



**Otieno & another v Republic (Criminal Appeal E017 of 2022)  
[2024] KEHC 5696 (KLR) (20 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5696 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KILGORIS  
CRIMINAL APPEAL E017 OF 2022**

**F GIKONYO, J  
MAY 20, 2024**

**BETWEEN**

**BRIAN OTIENO ..... 1<sup>ST</sup> APPELLANT**

**BRIAN OCHIENG ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the conviction and sentence of Hon. M.I.G. Moranga (S.P.M) in Kilgoris SPMCR SOA Case No. E003 of 2022 delivered on 11th November 2022)*

**JUDGMENT**

1. The appellants were charged with the offense of gang defilement contrary to section 10 of the [Sexual Offenses Act](#) No. 3 of 2006. Particulars were that on 10<sup>th</sup> January 2022 in Transmara South Sub-County within Narok County in association with each other and in turns intentionally caused their penis to penetrate the vagina of EA a child aged 16 years old.
2. The appellants faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offenses Act](#) No.3 of 2006. the particulars of the offense were that on 10<sup>th</sup> January 2022 at [particulars withheld] within the Narok County in association with each other and in terms unlawfully and intentionally committed an indecent act by touching namely vagina of EA and A girl aged 16 years with male genital organ namely pennies without her consent.
3. The appellants were convicted of the offense of gang defilement contrary to section 10 of the sexual offenses act and sentenced to serve 15 years imprisonment.
4. Being dissatisfied with the conviction and sentence the appellants filed their appeal herein. The appellants filed the memorandum of appeal dated 25<sup>th</sup> November 2022. the appellants Have raised 4 grounds of appeal.



- i. That learned trial magistrate erred in law and enforced in finding that the prosecution had proved its case beyond reasonable doubt.
  - ii. That the learned trial magistrate erred in law and fact in finding sufficient proof of penetration.
  - iii. The learned trial magistrate erred in law and fact by relying on the uncorroborated evidence of PW one who had been declared a hostile witness
  - iv. The learned trial magistrate erred in law and in fact in disregarding the whole evidence of the defense.
5. Their appeal was canvassed by way of written submissions. The appellants have not filed and the respondents have filed.

### **The Appellants' Submissions**

6. The appellants argued that, they were sentenced to a mandatory sentence without exercise of discretion which made the sentence unconstitutional. They cited ample case law to buttress this point.
7. The second point urged by the appellants was that, the 1<sup>st</sup> appellant was a minor at the time of the commission of the offence and should receive the protection of the law. The other appellant is said to be a young person of 22 years and should not be condemned to jail.
8. The appellants also argued that the prosecution did not call crucial witnesses like Shaban to clarify certain salient matters, and so an adverse inference should be made against the prosecution. In any event, they argued that the evidence by the prosecution was insufficient and hearsay which created a doubt in their case. They urged the court to give them the benefit of the doubt and acquit them. They cited the case of *Elizabeth Waitheigeni Atimu vrs Republic* (2005) eKLR.
9. They further argued that medical evidence by PW4 did not prove penetration, and that broken hymen is not proof of penetration.

### **The Respondent's Submissions**

10. The respondent submitted that the age of the complainant was proved beyond reasonable doubt. PW 1 POB mother of the complainant testified that the complainant was 16 years old and was in class 7. The complainant testified that she was born on 15<sup>th</sup> June 2006. Certificate of Birth (P Exh1) was produced which indicates that the minor was born on 15<sup>th</sup> June 2006.
11. The respondent submitted that the evidence tabled by the prosecution is riddled with Cogent Identification of the Appellants as the perpetrators of the offense and the trial court was correct in holding so. The complainant consistently identified the accused persons as the perpetrators of the offense in her testimony on 19<sup>th</sup> January 2022, 1<sup>st</sup> February 2022, 16<sup>th</sup> March 2022, and 17<sup>th</sup> May 2022 not once did she waiver, hesitate, or err from identifying the appellants as the perpetrators of the offense. The appellants were well known to the complainant. The 1<sup>st</sup> appellant was a coworker of the complainant's mother, PW2, and on the material date, the complainant was informed by another person that the 1<sup>st</sup> appellant was calling her and she went to the 1<sup>st</sup> appellant's house all by herself and found him together with the 2<sup>nd</sup> appellant. As such she had a prior personal knowledge of the appellant. While she was looking for the compliment, PW2 overheard the 1<sup>st</sup> appellant's voice which was well known to her being that he was a close coworker at a gold mine in a phone call conversation made by a 3<sup>rd</sup> party who was assisting her PW2 in the location of the minor/ complainant. The call was made to the 1<sup>st</sup> appellant's known mobile phone contact and PW2's presence and in that phone



