



**Gitonga v Director of Public Prosecutions (Criminal Appeal  
E129 of 2023) [2024] KEHC 6164 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6164 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL E129 OF 2023  
TW CHERERE, J  
MAY 23, 2024**

**BETWEEN**

**PETER GITONGA ..... APPELLANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT**

*(Being an appeal against conviction and sentence in Meru Criminal S. O  
No. E041 of 2022 by Hon. T.M. Mwangi (SPM) on 27th September, 2023)*

**JUDGMENT**

1. G. (Appellant) was charged with the offence of defilement contrary to Section 8 (1) as read with 8(4) of the [Sexual Offences Act](#) No. 3 of 2006. The offence was allegedly committed on diverse dates between 19<sup>th</sup> and 22<sup>nd</sup> August, 2022 against E.N a girl aged 16 years' old. He also faced an alternative charge of committing an indecent act with the child contrary to Section 11 (1) of the [Sexual Offences Act](#) No. 3 of 2006 by unlawfully touching E. N's vagina.
2. Complainant recalled that Appellant was well known to her as he used to work at their home. She recalled that on 19<sup>th</sup> September, 2006, she was in church at about 08:00pm when her friend E. G informed her that someone wanted to talk to her. That she was led outside where she found Appellant and E.G went away leaving her behind. That Appellant informed her that he wanted to give her something to take to her mother and they proceeded to his house where he defiled her. That the following morning, he locked her in the house and returned in the evening at 06:00pm and they travelled to Appellant's aunt's home where Appellant slept on the coach and she slept with his aunt. That the following day they went to visit yet another of Appellant's aunt and stayed there from Monday to Thursday during which time she slept in bed and the Appellant slept at a neighbor's house.



3. It was complainant's evidence that Appellant then took her to his mother's house on Thursday and it was while there that she called her mother using Appellant's cellphone and informed her where she was. That police visited the home and arrested them.
4. When complainant's mother Christine Muthoni noticed that complainant was missing from church on the night of 19<sup>th</sup> August, 2022, she went home and reported her disappearance to the police station the following day. When complainant later called to say where she was, she accompanied police who upon finding complainant and Appellant together arrested them. Complainant said she had been defiled and was taken to hospital
5. PW3 D. N., a doctor at Nairobi Women Hospital testified that upon examination of the complainant, she was found with an old torn hymen which was indicative that she had several intercourse one week before examination or earlier. He tendered the P3 form as PEXH. 1.
6. PW4. Senior Sergeant H. W. managed to arrest Appellant and complainant after tracking the number complainant had used to call her mother. Appellant was subsequently charged. below 18 years. The witness tendered complainant's certificate of birth which showed she was born on 28<sup>th</sup> January, 2005 as exhibit No.3.
7. The appellant tendered sworn defence. He stated that complainant found her in his mother's home on 15<sup>th</sup> August, 2022 and that he is the one that called complainant's mother to inform her of complainant's whereabouts. He denied defiling the complainant.
8. After the conclusion of the trial, Appellant was convicted on the main charge and sentenced to serve 10 years' imprisonment.

## **Appeal**

9. Dissatisfied with the conviction and sentence, the appellant lodged this appeal and by amended grounds of appeal raised three grounds namely:
  1. The learned Trial Magistrate erred in matters of law and fact for failing to notice that the charge sheet was defective.
  2. The appellant's rights under Article 49(1)(f)(i) and (ii) of the Constitution of Kenya 2010 were violated
  3. The time spent in custody while on trial was not taken into account during sentencing as stipulated by Section 333 (2) of the Criminal Procedure Code
10. Ms. R. for the DPP opposed the appeal and stated that the case was proved beyond reasonable doubt and urged the court to uphold the conviction and sentence. That the appellant tricked the complainant to his house and defiled her and that medical records of the complainant were produced wherein the complainant had a torn hymen.

## **Analysis and determination**

5. This being a first Appeal, this Court has a duty to evaluate the evidence, analyze it afresh and draw its own conclusion, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify as did the trial Court, and give due allowance for that (See *Okeno v Republic* [1972] E.A.32).



6. It is trite that the age of a minor is a critical component of a defilement charge and that it is an element which must be proved by the prosecution beyond reasonable doubt. In *Kaingu Kasomo v Republic* Criminal Appeal No. 504 of 2010 the Court of Appeal stated as follows:

“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”.

7. Complainant was born on 28<sup>th</sup> January, 2005 and was 17 years when the offence was committed and Appellant was rightly charged under the provisions Section 8(1) as read with 8(3) of the *Sexual Offences Act* No. 3 of 2006.

8. Section 2 of the Act defines penetration to entail: -

“partial or complete insertion of a genital organ of a person into the genital organ of another person.”

11. Concerning medical evidence, the P3 form PEXH. 1 revealed that complainant had an old hymenal scar when she was examined on 26<sup>th</sup> August, 2022 from which it was concluded that she had been defiled. Complainant explained that the acts of defilement by Appellant took place on 19<sup>th</sup> August, 2022 and that in my considered view explains the old hymenal scar which fits in the period of one week that the doctor estimated the defilement to have taken place. I therefore find as did the trial magistrate that penetration had been proved and Appellant identified as the perpetrator.

12. Concerning the Appellant’s contention that the charge sheet was drafted before the offence was committed, I find that the issue ought to have been raised with the investigating officer to explain the date of drafting of the charge sheet. All in all, the charge sheet clearly discloses the dates of the offence and it is therefore not likely that Appellant was prejudiced by the date of the drafting of the charge.

13. Concerning violation of the 24-hour rule under Article 49(1) of the *Constitution*, I have looked at the calendar for August, 2022 and it reveals that Appellant was arrested on the night of 25<sup>th</sup> August which was a Thursday. 24 hours lapsed on the night of 26<sup>th</sup> August, 2022 followed by a weekend. Appellant was subsequently arraigned on Monday 29<sup>th</sup> August, 2022.

14. In my considered view, I find that Appellant’s right under Article 49(1) was therefore not violated.

15. The record also reveals that the trial magistrate did not give Appellant the benefit of section 333 (2) of the *Criminal Procedure Code* which provides that:

2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

16. Appellant was remanded in custody from the date of arrest on 25<sup>th</sup> August, 2022 until 27<sup>th</sup> September, 2023 when he was sentenced.

17. Taking all the foregoing factors into consideration, it is hereby ordered:

1. Appeal on conviction is dismissed



2. Appeal on sentence succeeds
3. The 10-year imprisonment term is set aside and substituted with a 5 years' imprisonment term, which shall be computed from 25<sup>th</sup> August, 2022

**DELIVERED AT MERU THIS 23<sup>rd</sup> DAY OF MAY 2024**

**WAMAE. T. W. CHERERE**

**JUDGE**

**Appearances**

Court Assistants - Kinoti/Munene

Appellant - Present in person

For DPP - Ms. Rotich (PC-1)

