



REPUBLIC OF KENYA



**Gichangi v Republic (Criminal Appeal E015 of 2021)
[2024] KEHC 2363 (KLR) (5 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2363 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL APPEAL E015 OF 2021
RM MWONGO, J
MARCH 5, 2024**

BETWEEN

THOMAS MURIMI GICHANGI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the judgment of Hon M. Kivuti
delivered on 22nd Sept 2021 in PMCC S.O No.30 of 2019)*

JUDGMENT

1. The Appellant was charged in the trial court with the offence of defilement contrary to Section 8(1) and (2) of the *Sexual Offences Act* No 3 of 2006. He also had an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence are that on the 18th August, 2019 at [particulars withheld] village in Mwea West sub county within Kirinyaga County, unlawfully and intentionally caused his penis to penetrate the vagina of J.W.G a child aged 10 years.
2. The prosecution called 5 witnesses and the appellant gave a brief unsworn statement. After the hearing the appellant was convicted for defilement and sentenced to serve life imprisonment on 22nd September, 2021.
3. Dissatisfied, the appellant moves this Court on the grounds that:
 - 1) The prosecution did not prove its case beyond reasonable doubt.
 - 2) The ingredient of defilement was not proved.
 - 3) He was not subjected to a medical examination.
 - 4) His defense was ignored.



4. The prosecution case was as follows. PW1- JWG was the complainant; She testified as PW1. She said that she lives in [particulars withheld] village, and is 10 years old. She is a pupil at [particulars withheld] Primary School. On the material date, she said she attended [particulars withheld] village with her grandmother JW. Her grandmother was left behind after church. Her (complainant) friend namely B whose mother was hospitalized did not attend church and she had been given Kshs.20 by her mother to give B as her contribution.
5. She was in the company of one Annie, when she decided to go to Kambi area near their church to buy a cake before proceeding to Beth's house. Annie was called by her aunt and she left her behind. The accused beckoned her while at a shop where a game was being played. She had met with the accused prior to the incident when he accompanied her mother to buy hay in a certain farm where the accused was warding off birds. She was standing outside the game shop when the accused beckoned her. When she approached the accused, he told her to accompany him to his house so he could tell her a secret.
6. They walked to his house which was a bit far. He unlocked the padlock and opened the door. It was a single room among others in a row of houses within a plot. It had a seat, a bed and a radio. She sat on the chair. After the accused entered, he removed all her clothes. He then removed his clothes and locked the door. It was about 1 pm.
7. The accused put on a plastic thing which looked like a balloon on his 'susu'(penis). He lay on her then inserted it in her 'susu'(vagina) between her legs. He defiled her on the seat. She told him to stop and threatened to tell her mother. However, the accused unclenched her hand and put Kshs.100. She dressed up and put the Kshs.100 in her skirt pocket. She had worn a red skirt and a white top.
8. She unbolted the door from the inside and left the accused in the room. She went home and told her mum that she was feeling pain on her private part. Her mother told her that she was growing into an adult. Later, when she felt pain while passing urine, she told her mum that Toma had defiled her.
9. Her mum took her to the police station in Kangai, then she was taken to Sagana police station. She was taken to hospital where she was examined and the doctor told her that she had not contracted HIV. Her mum was given the treatment documents. She recorded a statement.
10. In cross examination by the accused, she stated that they were alone in his house and she could still tell its location as it was near Mwalimu's house in [particulars withheld] village. On re-examination, she stated that she had seen the accused in Marura on several occasions before the incident.
11. PW2- Regina Wangui, the complainant's mother, testified that on Sunday 18th August, 2019 at about 10am, the complainant and her grandmother left for church in [particulars withheld] village. Her grandmother left her behind. The complainant arrived home at 7 pm and when she asked her why she was late, she replied that she had passed by her aunt's house to watch TV. She warned her never to go home late again.
12. On Wednesday morning that week, the complainant arrived home at 9pm and her mother beat her up for being late. JWG told her that she had been at her aunt's place where she was watching TV. The complainant stopped her mid-way as she was beating her and informed her that Tomas had called her on Sunday and he told her to love him and to have sex with him but she refused.
13. PW2 called her husband and told JWG to repeat what she had told her and she did. She took her to Kangai police post where they made a report. They led police officers to Nguka village where the accused who was a boda boda operator was arrested. They proceeded to Sagana police station. The complainant was treated at Sagana sub county hospital. She was issued with a P3 form which was filled



