



REPUBLIC OF KENYA



**Ondara v Republic (Criminal Appeal 161 of 2023)
[2024] KEHC 7033 (KLR) (12 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7033 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 161 OF 2023**

**DR KAVEDZA, J
JUNE 12, 2024**

BETWEEN

JUSTINE ONDARA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence imposed by
Hon. A. Mwangi (CM) on 10th May 2023 at Kibera Chief Magistrate's
Court Sexual Offences case no. E078 of 2021 Republic vs Justine Ondara)*

JUDGMENT

1. The appellant was charged and after a full trial convicted for the offence of defilement contrary to section 8(1) as read with 8(4) of the [Sexual Offences Act](#), No. 3 of 2006. He was sentenced to serve fifteen (15) years imprisonment. Being aggrieved, he filed an appeal challenging his conviction and sentence.
2. In his petition of appeal, and amended grounds of appeal, the appellant challenged the totality of the prosecution's evidence against which she was convicted. He contended that the element of penetration was not proved. He complained that the trial court misapplied the provision of section 34 of the [Sexual Offences Act](#) resulting in a conviction. In addition, the sentence imposed was harsh and excessive.
3. The appeal was canvassed by way of written submissions with both parties filing the same, there is no need to rehash them.
4. This is the first appellate court and in *Okeno v. R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence before the trial court, and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.



5. The prosecution called five (5) witnesses in support of their case. PW2, the complainant, told the court that she could not remember her birth date and mentioned that she was a student. She testified that she had lived with her stepfather before moving to Nairobi. In Nairobi, she initially stayed with her friend BO before getting a job as a house help for a woman named C. She recalled that on June 14, 2021, around 3 pm, C boyfriend, the appellant, came to her room. He started caressing her breast, pushed her on the bed and raped her. After the ordeal, he told her not to tell anyone. She testified that the appellant raped her on two different occasions when her employer was away.
6. It was after the third incident that she called her aunt (PW3) to report it. Her aunt informed C, who then took her to Kenyatta National Hospital for an examination. Following the examination, she went to her aunt's home, reported the matter to the police, and was taken to SHOFKO. She also underwent an examination at Tumaini Hospital, where the PRC Form was completed.
7. During cross-examination, she testified that she left her home to live with her aunt, who then took her to C's house. There, she had access to all the facilities, including a phone used for communication. She stated that she did not tell anyone about the incidents, including C, the appellant's girlfriend, and her employer. Moreover, the phone she used to report the incident belonged to the appellant. She also told her aunt not to inform her employer. She emphasized that she did not have a boyfriend.
8. PW3, JA, testified that she is the complainant's aunt. On June 22, 2021, she received a call from the complainant, who said she did not want to continue working for her employer, C, because the appellant had repeatedly defiled her. The complainant mentioned that the incident occurred on a double-decker bed, which broke and injured her. PW3 decided to inform the complainant's employer. The following day, C brought the complainant home, and J reported the incident at Kibera Police Station. The complainant was connected to SHOFKO for counselling. PW3 stated that the complainant was 17 years old at the time of the incident.
9. During cross-examination, PW3 told the court that she did not take the complainant to the hospital and was informed that the incident happened on June 24, 2021. The complainant was taken to Tumaini Hospital by SHOFKO on July 2, 2021. J maintained that the complainant could not escape from her employer because she had no phone and did not know the area. She also insisted that she did not frame the appellant for the charges. Additionally, she mentioned that C had called her, expressing dissatisfaction with the complainant for breaking utensils.
10. PW1, Triza Wanjiku Njeri, a social worker with SHOFKO, testified that on July 3, 2021, the complainant was brought to their facility after being referred from Tumaini Hospital and needed shelter. The complainant told her that she had been defiled by her employer while his wife was away. PW1 with the complainant's aunt (PW3), took the complainant to the hospital and reported the matter to the police. She noted that the complainant did not mention that she had been sacked by her employer.
11. PW4, Alice Gori, a nursing officer, testified that on July 5, 2021, the complainant was brought to their facility by two women. The complainant reported that she had been sexually assaulted by her employer's husband on July 21, 2021, in the kitchen, and again on July 22, 2021, in the sitting room. Upon examination, PW4 found the complainant's hymen was broken, the vaginal opening was gaping, and there was a whitish discharge. The complainant had contracted an infection and had swelling on her right breast. PW4 filled the PRC and P3 forms, which she presented in court.
12. During cross-examination, PW4 stated that she examined the complainant 15 days after the alleged incident and confirmed that the complainant informed her of the termination of employment.



