



REPUBLIC OF KENYA



**Odupo alias Bunge v Republic (Criminal Appeal E074 of 2022)
[2024] KEHC 5025 (KLR) (14 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5025 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL E074 OF 2022
AK NDUNG’U, J
MAY 14, 2024**

BETWEEN

JUNIOR ODUPOI ALIAS JOSEPH BUNGE APPELLANT

AND

REPUBLIC RESPONDENT

*(From original Conviction and Sentence in Nanyuki CM
Sexual Offences Case No E064 of 2021– B.M Mararo, PM)*

JUDGMENT

1. The Appellant, Junior Odupo Alias Joseph Bunge was convicted after trial of defilement contrary to Section 8(1) as read with Section 8 (4) of the [Sexual Offences Act](#), No 3 of 2006. The particulars were that on 14/08/2021 at about 1600 hours in Laikipia central intentionally caused his penis to penetrate the vagina of TWM , a child aged 17 years. He was tried, found guilty and convicted and 05/12/2022, he was sentenced to nineteen (19) years imprisonment.
2. Being dissatisfied with the conviction and the sentence, he appealed to this court challenging the conviction and the sentence vide a petition of appeal filed on 14/12/2022 on the following grounds;
 - i. The learned magistrate erred by failing to note that the prosecution did not prove their case beyond reasonable doubt.
 - ii. The learned magistrate erred by failing to note that he was not subjected to medical examination.
 - iii. The learned magistrate failed to note that he was not squarely placed at the scene of crime.
 - iv. The learned magistrate failed to note that his defence was quashed without cogent reasons.



- v. That his right to cross examine pursuant to Article 50 (2)(k) of the Constitution was infringed during examination in chief of the medical officer.
 - vi. That the sentence meted upon him was harsh for a first offender.
3. The appeal was canvassed by way of written submissions. In his written submissions, he argued that there were discrepancies on dates as to when the alleged defilement was committed as PW3 testified it was on 11/08/2021, PW4 stated it was on 14/08/2021, PW5 stated 09/08/2021 and PW6 stated it was on 10/08/2021 hence the prosecution failed to establish the exact material dates of the alleged offence. On penetration, he submitted that it beats logic why PW1 would agree to be alone with a stranger, why she did not scream and why she did not inform PW5 that her defiler had requested her to visit him again.
 4. Further, the medical evidence did not corroborate PW1 evidence as the medical report and the clinical officer did not hold an independent opinion of a possible recent signs of penetration. That one would expect some signs of injuries or laceration on the genitalia going by what PW1 described as a painful sexual experience. That sign of forced sexual intercourse would have been presence of epithelial cells. The clinical officer failed to mention when the hymen was broken to create a nexus to link him with the defilement on the alleged material dates. That the age of injuries and the probable type of weapon used to penetrate the vagina is prerequisite in a defilement case and failure to prove these aspects render a claim of defilement null and void as was held in Ben Maina Mwangi v Republic (2006) eKLR.
 5. He submitted that he did not challenge the medical evidence as he was not advised to challenge and cross examine the medical officer. That Article 50 (2) of the Constitution requires that an accused person especially if unrepresented be guided safely through the trial process as was held in Jairus Mukolwe Ochieng v Republic CR APP No. 217 of 2007 where it was held that where an accused is not represented, the court must at the close of any examination, enquire if the accused wishes to put any questions to the witnesses and the court must record the answers. He submitted that failure to accord an accused a fair trial may vitiate the proceedings. That section 169(1) of the Criminal Procedure Code was not complied with since his defence was quashed not because it was an afterthought or mere denial, but for the fact that he failed to deny the commission of the offence. That the sentence was harsh and excessive and failed to consider his mitigating factor and also failed to consider that he was a first offender and non-aggravating nature and circumstances of the case. Further the credibility and the demeanour of PW1 and PW5 was not recorded in the proceedings.
 6. In rejoinder, the Respondent's counsel submitted that all ingredients of the offence were proved to the required standard. The age was proved by complainant's birth certificate and identification was proved as the complainant was able to physically recognise him. On penetration, she submitted that the complainant's evidence on how the offence was committed was not challenged by the Appellant in his defence which could only lead to a conclusion that the complainant was telling the truth. That the trial court observed that retelling of the ordeal was so painful to the complainant to the extent that she broke down during cross examination by the Appellant and thus, the court was satisfied that she was telling the truth. Further, the clinician testified that the hymen was broken and there was evidence of penetration. He further clarified that it is not a must that injuries must be present in cases of defilement. Therefore, the evidence was sufficient, consistent and corroborative to convict the Appellant for the offence.
 7. She further submitted that his defence was considered and the trial court found that it did not dislodge the water tight testimony by the prosecution. On the sentence, she submitted that it was upon the Appellant to demonstrate that the sentence was manifestly excessive, and that the trial court overlooked some material factor or acted on wrong principle. That the trial court considered the Appellant's



mitigation and the time he had spent in remand hence the sentence of 19 years was not only lawful but lenient in the circumstances.

8. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and to subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. (See *Okeno v Republic* [1972] EA 32).
9. I have had occasion to read and consider the evidence as recorded in the trial court. I have taken cognizance that I never saw nor heard the witnesses testify and I have given due allowance for that fact. I have further considered the submissions by learned counsel and the case law cited.
10. The evidence before the trial court was as follows. PW1 the complainant testified that she is 17 years old. She stated that on 08/08/2021 while coming from church, she met RW who asked for her help in washing clothes. They went and found the Appellant who introduced himself as Joseph. John Gitonga was also there. The Appellant told RW and John to leave and the Appellant closed the door. He took her to the bed, removed her clothes and they had sex. He removed her pant/biker and he raped her. She did not resist and she could not scream as he held her neck. She did not tell anyone. On 14/08/2021, she went to help RW with her child and RW and John left. The Appellant raped her. She did not resist and he said that he would strangle her if she said anything. On 17/08/2021, she was not feeling well and she told Mrs Muhoro who called her father and they went to the police post and to hospital. She stated that the Appellant was a herder and she took the police to him.
11. On cross examination she testified that she knew the Appellant as Joseph but she did not know where he lived. That he threatened to kill her. The ordeal was painful and it happened at Rosemary's house.
12. PW2 GM, the complainant's father testified that the complainant was 17 years old. He was contacted by Mrs Muhoro to go to school who informed him that the complainant had been raped. The complainant confirmed and said it was a Maasai boy. He reported the matter and he took the complainant to hospital. The Appellant was later arrested and he was summoned. He stated that he did not know the Appellant. He testified on cross examination that he saw the Appellant at police station and maintained that he did not know him and had not planned to steal with him.
13. PW3 Peris Wakio testified that she is a teacher. That some student went to the staffroom and asked if they could talk to her privately. The complainant informed her that she went to her friend's place where the room was locked and she was raped. She did not explain clearly and she had not told anyone. She informed the deputy who told her to call the complainant's father. That they said the offence was committed on 11/08/2021. She did not know the Appellant.
14. PW4, the clinical officer testified that he filled the P3 form on 18/08/2021. Upon physical examination, nothing abnormal was noted on outer genitalia, there were no lacerations, no bruises on external internal and the hymen was broken. He testified that the hymen was previously broken and evidence on penetration was from the history of the minor. He testified that it is not a must that injuries be present to prove defilement. He produced the P3 form and PRC form as Pexhibit 2 and 3 respectively.
15. PW5 RW testified that on 09/08/2021, she was in her house with her boyfriend John and the Appellant when the complainant found them there. They were told to leave and they left with John. The complainant told her that she had sex with Appellant. They were girlfriend and boyfriend. That she did not tell her and she was okay. The complainant told people in school. On cross examination, she testified that it was on 08/08/2021. That the Appellant asked them to leave. That it was not in the Appellant's house but her house. That she did not witness but was told that he slept with the complainant. That he did it on 14/08/2021.



