



**Yussuf & another v Republic (Criminal Case E031 of 2022)  
[2024] KEHC 6740 (KLR) (21 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6740 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CRIMINAL CASE E031 OF 2022  
JN ONYIEGO, J  
MAY 21, 2024**

**BETWEEN**

**ABDIRASHID ABDI YUSSUF ..... 1<sup>ST</sup> APPELLANT**

**MOHAMED MUHAMUD ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence by Hon. Wasike SRM in Sexual Offences No. E019 of 2021 delivered on 17.06.2022 at SRM's Court at Mandera)*

**JUDGMENT**

1. The 1<sup>st</sup> appellant was charged jointly with the 2<sup>nd</sup> appellant for the offence of gang defilement contrary to Section 10 of the *Sexual Offences Act* No. 3 of 2006. In respect to count one, it was alleged that on 02-06-2021 Abdi Rashid Abdi Yussuf (1<sup>st</sup> appellant) at Bulla Dodai in Mandera North Sub County within Mandera County in association with Mohamed Mohamud (2<sup>nd</sup> appellant) and another not before the court intentionally and unlawfully caused his penis to penetrate the vagina of F.H., a child aged 17 years.
2. The 2<sup>nd</sup> appellant faced an alternative count of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 2006. The particulars were that on 02.06.2021 at Bulla Dodai in Mandera North Sub County within Mandera County in association with Mohamed Mohamud (2<sup>nd</sup> appellant) and another not before the court intentionally and unlawfully touched the vagina of F.H., a child aged 17 years.
3. In respect to count II, the 2<sup>nd</sup> appellant was charged with the offence of Gang defilement contrary to section 10 of the *Sexual Offences Act* No. 3 of 2006. It was alleged that on 02.06.2021 at Bulla Dodai in Mandera North Sub County within Mandera County in association with Abdi Rashid Abdi



- Yussuf (1<sup>st</sup> appellant) and another not before the court intentionally and unlawfully caused his penis to penetrate the vagina of F.H., a child aged 17 years.
4. He also faced an alternative count of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 2006. Particulars were that on 02.06.2021 at Bulla Dodai in Mandera North Sub County within Mandera County in association with Rashid Rashid Abdi Yusuf (1<sup>st</sup> respondent) and another not before the court intentionally and unlawfully touched the vagina of F.H., a child aged 17 years.
  5. The appellants were convicted of their respective main counts and sentenced to serve 5 years' imprisonment each.
  6. Being dissatisfied with the said conviction and sentence, the appellants filed a petition of appeal dated 29.06.2022 through the firm of Wanyanga & Company Advocates, citing the grounds summarized as hereunder;
    - i. That the learned trial magistrate erred in law and facts in convicting the appellants against the weight of the evidence.
    - ii. That the learned trial magistrate heavily misdirected herself in law in shifting the burden of proof to the appellants and further ignoring the defense of the appellants without proper evaluation;
    - iii. That the learned trial magistrate erred in law and facts in convicting the appellants yet the prosecution evidence was laced with contradictions.
    - iv. That the learned trial magistrate failed to find that failure to call crucial witnesses was a fatal blow to the prosecutions' case.
    - v. That the learned trial magistrate erred in law and fact in convicting the 2<sup>nd</sup> appellant yet no tangible evidence linked him to the said offence.
  7. Ultimately, they prayed that this appeal be allowed and sentence be quashed and subsequently they be set free forthwith.
  8. The court directed that the appeal be canvassed by way of written submissions which directions the parties complied with.
  9. The appellants urged that the learned magistrate failed to resolve and reconcile the apparent doubts, contradictions and inconsistencies in the prosecution case. That the same was brought out by the immense differences in relation to the age of the complainant which could not authoritatively be determined.
  10. Additionally, that there was no consistency regarding the date the alleged offence was committed and therefore, the same ought to have been resolved in favour of the appellants. Reliance to that end, was placed on the cases of Stanley Mathenge Karani v Republic [2016] eKLR and John Mutua Munyoki v Republic (2017) eKLR where the court held that the appellate court has an obligation to reconcile evidence where the trial court failed to do so and determine its effect on the appellant's conviction and sentence.
  11. It was urged that in the pre-sentencing report, the learned trial magistrate failed to take cognizance of the fact that the complainant previously had been married in Ethiopia and that she knew one of the appellants and yet in her statement, she denied any knowledge of the appellants. That the same impacted on her character as a credible witness. That the medical report relied on by the trial court to



