



**Wanyoike v Republic (Criminal Appeal E016 of 2023)
[2024] KEHC 6862 (KLR) (10 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6862 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E016 OF 2023
DR KAVEDZA, J
JUNE 10, 2024**

BETWEEN

BRIAN WANYOIKE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence delivered by Hon. D. kuto, PM on 28th November 2023 in Kibera Magistrate's Criminal Sexual Offence Case No.064 of 2021 Republic vs Brian Wanyoike)

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 15 years imprisonment.
2. The particulars of the offence were that on the 24th day of May 2021, the appellant at Westlands sub county, within Nairobi county, intentionally and unlawfully caused his penis to penetrate the vagina/ anus of DWN a child aged 16 years 7 months old.
3. Being aggrieved, the appellant filed an appeal challenging his conviction and sentence. He filed a petition of appeal in which he raised 7 grounds. The main grounds are as follows. In a coalized form in ground 1, the appellant contended that the element of penetration was not proved. In ground 2, 3 and 4, the appellant contended that there was no corroborative evidence to support the prosecution case and faulted the prosecution's case for being riddled with inconsistencies and contradictions. In ground 5,6 and 7, the appellant faulted the trial court for convicting him for the offence yet the conduct of the complainant was consistent with that of an adult and thus in tandem with the statutory defence as contained under section 8(1) as read with (5) and (6) of the Act and that the trial court failed to



consider his defence in light of totality of the whole evidence which reasonably exonerated him of any wrongdoing.

4. As this is the appellant's first appeal, the role of this appellate court of first instance is well settled. It was held in the case of *Okeno vs Republic* [1972] EA 32 and further in the Court of Appeal case of *Mark Oruri Mose vs R* [2013] eKLR that this court is duty-bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.
5. The prosecution called six (6) witnesses in support of their case. The complainant DWN (name withheld) the complainant herein gave unsworn evidence after voir dire examination. She told the court that on the 23rd May 2021, she spent half of the day with her parents up to around 11pm when the parents went to bed. Her sister, M, then called a friend named Nganga, asking if they could go to his place. They took a cab and proceeded to Nganga's house, where they found Nganga and another guy who were both unknown to her.
6. PW1 further told the court that they all sat down to play games, and she had some orange juice. Thereafter, when M and Nganga left the room to go to the kitchen, the other guy, whom she identified as Brian, the appellant herein, pushed her in the bedroom and started undressing her. The complainant immediately tried to call for help from her sister, M, but the appellant held her hands to the bed and forced her to have sex with him. The appellant put his penis in her vagina and anus but later Nganga walked in and found them. Shortly after, her sister M took her by the hand and they left.
7. On cross-examination, the complainant stated that as at the material date, she was 16 years old and a year 12 student at (Particulars withheld) High School. She stated that she was not a frequent drinker and would only do so at parties having started drinking at year 11. She also stated that she could not tell if blood splashed on the bed sheets. Further, that she changed clothes and while they say the hymen was broken, it is not indicated when that happened. She denied that she was meeting the boyfriend for sex and denied having relationships with boys. She maintained that the appellant inserted his penis in her vagina and anus, and that she was a virgin prior to the date of the incident. She further maintained that other than herself, the rest were taking alcohol and she did not know what happened to the pant she was wearing on that day as well as her clothes. On re-examination the complainant maintained that she did not have consensual sex with the appellant on the material date.
8. PW2, MWN, testified on oath and told the court that on 23rd May 2021, she wanted to go out, and PW1 requested to join her. She called her friend Brian Nganga, and they went to his place where the appellant was introduced to PW1. They played some games at the dining table and since Nganga offered to prepare some food, she went with Nganga to the kitchen leaving the appellant with PW1 at the dining table. PW2 later realised that PW1 was in the guest bedroom and told her that it was time to leave. While at the car, PW1 started crying saying that she had been raped by the appellant. In the morning, PW1 and PW2 informed their parents about the incident and she was later called to record a statement.
9. On cross-examination, PW2 stated that during the day, she had gone out with her friends who she did not intend to mention and that the complainant was not with her but she later went with the complainant to Nganga's place. She further stated that Nganga was a friend and not a sexual partner but it was not the first time they were meeting. She denied that they were dressed for sex and maintained that she introduced PW1 to the Appellant and Nganga as a 16 year old but that information was not put in the statement. She denied that PW1 threw up having taken a lot of alcohol and further denied that the complainant had consensual sex.



