



REPUBLIC OF KENYA



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

**Njoka v Republic (Criminal Appeal E019 of 2023)
[2025] KEHC 2224 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2224 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CRIMINAL APPEAL E019 OF 2023
LW GITARI, J
FEBRUARY 7, 2025**

BETWEEN

KENNEDY JOMO NJOKA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appeal arises from the proceedings in the Principal Magistrate's Court, Marimanti Sexual Offences Case No. E012/2022 where the appellant was charged with the offence of defilement contrary to Section 8(1) (3) of the *Sexual Offences Act* (Cap 63A Laws of Kenya. The particulars were that on 6/5/2022 within Tharaka Nithi County, intentionally and unlawfully caused his penis to penetrate the vagina of B.K a child aged thirteen (13) years.
2. The appellant denied the charge and a full trial was conducted. The learned magistrate held that the charge was proved beyond any reasonable doubts. He was convicted and sentenced to serve twenty years' imprisonment.
3. The appellant was dissatisfied with bot convictions and sentence and filed this appeal based on the following grounds:
 1. That the learned trial magistrate erred in law and fact by failing to find that the light used to identify the appellant at the scene was not fully analyzed by the trial court.
 2. That the learned trial magistrate erred in law and fact by failing to take into consideration that, the complainant was pregnant at the time of the alleged defilement, thus no findings made by the trial court to establish who was responsible for the pregnancy.
 3. That the learned trial magistrate erred in law and fact by failing to note that the key witness was not called in this matter.



4. That the learned trial magistrate erred in law and fact by dismissing the appellant defense without giving cogent reasons of dismissing it.
4. He prays that the appeal be allowed, conviction be quashed, sentence be set aside and he be set at liberty.
5. The respondent opposed the appeal and prayed that it be dismissed.

Brief Facts

6. The complainant is a minor who was aged thirteen years at the time the offence was committed. She gave her evidence without being sworn. She told the court that on 6/5/2022 at about 11:00 pm she was asleep in their house with her mother when the appellant went there and claimed that he was sent by the sub-chief. The appellant threatened to imprison the complainant's mother. The mother went outside and on coming back she told the complainant to go outside as there was a police calling. On going outside, she met the appellant who ordered her to sit down. He then told her to lie down and she complied. The appellant then did bad manners to her twice and wanted to do a 3rd time but she screamed and he let her go. She went back to the house. She then walked outside with the appellant and walked for about four minutes then forced her to have sex with him. She went back to the house and met his brother JPM. He called his brother M and told him she was back in the house. The brother called the sub-chef to enquire whether he had sent the appellant, he replied in the negative and told them to report to the police. They went to Ciakariga Police Station and reported.
7. The complaint was taken to Marimanti Level Four Hospital. She told the court that the appellant was employed by her brother, K as a casual labourer. He told the court that he saw the appellant very well as there was moon light.
8. PW2 – James Njeru was the area assistant chief who testified that he was called at night by M who was enquiring whether he had sent a man who claimed to be a police officer to pick the owners of that homestead. He was then called by TM who informed him that the man had gone with the complainant and defiled her then took her back to the house. He told them to report the matter to the police the next day. In cross-examination, PW2 testified that he received the report that it is the appellant who had gone to that house claiming he had sent him. PW 2 said he had not sent the appellant. That he was informed that the appellant had escaped from the area.
9. PW3 – TM testified that he received a call from M who is the complainant's brother and he informed him his mother was arrested by police who went with her. That M called back but said the mother had returned but complainant was picked.
10. PW3 called the assistant chief then called Muga. PW3 talked to the complainant and she said that it was not a police officer but that it was 'Jomo' who took her to the farm and raped her. PW3 called the assistant chief and informed him. He advised them to report to the police.
11. PW4 was Lilian Wahu, a Clinical Officer at Marimanti level 4 Hospital. She testified that she filled the P3 form for the complainant who alleged that she was defiled by a person who was well known to them. She was defiled on 6/5/2022 at 11:00 pm at her mother's farm. She had not changed clothes. Her inner wear was stained with brownish discharge. She had a pregnancy which was about 34 weeks. The genitalia was very dirty and there were grass debris on the posterior part. There was a whitish discharge which had dried up meaning it had been there for some time. Laboratory test showed epithelial cells, indicating possible case of defilement. She produced the P3 form as exhibit. In cross-examination she stated that no spermatozoa was seen but the whitish discharge indicated that there was penetration.



