



**Gacheche v Republic (Criminal Appeal E018 of 2021)
[2024] KEHC 985 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 985 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL APPEAL E018 OF 2021
CM KARIUKI, J
FEBRUARY 8, 2024**

BETWEEN

SIMON MUNGAI GACHECHE APPELLANT

AND

REPUBLIC RESPONDENT

(Being from the conviction and sentence by Honourable J Wanjala- Chief Magistrate delivered on 20th August 2021 in the Chief Magistrate Court at Nyahururu SOA Case No. 113 of 2018)

JUDGMENT

1. The Appellant Simon Mungai Gacheche was on 10/9/2018 arraigned in court where he was charged with the following offenses: -
2. Defilement Contrary to Section 8 (1) (2) of the *Sexual Offences Act* No. 3 of 2006. Particulars being that on the 7th day of September 2018 at Laikipia West Sub County within Laikipia County intentionally caused his penis to penetrate the Vagina of CMG a child aged 10 years.
3. From the typed charge sheet that is available on the Charge on page 2 is indecent assault particulars being that, on the 7th day of September 2018 at Laikipia West Sub County within Laikipia County intentionally touched the vagina of CMG a child aged 10 years. (see pages No. 44 and 5 of the Record of Appeal).
4. The prosecution called a total of six (6) witnesses in support of the charges whereas the Appellant gave an unsworn statement in his defense.
5. On 19/8/2021, the appellant was found guilty and convicted on the charge of defilement in Count No. 1. The Appellant was on the 20/8/2021 sentenced to life imprisonment.
6. The Appellant filed homemade grounds of appeal after he was convicted of defilement and sentenced to serve life imprisonment.



7. The grounds can be summarized as follows;
 - a. That, the trial magistrate erred in law and fact by not considering the fact that the complainant did not identify fully the accused as there were discrepancies between the description given by the father of the complainant and the complaint herself hence uncollaborated evidence.
 - b. That, the trial magistrate erred in law and fact by convicting the appellant without any DNA report that connected the accused with the act.
 - c. That, the trial magistrate erred in law and fact by convicting not the appellant not considering the discrepancies in P3 and PRC presented by the medical practitioners.
 - d. That, the trial magistrate erred in law and fact by not considering that the case was not proved beyond a reasonable doubt.
 - e. That, the trial magistrate erred in law and fact by convicting the appellant against the weight of the evidence hence passing a harsh sentence under Circumstances.
8. He prayed for judgment and sentence to be quashed and be set at liberty.
9. The parties were directed to canvass an appeal via submission but only Appellant Advocate lodged the same.
10. The prosecution evidence can be summarized as follows.
11. PW 1 ZKN is the father of the complainant. He told the court that the complainant was born in 2008 (on 9.4.2008). He produced (identified her birth certificate exhibit 1. He testified that on 7.9.2018 around 5.30 pm, he sent the complainant to take some clothes to his customer by the name Mama John at her shop at M M. He waited for the child to come back home for some time. Then it was getting late he decided to follow her to Mama John's place but he was told that she had left. He went back home but still the child had not come back home. When he was about to tell people that his child was missing he got informed that the child had been found but she had been raped and she was at the chief's place. He proceeded to the chief's place and found his child with the chief. The child looked disturbed. He took her to the hospital at Sipili the same night.
12. The child was examined and treated. He tried to talk to the child but she was not talking. The doctors checked the child and found that she had been defiled. He reported the matter to police. He stated that the child was bleeding from her private part and looked traumatized. She was not talking. Later he asked the child who told him that she had been defiled by a person she met at Mama John's shop but she did not know his name. He then inquired from Mama John who told him that the person who was at her shop when the child went there was called Mungai.
13. He stated that he knows the said Mungai. He went with other people to Mungai's home and found him. He was arrested and he is the accused person in this case.
14. He took Mungai to where the child was and she identified him to be the one that had held her. He was then taken to the police station. He identified the P3 form that was filled with respect to the child. Exhibit 3.



