Gichuki v Republic (Criminal Appeal E027 of 2024)
[2025] KEHC 6973 (KLR) (15 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6973 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MARALAL

CRIMINAL APPEAL E027 OF 2024

AK NDUNG'U, J

MAY 15, 2025

BETWEEN

GEOFFREY GICHUKI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Maralal SPM's Criminal Case No.S.O.8 of 2018 – Hon. R.K.KOECH – SPM)

JUDGMENT

1. The Appellant was charged with the Defilement contrary to Section 8(1) (4) of the *Sexual Offences Act* No.3 of 2006. The Particulars were that on the diverse dates of January 2018 to the beginning of May,2018 at Maralal town in Samburu Central Sub-County of Samburu County within the Republic of Kenya intentionally caused his penis to penetrate the vagina of PE a child aged 16 years.

2. He faced an alternative Count of Indecent Act with a child Contrary to Section 11 (1) of the *Sexual Offences Act* No.3 of 2006. The Particulars were that on the diverse dates of January 2018 to the beginning of May,2018 at Maralal town in Samburu Central Sub-County of Samburu County within the Republic of Kenya intentionally touched the vagina of PE a child aged 16 years with his penis.

3. He was tried and in a judgment dated 8th April, 2021, he was found guilty on the main Count, convicted and sentenced to serve 15years imprisonment.

4. Aggrieved by the conviction, he lodged this appeal and set out the following grounds;

    i. That the learned trial magistrate erred in matters of law and facts by failing to note that the persecution failed to prove its case beyond and reasonable doubt.

ii. That the learned trial magistrate erred in matters of law and fact by failing to note that the prosecution's evidence was riddled with material contradictions, inconsistencies, untrue statements which were uncorroborated and therefore was unreliable to secure a conviction.

iii. That the learned trial magistrate erred in matters of law and facts by rejecting the appellants defence, without any cogent reason.

iv. That the learned trial magistrate erred in matters of law and facts by failing to consider that the appellant and the complainant met in a club where the complainant had been employed where any other adult would have treated him like as adult.

v. That the learned trial magistrate erred in matters of law and facts by failing to note that no DNA was conducted to prove that the appellant was the father to the complainant's new born baby.

vi. That the learned trial magistrate erred in matters of law and facts by failing to note that the investigations that were done on the matter were shoddy and could not have revealed the truth.

vii. That I pray to be present at the hearing of this appeal (sic)

5. The appeal was canvassed by way of written submissions. The Appellant submitted that PW1 testified under the oath that she was a female adult of 18 years with evidential proof of birth certificate.

6. Further that she wanted to forgive him and the prosecution referred the matter to the children department for a parental responsibility agreement ascertaining that the prosecution was consonance with the testimony of the PW1 she was as female adult.

7. Placing reliance on the case of Richard Munene =vs= Republic (2018) eKLR, the Appellant maintained that there was contradiction between the evidence of PW1 and that of her parents PW2 and PW3 who testified that they found PW1 in the home of the Appellant whereas PW1 said she went home on her own when she was locked out by the appellant from his house.

8. The Appellant submits that PW1 after PW1 gave birth, parents from both sides met and consented for joint parental responsibility confirming that indeed PW1 was an adult.

9. The prosecution is faulted for the failure to conduct a DNA test to ascertain the paternity PW1's child. This was necessary to prove the case beyond reasonable doubt.

10. For the Respondent, it is submitted that Section 8 (1) of the *Sexual Offences Act* provides a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

11. S. 8 (4) provides a person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years

12. That the *Sexual Offences Act* No.3 of 2006 defines "Penetration" as the partial or complete insertion of the genital organs of a person into the genital organs of another person.

