



REPUBLIC OF KENYA



**Ndege v Republic (Criminal Appeal E026 of 2022)
[2024] KEHC 3172 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3172 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL APPEAL E026 OF 2022
WA OKWANY, J
MARCH 14, 2024**

BETWEEN

JASPER MORIASI NDEGE APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal against the Judgment of Hon. W. C. Waswa – SRM
Nyamira dated and delivered on the 16th day of November 2022 in the
original Nyamira CM’s Court Sexual Offence Case No. E72 of 2021)*

JUDGMENT

1. The Appellant herein, Jasper Moriasi Ndege, was charged with the offence of Defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act*. The particulars of the charge were that on 22nd October 2021 in Nyamira North Sub-county within Nyamira County, intentionally caused his penis to penetrate the vagina of NN (particulars withheld) a child aged 4 years.
2. The Appellant also faced the alternative count of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*. The particulars were that on 22nd October 2021 in Nyamira North Sub-county within Nyamira County, intentionally touched the vagina of NN a child aged 4 years with his penis.
3. The prosecution presented the evidence of a total of four witnesses as follows: -
4. PW2 JK (particulars withheld) the mother of the victim N. N. engaged the services of the Appellant, then a motor cycle rider (boda boda) to ferry NN to and from school. The Appellant thereafter provided the boda services for about 4 months prior to the date of the offence.



5. On the material day, being 22nd October 2021, at about 5pm, the Appellant went to pick the victim from school but did not take her home immediately. PW1, NN testified that on their way home from school the Appellant took her into the maize plantation where he defiled her before taking her home.
6. PW2 informed PW1 that the Appellant had defiled her and that she felt pain when passing urine. PW1 took the victim to hospital and later to the police station where she recorded her statement.
7. PW3, Johnson Nyandigisi, the Clinical Officer, examined the victim who had reported pain during urination. He noted that the victim's labia minora and majora were inflamed and swollen with bruises. He however noted that the hymen was intact. He concluded that there was attempted penetration. He produced the Post Rape Care Form, P3 Form and the Clinical Attendance Card as P Exhibit 1, 2 and 3 respectively.
8. PW4, PC Getae Okilla confirmed that PW1 reported the defilement incident at Nyamusi Police Station on 23rd October 2021. He also confirmed that the Appellant was arrested on 24th October 2021.
9. When placed on his defence, the Appellant admitted that he knew the complainant as he used to drop and pick her from school using his motor cycle. He however denied the charge of defilement and stated that he took the complainant home safely from school on the day in question. He did not call witnesses.
10. At the close of the trial, the court found that the prosecution had proved its case, on the main count of defilement, to the required standards and convicted the appellant who was thereafter sentenced to serve life imprisonment. Aggrieved by the decision of the trial court, the Appellant filed the instant appeal in which he listed the following grounds of appeal: -
 1. The learned trial judge erred in law in holding and finding that the ingredients of the offence of defilement had been proved as against the appellant to the required standards.
 2. The learned trial magistrate erred in law in relying on uncorroborated evidence of a minor thereby running to error in relying on the said evidence to convict the appellant.
 3. The learned trial magistrate erred in law and fact in relying on inconclusive medical evidence which had no nexus with the appellant in making a finding that the appellant's penis had penetrated the virgina (*sic*) of the complainant.
 4. The learned trial magistrate erred in law in heavily relying on hearsay evidence to convict the appellant.
 5. The learned trial magistrate erred in law in pronouncing a harsh sentence against the accused without ascertaining the age of the complainant through medical evidence.
12. The appeal was canvassed by way of written submissions which I have considered. The Respondent did not oppose the appeal and argued that the difference between the time that the victim was examined could imply that someone else defiled her.
13. It is trite that even though it is the right of the respondent to decide whether to oppose or concede to an appeal, that decision is, in itself, not binding upon this Court which is still obliged to consider and determine the appeal on its merit. (See *Godfrey Ngotho Mutiso v Republic*, Cr. App. No 17 of 2008 and *Norman Ambich Miero & Another v Republic*, Cr. App. No. 279 of 2005 (Nyeri).
14. The crux of this appeal is whether or not the trial Magistrate had evidence upon which he could convict the Appellant. The second issue is whether there were unique features of the trial that could have infringed on the Appellant's right to a fair trial under Article 50 of the *Constitution*.