16. PW6 the investigating officer testified that a report was made that the complainant had been defiled by a person known to her. She was treated and he commenced the investigations whereby he arrested the Appellant who took him to the scene of crime. Complainant identified the Appellant as Joseph. He testified on cross examination that the complainant had been defiled severally last been on 14/08/2021 and the complainant informed him that the offence was committed at her friend's house and not at the Appellant's plot. He produced the complainant's birth certificate as Pexhibit 1 and investigation diary as Pexhibit 4.
17. The Appellant in his sworn defence testified that on 17/08/2021, he was at (Particulars Withheld) village 2. That he lives in Jua Kali town. His elder brother who had been involved in an accident had called him the previous day. That he was arrested and charged. He testified on cross examination that the complainant claimed that she was defiled by Joseph and she was told to say it was him. That the complainant's father tried to engage him in stealing.
18. That was the totality of the evidence before the trial court. It is trite that for the charge of defilement to stand, the Prosecution must prove the age of the victim (must be a minor), that there must be penetration and a clear identification of the perpetrator.
19. Having established the ingredients of the charge, the question that this court should therefore determine is whether those ingredients were proved to the required standard.
20. The Appellant argued that there were discrepancies on dates as to when the alleged defilement was committed as PW3 testified it was on 11/08/2021, PW4 stated it was on 14/08/2021, PW5 stated 09/08/2021 and PW6 stated it was on 10/08/2021 hence the prosecution failed to establish the exact material dates of the alleged offence.
21. The issues of lack of clarity on date when the offence was committed in my view cannot vitiate a conviction. It does not lessen the fact that an offence was committed. The Court of Appeal in [Obedi Kilonzo Kevevo v Republic](#) [2015] addressed this issue where it held;

“Applying this principle to the rival arguments of the parties, we are satisfied in the instant case that this was an omission and discrepancy which did not prejudice the appellant and that no miscarriage of justice has been occasioned as a result of the difference in dates. The errors on the dates cannot make the charge sheet defective or the conviction a nullity. This defect is therefore curable under Section 382 of the [Criminal Procedure Code](#)...”
22. Further, Section 214 (2) of the [Criminal Procedure Code](#) provides that;

“Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.”
23. Proof of age is important in a sexual offense. In *Kaingu Kasomo v. Republic*, Criminal Appeal No. 504 of 2010 (UR), the Court of Appeal stated that:

“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.”



24. In the present appeal, the complainant's age was not disputed. She testified that she was 17- years old which was confirmed by her father, PW2. Her birth certificate was produced by PW6 as Pexhibit 1 which shows that she was born on 01/04/2004. The offence is alleged to have been committed on 14/08/2021 and therefore she was 17 years at the material time hence, a child for the purpose of sexual offences.
25. As to penetration, the Appellant submitted that the medical evidence did not corroborate PW1 evidence as the medical report and the clinical officer did not hold an independent opinion of a possible recent signs of penetration. That one would expect some signs of injuries or laceration on the genitalia going by what PW1 described as a painful sexual experience. That sign of forced sexual intercourse would have been presence of epithelial cells. The clinical officer failed to mention when the hymen was broken to create a nexus to link him with the defilement on the alleged material dates.
26. The clinical officer testified that upon physical examination, nothing abnormal was noted on outer genitalia, there were no lacerations, no bruises on external/internal and the hymen was broken. He testified that the hymen was previously broken and evidence on penetration was from the history of the minor. He testified that it is not a must that there be injuries to prove defilement. He examined the complainant on 18/08/2021, four days after the alleged commission of the offence.
27. The trial court while convicting the Appellant found corroboration of the complainant's evidence from the medical evidence. The trial magistrate stated that PW4 examined the complainant and noticed bruises on external genitalia and hymen was broken with old tears. He concluded that there was an element of penetration hence penetration was conclusively proved.
28. This is not the case as no bruises were found as per the testimony of PW4. The P3 and the PRC forms indicate that the hymen was previously broken. PW4 did not also make a conclusive finding on whether there was proof of penetration. What can be deduced from PW4's evidence is that there was nothing abnormal to prove a recent sexual encounter. However, it not lost on the court that the complainant was examined four days after the last encounter.
29. It is also not lost that defilement can be proved by the evidence of the victim alone as it has been held in a myriad of cases.
30. In *Kassim Ali v Republic* Cr. App. No. 84 of 2005 (Mombasa) it was held thus;
- “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.”
31. This is in line with Section 124 of the *Evidence Act* which states that;
- “Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is 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.”