13. 11. Reliance is placed on the case of FOD-vs-Republic (2014) eKLR, where Majanja J, expressed himself as follows:

> " In order to secure a conviction for the offence of defilement under Section 8 (1) of the *Sexual Offences Act*, the prosecution must prove that the person has committed an act which causes penetration with a child. "Penetration" under Section 2 of the Act means, "the partial or complete insertion of the genital organs of another person. "

14. That the testimony of PWI was beyond a shadow of a doubt, that the appellant lived together with the victim and had sexual intercourse. This evidence was corroborated by the testimony of PW2 and PW3. Further, that the testimony of PW5 indicates that the victim was 18 weeks pregnant and medical evidence was produced to prove the fact. This was evidence that PW1 was defiled.

15. It is submitted that the age of the minor was proved by the birth certificate (PEXH 1). It indicated that the victim was born on 20th May, 2001 and she was therefore 17 years old at the time of incident.

16. Counsel submitted that it is a settled principle of law that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.

17. It is urged that the prosecution relied on evidence that is cogent, which the appellant failed to shake in his defence. The trial court was right in determining that indeed the appellant was guilty of the offence of defilement.

18. On the question whether the victim presented herself as an adult the Appellant having met her at a club, it is submitted that this issue was not raised in the Appellant's unsworn statement of defence.

19. Further, that it is not mandatory that a DNA test be done to prove defilement.

20. This is a first appeal. It is the duty of this court as the first Appellate court to re-evaluate the evidence and make its own findings on the culpability or lack thereof of the Appellant. In the case of Okeno v Republic [1972] EA 32 at 36, Court of Appeal laid down the duty of the Court on a first appeal:

> " 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. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). 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 findings and conclusions; it must make its own findings and draw its own 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, see Peters v. Sunday Post, [1958] E. A. 424."

21. Earlier on, the The Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 had stated: -

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not

which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

22. The court is not involved in finding evidence to support the conviction. It is involved in wholesome review of evidence and reaching its own conclusions.

23. That duty is also further explained in Kiilu & Another v Republic [2005]1 KLR 174, where the Court of Appeal held that:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. 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 findings 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.

24. Further afield, the Supreme Court of India in K. Anbazhagan vs. State of Karnataka and Others, Criminal Appeal No. 637 of 2015 put it more succinctly as follows:-

> " The appellate Court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely,...The appellate Court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind – sans passion and sans prejudice. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test."

25. The evidence at the trial court was as follows. PW1 stated that she was 18 years old. At the time of the incident she was 17 years old. Her birth certificate showed that she was born on 20/5/2001.

26. She recalled that between January 2018 and May 2018, She got to know the Appellant after she finished class eight. They started a relationship as a boyfriend and girlfriend. She started living with appellant but when they differed, PW1 went home. PW1 was pregnant and her mother told her not to step home with the pregnancy.

27. PW1 and her mother went and picked the Appellant and took him to Maralal police station. They lodged a complaint and the appellant was arrested. She recorded her statements at the police station and was issued with P3 form to take to the hospital. The child sired by the appellant was born on 1/10/2018. The appellant is the father of the child.

28. PW2 stated that between January 2018 and May, 2018 PW1 the daughter disappeared from home. PW2 looked for her and found her in the house of the Appellant.

29. When she was found the matter was reported at Maralal police station. The police recorded the statements and the appellant was charged in court. PW1 one was found in the house of accused, she was pregnant. She was taken to hospital and they were told her delivery date was October, 2018. That time was between 16 and 17 years old.

30. PW2 stated that in October, 2018 PW1 gave birth to her child and parents of the appellant came and we had a discussion. They agreed that PW1 nurses the child for 6 months. They also went to children's office.

31. PW3 stated that between January, 2018 and May 2018 PW1 disappeared from home. They looked for her severally but did not find her. PW1 disappeared before Christmas on 2017. In March 2018 she found PW1 in the house of the appellant. PW1 had been impregnated by the Appellant. PW1 told PW3 that she was three months pregnant by then she had differed with the appellant.

32. She took her to hospital she was examined and found pregnant. PW1 went back home and stayed until she gave birth. PW1 delivered on October, 2018.

