the ingredients set out under the above stated provision, it was incumbent upon the prosecution to prove that; the victim was a child aged between 12-15 years; there was penetration and, that the perpetrator was identified. The onus to prove the stated elements always lies with the prosecution. See *Peter Mwangi Kariuki v republic* (2015) eKLR where the court held that the legal burden of proof beyond reasonable doubt constantly remains with the prosecution. Indeed, the burden of proof does not shift and it remains with the prosecution throughout the trial.
32. In the instant case, there is no doubt that the complainant was born on 9<sup>th</sup> December, 2002. By the time the offence was alleged to have been committed i.e July, 2018, the compliant was about 15 years



- and 7 months .This is evidenced by the birth certificate marked P.E- 3. Having held that the victim was at the time the offence committed a child, the next question is whether, there was penetration.
33. The complainant claimed to have had sex twice on unspecified dates during the month of July, 2018. She claimed that as a result of having sex with the appellant, she conceived. There is no doubt that the allegation of defilement of the complainant was kept as a secret by the complainant until after about four months when the grandmother noticed that she (complainant) was pregnant. After her mother was alerted by the grandmother, she was subjected to thorough beating by the mother thus prompting her to disclose the name of the person responsible as the appellant who turned out to be a friend to her father.
  34. According to the medical report (Pw3 form), the clinical officer stated that when the complainant was taken to their medical facility on 16<sup>th</sup> November, 2018, they did a scan which revealed that she was 21 weeks pregnant. Pw3 told the court that the complainant had a long standing broken hymen.
  35. The only medical evidence being connected with the act of defilement in this case is the alleged positive pregnancy examination. It was incumbent upon the prosecution to connect the broken hymen with the alleged defilement in this case. Unfortunately, Prosecution did not seek an adjournment to enable the complainant deliver to facilitate extraction of DNA samples from the baby or foetus if not successfully delivered and the appellant for examination and comparison before concluding that the broken hymen and therefore the pregnancy was as a result of defilement of the complainant by the appellant.
  36. In the absence of any DNA examination, there is no conclusive evidence to connect the pregnancy with the defilement in question. The period between July 2018 and November 2018 is sufficient enough for the complainant to have had sex with somebody else other than the appellant to have had her hymen broken. In her evidence in chief, she did not claim that she had not had sex before the alleged defilement. In other words, she may have had sexual intercourse prior to July 2018 and therefore the pregnancy alone does not have a link or nexus with penetration by the appellant. Accordingly, penetration by the appellant was not proved to the required standard.
  37. The next issue is that of identification. The victim claimed that the appellant entered the house through the window. In the same room was her sister who was sleeping a separate bed. Although the court was not told how old the sister was, she was a crucial witness who ought to have been called to corroborate the complainant's evidence.
  38. The deliberate failure to call the said sister is questionable and the only logical and inescapable conclusion is that her evidence would have most likely adversely affected the prosecution's case. See *Bukenya and other v Uganda* (1972) E.A where the court set out the rule that has frequently been applied in our courts that;
    - (i)The prosecution must make available all witnesses to established the truth, even though their evidence maybe inconsistent.
    - (ii)The court has the right and the duty to call any person whose evidence appears essential to the just decision of the court
    - (iii)where evidence called is barely adequate the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.
  39. M/S Isika argued that evidence of Pw1 ought to have been corroborated to strengthen the element of identification. There is no doubt that the appellant was before well known to the complainant. She claimed that the appellant used torch light from his phone flashing around and that is how she



identified him. On cross examination, she stated that the appellant was dressed in a black trouser and brown jacket. She therefore claimed that there was identification through recognition. She however fell short of the explanation regarding the density of the torch light so as to conclude whether it was sufficient enough for positive identification or recognition.

40. It is clear that nobody else gave evidence to corroborate the evidence of Pw1. There is no other corroborative material to support the fact that defilement took place around the month of July, 2018. Even the grand-mother who was sleeping in the same house but separate room was not informed or even alerted of the incident. There was no resistance or even commotion during the alleged defilement.
41. I am alive to the fact that evidence of a single witness can be used to convict where there is no other evidence as long as the trial court warns itself of the dangers of convicting based on such evidence. See *Abdalla Bin Wendo vs Republic* (1989) KLR 424 and *R v Turnbull* (1976) 3 All ER 549. Equally, I am alive to the fact that under Section 124 of the [Evidence Act](#), a court can convict on a sexual offence based on the evidence of the victim alone subject to the trial court recording reasons satisfying itself of the truthfulness of the victim's testimony.
42. In this case, the trial magistrate stated that the prosecution evidence was not corroborated but he nevertheless found the complainant truthful and believable and that she had no reason to lie against the appellant.
43. In this case, the victim was the only witness hence corroboration was necessary unless the trial court warned itself of the dangers of convicting based on the evidence of a single witness. For the trial court to warn itself, it must state or record reasons for reliance on the victim's evidence alone. In this case, the trial court did not record the observations made on the demeanor of the complainant in the proceedings as required under Section 199 of the [Criminal Procedure Code](#) which provides;

“ when a magistrate has recorded the evidence of a witness, he shall also record such remarks (if any) as he thinks material respecting the demeanor of the witness under examination ”
44. In the case of *Rosemary Mitchere Muthamo v Republic* (2020) eKLR the court had this to say

“ It is noted however that when Pw1 stood in the witness box, the learned magistrate did not record his demeanor. He seems to have had a belated recollection of the same when he was writing the judgment. This was wrong. The demeanor of the witness where necessary must be noted and recorded as he testifies but not sneaked belatedly into the judgment ”.
45. The trial court was duty bound to note or make remarks on what observations or assessment he had made on the creditworthiness or reliability of the complainant's testimony considering that the complainant was beaten before disclosing the person responsible of the pregnancy. One would pose a question whether the witness was truthful and therefore creditworthy to believe that the appellant was the person who defiled her.
46. I do agree with m/s Isika that recognition at night without proper voice or visual identification and elaboration on the density of the torch light during the material night is doubtful. This is a witness whose credibility is subject to doubt. She could not explain as to whether the window was broken before gaining entry. There was no claim that the window was broken or whether it was deliberately let lose or open for the appellant to enter which is denied. The grandmother was sleeping in the same house yet she could not be told. The conduct and behavior of the appellant is suspect and questionable. This is not a behavior of a honest person. To claim that she feared disclosing the act of defilement is being insincere. How could it happen in succession within the same week yet fail to report.



47. I find the conduct and behavior of the victim suspect and not consistent with a defiled victim. In a nutshell, I am satisfied that the prosecution did not discharge its burden of proof to the required degree hence the appeal herein must succeed. Accordingly, the conviction herein is quashed and the sentence thereof set aside with orders that the appellant be and is hereby set free forthwith unless otherwise lawfully held. Right of appeal 14 days.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 26<sup>TH</sup> DAY OF MAY.2021**

**J. N. ONYIEGO**

**JUDGE**