32. However, Section 124 of the Evidence Act can only be complied with if the “reasons” are “recorded in the proceedings” indicating that the “Court is satisfied that the alleged victim is telling the truth”.
33. Apart from analyzing the complainant’s testimony, the learned magistrate did not comment further on the complainant’s testimony. He did not state whether he was satisfied that the complainant was telling the truth and the reasons why he believed her testimony.
34. For the court to base a conviction on the uncorroborated evidence of a victim of sexual offence, such evidence must be firm and reliable and must not harbor any predisposition to an untruth. The evidence of the complainant needed further interrogation to test its veracity. The complainant states she went to the home of RW to help her wash clothes on the 8/8/21. John (boyfriend to Rosemary) was there and a person who was introduced as Joseph (who PW1 states is the Appellant). She states they had sex. She did not tell anyone. PW1 in what is a clearly bizarre happening, returns to the home of RW on 14/8/21. Again, John and RW are there. They are again told to leave. They leave. The Appellant raped her. It is inexplicable how PW1 would return to where she was raped earlier and the same pattern of RW and John being told to leave is repeated and PW1 agrees to remain there with the person who had raped her earlier. In my view PW1 was less than candid in her testimony. She appears to be withholding some truths about what was going on in the whole scenario. This does not augur well with the credibility of her evidence.
35. I hasten to add, however, that even if the complainant was willingly going to the said house, any implication of consensual sex is cast away by dint of Section 43 (1) (c) and (4) (f) of the Sexual Offences Act whose import is that a minor is incapable of appreciating the nature of the act and to give consent to sexual intercourse. Any sexual intercourse with a child is intentional and unlawful because it is “in respect of a person who is incapable of appreciating the nature of the act which causes the offence.”
36. Therefore, if there be evidence of penetration, it would be immaterial the circumstances under which the complainant went to the subject house and whether the sex was consensual.
37. PW1 states she did not resist the sexual assault. She did not explain in graphic details what transpired between her and the Appellant. She only stated that they had sex and the Appellant raped her. She did not explain whether the act of sex or rape meant that the Appellant penetrated her vagina. In *Julius Kioko Kivuva v Republic* [2015] Eklr, expounding on the threshold for proof of penetration, Nyamweya J (as she then was) stated that;

“Penetration” under section 2 of the Act is defined to mean “the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

The complainant (PW1) testified as follows in this regard:

“The accused removed my pant and my skirt. I also had a black biker which he also removed. He did not use a condom. We had sex twice that night. We slept up to 9.00 a.m the following day”

PW1’s testimony in this regard was not specific as to the act of penetration; and her evidence of having sex does not necessarily prove that penetration took place, in the absence of further evidence and details as to what actually happened in the act of having that sex. Evidence of sensory details, such as what a victim heard, saw, felt, and even smelled, is highly relevant evidence to prove the element of penetration, as a victim’s testimony is the best way to establish this element in most cases. The specificity of this category of evidence, even though it may be traumatic, strengthens the credibility of any witness’s testimony, and is particularly



powerful when the ability to prove a charge rests with the victim’s testimony and credibility as it does in this appeal.”

38. Kemei J in *P M M v Republic* [2017] eKLR stated that;

“As noted in the case of *Julius Kioko Kivuva = v= Republic* (machakos Hccra No. 60 OF 2014) that evidence of sensory details such as what a victim heard, saw, felt and even smelled is relevant to prove the element of penetration. I share the same findings of the learned justice Nyamweya in the above stated case. It was necessary for the Complainant to provide the vivid details of the sequence of how the rape ordeal took place. Even though the doctor noticed the presence of whitish discharge and semen as well as a rugged vagina it was only the Complainant to present sufficient details as to whether penetration did occur. Hence I find the evidence clearly established the alternative charge of committing an indecent act with an adult contrary to section 11A of the *Sexual Offences Act...*”

39. I associate myself with the finding in *Furaha Ngumbau Kagenge Versus Republic*, Criminal Appeal No. 141 Of 2016, Mombasa (Cr); the court observed that;

“.....it is not always the case that sex is synonymous with penetration, hence the definition of penetration that is set by Section 2 of the *Sexual Offences Act*, which is required to be proved beyond reasonable doubt.....”

40. The complainant’s testimony in this regard was not specific as to the act of penetration and her evidence of having sex does not necessarily prove that penetration took place in the absence of further evidence and details as to what actually happened. The complainant’s explanation as to what transpired between her and the Appellant was vague and therefore, even though Section 124 of the *Evidence Act* provides for the possibility of a conviction on the basis of the uncorroborated evidence of the victim of a sexual offence, the complainant evidence falls short of establishing that penetration occurred.

41. In the result, my finding is that a major ingredient of the offence being penetration of the victim remains unproved. There are doubts whose benefit must turn in favour of the Appellant. The appeal succeeds and I set aside the conviction and substitute thereof an order of acquittal. The Appellant is set at liberty forthwith unless otherwise lawfully held under another warrant.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 14TH DAY OF MAY 2024

HON. JUSTICE A.K. NDUNG’U

JUDGE