15. As the first appellate court, I am required to examine the evidence, to ‘re-hear’ the case, reconsider the material before me and make my own decision therein without disregarding the Judgment of the trial Magistrate but carefully weighing the evidence and final findings made in the matter. This is the position that was stated in the well-known cases of *Ruwala v R* {1957} EA 370 and *Okeno v R* {1972} EA 32.

The Law

16. On appeal against a conviction, it is important to restate that the burden of proof in criminal cases remains on the prosecution and still is proof beyond reasonable doubt. The evidence before the trial court must be weighed with greatest care on its relevance, admissibility and materiality to the charge as provided for under Section 107 (1) of the *Evidence Act* and the principles in *Woolmington v DPP* {1935} AC 462.

Legal Representation

17. The Appellant submitted that because of the seriousness of the charges that he faced before the trial court, the State should have accorded him legal representation at its expense as provided for under Article 50 (2) (h) of the *Constitution*. The said Article stipulates that: -
- (2) Every accused person has the right to a fair trial, which includes the right—
- (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;”
18. The Respondent did not make any submissions on the issue of legal representation. It would be proper to presume that the Appellant is taking issue with the failure, by the trial court, to inform him of his right to legal representation. Article 50(2) (g) of the *Constitution* requires that an accused person has a right to choose an advocate of his own choice to represent him in the matter, and it imposes a duty on the trial court to inform the accused person of that right.
19. In *Jared Onguti Nyantika v Republic* [2019] eKLR, it was stated that that it is a fundamental issue in the trial process that an accused person be informed of his right to an advocate of his own choice, and that the failure to facilitate it amounts to an injustice. It was emphasized that the accused person ought to be notified of this right at the earliest opportunity, and that failure to inform the accused of the right was a denial of a right to fair hearing. The court linked Article 50(2) (g) with Article 25(c) of the *Constitution*, which states that the right to fair trial shall not be limited.
20. Similarly, in *Daniel Mpayo Ngiyaya v. Republic* [2018] eKLR, it was stated, with respect to Article 50(2) (g), that where an accused person faced a serious charge or sentence, the court is bound to inform him of the right to legal representation, and that it would amount to miscarriage of justice to fail to do so. It is therefore noteworthy that the importance of legal representation, in general, cannot be gainsaid.
21. In an effort to give effect to Article 50(2) (g) and (h) among other Articles of the *Constitution*, Parliament passed the *Legal Aid Act*, No. 6 of 2016 so as to facilitate access to justice and social justice. These objectives of the *Act*, as stated in the preamble and Section 3 thereof are to provide affordable and accessible legal aid to indigent person in Kenya in accordance with the *Constitution*, and to provide legal awareness. Section 4 of the *Act* echoes the same theme by setting out the guiding principles which are listed as inclusiveness, non-discrimination, and protection of marginalized groups. For the purpose of implementation, certain duties have been cast on the court. Section 43 of the *Act* imposes certain duties on the court in order to ensure the proper implementation of the *Act* as follows: -