- convict the appellants was not conclusive as the same together with the pre-sentencing report, displayed that the appellants could not have been the persons who penetrated the complainant unless further tests were to be conducted by taking samples from the appellants.
12. That having noted that she was previously married, then the broken hymen could have been as a result of the consummation of the said marriage. In the end, it was urged that prosecution portrayed contradicting and inconsistent testimonies from the witnesses and therefore, the same could not be regarded as safe to be relied on in reaching a conviction.
  13. In opposing the appeal, Mr. Kihara, the prosecution counsel via his written submissions dated 19.07.2023 submitted that the complainant's evidence was corroborated by that of the medical officer who testified that indeed she had been defiled.
  14. On identification, counsel submitted that the appellants were properly identified as the ordeal took place during the day till the late evening and therefore, the time was enough to conclude that there was positive identification of the perpetrators. Mr. Kihara urged that the sentence meted out by the court was not only reasonable but also appropriate bearing in mind the circumstances of the case at hand. It was thus urged that this court should dismiss the appeal herein and uphold the conviction and sentence by the trial court.
  15. As the first appellate court, I am duty bound to re-evaluate the evidence afresh and arrive at my own independent conclusion. I am however reminded to bear in mind that I neither saw nor heard the witnesses and give due regard to that. See *Njoroge v Republic (1987) KLR, 19* & *Okeno v Republic (1972) E.A, 32*.
    16. PW1, F.H.O. testified that she was aged 17 years in as much as she did not know when she was born. She stated that on 02.06.2021 at about 1.30 p.m. while at Rhamu market, she met the appellants who offered her a lift in their taxi motor vehicle. That in as much as she did not know the occupants well, she welcomed the offer to take her home. While inside the vehicle, the occupants turned towards Dagahle and then to Soko Degodia as one of them held her hand and another covered her mouth thus gagging her.
    17. She testified that they took her to a house with only a bed on which they defiled her in turns. She stated that a man not before the court removed her clothes and thereafter made her lie on the said bed. That another man who was also not before the court took the first turn to defile her. The 2<sup>nd</sup> accused thereafter took over in defiling her while the man not before the court covered her mouth. That the 1<sup>st</sup> accused person was the last to defile her as the man not before the court continued to cover her mouth. It was her evidence that she stayed in the said house the whole of the afternoon, night and the following day as the accused persons continued defiling her. She stated that after leaving the house at 3.00. p.m., she found her family members looking for her. That after explaining her ordeal, she was taken to Rhamu Police Station and thereafter, Rhamu Referral Hospital.
    18. PW2, Halima Abdullahi Elmi testified that PW1 was her daughter in as much as she could not remember her birth date. She was however sure that pw1 was fourteen years old. That on 2.0.2021 at 6.00 p.m., she received a call from Habiba Abdullahi who informed her that PW1 was missing. She stated that previously, she had sent the complainant to Soko Jogoo to take a milk container



to the market but was later reported missing. She thus informed the elders and mosques to help her find her daughter.

19. That on the following day, she saw her near Rhamu field and upon asking her what had happened, she narrated her entire ordeal to her. She stated that she looked at the complainant's private parts and noted some injuries. She was thus assisted by family members to report the matter to the police station and later to the hospital.
20. PW3, Abdirahman Abbas, a clinical officer who examined the complainant recalled that the complainant upon being examined was found to have been defiled. His approximation of the age of the complainant was 16 years old. That her hymen was broken besides there being lacerations at the vaginal orifice near the perineum and white discharge. He thus produced the P3 Form and the treatment card.
21. On 25.03.2022, the trial court delivered a ruling that the accused persons had a case to answer thereby placing them on their defence.
22. DW1, Abdirashid Abdi testified that he was a taxi driver but that he did not commit the offence herein. He stated that his vehicle was in Mandera for repair when the alleged offence occurred. It was his case that the complainant did not mention the number plate of the alleged vehicle that offered her a lift and further, that his name was not mentioned by the complainant to affirm that indeed he was the perpetrator of the offence herein.
23. DW2, Mohammed Muhamud testified that on 06.06.2021, he was at Rhamu from Bulla Dodai when he met a girl and her family in the company of a police officer. That they were making noise and so, he entered the plot as he was going to greet his cousin. That he was shocked when the father of the girl asked her to identify the plot that she had been taken to a request that the girl responded to by saying that she did not know. That after he (Dw2) told the man not to force the girl, the man got angry and thereafter approached the police officer he was with who in turn asked for his name and whether he knew the girl. After having given his name to the police officer, the officer went away but upon going back, he asked if he was Mahmoud which he denied.
24. It was his case that the officer informed him that he was living with a person who had defiled a girl and so, he got arrested. That the investigating officer promised to investigate on the issue but the same did not happen. He denied ever participating in defiling the complainant.
25. I have considered the grounds of appeal and evidence adduced before the lower court. In my view, the following are the issues for determination.
  - i. Whether the offence was proved beyond reasonable doubt; and
  - ii. Whether the sentence was manifestly harsh and excessive in the given circumstances.