33. PW4 stated that he was the investigating officer in the matter. The complaint was reported on 6/5/2018. PW1 who is a minor reported that she cohabited with the Appellant from November,2017 after clearing her studies at [particulars withheld] primary school. When she got pregnant the Appellant chased her away. PW4 produced the birth certificate of PW1 in evidence.

34. He stated that the brother of the accused gave some money to PW1 to go to hospital to confirm if she was pregnant. PW1 was tested and her pregnancy test turned positive. The appellant locked her outside his house. PW1 then went to police station and lodged her report. She came alone but on that day her witness summons was recorded, she was accompanied by her mother.

35. He added that both parents of PW1 recorded statement. Both Corporal Kimwele and Police constable Wanya went and arrested the appellant at Choices hotel. They took him to the police station and charged him with the present offence. PW4 issued P3 form to PW1 to be filled in hospital. The doctor confirmed that she was in early stage of her pregnancy.

36. In cross-examination PW4 stated that they found appellant in his place of work. PW1 had told PW4 that Appellant impregnated her and she went to police station and reported.

37. PW5 stated that he is a registered clinical officer attached to Samburu County Referral Hospital. PW1 was taken there on 8/5/2018 with complaints of having been sexually assaulted in January, 2018. PW1 was in fair general condition.

38. PW5 confirmed that the abdomen was distended she was sent to laboratory for urinalysis and HIV test. Pregnancy test was not conducted because specimen was not available. PW1 was sent to ultra sound which revealed a visible foetus of 18 weeks. There was no infection and she was discharged. PW5 filled the P3 form on 8/5/2018 and treated the patient. PW5 produced the out-patient card PEXH.2 and P3 form as PEXH.3.

39. In cross-examination, PW5 stated that he doesn't know who is responsible for the pregnancy but PW1 knew the father of the child.

40. In his defence, the Appellant gave an unsworn testimony. He stated that he ran a butchery business and that he was aware of the charges facing him. He maintained that the complainant was not found in his house yet it was stated he had impregnated her.

41. He added that he was placed in the cells for 3 three days even though he had been told they were going to the police station for discussion. He was released on 4th day and told to go back to police station in the morning. He was asked to give the Officer Commanding Station (OCS) kshs.80,000/= but he didn't have the money. When he failed to pay the money, he was charged in court.

42. He added that he was unable to do his work in peace. He has been tormented very much. That the police officer who was tormenting him is called Kimwele. He stated that the complainant was taken to hospital but despite being linked to the pregnancy, he was not taken to hospital for a medical examination.

43. I have had occasion to consider the evidence as recorded at the trial court. In so doing, I have taken cognizance that I did not see nor hear the witness testify and have given due allowance for that fact. I have in the same vein considered the grounds of appeal, the submissions made and the applicable law.

44. Of determination is whether the prosecution proved its case to the threshold set in law and if in the affirmative, whether the sentence meted out was legal and appropriate in the circumstances.

45. Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act* establishes the offence of defilement as follows:

> " 8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> 8(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."

46. The specific elements of the offence defilement arising from Section 8(1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are:

    a. Age of the complainant;

    b. Proof of penetration in accordance with Section 2(1) of the *Sexual Offences Act*;

    c. Positive identification of the perpetrator.

47. The appeal herein is anchored on 4 main grounds being contradictions in the prosecution evidence, the failure to conduct a DNA test, the fact of PW1 presenting herself as an adult and the alleged rejection of the defence evidence without a cogent reason.

48. On the alleged contradictions, my reading of the record shows that the variance in the evidence of PW1 on the one hand and PW2 and PW3 on the other hand is about whether PW1 was found by the parents at the Appellant's home or she took herself home before a report was made to the police. This variance in my view not material since the main issue was whether the Appellant had penetrated PW1.

49. Our courts have time without number addressed the issue, extent and ramifications of contradictions in the prosecution's case. In MW v Republic [2019] eKLR, the court stated that:

> " The law as regards the issues of contradictions and discrepancies is very crystal clear. It is trite law that inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected.