- at the same hospital. She stated that the accused was known to her as there was a time he used to operate a barber shop in Marura B village.
14. In cross examination by the accused, she stated that the complainant informed her that he had defiled her 3 times.
 15. PW3- Gideon Muchira is a clinical officer at Sagana sub county hospital. He testified that the complainant was initially examined at the facility by his colleague Grace Wangari who was the author of her treatment note while he filled the complainant's P3 form.
 16. He stated that the complainant had a history of being defiled by a person known to her. Upon genital examination, her hymen was broken and she had lacerations on her vaginal wall. There was proof of penetration by dint of the broken hymen and laceration at the entry of the vaginal orifice. He relied on the treatment notes to fill the P3 form which he produced as an exhibit.
 17. In cross examination by the accused, she stated that there was no indication as to whether the perpetrator used a condom.
 18. PW4 - Watere Muriithi is a clinical officer at Sagana sub county hospital. She testified that she examined the complainant on 22nd August, 2019 at the facility. She gave a history of being defiled by a person known to her 3 times at [particulars withheld] village. On vaginal examination, she had lacerations around both labias at the opening of the vagina. Her hymen was broken which was proof of penetration.
 19. She underwent lab tests. HIV test turned negative, urinalysis showed pus cells and leucocytes which was an indication of infection of the urinary tract. High vaginal swab showed pus cells but no spermatozoa were seen. She stated that the broken hymen and lacerations appeared fresh. She produced the treatment card as PExhibit 2.
 20. PW5 - PC Reuben Maina stated that he is stationed at Sagana police station, and is the current investigating officer. He testified that he took over the police file from PC Noah Kiplagat who was transferred to DCI headquarters in Nairobi. He read the police file and established that on 18th August 2019, the complainant had gone to church with her friend Anita.
 21. According to PW5, Anita asked the complainant to accompany her to visit their friends after attending Church but she refused. Anita promised to buy her ice cream and she agreed. They went to the house of the accused. He closed the door. One Bedan Kinyua was in the house. The accused pushed the complainant to a sofa then removed her clothes. He got a condom, put it on his penis and penetrated the complainant in her vagina.
 22. The complainant went to her grandmother's house and later went home. Her mother noticed that she was not walking in her normal gait and she questioned her. She informed her about the incident. She was taken to Kangai AP post by her parents. They were referred to Sagana police station. The accused and the complainant were taken to Sagana Sub-County hospital for examination. The accused was later charged in court. The complainant was 10 years at the time as per her birth notification form which he produced as an exhibit.
 23. On cross examination, he stated that the complainant was lured into his house by Anita but no report about Bedan Kinyua was made at Sagana police station.



The Defence Case

24. DW1- Tomas Murimi Gichangi gave an unsworn statement and stated that he came from Wang'uru and worked as a barber. He stated that all the witnesses contradicted themselves, and that the complainant and her mother colluded to obtain money. He asked the court to be considerate.
25. Parties filed written submissions as directed by the court

Appellant's Submissions

Contradictory evidence on identity and penetration

26. PW1, the complainant stated that she was defiled three times. When she was taken to the hospital the Doctor examined her and found that the hymen was torn afresh. The appellant submitted that these are mere lies because a fresh-torn hymen was supposed to be oozing blood. There was no presence of blood on her clothes and there was no indication where the oozing blood went.
27. Furthermore, the applicant submitted on the complainant's claim that she was locked in a concrete house that was among a row of houses. Sincerely, speaking, if she was defiled forcefully, she could have screamed and inhabitants of those houses could have come to help her. What hindered her from screaming if she was really in the accused's house?
28. Again Regina Wangui, PW2, her mother, stated that she beat PW1 the complainant on being late immediately after the incident for being late. Thus, that the beating she sustained from her mother was the main cause of injuries she had sustained on her labia majora and minora and the tearing in the hymen.

Age of the complainant

29. The appellant submitted that the trial court erred in relying on the Birth Notification Form that had some omissions.

