



**Ndinda v Republic (Criminal Appeal E054 of 2022)
[2024] KEHC 1271 (KLR) (7 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1271 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL APPEAL E054 OF 2022**

RK LIMO, J

FEBRUARY 7, 2024

BETWEEN

JAPHET KASYOKI NDINDA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Japheth Kasyoki Ndinda, the Appellant herein was charged with the offence of defilement contrary to section 8(1) (4) of *Sexual Offences Act* No 3 of 2006.
2. The particulars of the offence were that on the 27th August 2020 at Kasevi sub-location, Thokoa location, Migwani sub-county within Kitui County, intentionally caused his penis to penetrate the vagina of one SMK a child aged 16 years 7 months.
3. He also faced an alternative charge of indecent act but was found guilty in the main charge. The Appellant denied committing the offence and below is a summary of the evidence tendered at the trial.
4. SMK (PW 1) the complainant in the case stated that she was 16 years old having been born on 1/04/2004. She stated that she was at home on the material day in the evening around 8-9pm when she heard someone knocking on their door. She stated that she asked who it was and the person stated that it was Kasyoki (the Appellant) and that he had been sent by someone to call the complainant. She stated that she went out to the road and while there, the appellant grabbed her, blocked her mouth and took her to his house. That while there, he instructed her to undress and when she refused, he threatened her and proceeded to tear her dress then he defiled her. She stated that she couldn't go home the following morning as she was in pain and the appellant called his brother's wife Kahindi who took her to her house where she was locked in the entire day. She stated that while she was locked in the house, she heard her sister MK inquiring about her and the appellant lied that she was not in the house. That she then heard the appellant asking his sister in law Kahindi to set her free and that the same



- Kahindi asked her to lie and say that she had spent the night in a bush. She stated that she walked out and she met her sister who took her to Ikome Nzoka Police Post. That from the police post they were referred to Migwani Police Station and later to Migwani hospital where she was treated. During cross examination, the witness denied being in a relationship with the appellant and maintained that he had defiled her. She also indicated that the two did not meet anyone on their way to the appellant's home. She also testified that she met her sister at the river when she was released from the appellant's home.
5. PW2 MKK PW1's sister told the trial court that PW1 went missing on 26th August 2020 at around 9pm and on 27th August 2020 she was informed by someone she referred to as Mulingwa that PW1 was at the appellant's home. She stated that she went to the appellant's home and on her way, she met appellant's mother who informed her that PW1 was at the appellant's house. That the two proceeded to the appellant's house but the appellant denied knowing about PW1's whereabouts. She testified that she gave her contacts to the appellant and left but he called her shortly after as she was talking to some pastors and informed her that PW1 was with appellant's sister in law by name Kahindi. She stated that she then saw PW1 coming from the appellant's compound and that her dress was torn and dirty. That she called her mother who came with the Area Chief and the matter was then reported to the police.
 6. Francis Sila Ngwee – (PW3) the Area Chief testified that the complainant's mother called him on 28/8/2020 at around 11:00a.m, informing him about the disappearance of her daughter (S PW1). The chief testified that the mother had gotten a tip off that her daughter was at the Appellant's home and that he went to the Appellant's home with the mother but the Appellant and his mother denied seeing or hosting her. The Chief stated as they were about to leave, he got a call that S was just in the neighbouring house belonging to one Mulatya Muthui where they headed to and found the girl. He stated that when he interrogated her, she disclosed that she had been at the Appellant's home for 2 days and following that information, he handed the matter over to the police who later arrested the Appellant.
 7. TK (PW4) - The complainant's mother narrated about her daughter's disappearance from home on the night of 26th August 2020 and the search that ensued from 26th -28th August 2020. She stated that she received a tip that her daughter (PW1) was at the Appellant's home on 28th August 2020 and reported the same to PW3, the area chief who accompanied her to the Appellant's home. She also testified on how they found PW1 at Pastor Mulatya's home and she initially told them that she had slept in a bush but later stated that she had spent two days with the appellant. She testified that she reported the incident to the police and later took PW1 to hospital.
 8. Dr Phyrus Omondi (PW 5) a medical officer based at Migwani Hospital testified that he examined the complainant on 28/8/2020 and found that her vaginal wall was reddish and inflamed and that her hymen was freshly torn and noted lacerations inside her vagina with whitish discharge, which upon laboratory tests, indicated presence of sperm. He marked the P3 Form as PEXH 4.

