



**Ongechi v Republic (Criminal Appeal E018 of 2022)
[2024] KEHC 4606 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4606 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL APPEAL E018 OF 2022
WA OKWANY, J
APRIL 11, 2024**

BETWEEN

SAMMY ONGECHI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal against the Judgment of Hon. M. C. Nyigei – PM Nyamira dated 19th August 2021 in the original Nyamira Chief Magistrate’s Court Sexual Offence Case No. 59 of 2018)

JUDGMENT

1. The Appellant herein was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act*. The particulars of the offence were that on the night of 6th and 7th day of November 2018 in Nyamira North sub-county within Nyamira county, intentionally and unlawfully caused his penis to penetrate the vagina of CMN (particulars withheld), a child aged 14 years.
2. The Appellant also faced the alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*. The particulars were that on the night of 6th and 7th day of November 2018 in Nyamira North sub-county within Nyamira county, intentionally and unlawfully caused his penis to come into contact with the vagina of CMN (particulars withheld), a child aged 14 years.
3. The pleaded not guilty to both the main charge and its alternative count. A trial thereafter ensued in which the prosecution presented the evidence of six witnesses.

The Prosecution’s Case

4. PW1 CMN (particulars withheld), a class 7 pupil at (particulars withheld) Primary School testified as follows: That she was sent the Posho Mill at Kebuye market on 6th November 2018 where she met



the Appellant herein who was also her teacher. That the Appellant invited her to his house where he requested her to help him cook some vegetables. While at the house, the Appellant pushed her into his bedroom where he undressed her, wore a condom and penetrated her vagina. The Appellant did not heed to the victim's pleas to be allowed to go home. He detained her in his house for the entire night and once again had sex with her at about midnight.

5. The victim returned home the following day where she found a search party comprising her brothers already looking for her. She informed them of what had transpired after which the matter was reported to the Assistant Chief and the police who thereafter arrested the Appellant. PW1 was treated and examined at Ekerenyo hospital.
6. PW2, GON (Particulars withheld) the complainant's brother sent PW1 to the Posho Mill on the fateful day. He later received information that the complainant had not returned home and embarked on a search for her. His efforts to trace the complainant at the market was not successful as he only found the maize that the victim had left at the Posho mill. The complainant returned home the following day and informed him of her night-long ordeal at the Appellant's house.
7. PW3, James Mbirisa Sabuni, received the defilement report from PW1 and PW2. The victim led them to the Appellant's house where the Appellant was arrested.
8. PW4, Joyce Moige, escorted the complainant to the police station on 7th November 2018.
9. PW5, No. 112677 PC Erastus Musa, was the investigating officer. He recorded the witnesses' statements and escorted the complainant to Ekerenyo Hospital for examination and treatment. He charged the Appellant with the offence of defilement and produced the minor's immunization card (P.Exh 4).
10. PW6, Geoffrey Mogaka, a clinical officer at Nyamusi sub-county hospital testified that examination carried out on the complainant following the sexual assault revealed that; pregnancy test was negative, there were numerous puss and epithelia cells, the genitalia was normal with no tears or blood stains and the hymen was intact. He stated that the lab tests and presence of puss cells in the urinalysis and HVS was evidence of penetration. He concluded that the victim had been forcefully penetrated using a condom. He produced the P3 Form (P.Exh1), PRC Form (P.Exh2) and Treatment Notes (P.Exh3)
11. At the close of the Prosecution's case, the trial court found that he had a case to place him on his defence. He elected to give a sworn testimony and did not call any witnesses.

The Defence Case

12. The Appellant (DW1), a retired teacher and a pastor at PAG Church in Ikonge testified that he was at his home when people came with crude weapons and beat him up while demanding to be told everything that had transpired. He testified that he lost his teeth in the beating and was taken to Magwagwa Police Post where he met a girl who alleged that he had defiled her. He denied the offence and attributed his woes to wickedness, malice and jealousy by one Pamela Osugo, a senior teacher who was allegedly unhappy with his good work and impending promotion. He further testified that the charges were fabricated as the P3 Form indicated that there was no evidence of penetration.
13. He further stated that he was aware that the minor gave birth to a child that he did not sire one year after the incident and testified that whoever impregnated the minor was the one who defiled. He claimed that the complainant's brother attempted to extort Kshs. 200,000 from him and that he was implicated in the defilement case because he was not able to raise the money. her but he was not responsible.