Respondent's Submissions

Whether the prosecution proved the offence beyond reasonable doubt

30. The Respondent submits that the evidence of J.W.G testifying as PW-1 was clear. She stated:

“I was standing outside the game shop when the accused beckoned me and I went over to where he was. He told me to accompany him to his house so he could tell me a secret. We walked to his house which was a bit far

The accused entered and removed all my cloths and he removed his clothe. ...

He defiled me while on the seat.” [Page 4 to 5 typed proceedings]
31. PW-2 Regina Wangui confirmed that she was informed by PW-1 the complainant of her pain after having gone through the ordeal of defilement.
32. PW-3 Gideon Muchira Kinyua was one of the investigating officers. He produced the P3 Form as Exhibit-1, indicating that the complainant had been defiled. He stated the age of the minor then to be 10 years.



33. PW-4 Watare Muriithi was the clinical officer. She was able to establish that there were lacerations around both labia at the opening of vagina. The complainant's hymen was broken which was proof of penetration. Pus cells done showed she had an infection of the urinary track. She produced the treatment card as PExhibit-2.
34. PW-5 PC Reuben Maina was the investigating officer having taken over from PC-Noah Kiplagat. After establishing the chronology of events, he produced the birth notification indicating that the complainant was born on 8th December 2008.

Whether the appellant ought to have been subjected to medical examination

35. The respondent submits that medical examination of an accused person under Section 36(1) of the *Sexual Offences Act* 2006 is not mandatory but discretionary on the trial Court.
36. In Charles Karanja Somba v Republic [2012] eKLR the Court held:

“And Contrary to the appellant's assertion in the appeal, there existed no legal burden on the part of the [Court] to order forensic tests as anticipated under Section 36 of the *sexual offences Act*. Moreover, no application was made to the Court in the course of the trial.

Whether the appellant defense was ignored

37. The respondent submits that the appellant when placed on his defense, he did not call any witness. He only stated that he was aware of the charge facing him and that the complainant and the mother were out to extort money from him.

Issues for Determination

38. The issues which arise for determination in a defilement case are as follows:
1. Whether there was penetration.
 2. Whether the age of the complainant was proved.
 3. Whether the perpetrator was properly identified and connected to the offence.

Analysis and Determination

39. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) and (2) of the *Sexual Offences Act* No 3 of 2006 and was convicted for defilement. He was sentenced to serve life imprisonment on 22nd September, 2021.
40. The ingredients of the offence of defilement are well stated in George Opondo Olunga v Republic [2016] eKLR, it was stated that the ingredients of an offence of defilement are; identification or recognition of the offender, penetration and the age of the victim.
41. Section 8 (1) of The *Sexual Offences Act* provides that:

8.

- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement. (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.



Identity of the perpetrator

42. PW 1 testified that the accused put on a plastic thing which looked like a balloon on his 'susu'. He lay on her then inserted it in her 'susu'(vagina) between her legs. He defiled her on the seat. She told him to stop and threatened to tell her mother but the accused unclenched her hand and put Kshs.100. She dressed up and put the Kshs.100 in her skirt pocket. She had worn a red skirt and a white top.
43. The complainant stated that she had known the accused from before because she met him when her mother was buying hay at a certain farm where the accused was warding off birds. She said she went to his house and described the plot and the room.
44. In cross examination by the accused, she stated that they were alone in his house and she could still tell its location as it was near Mwalimu's house in Marura B village. In re-examination, she stated that she had seen the accused in Marura on several occasions before the incident.
45. PW2 testified that the complainant stopped her mid-way as she was beating her and informed her that Tomas had called her on Sunday and he told her to love him and to have sex with him but she refused.
46. PW 5- the investigating officer. He testified that he took over the police file from PC Noah Kiplagat who was transferred to DCI headquarters in Nairobi. He read the police file. He did not identify the accused person. He did not arrest the accused person at the scene of the incident.
47. Section 124 of the [Evidence Act](#) gives guidance to the court where it opts to solely rely on the evidence of a victim, devoid of other evidence placed before it. It provides as follows:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other 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 offense, 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.”