26. 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 than fifteen years but which may be enhanced to imprisonment to life.”
27. Elements of the offence of gang rape or gang defilement as can be discerned from Section 10 of the [Sexual Offences Act](#) are: -
- i. Unlawful sexual act committed in association with another or others without consent.
- Or
- ii. Being in the company of another or others who commit the offence with common intention of committing the offence.
28. Accordingly, a person may not have engaged in the sexual act of defilement but is guilty of gang rape or defilement if he was in company of another or others who commit the offence with common intention of committing the offence.
29. For gang defilement to be proved besides the above, the three ingredients of defilement being age of complainant, penetration and identification of assailant must also be proved.
30. The case of Francis Omuroni v Uganda Court of Appeal; Criminal Appeal No. 2 of 2000, is explicit on proof of age of the sexual victim by stating that:
- “ 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 the 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...”
31. What emerges from the above authority is that age may be proved through certificate of birth or age assessment by a qualified doctor or through other credible evidence such as baptismal card, notification of birth or school records or the evidence of parents or guardian.
32. In this case, PW1 testified that in as much as she did not know her age, she was informed by her parents that she was 17 years; PW2, the complainant’s mother also testified that in as much as she could not remember the birth date of the complainant, she was sure she was 14 years old. PW3, the clinical officer after examining the complainant, approximated the age of the complainant to be 16 years old.
33. The above notwithstanding, the trial magistrate having been unsure whether the complainant was a child or not, took cognizance of the fact that the section under which the appellants were charged makes provision for an act of defilement or rape. The trial court thus changed the charge for defilement into that of rape. It therefore called for scrutiny the aspect of consent, if at all the same was procured before the act of sexual intercourse occurred. In so doing, the trial magistrate opined that the same was to ensure that justice is served both to the complainant and the appellants.
34. The above notwithstanding, section 3 (1) (2) of the Second Schedule to the [Sexual Offences Act](#) provides as follows:



This paragraph amends the Criminal Procedure Code. (2) Section 184 of the Criminal Procedure Code is repealed and replaced with the following new section- Charge of rape. 184. Where a person is charged with rape and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under one of the sections of the *Sexual Offences Act*, he may be convicted of that offence although he was not charged with it.

35. It therefore follows that the action by the trial magistrate to replace the charge of gang defilement with that of gang rape was not only sound but also supported by the law.
36. Rape is defined under Section 3(1) of the *Sexual Offences Act*, 2006 in the following terms; -  
A person commits the offence termed rape if –
- a. He or she intentionally or unlawfully commits an act which causes penetration with his or genital organs.
  - b. The other person does not consent to the penetration; or
  - c. The consent is obtained by force or by means of threats or intimidation of any kind.
37. 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.”
38. PW1 recalled how while at Rhamu market, she met the appellants who offered her a lift in their taxi vehicle of alto make. That in as much as she did not know the occupants well, she welcomed the offer to take her home. She testified that instead of being taken home, the appellants instead diverted and took her to a house where she was defiled in turns by the very appellants.
39. PW2 also testified that upon finding the complainant and narrating to her all that happened, she checked the complainant’s private parts and confirmed that she was injured. PW1 and PW2’s testimony was corroborated by the testimony of PW3, the clinical officer who examined the complainant and stated that the complainant’s hymen was broken; there were lacerations at the vaginal orifice near the perineum and that there was whitish discharge. He thus confirmed that indeed the complainant was defiled and further produced a P3 Form and treatment notes. From the available medical evidence, there was cogent proof of penetration. The trial court was thus properly grounded on evidence in her finding that there was proof of penetration.
40. On identification, PW1 narrated how the appellants together with others not before the court defiled her in turns. That in as much as she did not know the names of the perpetrators at that time, she could recognize their faces as she watched them while they were defiling her. Additionally, that she was in the same house the whole of the afternoon of the first day right to the night and through the next day in the morning as they defiled her in turns. It therefore follows that the presence of light and the amount of time that the complainant and the appellant spent together, enabled the complainant to positively identify her assailants. On this score, I am guided by the decision of *Mwaura v Republic* (1987) KLR.