- 43(1). A court, before which an unrepresented accused person is presented, shall –
- a. promptly inform the accused of his or her right to legal representation;
 - b. if substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her; and
 - c. inform the Service to provide legal aid to the accused person.
22. In *Joseph Kiema Philip v. Republic* [2019] eKLR, the Court highlighted the link between the *Legal Aid Act*, 2016, and the constitutional requirement that trial courts inform an accused person of their right to be represented by advocates of their own choice and pointed out that the objective of the *Legal Aid Act*, 2016, is to give effect to Article 50(2) (g) of the *Constitution*, so as to facilitate access to justice and social justice. It was stated that the *Legal Aid Act*, 2016, imposes duties on the courts, with respect to an unrepresented person, which include a duty to promptly inform him of their right to legal representation, if substantial injustice is likely to inform him of their right to an advocate to be assigned to him by the State and to inform the State to provide legal aid to the accused person. It was emphasized that trial courts, as a matter of constitutional duty, and the interest of justice, must give the information to the accused person, and make a preliminary enquiry, at the earliest possible time, to determine whether the accused person would require legal representation. The court stated that the trial record ought to indicate that the rights under Article 50(2) (g) (h) were communicated to the accused person.
23. Article 50(2)(h) of the *Constitution* states that every accused person is entitled to be assigned an Advocate by the State at State expense, if substantial injustice would otherwise result, and to be informed of that right promptly. The importance of this right was addressed in *Joseph Ndungu Kagiri v. Republic* [2016] eKLR, *Macharia v. R* [2014] eKLR, among others. However, it has been held that the same is qualified and subject to the substantial injustice test. Not everyone, therefore, is entitled to an Advocate at State expense, with each case being considered on its merit. In *Charles Maina Gitonga v. Republic* [2018] eKLR, it was stated that legal representation at State expense is not an inherent right available to an accused person under Article 50 of the *Constitution*, adding that, under section 36(3) of the *Legal Aid Act*, an accused person has to first demonstrate that he was unable to meet the expenses of trial. Even then, under section 43, the trial court is obliged to consider the circumstances of each accused person. Much as the accused person is required to make his case for such assistance, the court does have a duty to assess the situation and advise the accused appropriately. The law is meant to assist the indigent, the marginalized, the excluded and the discriminated, largely the poor. It would be defeatist to again require them to make a justification. The trial court has to be proactive.
24. In the instant case, I do not find any material that suggests that the appellant sought to establish that he suffered substantial injustice, by not being provided with legal representation at State expense. It has not been demonstrated that that his case involved complex issues of fact or law which made him unable to effectively conduct his own defence, owing to some disability or language difficulties or the nature of the offence.
25. In the present case, I note that the sentence imposed by the statute, which defines the offence charged, is very stiff, life imprisonment. It is however worthy to note that life imprisonment has since been declared unconstitutional by the Court of Appeal in a decision that I will discuss later in this judgment. This means that courts now have the discretion to pass less severe sentences on persons convicted for defilement of minors of 11 years and below. I further note that even though the Appellant was not informed of his right to legal representation, he was still able to conduct his own defence and cross examine the prosecution witnesses. I find that the Appellant’s right to fair trial was not violated.



Defilement

26. In the present case, the charge in question was of defilement contrary to Section 8 (1) of the [Sexual Offences Act](#). The section provides that the offence is proved by the prosecution when the following elements are established beyond reasonable doubt: -
- (a). The act of penetration of the male sexual organ into the sexual organ of the victim, in this instant appeal, that of the complainant.
 - (b). The age of the victim must be proved to be under 18 years. For purposes of this appeal, the prosecution must prove that the complainant was aged 4 years at the time she was defiled.
27. That it was the appellant who unlawfully defiled the complainant on 22nd October 2021.

Penetration

28. The Appellant submitted that even though the victim was reported to have sustained inflammation of labia majora and minora, there was no proof that the said inflammation could be attributed to him. The Appellant also argued that the fact that PW3 indicated that hymen was intact meant that there was no penetration.
29. The Appellant further submitted that the fact that PW3 was of the opinion that this was a case of attempted penetration means that the offence, if any, should have been that of attempted defilement under Section 9 of the [Sexual Offences Act](#) which states that: -
- “(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.”
30. It was the Appellant’s case that the medical evidence did not support the offence of defilement since the act of penetration was not complete. According to the Appellant, the evidence pointed to a less severe offence.
31. The Appellant observed that since the testimony of the child differed with the medical evidence on penetration, the child’s evidence required corroboration. Reference was made to the decision in [Johnson Muiruri v Republic](#) [1983] eKLR where it was held:-
- “where in any proceedings before any court, a child of tender years is called a witness, the court is required to form an opinion on a voir dire examination, whether the child understands the nature of an oath in which event his sworn evidence may be received. If the court is not so satisfied, his unsworn evidence may be received in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.”
32. The Appellant also took issue with the discrepancy on the age of the injuries as indicated in the P3 Form and the Treatment Notes. It was the Appellant’s case that to the extent that samples were not taken from him and the victim for DNA analysis, there was no material to link him to the offence.
33. The victim testified as follows on the circumstances under which she was defiled: -
- “On 22/10/2021 at 4.00pm, Jasper took me from school using a boda. He took me to a maize plantation. He removed my clothes. He removed all my clothes including my panty. Jasper



also removed his trouser and inner wear. Jasper used his private parts and placed it inside my private part.

NB: Witness cries in court as she demonstrates what happened. She points to her vagina. I believe she is saying the truth.

PW2 Continues:

The accused lay me down and slept on top of me. When he was done, he put on my clothes and placed me on the motor cycle and took me home. I told my mother when I reached home because I was in pain when I went to for a short call. My mother took me to hospital. It was in the evening and it was not dark. Since I started school, it was Jasper who used to take me to school and return me home.”

