



REPUBLIC OF KENYA



**Kihiu v Republic (Criminal Appeal E054 of 2023)
[2024] KEHC 8327 (KLR) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8327 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL E054 OF 2023**

JM NANG'EA, J

JULY 11, 2024

BETWEEN

MICHAEL WAWERU KIHU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the Senior Principal Magistrate's
Court at Ruiru (Hon. C. K. Kisiangani (PM) delivered on 19/06/2023)*

JUDGMENT

1. The appellant is dissatisfied with the “judgement and conviction” by the above stated lower court before which he was charged with a main offence of defilement contrary to section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* No. 3 of 2006. In the alternative the appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the same *Act*.
2. The particulars of the main charge are that on 25/07/2020 in Ruiru Sub County the appellant intentionally and unlawfully caused his penis to penetrate the vagina of E.W, a child aged 14. It is alleged in relation to the alternative charge that on the same date and at the same place the appellant intentionally and unlawfully touched E.W's vagina using his penis.
3. The appellant refuted the charges.
4. After a full hearing, the trial court convicted the appellant of the main charge of defilement pursuant to Section 215 of the *Criminal Procedure Code*.
In light of this finding the learned trial magistrate decided not to comment on the alternative charge.
5. The grounds of appeal as per “Petition of Appeal” filed on 04/07/2023 may be condensed as follows:



- a. That the learned trial magistrate erred in convicting the appellant against the weight of the evidence.
 - b. That the trial magistrate unlawfully shifted the burden of proof to the appellant.
And
 - c. That the trial court failed to consider the defence offered by the appellant.
6. It is trite law that a first appellate court has the duty of re-assessing or re-evaluating the evidence presented before the trial court and arrive at its own conclusions on both matters of fact and law while being mindful of the fact that unlike the lower court it did not have the advantage of watching the demeanour of witnesses {(see the case of *Okeno v. Republic* (1972) EA 32}.
 7. The prosecution evidence is that the appellant invited E.W. into his compound on 25/7/2020 at around 1.45 pm purportedly to pick something her father had left with him. E. W. obliged but the appellant allegedly placed her on a table before removing her clothes and inserting his penis into her vagina. She knew the appellant as their neighbour called Michael Waweru. She was taken for medical examination on 27/7/2020 which revealed that her hymen was missing. No other abnormalities were noted in E.W.'s genitalia. According to PW 4 (Clinical Officer) who produced the medical examination records, missing of the hymen in regard to a 14-year old girl is indicative of penetration.
 8. According to PW 2 and PW 3 who are E. W's sister and mother respectively, their observation of the girl's vagina on 27/07/2020 showed some scratches and further that it was oozing some fluids. The two witnesses said they got to learn about the incident when E. W. kept pestering them to tell her about abortion and how it is procured. This aroused their curiosity and they inquired why she was interested in the subject. That was when E.W. related the sexual act to them but she didn't immediately name the culprit. She, however, named the appellant on 28/7/2020 as her attacker explaining that she hesitated to name him earlier because he had threatened to shoot her with a gun if she revealed the incident.
 9. The appellant gave a sworn defence and called one witness (DW 2) who is his house help. He confirmed his arrest on 31/7/2020 but continued to deny the charges. According to the appellant, on 25/7/2020 at 9.00am he left home at BTL (Ruiru) for O. J. Shopping Centre to do some work. At 12 pm he arrived at Ruiru to pick a mechanic called Ochieng. He met with the mechanic at 1.30pm and offered to sell him motor vehicle spare parts. Later at 2.23pm while the appellant was in Nairobi the said Ochieng sent him money by m-pesa with which he bought spare parts worth kshs.1,500 as per an m-pesa statement he exhibited.
 10. The appellant further testified that he left Nairobi for home at about 6pm arriving at 8.00pm. He therefore denies defiling E. W. contending that the girl has never visited his home. The appellant, however, admitted that she knew E. W. well as her parents were his close neighbours.
 11. DW 2 confirmed the appellant's evidence that he left home at 9.00am on 25/07/2020. She had worked at the appellant's home until 5.30pm when she left for her home. At the time only the appellant's wife had returned home, according to the witness.
 12. The appellant and the prosecuting Counsel filed written submissions which I have perused together with the entire record. Going by his grounds of appeal and submissions, the appellant seems to be appealing his conviction only. From his defence in the lower court he doesn't also appear to dispute the fact of E. W. having been penetrated save that he denies being the offender. The main point to determine, therefore, is whether the trial court correctly held that the prosecution proved beyond reasonable doubt on the material on record that the appellant was the defiler.