12. PW5 was the investigating officer who testified that he received a report from two ladies, the complainant and her mother who reported that the appellant went to their homestead claiming he was sent by the chief to arrest them. He went out with the complainant's mother and had sexual intercourse with her. He then called the complainant who he also defiled. PW3 escorted them to hospital. A P3 form for the complainant was filled. He also obtained her birth certificate showing that she was born on 25/11/2008. Exhibit 3. He also produced the complainant's panty which was stained. Exhibit 4. The appellant was then arrested and charged.
13. The appellant gave unsworn defence and told the court that on the material day, he worked up to 5.00 pm, went home and slept up to the next morning. On 12/5/2022 he went home and his father told him he had bought land from the complainant's family and there was a dispute as they wanted their money. They went and discussed but the talks were not fruitful. The mother promised to teach them a lesson. On 15/5/2022 police officers went and arrested him. He was charged in court on 25/5/2022. He told the court that he is having another case, Sexual Offences Case No. E011/2022 which was allegedly committed the same time as the present case. That the case was fabricated. That the statements were recorded in July and August.
14. The appeal was canvassed by way of written submissions. The appellant submits that he was not properly identified and relies on the case of *Wamunga Vs. Republic (1989) KLR* where it was stated that:

It is trite 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 favorable and free from possibility of error before it can safely make it the basis of conviction."
15. He also relies on the case of *Nzaro Vs. Republic (1991) KAR 212* and *Kiarie Vs. Republic (1984) KLR 739* where the Court of Appeal stated that the evidence of identification or recognition at night must be absolutely watertight to justify conviction.
16. In *R -Vs- Turnbull & Others (1976)3 ALL ER 549* the court considered the factors that ought to be considered when the only evidence turns on identification by a single witness.
17. On penetration, the appellant submits that the prosecution did not prove that there was penetration. He relies on *Charles Wamukoya Karani Vs. Republic and Sekitoliko Vs. Uganda (1967) EA 53*. I note that the appellant has raised matters which are not in the evidence of the clinical officer. The P3 form was filled on 9/5/2022 which is not twelve days after the incident. The report was made on 7/5/2022 and she was referred to hospital the same day. The P3 form was filled on 9/5/2022 which was two days after the incident. The submission that she was taken to hospital after twelve days is not correct and is disregarded.
18. The appellant submits that the sentence was harsh. That under Section 8(3) the sentence was not mandatory, he relies on *Caroline Auma Majabu Vs. Republic (2014)eKLR* Court of Appeal, where it was stated that "the word 'liable' merely gives a likely maximum sentence thereby allowing a measure of discretion to the trial court in imposing sentence with the maximum court being indicate."
19. He relies on *MK Vs. Republic (2015)eKLR* where the mandatory sentence was discussed.
20. The appellant also cited the South African Case of *State Vs. Coetzee (1997) 2 LRC 593* and *R.V Gagnon (L) 2006 SCC 17 (2006) 1SCR 621*.

He prays that the conviction be quashed.



21. For the respondent, it is submitted the only issue for determination is whether the prosecution proved their case to the required standards. They submit that the charge was proved beyond any reasonable doubts and the appeal should be dismissed.

Analysis And Determination

22. I have considered the grounds of appeal, the proceedings before the learned magistrate and the submissions. The only issue that arises for determination is whether the charge was proved beyond any reasonable doubts.

23. This is the 1st appellate court and this court has a duty to analyze and evaluate the evidence which was adduced before the trial court and come up with its own independent finding. The appellant has a legitimate expectation that the evidence will be subjected to an exhaustive evaluation by the appellate court and the appellate court's own independent finding. See *Okeno Vs. Republic* (1972) E.A 32. In *David Njuguna Wairimu Vs. Republic* (2010)eKLR stated that:

There are instances where the first appellate court may, depending on facts and circumstances of the case come to the same conclusion as those of the lower court. It may also reverse those conclusions. We do not think there is anything objectional in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”

24. In doing so, the 1st appellate court must make allowance for the fact the trial court has had the advantage of hearing and seeing the witnesses, See *Pelis –v- Sunday Post* 1978 E.A 24.

25. The appellant was charged with defilement contrary to Section 8(1) (3) of the [Sexual Offences Act](#) which provides as follows:

Any person who commits an act which causes penetration with a child is guilty of an offence termed as defilement.

- 3) 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”.

26. Under the Section it is well settled that the key ingredients of the charge of defilement are: Age of the victim Penetration Identification of the penetrator

27. In this appeal the appellant is challenging the positive identification of the penetrator. The prosecution proved age of the victim with credible evidence when they produced the birth certificate of the victim in court as an exhibit. The birth certificate shows that the victim was born on 25/11/2008 and the offence was committed on 6/5/2022. The complainant was thirteen years when the offence was committed. The age of the complainant was proved to the required standard.

28. On the identity of the penetrator the appellant contends that the complainant did not give evidence on the source of light that enable her to recognize him. The record of the lower court shows that the appellant did not challenge the testimony of the complainant on his identification. In cross-examination the complainant told the court that she knew the appellant very well and that he does minor jobs. PW3 – testified that the complainant informed her the same night that the person who arrested her was Jomo who took her to the farm and raped her. I find from these evidence that the identity of the penetrator was never in doubt.



29. The learned trial magistrate at Page 46 of the record stated that:

I have no doubt in my mind that PW1 is a truthful and credible witness, she re-collected with clarity the events that took place on the material night. PW1 recalled that the accused defiled her three times when she screamed and accused released her.”