15. The child complainant testified as PW 2. She stated that she was born on 9.4.2008 as per the birth certificate (copy produced as exhibit 1). She testified that her father sent her to deliver some clothes for her child. That at the shop she met a person she had known as Mr Mungai.
16. He is the accused in this case. When she left Mama John's shop and started walking home the accused person followed her and offered to give her a lift on his bicycle. She sat on the bicycle and the accused person who said that he knew her home asked her whether they could pass a shortcut route or the long one. She opted for the shortcut route.
17. The accused person proceeded for a while and then they started walking. She stated that they had alighted from the bicycle when they reached a hilly place. The accused person stopped and got hold of her strangled her in the throat and told her not to scream. He then took her to a farm (shamba) and made her lie down on her back and he removed her clothes which included a skirt and long trousers.
18. She was not wearing a panty or she could not recall if she was wearing one. She was then defiled by the accused person. She stated that;

“ He had sex with me. I was lying on my back and he was lying on me”
19. She was pointing at her buttocks saying that she felt pain in the place where she used for long calls. After the accused finished he told her to go home but should not tell anyone. She went home when it was already night. Before she reached home she met a chief on the road and she informed him. The chief then took her to her home and near her home she met her mother who was looking for her around 8.00 pm.
20. She then informed her mother what had happened and described the person who had defiled her. Her mother checked her private part and found that she had been raped because she was bleeding from her vagina. She stated that;

“ I started bleeding after he had sex with me...”
21. Her parents took her to the hospital at Sipili and she was treated and her father (PW 1) went to report to the police. She stated that when the accused person was defiling her she asked his name and he said that he was called Maina. She accompanied her father to report to the police. She told her father that the person who had defiled her had met him at Mama John's shop.
22. Her father went to ask Mama John who said that the person was called Mungai and he was known. The father and other people looked for the said Mungai who was arrested and was taken to her home. She identified him before he was taken to the police station. He is the accused person herein. She stated that when the accused person was arrested he was still wearing the same clothes he had when he defiled her.
23. She identified some clothing in court that was taken from the accused person when he was arrested being a jumper white and black checked jumper. She also identified a skirt to be the one she was wearing and a petty coat. A small dark blue long trousers and a long-sleeved T-shirt. She stated that those were the clothes she was wearing on the material date.
24. PW 3 Mary Wanjiru or Mama John testified that on 7.9.2018 the complainant went to her home taking her some clothes for her child. She had been sent to take the clothes to her by her father. She stated that she tried the clothes on her child and only one fitted the child. She gave the other clothes to the complainant to be returned to her father. When the complainant was leaving her house she had a shop



she was left with a customer whom she identified to be the accused person in this case who had a bicycle. She stated that;

“The customer was Mungai. He used to come to my home to buy cigarettes. Mungai asked for Kiraiko (cigarettes) and I told him that I did not have one. I told him to go and buy from Baba Mburu – a neighbor who had a shop. Mungai left”

25. That Mungai (accused) had a bicycle and a panga. That the accused person left. Later the complainant's father (baba M) came asking where his child was. He told him that the child had left to go back home meaning the complainant herein. The complainant's father left.
26. The following day Baba M went and asked whether she knew the customer who came to her home when the child was there. She told me the complainant's father the customer who came when his child was at her home was known as Mungai. Then the complainant's father PW 1 told her that the customer (ie Mungai) had raped his child.
27. When she saw the accused person in court she pointed him out to the court as the customer who went to her home when she was there on 7.9.2018. She stated that the accused person was the last customer that went to her shop on that day and he met the complainant at the shop. She stated that the accused used to go to her shop quite often. She knew him very well.
28. PW 4 Nancy Wanjiku Wachira – a registered clinical nurse testified that in September 2018 she was working at Sipili Health Centre. She is the one who filled out the P3 form (exhibit 3) for the complainant herein. She also saw her. She stated that the status of her clothes – long trousers were wet with urine and blood stains. Her skirt was also blood-stained. She was wearing it but it was blood-stained and had dust.
29. On examining the complainant – general body physical examination there was no problem but on the lower limbs, she saw blood stains on both legs. There was a laceration on the neck on the left side. The approximate age of the injuries was some hours because she saw the child on the same date of the incident. Section C of the P3 form indicates that on the labia majora labia minora and cervix, she saw no tear, and no sperm deposit but she saw whitish discharge on the labia minora.
30. That she found the presence of blood in the vagina on the labia majora and labia minora. She concluded that there was evidence of penetration to show that the child had been defiled. The hymen was broken and there was a tear on the anal region up to the vagina there was the presence of blood and the tear showing that there had been penetration. She also talked to the child (complainant) who told her that she had been defiled by someone she could identify. She produced the P3 form exhibit 2.
31. A PRC form was filled by PW 6 Lucy Nyambura Ngethe who was a nurse at Sipili Health Centre on 7.9.2018 when she was on night duty. The complainant was presented to the hospital on that night. She found that the child had a tear in her private parts. (kwa njia ya kisasi), which she refers to as a perineal tear. On the head and left she saw dust on the head at the back of the head and a small injury to the left ear – a bruise. She also examined her private part and concluded that the child had been raped. She produced the PRC Form.
32. The investigating officer No 58561 SS Jacob Musungu stated that on 8.9.2018 he received the complaint from her father PW 1 at the Sipili police post who reported that the complainant had been defiled by a neighbour. On 9.9.2018 the complainant returned to the police station accompanied by an assistant chief called Richard and they presented to him the suspect by the name of Simon Mungai. The complainant was also present and she stated to him that he was the one that had defiled her on 7.9.2018 after he went to him at Mama John's shop.