14. At the end of the case, the trial court found the Appellant guilty of the charge of defilement contrary to section 8 (1) as read with section 8(3) and sentenced him to serve 20 years' imprisonment.
15. Dissatisfied with the decision of the trial court, the Appellant instituted the present appeal in which he mainly challenges his conviction while arguing that it was based on evidence that was not watertight. The Appellant contends that the Prosecution did not discharge its burden of proof.
16. The Appeal was canvassed by written submissions which I have considered.
17. The duty of the first appellate court is to re-analyse and re-consider the evidence presented before the trial court with a view to arriving at its own conclusions while bearing in mind the fact that it neither heard nor saw the witnesses testify. (See *Kiilu & Another vs. Republic* [2005]1 KLR 174).
18. I have considered Record of Appeal and the parties respective submissions. I find that the main issue for my determination is whether the conviction was safe.

Analysis and Determination

19. Section 8 of the *Sexual Offences Act* stipulates as follows: -
 8. Defilement
 - (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
20. The elements of the offence of defilement are therefore proof of age, proof of penetration and positive identification of the perpetrator. (See *George Opondo Olunga vs. Republic* [2016] eKLR.)

Age

21. The Prosecution produced the minor's Immunization Card (P.Exh 4) which indicated that she was born on 25th December 2003. The offence in question was allegedly committed on 7th November 2018. I am satisfied that the prosecution proved that the victim was 14 years old (about a month shy of 15 years old). I find that the first ingredient of the offence of defilement was proved to the required standard.

Penetration

22. The ingredient of penetration is defined under Section 2 of the Act as follows: -

The partial or complete insertion of the genital organ of a person into the genital organs of another person.
23. The above definition connotes that penetration need not be complete. Penetration can be proven by either the sole testimony of the victim in line with Section 124 of the *evidence Act* or the victim's testimony corroborated by medical evidence.
24. The minor testified that the Appellant penetrated her twice on the night in question. I have considered the medical evidence presented before the trial court through the P3 Form, (P.Exh1), PRC Form (P.Exh2) and Treatment Notes (P.Exh3). According to the P3 Form, though the pregnancy test was



negative, there was presence of puss and epithelia cells. It also recorded that there were no physical injuries seen on the minor's genitalia and the status of the hymen is not indicated. Further, the P3 Form records that the conclusion of penetration was based solely on the findings from the laboratory after conducting a urinalysis and HVS.

25. I have perused the PRC Form (P.Exh2) and I note that it records the following findings: no hymen, no lacerations, underwear has stains but no tears noted on the genitalia. The Treatment Notes (P.Exh3) indicates that there are no tears, no blood stains, underwear is not soiled and no hymen is present. In his evidence PW6, the Clinical Officer testified that the treatment notes, the P3 Form and the PRC indicated that the hymen was intact.
26. My analysis of the medical evidence shows that it does not support the element of penetration in view of the fact that no physical injuries were noted on the victim's genitalia. This Court cannot satisfy itself on the status of the- victim's hymen because the Clinical Officer's testimony is different from what was recorded in the P3, PRC Forms and Treatment notes.
27. Furthermore, if indeed the hymen was absent as indicated on the three documents presented by the prosecution, this court is not able to ascertain if the hymen was freshly broken following the alleged defilement or if it was an old tear. The medical reports are silent on the exact status of the hymen thus casting doubt on the issue of penetration. My finding is that the fact that the complainant had no injuries in her genitalia is not consistent with her testimony to the effect that she was forcefully penetrated twice on the night in question. I find that the ingredient of penetration was not proved to the required standard.

Identification

28. The last ingredient of the offence of defilement is the identification of the accused as the perpetrator of the offence. It is the identification that links an accused person to the alleged offence. In this regard, the Prosecution was also required to prove the identity of the attacker. Having already found that the evidence of penetration did not meet the threshold expected in a defilement case, I find that the discussion on the ingredient of identification of the Appellant becomes moot. Suffice only to say that the Appellant was well known to the complainant as her teacher, a fact that the Appellant did not deny.
29. It is to be noted that the burden of proof rested with the prosecution to prove its case against the Appellant beyond reasonable doubt. In *Stephen Nguli Mulili vs Republic* [2014] eKLR: - it was held that: -

“ [I]t is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of *DPP V WOOLMINGTON*, (1935) UKHL 1 where the court eloquently stated that the “golden thread” in the “web of English common law” is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See *Festus Mukati Murwa vs. R*, [2013] eKLR.”
30. In the instant case, I have already expressed my doubts and reservations on the subject of penetration which is a key plank in proving defilement. I find that the prosecution's case did not meet the threshold set for proof in defilement cases. Consequently, I find that the instant appeal is merited and I therefore allow it. I therefore quash the conviction and set aside the sentence. I direct that the appellant be set at liberty forthwith unless he is otherwise lawfully held.
31. Orders accordingly.



**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS
THIS 11TH DAY OF APRIL 2024.**

W. A. OKWANY

JUDGE

