



**Oloo v Republic (Criminal Appeal E019 of 2022)
[2024] KEHC 4255 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4255 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E019 OF 2022**

MW MUIGAI, J

APRIL 11, 2024

BETWEEN

DANIEL OBUYA OLOO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of Hon. E.W.Wambugu in
Criminal Case No. E010 of 2020 delivered on 23 rd March ,2022)*

JUDGMENT

Background

1. The Appellant Daniel Obuya Oloo was charged with the offence of defilement
2. The information that led to the arraignment of the Appellant before the Trial Court was as follows:
Offence of defilement contrary to section 8(1) as read with section 8(4) of the [Sexual offences Act](#) No . 3of 2006 and on the alternative count he was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the [sexual Offences Act](#)
Particulars of the offences were as follows:

Daniel Obuya Oloo: Between 18/05/2020 and 17/10/2020 within Machakos County. He intentionally and unlawfully caused penetration with his genital organ penis into the genital organ vagina of JSK, a child of 17 years

3. The Appellant pleaded not guilty to charge and the matter proceeded to full trial.

Prosecution Case at the Trial Court

4. Prosecution case was anchored on the evidence of four [4] witnesses.



5. PW1 was JSK who testified that in April 2020, the accused person who is her neighbour asked her to be his girlfriend and they got into a love relationship and on 18/5/2020 she ran away from home and went to the accused person's home. She used to do chores and slept in a different house with the accused person but did not engage in sexual intercourse with the accused. Her mother was looking for her so she went home and the next day they went to the market and when they reached there her mother asked her to accompany her to Donyo Police Station and was interrogated by the police officers.
6. PW1 told them that she left home on her own volition and went to stay at the accused home. She was taken to Matuu hospital for examination and they checked for HIV and pregnancy which all came out negative. She testified that she had sex with the accused on a date she cannot recall in May.
7. On 25/9/2020 police officers arrested the accused but he escaped and PW1
8. followed him to his aunt's place. Her mother came there and made a report and both of them were arrested and taken to Donyo Sabuk Police Station and she was taken for a second examination and was found not pregnant.
9. In cross-examination, she told the trial court that she had no reason of leaving home the first time but the second time was because of being beaten and that she went to live with the accused brother on her own volition. The accused used to tell her to go back home so that she could continue with her education and that she was being beaten and had told the accused that her mother had injured her.
10. PW2 was EMK mother of PW1. She testified that on 18/5/2020 PW1 ran away from home and she reported to the local administration and police and investigations commenced. PW1 was found in the accused house, who was her neighbor, they took her to the police station and she was told to pick her and took her home. PW1 was not taken to hospital and the Accused person was not arrested.
11. After sometime she ran away again. The accused was not arrested the Police went to arrest him 3 times but he ran away. On 24/8/2020 PW2 reported the matter at Donyo Sabuk Police One day she saw PW1 going to the accused house and asked her to go back home but she ran away. She then called the police but he ran away to his Aunt's place in Mananja. She went for the Complainant as the Accused person was married with 3 children.
12. PW2 continued, and told the trial court that she went there and made a report in which PW1 and the accused were arrested and taken to Donyo Sabuk Police Station. The next day she accompanied her daughter to the hospital, and on examination she was not pregnant. She stated that she had no grudge with the accused and beat up her daughter when she found her with the accused's phone which she gave to the Police. She stated that the accused was born in 2003 and she had her birth certificate Exh-4.
13. In cross-examination, PW2 testified that she never sent PW1- to the accused home and that the accused used to go to her home on dates she could not recall. She did not know where the accused medical reports were as she was only given her daughter's reports only.
14. PW3 was – PC Christine Kilati. She testified that on 17/10/2020, PW2 reported her daughter had disappeared and was with a certain man. It was recorded in the OB. A phone-call was made to Mananja police post where the two were arrested and the accused was locked in the cells. She filled the P3 form and took the two to Matuu level 4 hospital where they were examined and PW1 treated and P3 Form filled by the doctor. The Complainant was 17 years old. From Police Records PW2 had earlier made a similar report.
15. In cross-examination, PW3 in her testimony told trial court that she took the accused and PW1 for examination. That PW2 reported that the accused was defiling her daughter and later the accused was arrested with PW1. She stated that she did not hail from the accused village and that her colleagues