- call as per PW2's testimony, the 1<sup>st</sup> appellant told the third party that he (the 1<sup>st</sup> appellant) had the minor complainant in his custody. PW2 testified that upon confirming that the minor was with the 1<sup>st</sup> appellant at his home, she went there and found the 1<sup>st</sup> appellant who informed her that the minor had been there at night that night but had left at 5:00 am and because the minor had not resurfaced at her (PW2) home, the 1<sup>st</sup> appellant promised PW2, the complainant's mother that he would look for and bring the complainant to her in 10 hours. The complainant spent sufficient time with the appellants to give room for and to enable proper identification the whole evening and night with the appellants.
12. The respondent submitted that the court rightfully held that penetration was proved beyond reasonable doubt. The minor testified that when she arrived at the 1<sup>st</sup> appellant's house the 2<sup>nd</sup> appellant dragged her into the house where they forcefully had intercourse with her in turns for the whole night after which she was sent away from the house at 5:00 am. The Clinical Officer also concluded the findings as per the P3 exhibited penetration.
13. Whereas the complainant was declared hostile, it is clear from the record that this was occasioned by her being mute when she was dust to provide details of the act of the gang development. She was sure and afraid and sometimes, as per the record, seemed irritated and angered in the middle of her testimony, when she was faced with the task of providing a detailed account of the gang department. On no occasion did the complainant appear to be deliberately untruthful nor did she exhibit any indication that a testimony was unreliable foodstuff rather, she only appeared to be ashamed of narrating all the offensive cards with details and this alone was the result that after being stood down multiple times, to receive counselling and to allow her to gather herself up she was declared hostile The complainant's testimony was corroborated by a medical report which showed signs and a conclusion of penetration and testimonies of other cues witnesses including the complainant's mother who interesting the complainant credibly and compellingly established that the complainant was in the custody of the opponents cumulative the prosecution's case was consistent and compelling and the court was writing attaching the weight to it and ultimately arriving at a conviction. They relied on the case of Daniel or the ambulance as a Republic [2011] eKLR.
14. The respondents submitted that the court considered the appellant's defence that they left the complainant unharmed that night and arrived at the conclusion that it was not convincing and found no reason to believe that the complainant was lying. They relied on the case of *AHM vs Republic* Criminal Appeal E043 of 2020 12022 KEHC 12773 KLR

### **Analysis and Determination.**

15. As the this is first appeal; the court will re-evaluate the evidence afresh and arrive at its own independent conclusions. Except, being minded to give allowance to the fact that the court neither saw nor heard the witnesses firsthand (*Njoroge v Republic* (1987) KLR, 19 & *Okeno v Republic* (1972) EA, 32.)

### **Issues**

16. From the grounds of appeal, the evidence adduced in the lower court, and the respective parties' submissions, the broad issues for determination are;
- i. Whether the prosecution proved its case beyond reasonable doubt. Here, will be discussed also, whether failure to call certain witness entitles the court to make an adverse inference against the prosecution.
  - ii. Whether the sentence was unconstitutional, or manifestly harsh and excessive.



## Elements of offence

17. The appellants were charged with the offence of gang defilement contrary to Section 10 of the [Sexual Offences Act](#) which provides as follows: -
- “Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who with common intention is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less the fifteen years but which may be enhanced to imprisonment to life.”
18. Elements of the offence of gang rape or gang defilement in Section 10 of the [Sexual Offences Act](#): -
- a. Unlawful sexual act committed in association with another or others or
  - b. Being in the company of another or others who commit the offence with the common intention of committing the offence.
19. Accordingly, a person may not have engaged in the sexual act of defilement but is guilty of gang rape or defilement if, with the common intention of committing the offence, he was in the company of another or others who commit the offence.
20. For gang defilement to be proved besides the above, the three ingredients of defilement age of complainant, penetration, and identification of assailant must be proved.
21. What does the evidence show?