13. PW5, PC Rachel Njeri, the investigating officer, testified that she recorded the complainant's statement on July 5, 2021, after the incident was reported. The complainant alleged that the appellant defiled her on the 14th, 16th, and 22nd of June 2021. She did not initially report the incidents due to threats but eventually informed her aunt on July 1, 2021, leading to an argument with her employer. On July 2, 2021, the complainant's employer escorted her to her aunt (PW3). The case was then referred to SHOFCO, which reported it to the police. When the police were involved, the complainant already had a PRC form, so PW5 only issued a P3 form.
14. During cross-examination, PW5 stated that the complainant stayed at SHOFCO from July 3 to July 5, 2021. She mentioned that PW3 had taken the complainant to her employer's house to help her reform as she had been misbehaving and sometimes spent nights outside. C, the employer, did not record a statement because she moved immediately after the incident. Additionally, the complainant did not report any pain in her body parts when the case was made to the police. PW5 testified that she did not investigate whether the complainant had other boyfriends. She also produced a copy of the birth certificate, indicating that the complainant was born on November 29, 2003.
15. After the close of the prosecution's case, the appellant was found to have a case to answer and gave sworn evidence in his defence. He also called one witness. The appellant told the court that the Complainant used to bring men around the house when her employer was away. He maintained that he did not defile the complainant.
16. DW2 FAtold the court that the Complainant was C house help and also a neighbour. The Complainant used to visit his house to watch television. He testified that he had seen the Complainant entertain a man in the house while her employer was away. He told the court that he was not impressed dressing and behaviour on the various times they interacted.
17. In his submissions, the appellant challenged the totality of the prosecution's evidence against which he was convicted. He maintained that the prosecution's evidence was marred by contradictions and inconsistencies. In addition, the prosecution witnesses were unreliable. In rebuttal, the respondent argued that the appellant was properly charged and convicted as the prosecution proved their case beyond reasonable doubt.
18. I have re-evaluated the evidence on record and considered the written submissions and the applicable law. To succeed in a prosecution for defilement, it must be proven that the accused committed an act that caused penetration with a child. "Penetration" under section 2 of the Act means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person."
19. Further, section 8(1) and (4) of the [Sexual Offences Act](#), No. 3 of 2006 provides thus: -
 8. Defilement
 - (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.
20. Bearing in mind the above provisions, I will now analyse the evidence on record to ascertain whether the essential ingredients of the offence preferred against the appellant were established to the required standard of proof. Regarding proof of age, I wish to state at the outset that the importance of proving the age of a victim, proof of penetration, and positive identification of the assailant in sexual offences is paramount.



21. The complainant's aunt (PW3) indicated that the complainant was 17 years old at the time of the alleged incident. The trial court considered the birth certificate produced in evidence by the investigating officer PW5, which indicated PW2's date of birth as 29th November 2003, confirming that indeed the child was seventeen years and six months at the time of the incident. There is no doubt that PW2 was a child within the meaning of the law.
22. The question I must now grapple with is whether the prosecution adduced sufficient evidence to prove that the appellant defiled the child victim as alleged. PW 2 gave evidence that the appellant who was living with the Complainant's employer at the time pushed her on the bed and defiled her on three different occasions. She maintained that the appellant also caressed her breast and used a condom during the ordeal.
23. The complainant was however examined 15 days after the 3rd incident. The medical evidence presented by PW4 indicated that the complainant had a swelling on the right breast which was painful. Her hymen was broken with a gapping vaginal opening. In addition, there was a whitish discharge. It is instructive to note that the examination of the complainant was done approximately fifteen (15) days after the third incident. The complainant was categorical that it was none other than the appellant who had defiled him.
24. In evaluating, assessing, and reconciling the evidence to determine whether there are contradictions discrepancies, and or inconsistencies in the prosecution evidence that prejudiced the appellant, this court has to attempt to fit in the shoes of the trial court.
25. Having re-evaluated the witness account of the events at the material time, the following inconsistencies are noticeable: The complainant testified that she was a pupil but did not disclose to the court which school or class she was attending. At the same time, she told the court that she left her home (Kisumu) and travelled to Nairobi to live with a friend and subsequently got a job as a house help. Her aunt (PW3) confirmed that she took the complainant to work for C as a house help. She did not tell the Court whether she informed C that the Complainant was a minor. It should be noted that the Complainant was seventeen and a half years old, hence, six months to adulthood and therefore conducted herself as an adult.
26. The timeline of the alleged defilement is also unclear. The complainant stated she was defiled by the appellant on 14th June 2021, 16th June 2021, and 22nd June 2021 when her employer was away. She reported the incidents to PW3 on 22nd June 2021 after the third time. PW3 testified that she received the distress call from the complainant on 22nd June 2021, after the alleged defilement. On cross-examination, she however stated that she received the call on 24th June 2021. PW4 yet introduces another date, 21st June 2021 when the Complainant was allegedly defiled. This information was relayed to PW4 who filled the PRC form. On the other hand, PW1 told the court that she was informed about the alleged defilement on 3rd July 2021. Interestingly, PW5 in her evidence stated the Complainant disclosed to her aunt PW3 about her ordeal on 1st July 2021 after she had argued with C her employer. The court is therefore presented with different dates when the incident was reported. The question that begs for an answer is whether the different dates alluded to by the witnesses, which are contradictory, were recorded in their statements. If so, why then was there no attempt by the prosecution counsel to clarify the contradictions during re-examination or submissions? Although the trial magistrate that the contradictions in the dates was negligible, I however disagree. It is my view that the contradictions are a clear indication that the Complainant was not a truthful witness as I shall demonstrate hereunder.
27. The complainant said that she did not report the first two incidents due to threats and lack of a phone. PW3 also stated that the reason why she did not report the incident was because the Complainant