- arrested the accused. She took the accused for examination on 19/10/2019 and relied on the doctor's report to establish that the accused defiled PW1.
16. PW4 was Benjamin Mainigi a clinical officer at Matuu Level 4 hospital. he testified that he had 3 P3 forms. Two belonged to PW1 and one for the accused. The first one being one where she was seen on 3/6/2010 brought by her mother and a police officer and she alleged to have been defiled on diverse dates from April to 19th May by a person well known to her.
 17. On examination she was in a fair general condition. Her hymen was torn and was not fresh. Urinalysis was done and there was no significant finding. He produced the P3 form and the laboratory results.
 18. The 2nd P3 for was still for PW1 where she was seen on 19/10/2020 and on examination she was in fair general condition. He testified the Complainant was brought to hospital after she was found cohabiting with a man as a wife from 18/9/2020 – 17/10/2020. She was 17 years at the time.
 19. On examination, the hymen was torn and was not fresh. HIV test was negative. Test for syphilis was negative, pregnancy was negative and urinalysis test had no significant finding. He produced the P3 form and the laboratory results and the post rape care form.
 20. He stated that he had a 3rd P3 form for the accused who was 22 years at the time of the examination and was in a fair general condition, HIV test was negative, test for Syphilis was negative. Urinalysis had nothing significant. He produced the P3 form and the laboratory results.
 21. In cross-examination. PW4 testified that PW1 was defiled on diverse dates from April to 19th May- as per the first P3 form Hymen was torn and was not fresh. There was nothing significant in the accused's laboratory results and he did not know if the accused committed the offence.
 22. The prosecution closed their case.
 23. The trial court upon considering the evidence on record found that the prosecution had establishes a prima facie case against the Appellant to warrant him being put on his defense and found that the Appellant had a case to answer.

The Defence Case at the Trial Court

24. The defense case was anchored on the evidence of two witnesses.
25. DW1 was Daniel Obuya Oloo He told the trial court that he lived in Donyo Sabuk and was a farmer. DW1 told court that on 1st June he was arrested and arrested again in October over the same case and that PW1 stated that she went to his brother's home and had never gone to his house and did not even know it. He stated that the dispute between him and PW2 was a boundary between their lands. That PW2 told him that if he pursued the matter she would fix him in a place that he could not get out. He continued to discredit the testimonies of PW2, PW3 on the issue of being taken to hospital and on the issue that the phone that PW2 said was given to her by PW1 was not produce by the prosecution. He stated that the doctor concluded that he could not tell whether he was involve in the offence or not.
26. In cross-examination, DW1 testified that the land dispute was reported but he did not have evidence of that report. He stated that he was not arrested together with PW1 and that he was however not challenging the investigation officer on how they were arrested. That the doctor did record that the complainant was defiled. He did not commit the offence of defilement.
27. DW2 was Titus Mutavi. He testified that he was the accused's neighbor and that the accused and PW2 had talks over boundary disputes since the year 2016 and that on 17/10/2020 the accused was arrested.



28. On cross examination he stated that the accused was his neighbor and that they had land dispute. The beacon on the accused's land touches PW2's land. The other neighbors were not present when they spoke of the boundary dispute. He stated that he land dispute was different from the defilement case and that he was not aware of the defilement case.

Trial Court Judgment

29. The trial court vide its judgment delivered on 18th march ,2022 found that the prosecution had proved their case against the accused person beyond reasonable doubt and was convicted of the offence as charged under Section 215 of the Criminal Procedure Code.

The Appeal

30. Dissatisfied by the judgment on the conviction and sentence, the Appellant filed his petition of Appeal

31. The appeal was premised on the following grounds that:

1. The learned magistrate failed to consider that the charge was manifestly incurable defective.
 2. That the prosecution case was not proved beyond reasonable doubt since MENS REA was not proved
 3. That the prosecution case was not proved beyond reasonable doubt by failure to summon the essential witnesses.
 4. That the prosecution case was not proved beyond reasonable doubt since there were contradictory evidences.
 5. That the prosecution case was not proved beyond reasonable doubt since penile penetration was not conclusive to warrant conviction.
 6. The learned Magistrate failed to consider that there was no independent witnesses in the case.
 7. The learned magistrate failed to consider the appellant's mitigating factors as provided under the sentencing policy guidelines 2015.
 8. That the court may consider that the appellant was considered as 1st offender and that the court may consider a more lenient sentence while considering mandatory minimum sentence under the Sexual Offence act have been declared unconstitutional.
32. The matter was disposed by written submissions.