13. The appellant relied on an alibi defence arguing that he could not have been the offender since at all material times he was elsewhere and not at the scene of the alleged defilement. The appellant also complains of some discrepancies between EW's medical examination report (P3 form) which purports to have been filled out at the Police Station indicating that the offence was committed on 28/07/2020 and her Post Rape Care Form showing that the incident occurred on 25/07/2020. It is pointed out that the complaint could not have been lodged with the Police before the offence was committed. PW4 who tendered the medical evidence explained the inconsistency on dates as typographical errors.
14. The prosecution Counsel opposes the appeal "partially". Rather inconsistently, however, it is submitted on behalf of the respondent that all the ingredients of the offence of defilement to wit; the age of the victim, penetration and identification of the offender were established. Counsel still points out what she says are some inconsistencies in the medical evidence which shows no injury to E W's genitalia yet PW4 opined that it is normal to see bruises in cases of forced sexual intercourse. Unlike on the complainant's P3 form, the Post Rape Care form is said to have additional notes indicating that her clothes were dirty. It appears that these are the reasons for the prosecution's partial support of the appeal and it is the Republic's case that the conviction was unsafe and the sentence meted out is illegal.
15. As held in *Machira v Republic* (Criminal Appeal E018 of 2023) (2024) KEHC 2712 (KLR), the burden of dislodging an alibi defence always rests with the prosecution. The general burden of proof is also on the prosecution and the required standard is beyond reasonable doubt. My Senior brother (Justice Mativo) explained the standard of proof in *Elizabeth Waitiigeni v Republic* 2015 by observing that before a guilty verdict is returned, it is necessary that guilt should not only be a rational inference but it should also be the only inference that may be drawn from all the facts and circumstances of a case regard being had to the defence offered by the accused person.
16. In *Waka Evans Amira v Republic* (2021) eKLR, as is the case in the instant matter, the defence of alibi was raised at the defence hearing stage. The court observed that by so doing the prosecution was denied a chance of testing the defence by conduct of necessary investigations and this is a factor in determining the weight to be given to such defence.
17. To counter the alibi defence, the prosecution could have sought to reopen its case pursuant to Section 212 of the *Criminal Procedure Code* but it didn't avail itself of this right. The court is therefore left to determine whether or not the alibi displaced the available prosecution evidence regarding the appellant's complicity.
18. It emerged during cross-examination of the appellant that the m-pesa statement he produced purporting to evidence his transactions in Nairobi at the time he allegedly defiled E.W. elsewhere does not indicate where he actually was during the transactions. For this reason inter alia the trial court doubted the alibi defence put forth.
19. I don't agree that the conviction of the appellant was against the weight of the evidence. The alibi is an afterthought as concluded by the trial court as no notice of the same, even during cross-examination of the witnesses, was given to the prosecution. The defence is not therefore credible and does not displace the prosecution evidence also considering that DW2 who appears to corroborate the appellant's evidence was said to have been hired to perform domestic chores for the appellant's family. I further concur with the learned trial magistrate that on the evidence the minor victim spoke the truth implicating the appellant (see the proviso to section 124 of the *Evidence Act*). By dint of this statutory provision corroborative evidence is not necessary where the court is satisfied that a victim of a sexual offence spoke the truth regarding complicity of the accused person. E W withstood long, hostile and intense defence cross-examination maintaining her stance that the appellant defiled her.



- 20. Section 214 (2) of the *Criminal Procedure Code* provides that variance between the charge and the evidence with regard to the time at which the offence was committed is not material so long as the prosecution was instituted within the time, if any, prescribed by law . Time here includes the date of commission of the offence. The inconsistency pointed out is thus immaterial in the circumstances of this case.
- 21. Concerning the appellant’s contentions that the trial court shifted the burden of proof to him and that his defence was not considered , this assertion is not borne out by the record. The trial magistrate was evidently guided that the onus was on the prosecution to prove its case beyond reasonable doubt. She also considered the defence evidence and, in my view, rightly found it wanting in credibility. These grounds of appeal therefore fail as well.
- 22. The upshot is that the appeal is dismissed.

JUDGEMENT DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 11TH DAY OF JULY, 2024.

J. M . NANG’EA

JUDGE

In the presence of:

..... for the Appellant
..... for the Respondent

The Court Assistant,