10. PW3, NNN, the complainant's mother gave sworn evidence and told the court that on 23rd May 2021, she took her kids to sleep at 8pm. She woke up the following day at 7am. Later, PW1 called her while she was at work indicated that she wanted to speak to her. The complainant went to PW3's office at around 11am and it is then that she intimated to her that she had been sexually molested. They went to the Nairobi women's hospital then Kilimani police station. PW3 testified that the complainant was 16 years old at the time of the incident. On cross-examination, she stated that she did not see the complainant leave the house and that the complainant does not drink alcohol. She stated that anyone could tell the complainant was a minor.
11. PW4, Brian Mundia Ng'an'ga, testified on oath and told the court that on the material date, he was in the house with the appellant when PW2 called saying that she wanted to come over. Shortly after, PW2 arrived in the company of the complainant (PW1), whom he met for the first time. They began playing games at the dining table and while he, the appellant and PW2 were drinking vodka, the complainant was drinking juice. PW4 testified that he later went with PW2 to the bedroom leaving the complainant behind with the appellant at the dining table. When they returned, they did not find the complainant and the appellant. He later found the two in bed naked. PW2 and the complainant then left but PW2 later called him saying that PW1 had been defiled by the appellant.
12. On cross-examination, PW4 stated that the appellant was a friend and he knew him since he was seven years old. He stated that he had been with the appellant and PW2 earlier on that fateful day. There were other friends but that they did not take alcohol. He indicated that the place has no CCTV. He said that PW2 was just a friend and they have no sexual relations. He stated he saw PW1 who in his view was a young lady. He also stated that he found the appellant and the complainant naked, lying in bed, with the appellant was on top of the complainant. They were all in shock.
13. PW5, PC Mercy Mwikali, testified that she was attached to the Kilimani police station and was the investigating officer in this case. The case was reported on 24th May 2021, as a case of defilement. She wrote a report and referred the complainant to Nairobi women hospital. The following day, the appellant showed up at the station saying that he was told that police officers were looking for him. She arrested the appellant and preferred the charges. She took the statement of the minor who briefly described the alleged scene of crime. She collected the bedsheets, which she produced an exhibit, and also took a statement from the appellant. She produced the complainant's birth certificate indicating she was born on 25th November 2004.
14. PW6, Joyce Wambui Gichia, told the court that she was a clinical officer based at Nairobi Women's hospital. She examined the complainant on 24 May 2021 and observed there was broken hymen and anal tear. She concluded there was non-consensual penal-vaginal-anal penetration and produced the Gender Violence Recovery Centre (GVRC) form as exhibit 1. She also testified on the PRC form. On examination, the outer genitalia was normal, the vagina was normal with inclines tenderness which meant that the complainant was in pain. High vaginal swab was done. There were pus cells. There was anal tear. It was produced as exhibit 2. She also produced the p3 form as an exhibit. On cross examination, PW6 stated that she did not ask the complainant if she was a virgin. She stated that it was normal to bleed after a first sexual experience and that the complainant's clothes were clean and had no stains.
15. After the close of the prosecution's case, the appellant was found to have a case to answer and was put on his defence. He called two witnesses.
16. DW1, Jane Wanjiku Wanyoike, testified on oath and told the court that she is the mother to the appellant, who, according to her, has never been involved in crime. She stated that she was away in Canada when the alleged offence occurred. That she knows PW4 as a friend and their families are close.