50. In the case of Philip Nzaka Watu v Republic (2016) CR APP 29 OF 2015, the court took the opportunity to expound on the applicable parameters as follows;

> "The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

51. Again the Court, in Joseph Maina Mwangi versus Republic Criminal Appeal No. 73 of 1993, held, inter alia, that: -

> "In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies, must be guided by the wording of section 382 of the criminal procedure code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences"

52. Finally on this point, the Court of Appeal decision in Erick Onyango Odeng' v. Republic [2014] eKLR citing with approval the Uganda Court of Appeal case of Twehangane Alfred v. Uganda Criminal Appeal No. 139 of 2001, [2003] UGCA, 6 held;

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case."

53. My evaluation of the evidence leads me to the conclusion that the contradictions complained of are periphery matters that do not prejudice the Appellant.

54. As regards the alleged failure to conduct a DNA test, it is trite law that medical evidence where availed can be relied upon to prove penetration. But it is not the only evidence that can prove penetration. In our instant case, there is medical evidence that PW1 was found pregnant on medical examination. The emerging issue then is whether the accused had penetrated her leading to the pregnancy.

55. In Evans Wamalwa Simiyu vs. Republic 120161 eKLR the court held;

> ...section 36 of the *Sexual Offences Act* that gives the trial court powers to order an Accused person to undergo DNA testing uses the word "may". Therefore, the power is discretionary

and there is no mandatory obligation on the court to order DNA testing in each case. In our view, in the case of the appellant DNA testing was not necessary. This is because the minor complainant identified the appellant who was known to her as the person who sexually violated her. The trial magistrate who saw and assessed the demeanor of the witnesses believed the complainant that it was the appellant who violated her..."

56. The same principle was restated by the Court of Appeal in Geoffrey Kionii vs Republic Cr. Appeal No 270 Qf 2010, as follows:

> " Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80, Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

57. The evidence by PW1 that she cohabited with the Appellant for over 4 months in which period they engaged in sexual intercourse which resulted in PW1 becoming pregnant remains uncontroverted as the Appellant did not challenge it in cross examination or directly in his statement of defence. The fact of engagement in the sexual intercourse is corroborated by the medical evidence confirming the pregnancy of PW1. The Appellant's unsworn statement of defence narrates the circumstances of his arrest and fails to answer the evidence of long cohabitation with PW1 falling short of challenging the prosecution's evidence. In light of the evidence on record, the Appellant's defence remains a hollow statement that raises no doubts in the prosecution's case.

58. The next ingredient that required prove was the identity of the Appellant as the perpetrator of the act. Evidence abounds that the Appellant was well known to the complainant, a person who cohabited with him for over 4 months. He was properly identified.

59. The Appellant has in ground 4 of the appeal invoked Section 8(5)(b) of the *Sexual Offences Act* which grants an accused a defence if he reasonably believes the complainant was over the age of 18 years and therefore legally able to give consent to sexual intercourse. He asserts that the court failed to consider that the Appellant and the complainant met at a club where the complainant had been employed and any other adult would have treated her as an adult.

60. Suffice it to note that this issue is raised for the first time in this this appeal. It never featured at trial either in cross examination or in defence evidence and no application to adduce further evidence was made, and in any event, such would have been a weak one below the threshold set in law for admission of additional evidence, this fact, if at all, having been in the knowledge of the Appellant all along.

61. I hasten to add that the defence under Section 8(5)(b) of the *Sexual Offences Act* in my view is only available where in the first instance there is admission that the act of penetration took place but that the accused person presumed the victim an adult. Allowing a denial of the act and this defence to be raised at the same time would be tantamount to playing Russian roulette with the administration of criminal justice as it in essence would open room for a game of chance whereby an accused would be gambling on either of the 2 defences to succeed.

62. This defence is not available to the Appellant for the aforementioned reasons.

63. From the foregoing, the charge against the Appellant was proved to the required degree. It is my finding that the appeal herein lacks merit and is dismissed.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 15TH DAY OF MAY 2025.

A.K. NDUNG'U

JUDGE