33. He stated that the P3 form was filled on 10.9.2018 and on 11.9.2018 he charged the accused person with the present offence and presented him to court. He stated that the complainant identified the jacket that the accused person was wearing when he was presented at the police post to be the same jacket the accused person was wearing when he defiled her. He kept the jacket as an exhibit. He did not however produce the jacket as it was said to have been misplaced after he left the station on transfer.
34. The accused person was put on his defense. He denied the charges. He stated that on 9.9.2018 he was arrested by the assistant chief Richard Mutahi Waigwa and a village elder who alleged that he was spoiling school girls. He was charged and taken to court with defilement which he denied. He alleged that he had differences with the assistant chief and the complainant's family before his arrest.
35. I have considered the evidence. The complainant states that she was defiled by the accused person. Her father PW 1 stated that he sent the complainant to deliver some clothes to PW 3 and later on she delayed returning home which prompted him to start looking for her only to find her later having been defiled. The complainant identified the defiler who is said to be the accused person.
36. The P3 form and PRC form indicate that the complainant had been defiled. Her father confirmed to have seen blood oozing. Also, the clinical officer confirmed the presence of blood stains on her private part.
37. **Appellant's Submissions**
38. The appellant submits that the Charge sheet is fatally defective as it carried two counts of defilement relating to the same complainant. Count 11 was not an alternative to Count 1 but a charge of defilement on its own. The defect was fatal and the appeal should succeed on that very ground alone. Thus the variation in the evidence and the charge sheet prejudiced the appellant's case and is incurable under Section 382 of the Criminal Procedure Code.
39. On identification, it is submitted that the offense is alleged to have been committed at dusk when conditions for proper identification were difficult. According to the complainant PW2, it was the first time she had seen the person who offered to carry her with a bicycle and she did not know him before. This is the person who allegedly defiled her. In her earlier evidence as found, she stated that she left the accused person in Mama John's home outside the house and went home. She had known that he was called Mungai.
40. From the aforesaid evidence, it follows that the person left at the shop of PW3 and the person who carried the complainant with a bicycle and later defiled her are completely two different persons as the former was known to the complainant as Mungai whereas the latter was unknown to her and it was the first time she was seeing him.
41. When PW2 the complainant met with the Chief, she did not tell him that the person who had defiled her was called Mungai. She only informed him that the person had a small swelling on the face. She did not inform her parents that it was Mungai who had defiled her despite having earlier confirmed that she knew the accused person as Mungai.
42. In her evidence, she stated that the person who defiled her had told her that his name was Maina and that he told her after she asked him his name. This is a clear indication that the person was unknown to her and the reason she was asking him his name. She further went ahead to confirm that she told her father that the assailant was called Maina and not Mungai.
43. The chief was not called as a witness to confirm that the accused had swelling on his forehead at the time of his arrest. PW1 the complainant's father did not testify on the swelling and this supports submissions that the assailant was a completely different person from the accused in Court.



44. After the accused person was arrested, no identification parade was conducted to enable the complainant to pick him as the assailant. The accused was taken to the complainant's home where she was asked to identify him. Of course, the accused was the only person under arrest at that particular moment and it was easy for the complainant to pick him out from the others as she knew or must have known from the surrounding circumstances that he was the one under arrest.
45. Although the complainant alleged to have identified his clothing, the first record or O.B. entry was not produced to confirm that she had reported that she was able to identify the assailant and that a description of the clothing was given to the police.
46. More contradiction came out in cross-examination where the complainant alleged that she did not know the accused before he carried her but she knew his home. PW3's evidence was not credible as although she claimed to have known the accused before the date of the incident, she confirmed in re-examination that it was her husband who gave her the name of the accused person.
47. The question that begs is why did she ask for his name if she knew him before, could she have described the wrong person to the husband who gave her the name of the accused? The witness did not see the complainant with the accused person and she did not see the direction taken by the accused after he left her shop.
48. PW1 the Complainant's father confirmed that when he went to report at Sipili Police Station, he reported that her child had been raped by an unknown person. The child confirmed to him that she could not know the person. He did not confirm the child mentioning Maina or Mungai which contradicts the complainant's evidence. Chief who is mentioned severally was not called as a witness.
49. In the case of Peter Mwangi MungaI V R (2002) eKLR, the Court held as follows on the issue of identification: -