34. My finding is that the victim gave clear, consistent and moving account of the sequence of events that resulted in her sexual assault. She was emphatic that she sustained injuries to her vagina as a result of her encounter with the Appellant in the maize farm. I am satisfied that PW2 was a coherent, candid and credible witness despite her tender age of 4 years. Her testimony was corroborated by the evidence of PW3 who produced her Treatment Notes and testified that;

“There were signs of attempted penetration hence the bruises and swellings of labia majora and minora. It is only that penetration was not successful.”

35. I find that the mere fact that there was a discrepancy on the age of the injuries – as stated in the P3 Form and the Treatment Notes was not a material defect that can impeach the otherwise watertight evidence of the victim. Section 124 of the *Evidence Act* stipulates as follows: -

124. Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him. Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

36. Turning to the Appellant’s argument that the case should have been treated as that of attempted defilement under Section 9 of the *Sexual Offences Act* and not defilement under Section 8 of the said *Act* in view of the fact that penetration was not successful, I find guidance in the position taken by courts that penetration need not be complete as partial or incomplete penetration is also considered as penetration. This was the finding in *Mark Oiruri Moses v Republic* [2013] eKLR where it was held: -

“.... Many times, the attacker does not fully complete the sexual act during the commission of the offence. That is the main reason why the law does not require the evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl’s organ...”

37. It is my finding that penetration was proved to the required standards and the mere fact that the Appellant did not complete the act does not exonerate him from the charge of defilement.

38. Turning to the Appellant’s argument that DNA analysis was not done on him and the victim to establish his connection to the complainant’s injuries, I find that the evidence on record is adequate



to prove defilement and that it is not mandatory that DNA analysis be carried out in all defilement cases. Courts have taken the position that the absence of a DNA test in a sexual offence case does not automatically lead to an acquittal. In *AML v Republic* 2012 eKLR (Mombasa), the Court held the view that: -

“The fact of rape or defilement is not proved by way of a DNA test but by way of evidence.”

39. This was further affirmed in *Kassim Ali v Republic* Cr Appeal No. 84 of 2005 (Mombasa) (unreported) where this Court stated that:

“The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.

It must therefore be appreciated that even without the presentation of the DNA report the trial Court was still entitled to find the Appellant guilty on the evidence of the other witnesses. In my view, that evidence was strong enough and the logical conclusion to be arrived at in light of that evidence was that the Appellant was guilty as charged. As already stated, the directive to carry out DNA analysis by the trial Court is a discretionary one. Neither the *SOA* nor the *National Police Act* provide for the physical presence of the accused or his representative during the DNA analysis. The ground that the DNA test was done unprocedurally therefore fails.”

Age

40. It was not disputed that the complainant was aged 4 years at the time of the offence. I note that PW1 produced the victim’s Birth Certificate which showed that she was born on 5th October 2017. I find that age was proved to the required standards.

Identification

41. It was also not disputed that the Appellant was well known to the victim as he would ferry her to and from school for a period of at least 4 months prior to the unfortunate incident in question.
42. The Appellant confirmed that he knew the victim and her mother (PW1). I note that the complainant identified the Appellant by his name, Jasper. I find that the identity of the Appellant was proved to the required standard.

Sentence

43. Section 8 (1) (2) of the *Sexual Offences Act* stipulates as follows: -
- (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.
44. In the present case, the Appellant was sentenced to serve life imprisonment. I find that even though the sentence was proper and legal, the Court of Appeal in *Manyeso v Republic* (Criminal Appeal 12 of 2021) [2023] eKLR considered the constitutionality of the mandatory sentence of life imprisonment and held that the mandatory and indeterminate sentence of life imprisonment was discriminatory, inhumane and a violation of the right to human dignity. In the said case, the Court of Appeal partly



allowed the appeal and set aside the life sentence which it substituted with a sentence of 40 years' imprisonment.

45. Guided by the doctrine of precedents, I am minded to set aside the life sentence and substitute it with an imprisonment term of twenty-five (25) years. The sentence period will begin to run from the date when the Appellant first appeared in court in line with the provisions of Section 333 (2) of the *Criminal Procedure Code*.
46. In sum, I dismiss the appeal on conviction but allow the appeal on sentence as stated hereinabove.
47. Orders accordingly.

JUDGEMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 14TH DAY OF MARCH 2024.

W. A. OKWANY

JUDGE