He testified that the complainant was also examined by his colleague who filled the PRC form and confirmed that the findings were consistent with that he had found out. He tendered the Post Rape Care (PRC) as PEXH 2 and the Treatment notes as PEXH 1. He testified that the lacerations inside the vagina showed that force was used.
 9. PW6 P.C Sylvanus Odhiambo of Migwani Police Station and the investigating officer in the matter stated that the case was reported at the station on 29/8/2020 by the complainant, her mother and sister. He also stated that he accompanied them to Migwani Sub-County Hospital where PW1 was attended to and he later apprehended the appellant from his home. He produced PW1's birth certificate.



10. Japheth Kasyoki Ndinda, the appellant herein on defence gave a sworn statement and denied committing the offence and stated that he spent 28/8/2020 working and was arrested later that day from his home. He denied spending time with PW1 and claimed that he had been framed.
11. Kahindi Mwangangi (DW2) stated that she was the appellant's sister in law. She testified that she saw PW1 by the river on 27/8/2020 and that PW1 told her that she could not go home because her mother was angry with her as she had found out that PW1 had a boyfriend. She stated that she offered to take the complainant home but she refused.
12. The trial court evaluated the evidence tendered and found that the prosecution's case had been proved beyond doubt and convicted the appellant, sentencing him to serve 15 years in jail as provided by the law.
13. The Appellant felt aggrieved and filed this appeal, raising the following grounds, namely:
 - i. That the trial magistrate erred in both law and fact without considering that the appellant was detained for four days before being arraigned in court hence violating his rights.
 - ii. That the learned magistrate erred in both law and facts by convicting the appellant while relying on collaborated evidence of witnesses without considering all were from one family and could liaise to upload this heavy burden upon his shoulder.
 - iii. That the trial magistrate erred in both law and fact by convicting the appellant so harshly relying on doctor's report that the vaginal minora was broken of which nothing proved that the girl was defiled by the accused person other than another person.
 - iv. That the learned trial magistrate erred in both law and fact by rejecting the appellant's strong defence which could beat or challenge all witness evidence.
14. The appellant filed amended grounds of appeal on 19th September 2023 without leave of this court as provided under Section 350(2) of the [Criminal Procedure Code](#) which provides;

“A petition of appeal shall be signed, if the appellant is not represented by an advocate, by the appellant, and, if the appellant is represented by an advocate, by the advocate, and shall contain particulars of the matters of law or fact in regard to which the subordinate court appealed from is alleged to have erred, and shall specify an address at which notices or documents connected with the appeal may be served on the appellant or, as the case may be, on his advocate; and the appellant shall not be permitted, at the hearing of the appeal, to rely on a ground of appeal other than those set out in the petition of appeal.”
15. For the court's record, in addition to the appellant contending that the prosecution failed to prove its case, the additional grounds are that prosecution's evidence was contradictory and uncorroborated, that the credibility of the witnesses and evidence tendered was questionable, that crucial witnesses were not called and that the sentence passed was harsh.
16. The appellant submits that there was no indication that conditions were favourable for his identification at the material time as the complainant testified that she was abducted at night. He submits that none of the witnesses testified about seeing him with the complaint. He further faults the prosecution's case submitting that key witnesses were not called. He has identified the two pastors who are reported to have accompanied PW2 appellant's home. The other person that the appellant ought to have been called is a man he identified as Mulingwa who informed PW2 about the complainant's