30. I find that the learned magistrate had the chance to see PW1 and observe her demeanor. This court has no reason to doubt the credibility of PW1. The learned magistrate stated that the appellant was well known to the complainant which the appellant did not dispute. He observed that the appellant and the complainant discussed and appellant asked her who made her pregnant and she told her it was Njeru.

31. It is clear from the evidence that the identity of the appellant is not hanged on recognition and not identification of a stranger. The appellant in his defence admitted that he knew the complainant’s mother. In R –Vs- Turnbull (Supra) the court stated that:

...The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation” At what distance” In what Light” Was the observation impeded in any way...” Had the witness ever seen the accused before” How often” If only occasionally, had he any special reason for remembering the accused” how long elapsed between the original observation and the subsequent identification to the police” Was there any material discrepancy between the description of accused given to the police by the witness when first seen by them and his actual appearance”... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

32. The court stated that recognition is better and may be more reliable than the identification of a stranger. The complainant was with the appellant for a considerable long and could not have failed to recognize a person she knew.

33. In the case of Ogeto Vs. Republic (2004) KLR it was held that:

It is trite that a fact can be proved by the evidence of a single witness although there is need to test it with greatest care the identification evidence of such a witness especially when it is shown that the conditions favouring identification were difficult.”

34. So care should be taken when tone claim to have identified a stranger as opposed to recognition. In this case there can be no doubt that the complaint identified the appellant as she knew him before and they even talked and were together for a considerable time. The court is allowed to rely on the testimony of the victim to convict provided the court had reason to believe that she was truthful. Section 124 of the *Evidence Act* provides as follows:

Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of alleged victim 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.”

35. The trial magistrate had not reason to doubt the complainant. I find that the appellant was recognized as the perpetrator.

Penetration

36. Section 2 of the *Sexual Offences Act* defines penetration as follows:
37. The partial or complete insertion of the person’s genital organ into the genital organ of another person.
38. Penetration is proved by the evidence of the complaint corroborated by medical evidence. The complainant gave details of how the appellant penetrated him.”
39. The testimony of the complaint was corroborated by medical evidence adduced by PW4. She told the court that she examined the complainant and concluded that there was penetration. She produced the P3 form as exhibit. The complainant was pregnant, so the broken hymen was not part of the evidence conforming penetration. The Court of Appeal in the case of Alex Chemrotei Sakong Vs. Republic (2018) eKLR, the court quoted with approval the court of Appeal decision. In Mark Osuri Vs. Republic (2013) eKLR where the court stated that:

In any event the offence is against penetration of a minor and penetration does not necessarily end in release of sperms into the victim. Many times the attacker does not fully complete the Sexual Act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and penetration need not be deep inside the girl’s organ.”

40. I find that the testimony of the complainant which was confirmed by PW4 proves beyond any reasonable doubts that there was penetration.
41. On the sentence, I find that the minimum mandatory sentence under Section 8(1) (3) of the *sexual offences Act* is 20 years. The Supreme court in Petition No. E018 of 2023 Republic Vs. Joshua Gichuki Mwangi & Others held that sentences under Section 8 of the Sexual Offences (Cap 163A Laws of Kenya) and Lawful as long as the *Sexual Offences Act* remains valid. The decision binds all courts by virtue of the system of court as provided under Article 163 (7) of *the Constitution* which provides that –“ All courts other than the Supreme Court are binds by the decisions of the Supreme Court.”
42. I therefore find that the sentence imposed on the appellant was lawful.
43. On the issue that the learned Magistrate did not establish who was responsible for the complainant’s pregnancy, I find that the issue was not before the learned magistrate and he had not obligation to make a finding on it. In any case, the fact that she was pregnant does not mean that the appellant did not defile her. Each case is taken and must be taken on its facts, law and other circumstances. On the ground that the defence was not considered, I have looked at the defence and noted it was clearly an afterthought as it brought other matters which were not put to the complainant when she testified.
44. The record shows that the defence was considered by the learned magistrate who concluded that the defence was an afterthought. The appellant raised a defence alibi. The Court of Appeal in the case of Victor Mwendwa Mulinge Vs. Republic (2014)eKLR while addressing alibi defence stated as follows:

It is trite law that the burden of proving the falsity, if at all of an accused’s defence of alibi lies on the prosecution. See *Karanja Vs. Republic* 1983 KLR 501.....this court held that in



a proper case, a trial court may in testing a defence of alibi and in weighing it with all other evidence to see if the accused's guilt is established beyond all reasonable doubts take into account the fact that he had not put his forward defence of alibi at an early stage in the case so that it can be tested by those responsible for investigations and thereby prevent any suggestion that the defence was an afterthought.”

45. In the case the finding by the learned magistrate that the defence of the appellant was an afterthought is proper as it was a surprise defence which was given too late in the day and failed to give the prosecution time to test its veracity and was not put to any of the witnesses when they testified. The ground lacks merits.
46. In the end I come to the conclusion that the conviction of the appellant was sound. The charge against the appellant was proved beyond any reasonable doubt.

Disposition

47. The appeal lacks merits and is dismissed.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 7TH DAY OF FEBRUARY 2025.

L.W. GITARI

JUDGE