Submissions

Appellant's Submissions

33. The Appellant submitted that the charge was incurably defective in that it gives a misdescription of the offence in its particulars for conviction and sentence to attain the threshold.
34. Reliance was placed in the case of Amos vs DPP 1988, Selimia Mbell Owuor & Another to buttress the point.
35. It was submitted that Mensrea was required to be proved which was not and that he pleads the statutory defence in that the complainant engaged in consensual sex as she voluntarily settled as his wife and that the conduct of the complainant was sufficient to deceive the accused as to the age of the complainant.



36. It was further submitted the prosecution failed to summon the police officer who made the arrest which was against the law. Reliance was placed in the case of John Kenga Vs Republic where it was held that failure to summon some of the witnesses led to an acquittal.
37. On ground number 4 on contradictory evidence it was submitted that the entire prosecution was marred with grave contradictions and inconsistencies, discrepancies of evidence which the trial magistrate failed to appreciate and which discredited the prosecution's case.
38. On ground number 5, it was submitted that penetration had not been proved. Reliance was placed in the case of Jacob Odhiambo Omuombo vs Republic Cr Appeal No. 80/2008.
39. It was submitted that the doctor who presented the medical report did not state whether there was discharge or whether rupture of the hymen was as a result of sexual intercourse.
40. On ground number 7, it was submitted that the Court failure to consider mitigating factors such as that he was a first offender and that he was remorseful about the offence.
41. On sentencing, reliance was placed in the case of Philip Maingi & 5 others Vs DPP on the issue of minimum mandatory sentences in sexual offence.

Respondent's Submissions

42. Respondent in its submissions date 15th February ,2023, Mr. Mwongera, the State Counsel submitted that that they opposed the appeal on grounds that the elements of the offence were proved appropriately. Reliance was placed in the case of FOD vs Republic (2014) to buttress the element of penetration as an element of defilement.
43. It was submitted that the testimony of PW1 as corroborated by PW2 and PW4 was beyond a shadow of doubt that the appellant defiled PW1 on numerous occasions.
44. On the age of the complainant, it was submitted that it was proved by the production of the birth certificate which indicated that the victim was born on 29th July 2003.
45. It was further submitted that the prosecution relied on evidence that was cogent.
46. Reliance was placed in the case of Sigilani vs Republic and Section 134 of the Criminal Procedure Code on the elements of a charge sheet.
47. Reliance was made to the case of Richard Munene v Republic [2018] eKLR on the effect of contradiction or inconsistency in the evidence of prosecution witness.
48. On proof beyond reasonable doubt, it was submitted that the accused was properly identified by all the witnesses. Reliance was made to the cases of Peter Musau Mwanzia vs Republic [2008] eKLR, Wamunga v Republic (1989) on the issue of identification.

Determination/analysis

49. It is now well settled, that this Court as 1st Appellate Court, is dutybound carefully examine and analyze the evidence adduced a fresh and come to its own conclusion, while at the same time noting that it did not have the advantage of seeing the witnesses and observing their demeanor See Okeno-vs- Republic (1972) EA 32 & Pandya Vs. Republic (1975) EA 366.
50. Further this being first Appellate Court, it must itself also weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala-Vrs-R (1975) EA 57. Where it was stated that it is not the function of the first appellate court to merely scrutinize the evidence to see if there was some evidence to support



the lower Court finding and conclusion, 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 made the advantage of hearing and seeing the witnesses. See also Peter's vs Sunday Post(1958) E.A. 424 on the same point of analysis of evidence on Trial Court's record.

51. Having analyzed the grounds raised in the Petition, the main issues raised for determination are;
- a. Whether the charge was/is defective due to duplicity c/s 214,134 & 135 CPC
 - b. Failure to prove mens rea of the offence
 - c. Failure to summon essential witnesses
 - d. Contradictory and inconsistent evidence
 - e. Failure to prove penile penetration
 - f. Failure to consider mitigating factors.

52. All these issues will inform whether the prosecution proved its case beyond reasonable doubt and I will therefore proceed to analyze the same

Section 8(1) of the [Sexual Offences Act](#) No 3 of 2006 provides 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.

53. The ingredients for the offence of defilement can be summarized as follows;

- a. Age of the victim (must be a minor),
- b. penetration and
- c. Proper identification of the perpetrator.

54. In Wamukoya Karani Vs. Republic Criminal Appeal No 72 of 2013 George Opondo Olunga vs. Republic [2016] eKLR)

The Court of Appeal in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

“... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.” (emphasis added).