- whereabouts. The other person the appellant submits should have been called is a pastor called Mulatya who he submits was the owner of the home where the complainant was found.
17. On the sentence, the appellant submits that the trial court erred in relying on the complainant's testimony to sentence him. He submits that she was not a truthful witness as she allegedly told the police that she was at her boyfriend's house then later changed testified that she had been kidnapped.
 18. On sentence, the Appellant makes a 360 degree turn and contends that he has now been rehabilitated and he has since repented and is now a changed man. He prays for leniency stating that this court should consider the time he has so far spent in custody to be sufficient deterrence.
 19. The State has opposed this appeal on conviction but concedes that the sentence maybe reviewed on grounds that this was a Romeo and Juliet situation.
 20. The Respondent insists that it was able to prove all the ingredients of the offence and submits that the appellant's conviction was safe.
 21. On the contradictions highlighted by the Appellant, state counsel concedes on the same but submits that they did not go to the root of the prosecution's case. Counsel concedes that the complainant gave different version of how she disappeared from home and ended up at the appellant's and where she spent the night. Counsel further points out that it was apparent that the complainant heard her sister looking for her but failed to raise alarm.
 22. This Court has considered this appeal and the response made. My role as a first Appellate Court is to re-evaluate the evidence tendered with a view to making my own conclusion.
 23. The Appellant was charged with defilement contrary to section 8(1) (4) of *Sexual Offences Act* No 3 of 2006 which provides as follows:
 1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - (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.
 24. 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:
 - i. Age of the complainant
 - ii. Proof of penetration in accordance with section 2(1) of the Sexual Offences Act; and
 - iii. Positive identification of the assailant.
 25. This Court has considered the evidence tendered and it is quite clear that the prosecution established and proved all the elements to the required standard in law and perhaps at that realization that informed the appellant's change of tune in his submissions because he did an about turn and stated that he has repented and he is now a changed man after a Damascus moment in the correctional facility.
 26. The complainant's evidence was that she was at home on the material night when she heard someone knocking. She stated that she went out and the Appellant grabbed her, blocked her mouth and took her to his house which she stated was about 500 meters away and defiled her. This testimony was consistent with medical evidence which was tendered by Dr. Phyrus Omondi (PW5) who examined PW1. His testimony was he found that PW1's vagina wall was reddish and inflamed and her hymen was freshly



- torn. He stated that he also observed lacerations inside her vagina and whitish discharge that looked like semen which was confirmed to be semen after a lab test. He produced a P3 form dated 28/8/2020.
27. The prosecution was therefore able to prove beyond reasonable doubt that there was indeed penetration under the meaning of section 2 of the *Sexual Offences Act*.
 28. On identification, evidence that came forth was to the effect that the appellant and the complainant were neighbours. The appellant admitted to the same which was also consistent with the complainant's testimony on the proximity of her parent's home and that of the appellant. The complainant also gave an account of how the two of them ended up at the appellant's home. The complainant also initially told the police that she was in a relationship with the complainant and that she had gone to live with him after differing with her mother. PW6, the investigating officer testified on this and the complainant confirmed in cross examination that she had indeed told the police that the appellant was her boyfriend. The two of them knew each other and the issue of wrong identification in my view did not occur.
 29. The conviction of the Appellant was safe because all the ingredients of the offence were proved.
 30. The only issue for determination is the sentence. The State concedes that this was a Juliet and Romeo kind of engagement. I have checked the record and note that the appellant was born in 1995, which means that at the time he was approximately 25 years old. The girl was about 2 months shy of attaining the age of 17 at the material time.
 31. It is evident that the girl was under 18 but she voluntarily accepted to stay with the Appellant for 2 days. There is no other explanation that she was tied or locked up in a room for two days. It is apparent that she made no effort to either resist or call for help even when her Sister went there looking for her. That however does not mean that the court should condone such behaviour especially where an assailant takes advantage of the naivety of a young girl in order to commit offences.
 32. That does not mean that the courts should not convict where there is evidence but what it means is that in meting out an appropriate sentence, courts should not be tied by the mandatory prescription of sentence provided by the Statute. A Court should use its discretion to mete out an appropriate sentence after considering all the circumstances and other relevant factors like remorsefulness and the ages of both the complainant and the accused persons.
 33. It is on that ground that while I uphold the conviction, I will set aside the 15years sentence and replace it with a jail term of 8 years from the date of conviction (26th October 2022), because prior to that the appellant was out on bond.

DATED, SIGNED AND DELIVERED AT KITUI THIS 7TH DAY OF FEBRUARY, 2024.

HON. JUSTICE R. LIMO - JUDGE