## Age of the Complainant

22.

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

(*Francis Omuroni v Uganda* Court of Appeal; Criminal Appeal No. 2 of 2000)

23. Judicial authorities posit that, age may be proved through a certificate of birth or age assessment by a qualified doctor or through other credible evidence such as a baptismal card, notification of birth or school records, or the evidence of parents or guardians of, or the victim.
24. In this case, the complainant testified that she was 16 years old and in class 7. PW2, the mother of the complainant testified that the complainant was 16 years old and in class 7. The prosecution produced a certificate of birth (P Exh1) which confirmed that the complainant was 16 years old at the time the offence was committed.
25. Based on the evidence adduced, the court finds that the victim was 16 years old at the time of the incident.



## Penetration

26. Section 2 of the [Sexual Offences Act](#) defines penetration as:

" The partial or complete insertion of the genital organs of a person into the genital organ of another person."
27. PW1 testified that she had been sent by her mother PW 2 to deposit money in an impress account when she met a young boy who informed her that the 1<sup>st</sup> appellant was calling her. On arrival at his house both the 1<sup>st</sup> and 2<sup>nd</sup> appellants dragged her into the house and defiled her repeatedly. PW1 narrated how both had sexual intercourse with her in turns and then chased her out of the house in the morning ordering her to go home.
28. PW2 testified that indeed she sent her daughter to the shops to load her M-pesa l with some money on 10<sup>th</sup> January 2022 so that she could buy electricity tokens. However, she never came back that night. And since this was unusual, she sent word out for her to be sought.
29. PW3 a Clinical Officer confirmed having examined PW1 on 13<sup>th</sup> January 2022. He noted that PW1 had a foul smell on her vaginal region, and her hymen was perforated and old looking. He concluded that she had been defiled. He produced the P3 form P Exhibit 2 and the treatment notes as P Exhibit 3.
30. The appellants claimed that they released the complainant unharmed. They also argued that perforation of the hymen does not prove penetration as it may have been caused by other agencies. However, the evidence by the victim was corroborated by the medical evidence that there was penetration of PW1.

## Identification of the Perpetrator

31. Identification of persons who committed gang defilement in association with another or other, or present with common intention to commit the offence, is important.
32. Penetration was proved. Was it caused by the appellants in association with others or another or were present with the common intention to commit the offence?
33. The evidence by PW1 show that, on 10<sup>th</sup> January 2022 when she was coming back home from the shop, she met a young boy who informed her that the first appellant was calling her. It was about 7:00 pm she went to the first appellant's house. The appellants were well known to the complainant. The 1<sup>st</sup> appellant was a coworker of the complainant's mother who had personal knowledge of their alerts. PW2 while looking for the complainant overheard the first appellent talking on the phone to a third party and informed the third party that the complainant was in his custody. - The appellants informed PW2 that the complainant was there with them that night and that she had left at 5:00 am. They promised her that if the complainant did not resurface they would look for her and avail her in 10 hours.
34. This court finds that this ingredient was proved beyond reasonable doubt.
35. The first appellant in his defense stated that on 10<sup>th</sup> January 2022 at 7:00 pm his mother had sent him but before he could leave he found the complainant and a small boy in their house he left and came back at 8:00 pm. The complainant who may be known as 'C' told him she had come to watch TV when she asked her to leave she refused to win the 2<sup>nd</sup> appellant came back home he too pleaded with her to leave but she declined. And came back at 9:00 pm he later worked on to sleep with the 2<sup>nd</sup> appellant remaining in the sitting room seat. The complainant then slept in one of the beds in his house she later



left at 6:00 pm when he met the mother at his gate after work. They accompanied her to the police station as requested the opponents acknowledged the complainant was at school and under 18 years of age. They had given her a phone to call her mother so that they could be aware of where she was the 1<sup>st</sup> appellant claimed that whenever he demanded his dues from the mother of the complainant for grinding her mineral ore, she would force him to marry the complainant

36. This court is satisfied that the Appellants' defence was properly rejected based on evidence by the prosecution which proved beyond any reasonable doubt that the appellants defiled the child herein. The Appellants' conviction was safe.