48. However, in both the proceedings and the judgment, the trial magistrate did not explain the reasons why she believed the victim and opted to convict the Appellant on the sole evidence of the minor victim. Nevertheless, the evidence of the complainant as recorded in the proceedings is detailed, credible and consistent, and she was not shaken on cross-examination.

Whether there was penetration of the complainant

49. PW1- testified that she was penetrated by the accused. She told PW-2 RW who confirmed that she was informed by PW-1 the complainant of her pain after having gone through the ordeal of defilement.
50. Pw-3 Gideon Muchira Kinyua was one of the clinical officers at Sagana Sub-County Hospital. He testified that the complainant presented a history of being defiled by a person known to her. He stated that there was proof of penetration by dint of the broken hymen and laceration on the vagina orifice, at the entry.
51. He produced the P3 Form as Exhibit-1, indicating that the complainant had been defiled. He confirmed the age of the minor then as 10 years.



52. PW-4 Watare Muriithi was the clinical officer. She was able to establish that there were lacerations around both labia at the opening of vagina. Further, the complainant's hymen was broken which was proof of penetration. Tests disclosed pus cells which showed she had an infection of the urinary track. She produced the treatment card as exhibit-2.
53. The appellant submitted that PW1, the complainant, stated that she was defiled three times. When she was taken to the hospital the doctor examined her and found that the hymen was torn afresh. According to the appellant, these were mere lies because a freshly-torn hymen was supposed to be oozing blood. Since there was no presence of blood on her clothes, the appellant queried where the oozing blood went.
54. Ultimately, from the testimony of the prosecution witnesses, there is clear proof of penetration of the complainant.

Age of the complainant

55. The appellant submitted that the trial court erred in relying on the Birth Notification Form that had some omissions. PW1 – testified that she was 10 years old. During voir dire examination she said that she was 10 years old. She was born on 7/12/2008. She was a class 5 student at Nyaikungu Primary School.
56. PW 5 testified that the complainant was 10 years at the time as per her birth notification form PExb 3. The trial court noted that the birth notification was not clear on the month the complainant was born but the date and year of birth were clear.
57. The court ruled that the complainant stated that she was born on 12th December, 2008. Her P3 Form and treatment note indicate that she was 10 years old. She was examined by a qualified medical officer who would not have made a wrong assessment of her age. She was therefore 10 years old at the time of the incident.
58. A close perusal of PExb 3 shows the child's name as Joyce Wangui Njagi which is not the name of JWG. The mother's name in PExb 3 is indicated as Ann Wangui Njagi, whilst the name of the mother who testified as PW2 is shown in the proceedings as Regina Wangui. There is no explanation given for these discrepancies, which suggest that the child represented by the Birth Notification is not the same as the complainant.
59. Further, although the trial court stated that the complainant was examined and indicated as aged 10 by a qualified medical practitioner,. Further the Clinical Officer did not indicate that she tested or identified the complainant's age as 10. PW2 (her mother) did not testify as to the complainant's age. Nor did PW4
60. In the case of *Kaingu Kasomo v Republic*, Criminal Appeal No. 504 of 2010, the Court of Appeal stated as follows:

“ [The] age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.”
61. PW2- was not recalled by the prosecution to testify on the age of the complainant. Thus, the age of the complainant was not proved.



Conclusions and disposition

- 62. There were three issues which required proof- herein. The answers to the issues are as follows:
 - a. As to whether the age of the complainant was proved, the answer is the age of the complainant was not ascertained at the trial.
 - b. As to whether the Whether there was penetration, the answer is yes.
 - c. As to whether the perpetrator was properly identified, the answer is yes.
- 63. Accordingly, the appeal succeeds with regard to the age of the complainant and the decision of the lower court is hereby set aside on that account.
- 64. In the result the matter is remitted back to the trial court for retrial to ascertain the age of the complainant and for fresh sentencing, subject to the ascertainment of age.
- 65. Orders accordingly.

DATED AT KERUGOYA THIS 5TH DAY OF MARCH, 2024

R. MWONGO

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Delivered in the presence of:

- 1. Appellant - Present at Nyeri Maximum Prison.
- 2. State Counsel - Mamba
- 3. Murage, Court Assistant