had no access to a phone and she could not escape because she not familiar with the area. However, in cross-examination, the Complainant conceded that there was a phone in her employer's house available for communication. Additionally, DW2 told the court that the Complainant had been using his wife's phone. It cannot therefore be true that the Complainant had no access to any phone for use. In any event, both the appellant and the employer used to leave her at home during the day and therefore, if she needed assistance, she could have got a phone from the neighbours. I do not believe the testimony of PW3 that the Complainant was helpless that she could not escape from C house due to her unfamiliarity of the area. Indeed, the Complainant in her evidence admitted that at one time when PW3 sent her to run an errand she disappeared to have fun with her friends which displeased her aunt. Additionally, PW5 categorically stated that the reason why PW3 took the Complainant to work for C was because the Complainant had developed bad behaviour and was sneaking and spending nights out of home. Interestingly, PW3 did not disclose this evidence to the court.

28. The appellant alleged that he was framed by the Complainant after being sacked by C. Indeed, the court record reveals that both the Complainant and PW3 her aunt, did not disclose in their evidence in chief that the complaint against the appellant only arose (on 3rd July 2021) after her termination. This evidence with respect to her termination was revealed to the court by PW4 and PW5. The timing of the report was questionable based on the fact that the alleged defilement had occurred on 22nd June 2021.
29. Furthermore, medical evidence further complicates the case. The complainant's medical examination on 5th July 2021, revealed a broken hymen with old tears, a foul smell, whitish discharge, and a gaping vaginal opening. PW4 subjected her specimen to laboratory examination and told the court that the Complainant had contracted an infection. She did not however tell the court the type of infection and whether it was a sexually transmitted disease. Interestingly, the Complainant in her evidence told the court that the appellant had used condoms when he defiled her. PW4 did not offer an explanation why the complainant's vagina had a whitish foul-smelling discharge and yet the appellant had used a condom.
30. Importantly, the alleged defilement as per the statement of the Complainant occurred on 14th June 2021, 16th June 2021, and 22nd June 2021. The Complainant's examination was done 15 days after the last sexual encounter. (on 22nd June 2021). What concerns me however is how the vaginal opening was gaping 15 days after the alleged incident. While I do not purport to be a medical person, from judicial experience in handling sexual offences cases, it is not medically possible that the vagina would still have been open and gaping 15 days after the sexual encounter. If indeed, the vagina was open and gaping, then someone else defiled the complainant.
31. The appellant challenged the Complainant's evidence on penetration. An attempt by the appellant to introduce evidence of bad character against the complainant was rightly rejected by the trial court since leave had not been sought under section 34 of the Act. Nevertheless, DW2 FAinformed the court that he was not impressed by the character of the complainant in that she used to dress inappropriately and had been entertaining a tall man in her employer's house. This evidence corroborates the appellant's testimony that indeed the complainant used to entertain a man in the house. Not to forget that the reason why PW3 sought employment for the complainant was because she was spending night outside the home.
32. The issue that this court has to grapple with is whether the contradictions and inconsistencies outlined in the foregoing analysis are so trivial so as to be ignored, or whether they are substantial and fundamental to the issues for determination. In *Richard Munene vs Republic* [2018] eKLR, the Court



of Appeal stated as follows about contradiction or inconsistency in the evidence of the prosecution witness:

Contradictions, discrepancies, and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favor of the accused.

It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily create some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.

33. The test as to whether the contradictions are minor or substantial was laid out in the case of *Sigei v Republic* [2023] KECA 154 (KLR):

“In assessing the impact of contradictory statements or discrepancies on the prosecution’s case, our understanding is that firstly, for contradictions to be fatal, it must relate to material facts. Secondly, such contradictions must concern substantial matters in the case. Thirdly, such contradictions must deal with the real substance of the case.”

34. From the above authorities, it is clear that contradictions and inconsistencies, unless satisfactorily explained, would usually, but not necessarily, result in the evidence of a witness being rejected. The contradictions must be grave and point to deliberate untruthfulness.

35. Having analysed and re-evaluated the evidence on record, it is my finding that the Complainant and her aunt PW3 were untruthful witnesses as evidenced by the contradictions and inconsistencies in their evidence. The said contradictions are so substantial as they relate to material facts. I therefore disagree with the trial magistrate that they were minor and trivial and did not affect the credibility of the witnesses.

36. For the foregoing reasons, I find the appeal merited and hereby quash the conviction and set aside the sentence of fifteen (15) years imprisonment imposed by the trial court. The appellant is thus set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 12TH DAY OF JUNE 2024

D. KAVEDZA

JUDGE

In the presence of

Mr. Hamisi present for the Appellant

Appellant present

Ms. Paclea h/b for Ms. Tumaini for the Respondent

Joy Court Assistant