- She stated that her son cannot afford high end drinks and asked that the court be merciful and lenient to the appellant. On cross examination, she stated that she could not monitor where the appellant could be all the time and that on the material date, she was away in Canada.
17. DW2, Esther Wanjiru Wanyoike, testified on oath and told the court that she is the grandmother to the appellant. She stated that she had stayed with the appellant since birth and that the grandmother to PW4 is her neighbour. She stated that the appellant was at PW4's place when he was arrested and that the complainant looked like an adult according to her.
 18. DW3, Brian Wanyoike, the appellant herein, testified on oath and indicated that not all parts of the PRC form were filled and that it was indicated that the outer genitalia and the vagina were all normal. He further stated that his DNA was not taken and that the clothes were not given for analysis. He stated most areas on the PRC form and P3 form were blank and that the doctor and the investigating officer did not do what is required under the law.
 19. The appellant in his defence further stated that the complainant appeared roughly 23 years of age. He referred to photographs which in his view, showed the victim as an adult. He stated that PW4 used to meet most of the bills when they were together and that on the material day, he was with PW4 when PW2 called and told PW4 that they were coming over but that he did not know with who. Two ladies came and PW1 was not introduced as a child. He stated that the complainant kissed him and he did the same. They later went the bedroom and had sex. The complainant did not scream or complain. When PW4 found them in bed, the complainant said that they were just chilling. He honestly believed that the complainant was an adult. Further, that he was drunk when the sexual activity occurred.
 20. On cross examination, the appellant stated that he was not a doctor and that he could not tell why some clothes were not given to the police. He stated that samples should have been taken to confirm the offence occurred. That the complainant looked above 18 and that the complainant and PW2 looked like they had come for sex. He insisted that PW1 was taking vodka and that she was not forced to take alcohol. Further, that he did not have poor judgment and the complainant carried herself out as an adult. In Re-examination, he said that the complainant and himself were taking vodka and he was certain he slept with an adult. It was an honest mistake and he would not have slept with her had he known that she as a minor.
 21. The trial court found him guilty of the offence charged and convicted him accordingly.

Analysis and determination.

22. In his appeal, he challenged the totality of the prosecution's evidence against which he was convicted. He submitted that the elements of the offence of defilement were not proven beyond reasonable doubt. Further, that the medical evidence proved there was no defilement thus his conviction was unsafe. The appellant further submitted that PW1 was not a witness.
23. I find that there are only two issues which arise for determination
 - a. Whether the charge was proved beyond reasonable doubt; and
 - b. Whether the appellant's defence under section 8(5) of the *Sexual Offences Act* exonerated him of the offence charged
24. Section 2 (1) of the *Sexual Offences Act*, No. 3 of 2006 defines penetration as follows:

'Penetration' means the partial or complete insertion of the genital organs of a person into the genital organs of another person.



25. Further, section 8(1) and (2) 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.
- (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

26. 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. 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.

27. As regards penetration, PW1 gave a detailed account of how the appellant pulled her into the bedroom, undressed her and put his penis in her vagina and anus. PW6 further told the court that he found the complainant lying naked in bed with the appellant on top of her. The complainant's evidence was also corroborated by the medical evidence tendered by PW6 who examined the complainant at Nairobi Women's Hospital and observed that the complainant's hymen was broken and that she had an anal tear. She also observed that the complainant's vagina was normal with inclines tenderness which meant that she was in pain. PW6 concluded that there was non-consensual penal-vaginal-anal penetration. The appellant in his defence admitted having slept with the complainant but stated that he would not have done so if he had known that she was a minor. I find that from the totality of the evidence, the issue of penetration was proved by the prosecution.

28. On the issue of age, the Court of Appeal in [Edwin Nyambogo Onsongo vs. Republic](#) (2016) eKLR stated that the age of a victim in cases of defilement can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof

29. The prosecution produced the complainant's birth certificate showing that she was born on 25th November 2004 and yet the incident occurred on 4th May 2021. She was therefore sixteen (16) years at the time of the alleged incident. The prosecution, therefore, adduced credible evidence to prove that indeed the complainant was a child at the time the offence was allegedly committed.

30. Regarding the identity of the perpetrator, the complainant gave a detailed account of how the incident took place and squarely put the appellant at the scene of the crime. Additionally, it was not contested that on the material date, PW1 and PW2 were at the residence of PW4 at Bell Crest Apartments in Kileleshwa when the incident occurred. The appellant also did not dispute that he slept with the complainant and as such, I find that the prosecution proved the appellant was the perpetrator.

31. The appellant however faulted the trial court for disregarding his defence contemplated in Section 8(5) and (6) of the [Sexual Offences Act](#) in failing to find that the complainant carried herself as an adult and thus exonerated him from any wrong doing. The said sub-sections provide as follows: -

8 (5) It is a defence to a charge under this section if: -

- (a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
- (b) the accused reasonably believed that child was over the age of eighteen years