“Two main issues are raised in this appeal, First, whether the identification of the appellant as one of the people who robbed the complainant, was free from error. Secondly, whether a failure to call an eye witness to the robbery vitiates the appellant's conviction.

In Owen Kimotho Kiarie R. Criminal Appeal No.93 of 1983 unreported this court held that dock identification of a suspect is worthless unless it is preceded by a properly conducted identification parade. The principle was re-echoed in the case of Charles O. Maitanyi versus – Republic [1985] 2 KAR75. In that case, it was also held that even where the dock identification is preceded by a properly conducted identification parade the evidence of a single identifying witness must be tested with the greatest care before a conviction is entered. The court there said:

“That cannot be done unless the identifying witness has made a report as to whether he could identify the accused and given a description. His ability to identify the accused is then to be tested on an identification parade ... If one is to test the evidence with the greatest care this was the way that the Court of Appeal in England in R.L Turnbull [1976]3 ALL ER 549 saw the examination. The Judge... examines closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation" At what distance" In what light" Was the observation impeded in any way by traffic or a press of people" 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 the accused given to the police by the witness when first seen by him and the accused's actual appearance "

50. It is submitted that the accused ought to have been subjected to an ID parade and it was erroneous for the complainant's father and the Chief to have taken the appellant to his home where he was shown to the complainant. Failure to hold an ID parade was fatal in this case.
51. There were grave contradictions as noted from the evidence on record on who the perpetrator was and the Court did not address itself on this issue noting that the name Mungai came up after the accused was arrested and no investigations were carried out on Maina who was mentioned by the complainant earlier.
52. Chief Richard was a crucial prosecution witness as he was the first person to have met with the complainant after the accused was arrested and no investigations were carried out on Maina who was mentioned by the complainant earlier.
53. In the case of Peter Mwangi Mungai versus - Republic [2002] eKLR supra, the court Held that:
"Besides there was an eye witness, Abdi Kadir, who should have, but did not testify. There was no explanation given to the prosecution for their failure to call him as a witness. He was an important witness as the trial was at some stage adjourned to enable the prosecution to get him. But he was not called. The law is clear that the prosecution has a duty to call all witnesses necessary to establish the truth, but where the evidence in support of the charge against an accused is barely adequate the court hearing his case will be perfectly entitled to draw an adverse inference that where a witness who should have been called was not called his evidence would have tended to be adverse to the prosecution case. (see *Bukenya and others vs. Uganda* [1972] EA 549). We think that this is a proper case for such inference."
54. If the appeal on conviction does not succeed, the sentence of life imprisonment be set aside. The Learned Trial Magistrate imposed the sentence as it was the only sentence provided for under Section 8 (1) (2) of the *Sexual Offences Act*. Imposition of minimum sentences under the *Sexual Offences Act* was declared unconstitutional in the case of Philip Mweke Maingi & Others – Vs- ODP and the A.G. in Petition No. E017 of 2021 and in the case of Joshua Gichuki Mwangi versus -Republic Court of Appeal at Nyeri Criminal Appeal No. 84 of 2015 urge the court to reduce the sentence to an appropriate sentence given that the appellant was a first offender with no previous records.
55. **Issues, Analysis and Determination**
56. I have considered the evidence on record and the submissions filed. I find the issues are; whether the ingredients of the offence were proved any reasonable doubt and whether the sentence is excessive.
57. A first appellate court has to review and re-evaluate the evidence before the trial court and reach its conclusions, taking into account of course that the appellate court did not have the opportunity to hear and see the witnesses testify. See *Pandya vs R* [1957] EA 336; *Ruwala vs. Re* [1957 EA 570;
58. The offence of defilement is rooted in three main ingredients the age of the victim (must be a minor), penetration, and the proper identification of the perpetrator. These ingredients are provided for under section 8(1) of the *Sexual Offences Act* No. 3 of 2006 and must each be proven for a conviction to sue.
59. The complainant states that she was defiled by the accused person. Her father PW 1 stated that he sent the complainant to deliver some clothes to PW 3 and later on she delayed returning home which prompted him to start looking for her only to find her later having been defiled. The complainant identified the defiler who is said to be the accused person.