#### **Whether PW1 was Truthful in Terms of Section 124.**

37. Section 124 of the [Evidence Act](#) which provides as follows:

“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.”

The proviso to section 124 of the [Evidence Act](#) permits the court, in a criminal case involving a sexual offence, to convict on the sole evidence of the alleged victim of the offence,

“...if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

This has a bearing on the requirement for corroboration.

38. In this case, the trial court conducted a *voire dire* and noted that the complainant understood the consequence of taking an oath. The complainant gave a sworn testimony. The complainant narrated to the trial court the events and how they occurred. She was categorical that she went to the appellant's house and the appellants defiled her in turns. Her evidence was cogent and gave a picturesque of the incident with succinct details of the manner it happened and the identity of the assailants. PW2 corroborated the testimony of the complainant. The evidence leaves no doubt that the appellants' defiled her.
39. Contrary to the claim by the appellants, the prosecution evidence was cogent and proof that they defiled the girl herein in turns. There was no doubt whatsoever as to the guilt of the appellants.
40. In the upshot, the court finds that the Appellant was positively identified as the assailant herein; there was no mistaken identity or error. Accordingly, the prosecution proved their case beyond reasonable doubt. The trial court did not err in convicting the appellants for gang defilement. The appeal on conviction therefore lacks merit and is hereby dismissed.



## On Sentence

41. The sentence prescribed in Section 10 of the [Sexual Offences Act](#) No. 3 of 2006 upon conviction is liable to imprisonment for a term not less than fifteen (15) years but which may be enhanced to imprisonment for life.
42. The appellant argued that the sentence herein is a result of mandatory sentence provided in the penalty clause. The particular penalty clause has been interpreted not to deprive the court of judicial discretion in sentencing. The argument does not yield much.
43. The appellants argued that the 1<sup>st</sup> appellant was a minor when the offence was committed. There was no evidence adduced to that effect. But, he is certainly a young person.
44. The 2<sup>nd</sup> appellant is also a young person.
45. The aggravating factors weigh heavy; the appellants penetrated the minor in turn. The act of gang defilement on the girl was too traumatic. the sentence given to the Appellant is provided in law but exercise of discretion by the trial court ought to be exercised judicially. This court notes that the trial court considered the seriousness of the offence, time spent in custody, and the fact that the appellants were first offenders.
46. Gang rape or gang defilement is only comparable to merciless devour of prey by a pack of vicious wolves, but, here, it is to satisfy their insatiable sexual desires. Just as the wolves leave in their wake complete devastation, gang rape or defilement leave complete devastation of the innocent girl with eternal defacement of their humanity and person. The beauty of a woman which is encapsulated in the pride, self-esteem, integrity, and honour of the person is destroyed by such sexual depravity. To say the least, their worth and innocence are irreparably damaged by this beastly act. Victims of gang rape or defilement are also left with deep and chronic trauma that will affect them psychologically, emotionally, and physically for the rest of their lives. These things must be said to dramatize what it means to rape or defile a woman. This court has stated before, and will state it again without fear of contradiction, that whomever admires and defiles the prohibited; a child; will tremble in the right place; the prison. No wonder the legislative intent which reflects the societal detestation of defilement excludes sexual offenses from settlement through alternative dispute resolutions, traditional methods of dispute resolutions, plea bargaining, probation, community service orders et al.
47. The circumstances of this case could even justify enhancement to a life sentence.
48. For purposes of Section 333 of the [Criminal Procedure Code](#), the sentence shall commence from 11/11/2022 when the appellants were convicted.
49. This court finds no merit in the appeal. It is hereby dismissed.
50. Orders accordingly.
51. Right of appeal explained.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 20<sup>TH</sup> DAY OF MAY, 2024.**

**F. GIKONYO M**

**JUDGE**

In the presence of: -

Okeyo for DPP



Both appellants

Leken C/A