- (6) The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.”
32. From the above provisions, it can be seen that whenever an accused person opts to rely on the said defence then the evidential burden of proof shifts to that accused person to satisfy the conditions attached to that defence. It therefore remains the duty of an accused person to demonstrate that: -
- (a) That it was the child who deceived the accused person into believing that he/she was over the age of eighteen years at the time of the alleged commission of the offence;
 - (b) That the accused person reasonably believed that the child was over the age of eighteen years; and
 - (c) That when all the circumstances are brought on board and duly interrogated, they point to the conclusion that the belief on the part of the accused person was reasonable.”
33. The appellant will first have to prove deception by the child in respect of the child's age. That deception can be by way of words or actions on the part of the child.
34. The appellant submitted that he had a reasonable basis to believe the complainant was an adult as he managed to bypass the country wide curfew that was in force at the time, even though neither she nor her sister (PW2) were essential service providers. Furthermore, PW2 introduced the complainant as her younger sister, which, according to him, did not indicate that the complainant was a minor. He stated that both the complainant and PW2 were drinking alcohol, leading him to believe the complainant was an adult. The court was further told that the various photographs shown to the witness depicted the complainant as appearing to be an adult.
35. From the totality of the evidence presented, I am not convinced that the complainant deceived the appellant into believing she was an adult. The testimonies of PW4 and PW2 corroborate the complainant's assertion that she was drinking juice and not alcohol, as claimed by the appellant. This detail indicates that she could have appeared as a minor to the appellant and that is why she was not drinking alcohol. Furthermore, the fact that the complainant was able to move around when the curfew was in effect is not a reasonable basis to believe she was an adult. It is evident that their movement was facilitated by her sister, PW2, and not by any actions of the complainant.
36. Additionally, the medical evidence provided by PW6, who examined the complainant, found that her vagina was normal but with inclines tenderness, indicating that the complainant was in pain and had been sexually assaulted against her will. This evidence contradicts the appellant's claim that the sexual encounter was consensual. This defence thereby fails.
37. The other issue is about the contradictions and inconsistencies in the evidence adduced by the prosecution. The appellant submits that the prosecution's evidence is riddled with inconsistencies and contradictions. He specifically points out that the complainant testified there was use of force and that she screamed for help, but both PW4 and PW2, who were present in the house, did not hear any screams from PW1. He further indicated that the complainant was drinking alcohol on that fateful night, contrary to the testimony of PW1, PW2, and PW4. Lastly, the appellant highlighted that the complainant testified that on the material date, they took a cab to PW4's house, whereas PW2 testified that she drove there.
38. Whereas I appreciate that there can be minor discrepancies in a case, whether or not discrepancies in the evidence have the effect of discrediting that evidence would depend upon the nature of the discrepancies, that is to say, whether or not the discrepancies are significant as to affect the culpability



of an accused person. The Court should only consider the discrepancies if they are of such a nature that would create doubt as to the guilt of the accused.

39. In my view, the discrepancy as to whether the complainant and PW2 took a cab or drove to PW4's house is inconsequential and does not in any way undermine the credibility of the complainant, as it is undisputed that they were all together on the material date. Additionally, the medical report indicates that the complainant had been sexually assaulted against her will. The fact of whether the complainant screamed or whether PW2 and PW4 heard her while in the same house did not cast doubt to the strong prosecution case against the appellant. As such, I am satisfied as to the culpability of the appellant.
40. From the totality of the foregoing, I find that the prosecution adduced evidence beyond reasonable doubt to prove all the elements of defilement against the appellant herein as charged. In the circumstances, the conviction is affirmed.
41. As regards the sentence, it is instructive that sentencing remains pre-eminently within the discretion of the sentencing court. I take note of the aggravating factors that the offense was committed in an animalistic manner, as it was not only non-consensual vaginal penetration, but also anal penetration. This rules out intoxication as the contributing factor as alleged by the appellant.
42. Notwithstanding the mitigation that the appellant was remorseful. I note that the appellant was 24 years old and therefore 8 years older than the complainant. Further, having been acquaintances with the older sister to the complainant PW2, he definitely knew that the complainant was a child.
43. The law provides for a sentence of fifteen years imprisonment. The appellant in this case was sentenced to serve the fifteen (15) years imprisonment. I see no reason interfere with the discretion of the trial court due to the aggravating circumstances of the case.
44. The upshot of the above analysis is that the appeal is found to be lacking in merit and is dismissed.

It is so ordered.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 10TH DAY OF JUNE 2024.

D. KAVEDZA

JUDGE

In the presence of

Appellant Present

Ms. Tumaini Wafula for the Respondent

Joy Court Assistant