55. In the case of Francis Omuroni versus Uganda, Court of Appeal Criminal Appeal No 2 of 2000, it was held thus

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in



absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense

56. The element of age of the complainant and the victim was proved by the production of the birth certificate by PW2 Complainant's mother which indicated that the victim was born on 29th July 2003. The accused averred that there were contradictions on the age of the complainant as testified by the police officer but this was cured during her further cross examination. It is therefore evident that the victim was a minor as at the time of the defilement. The evidence of the Birth Certificate was not challenged nor controverted.
57. The second element is penetration Section 2 of the *Sexual Offences Act* defines penetration as;

“penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person.”
58. The complainant PW1 testified that she had sexual intercourse with the appellant on several occasions in the month of May on dates that she could not recall. The complainant further testified that she was in a love relationship with the accused who had asked her to be in a relationship with him. The complainant further testified that she run away from home without her mother's knowledge and went to stay in the accused's brother's house and would sleep with the accused in a different house.
59. PW2 who was the complainant's mother testified that the complainant ran away from home and when she learnt that she was staying with the accused she made a report at Donyo Sabuk Police station and attempts to have the accused arrested bore no fruits as he always ran away. She further testified that she found the complainant staying in the accused brother's house and on further investigations she found out that the accused and the victim were staying at the accused aunt's place in Mananja and alerted the police who organized for them to be arrested.
60. PW4 who was the clinical officer testified that he had two P3 forms belonging to the victim and on both, the examination's findings was that the victim's hymen was torn but not fresh.
61. From the evidence of PW1 who testified twice as the case was heard by different Trial Court was consistent that she went to the Accused person's house first at his brother's house and were arrested and she went back home, Later, as per PW2 's evidence PW1 ran away again on allegation her mother beat her this time to Accused person but now at his Aunt's house Mananja.
62. From the above evidence as per the Trial Court's record the Complainant PW1 and Accused person a neighbor and friend were together between 18/5/2020 – 17/10/2020. The evidence of PW1 was/ is corroborated by the Doctor's/medical evidence – production of 3 P3 Forms 2 for PW1 and the Doctor's medical opinion was that the Complainant's hymen was torn and not fresh- insinuating active sexual activity. Coupled with her absence from home on the diverse dates and found with/ at/in Accused's home; the only logical rational and reasonable inference in the circumstances is that the Accused person was recognized, not identified; as the perpetrator. More importantly, evidence on record is to the effect that PW1 was with the Accused person during the 1st incident, PW2 reported the matter, the Accused person and PW1 were arrested and later released and the incident ended there. The arrest and charge of the Accused person arose after the 2nd incident of PW1 who ran away and went and stayed with the Accused person. of importance, the Complainant testified that they had sexual intercourse in May but could recall the exact date.
63. The final element to be proved was identification. The complainant PW1 identified the Appellant and stated that she had sexual intercourse with him severally. The other prosecution witnesses also identified the accused particularly the complainant's mother, the investigating officer and the clinical



officer. The accused did not dispute knowing the complainant and in fact stated that they were neighbors and there was a boundary dispute between them. The totality of the circumstances disclosed by the evidence on record prove and confirm that the Prosecution proved beyond reasonable doubt the commission of the offence of defilement by the Accused person/on/to the Complainant.

- a) Whether the charge was/is defective due to duplicity c/s 214,134 & 135 CPC. The Appellant raised issue with PW2's evidence, she made a report of missing child and not of defilement and therefore the charge is duplex as he was charged with both missing child and defilement. This Court finds the charge/Information drawn and filed in the Trial Court confirms that there was compliance with the cited provisions. If any amendment of charge was required it was up to the prosecution to take up, the Prosecution tendered evidence to prove the charge as read out to the Accused person and plea of not guilty was entered. If the trial Court found the charge/information was defective, on the basis of the evidence tendered, the Trial Court would have dismissed the case under Section 210 of CPC as the Prosecution would not have proved their case to warrant the Accused person being placed on his Defense. I find no defect in the charge.
- b) Failure to prove mens rea of the offence; The Appellant posited that the Prosecution failed to prove mens rea in the offence of defilement. The Appellant outlined in the Submissions as follows;

The Complainant PW1 engaged in purely consensual sexual indulgence, the Complainant met the Appellant, she voluntarily went to his house and settled down as his wife. There is no indication on record that she was coerced for sex in the literal [meaning] of the word. The Complainant deceived the Appellant into believing that she was an adult.By her own admission the Complainant was a truant, she was not interested in school, she decided that she was ready to get married and she identified the Appellant as her husband.