60. The P3 form and PRC form indicate that the complainant had been defiled. Her father confirmed to had seen blood oozing. Also, the clinical officer confirmed the presence of blood stains on her private part.
61. The trial court held that it was satisfied from what was adduced in this case that the complainant was defiled. That evidence is not contested nor is the age of the victim which in any case was established by the prosecution. The epicenter of the contest is the perpetrator of the act of defilement to the victim. The appellant contends that it was not him who committed the heinous crime. The only person identified as the accused person is the defiler. He was with the complainant at Mama John's shop before the said defilement occurred on the same date.
62. The accused person alleges having a dispute or a difference between him and the assistant chief and the father of the complainant. He did not elaborate on the said grudge or differences. The trial court held that it witnessed the complainant testify. She stated that the accused person defiled her. The P3 form indicates that she sustained some tears in her private part which extended to her anal area. There was the presence of blood oozing from the private parts.
63. The trial court was satisfied that the complainant was truthful in her evidence that she was defiled. Her evidence was corroborated by that of PW 1, PW 3, PW4, PW5, and PW 6. She was born on 7.4.2008 meaning that as of 7.9.2018 she was aged 10 years and some months. She was a child under the age of 10 years.
64. On the defect of the charge sheet, the appellant submitted, that, the Charge sheet is fatally defective as it carried two counts of defilement relating to the same complainant. A perusal of the same proves otherwise. The trial court shows a charge sheet containing a defilement charge on page one and the next leave committing an indecent act. The only omission is the word alternative.
65. There is no contest as to the content nor contention as to any prejudice in the appellant case. Section 382 cures such omissions and thus I uphold the trial court holding that the charge sheet was properly drafted save for the noted omission.
66. In the circumstances of this case, there is no variation in the evidence and the charge sheet which prejudiced the appellant's case and thus it is curable under Section 382 of the Criminal Procedure Code.
67. This court finds that the trial court was justified in holding that, it believed that the complainant was defiled. The trial court did not find any logic in the accused's defense that this was a framed case against him due to a grudge or differences. The appellant did not ask the witnesses about the said differences. The accused's defense is not convincing. I see no fault in trial court findings, thus, I do hold and find that the complainant was indeed defiled by a person she was able to identify as the appellant who offered to give her a lift on a bicycle but later turned against her.
68. It was still in broad daylight and the victim had ample time to see the appellant from the shop to the scene of the crime and in times they were engaged in conversations along the way and at the time of the actual defilement. Thus, an appeal on conviction has no merit.
69. The Appellant advocate submitted that The Trial Magistrate imposed the sentence as it was the only sentence provided for under Section 8 (1) (2) of the *Sexual Offences Act*. Imposition of minimum sentences under the *Sexual Offences Act* was declared unconstitutional in the case of Philip Mweke Maingi & Others – Vs- ODPP and the A.G. in Petition No. E017 of 2021 and in the case of Joshua Gichuki Mwangi versus -Republic Court of Appeal at Nyeri Criminal Appeal No. 84 of 2015 thus



urge the court to reduce the sentence to an appropriate sentence given that the appellant was a first offender with no previous records.

70. In the case of Appeal criminal case no 22 of 2018 Evans Nyamari Ayako vs Republic delivered in Kisumu on 8/12/2023 the while reiterating the unconstitutionality of the Life imprisonment of life sentence held”...considering the comparative jurisprudence, and the prevailing socio-economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the convict. Instead, we now hold, life imprisonment translates to thirty years imprisonment”
71. Appellant having been stated to be a first offender, his sentence shall thus be reduced in the circumstances.
72. Thus, the court makes the orders;

i. The appeal on conviction and sentence is dismissed and the conviction upheld.

ii. The life imprisonment sentence is set aside and substituted with a twenty (20) year imprisonment to run from the date of conviction by the trial court.

DATED, SIGNED, AND DELIVERED AT NYANDARUA THIS ___ 8TH DAY OF FEBRUARY 2024

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C KARIUKI

JUDGE