645 in which the Court of Appeal adopted the finding in *Wangombe v Republic* (1980) KLR at 150, that;

“... In this case guilt turned upon visual identification by one or more witnesses...a reference to the circumstances usually requires the Judge to deal with such important matters as the length of time the witnesses had for seeing who was doing what is alleged...”.

41. Although there was no eye witness apart from the evidence of the complainant, Section 124 of the *evidence Act* does allow a court to convict based on the evidence of a single witness in a sexual offence as long as the court is satisfied that the witness is truthful. See *Stephen Nguli Mulili v Republic* (2014) e KLR. The trial court trusted the testimony of pw1 and relied on the same hence a truthful witness.
42. Although the complainant did not know the appellants before, she assisted in identifying them leading to their arrest. She even identified them in the dock which adds value on her credibility. As was stated in the case of *Muiruri and 2 others v R dock* (2002)1KLR 274 identification is not completely worthless and a court can safely rely on the same to convict. In the circumstances of this case, there was no error in identification of the perpetrators. I therefore find that this ingredient too was proved beyond reasonable doubt.
43. On consent, there was no evidence that the complainant consented to the appellants together with others not before the court to repeatedly and in turns have sexual intercourse with her. The manner and style in which she was being covered her mouth by those in company of the appellants when sexually assaulting her is proof enough that there was no consent. See *Anthony Nyaga Machaki and Geoffrey Ngari Machaki, Criminal Appeal No. E024 of 2021*.
44. On the issue that their defences were not considered the 1<sup>st</sup> accused invoked an alibi defence while the 2<sup>nd</sup> accused person urged that his name was not mentioned by the complainant as a perpetrator. Of importance to note is that the complainant stated that she did not know the names of the perpetrators but identified them together with others not before the court as the persons who defiled her.
45. She took a lot of time in their presence and the same aided her to properly identify them. It is against that backdrop that the appellant’s defence was properly rejected on the basis of evidence by the prosecution which proved beyond any reasonable doubt that the appellants defiled the complainant in company of others not before the court and that they were at the scene at the material time. Therefore, the question of alibi defence does not arise.
46. Although the prosecution did not call the investigating officer, the same in my considered view should not defeat the call for justice. It is trite that the principles to consider in determining the issue of crucial witnesses was dealt with in the leading case of *Bukenya and Others v Uganda* 1972 EA 549 where LUTTA Ag. Vice President held that:  

‘The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution...

The prosecution’s burden in regard to witnesses is to call witnesses who are sufficient to establish a fact.....The issue is whether those called are sufficient to aid the court establish the truth.....’
47. In my view the witnesses called were sufficient to establish the offence. As such, grounds 1, 2,4 and 5 of the appeal are dismissed.
48. Concerning the issue of whether the prosecution evidence was marred with contradictions, the learned magistrate was faulted for failing to resolve and reconcile the apparent doubts, contradictions and



inconsistencies in the prosecution case. That the same was brought out by the immense difference in regards to the age of the complainant as the same could not be authoritatively be determined. Additionally, that there was no consistency upon which date the alleged offence was committed and therefore, the same ought to have been resolved in favour of the appellants.

49. It is trite that contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. It is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from.
50. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. The correct approach is to read the evidence tendered holistically. It is only when inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court that they can necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from. In my view, there were no material contradictions to vitiate the trial. The issue of age was resolved by the court and actually in the appellants' favour.
51. On sentence, it is trite that the same is a matter that rests in the discretion of the trial court and it must depend on the facts of each case. On appeal, the appellate court will not easily interfere with the sentence unless, the sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle.
52. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the grounds aforesaid is shown to exist. [See Bernard Kimani Gacheru v Republic [2002] eKLR and Ahamad Abolfathi Mohammed & another v Republic [2018] eKLR].
53. Section 10 of the *Sexual Offences Act* No. 3 of 2006 states that upon conviction, the accused shall be liable to imprisonment for a term not less than fifteen (15) years but which may be enhanced to imprisonment for life.
54. In my view, the trial magistrate properly reached a fair determination in meting out sentence having in mind the prevailing circumstances. It is against that backdrop that I uphold the conviction and sentence by the trial court noting that the same were founded on sound legal principles and in fact lenient.

Dated, signed and delivered virtually this 21<sup>st</sup> day of May 2024

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**J. N. ONYIEGO**

**JUDGE**

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