64. The Appellant relied on Section 8 (5) *Sexual Offences Act* that provides;

(5) It is a defence to a charge under this section if—

- (a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
- (b) the accused reasonably believed that the child was over the age of eighteen years.

65. From the Trial Court record, the Appellant did not raise this Defense in cross examination of Prosecution witnesses particularly PW1 nor raise it as Defense during Trial instead he stated that he had a boundary dispute with PW2.

66. The evidence of PW1 & PW2 clearly indicates that in April 2020, the Accused person asked PW1 to be his girlfriend and were in a love relationship as her mother used to send her to charge her phone at the Accused person's home. On 18/5/2020 she ran away from home and went to the Accused person's home. She lived at his brother's House for 3 days. Her mother PW2 was looking for her, she went home and they went to Donyo Police Station. PW1 was interrogated taken to Matuu Hospital and HIV & pregnancy tests were negative. PW1 stated she had sexual relations with the Accused person in May but could not recall the actual date. The matter ended there and the Complainant went back home. This was the 1st time and no charge was preferred nor arrest made.

67. The 2nd time PW1 & the Accused person were in hiding until he was arrested. The issue that PW1 held out herself to be an adult is not borne out by evidence on record, they were neighbors admittedly had a



dispute on boundary which was in 2016. As a neighbor he knew PW1 was school-going girl. Secondly, no efforts were made to establish her age eg asking for ID card. Thirdly, The Appellant was already married with wife and children and wife ran away /left home in April 2020. Fourthly, consensual sex with an underage does not amount to consent, a minor cannot legally consent to an offence being committed. Fifthly, there was no marriage and/or husband and wife as the Appellant alleged, Section 4 of *Marriage Act* prohibits marriage by/with and under age person. For these reasons, the Defense in Section 8(5) of the Act is not available/applicable; the Appellant did not comply with Section 8(6) of the Act that provides as follows;

(6) The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

68. See High Court Criminal Appeal E007 of 2022 Nyeri High Court on the point.

c) Failure to summon essential witnesses

69. The alleged failure to call vital witnesses, Section 143 of the *Evidence Act* provides that:

No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.

70. In the case of *Mwangi vs. R* [1984] KLR 595 the Court stated:

“Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive.”

71. In *Keter vs. Republic* [2007] 1EA135 the court was categorical that:-

“The prosecution is not obligated to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt.”

d) Contradictory and inconsistent evidence

72. In *Erick Onyango Ondeng’ v Republic* [2014] eKLR, the Court of Appeal cited *Twehangane Alfred v Uganda*, (Crim. App. No 139 of 2001, [2003] UGCA, 6, in which the Court of Appeal of Uganda stated:

“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’s case.”

73. The contradiction on PW1 age as alleged by the Appellant did not cause any prejudice as PW2 mother of the Complainant PW1 produced Birth Certificate that the Complainant was born in 2008.

e) Failure to prove penile penetration

74. As this Court considered the issue of mens rea and whether the Prosecution proved its case beyond reasonable doubt, penetration is one of the ingredients to prove defilement. The Court in evaluation of evidence relied on evidence of PW1 who the Trial Court in the judgment found to be a consistent



and truthful witness who testified she had sexual intercourse with the Accused person in May 2020 although she could not recall the exact date. Secondly, her testimony was corroborated by the evidence of the doctor, that PW1's hymen was torn and not fresh. Thirdly, the evidence is that PW1 was found with the Accused when he was arrested, PW1 ran away from home and lived with the Accused person. The totality of the evidence confirms penile penetration by the appellant of the Accused person.

g) Failure to consider mitigating factors- the Appellant raised the issue that mitigation that he is a 1st offender was not considered and an appropriate sentence was not meted out. The Sexual Offences Act provides for minimum sentence as 15 years in Section 8(1) & (4) of Sexual Offences Act.

Disposition

1. Having considered the facts in this case, I uphold Trial Court judgment of trial Court the Appellant is guilty of the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the Sexual Offences Act No 3 Of 2006 and uphold the conviction.

2. This Appeal therefore wholly fails.

It is so ordered.

JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS HIGH COURT ON 11TH APRIL, 2024. (VIRTUAL /PHYSICAL CONFERENCE)

M.W.MUIGAI

JUDGE

In the presence/absence of:

Daniel Obuya Oloo - the Appellant

Mr. Mwonjera - for the Respondent

Patrick/Geoffrey - Court Assistant(s)

