



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njogu v Republic (Criminal Appeal E088 of 2023)  
[2024] KEHC 8853 (KLR) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8853 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
CRIMINAL APPEAL E088 OF 2023**

**S MBUNGI, J**

**JULY 19, 2024**

**BETWEEN**

**ANTHONY MWANGI NJOGU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence in sexual offence case no. 811 of 2016 in the Senior Principal Magistrate's court at Kigumo whose judgment was delivered by Hon. Ogonda-Principal Magistrate on 9th September, 2019)*

**JUDGMENT**

**Introduction**

1. This appeal arises from the original conviction and sentence in Sexual Offence Case No. 811 of 2016 at the SPM's Court Kigumo in a judgment delivered on 9<sup>th</sup> September 2029 by Hon. Ogonda - Principal Magistrate where the appellant was sentenced to serve life imprisonment.

The appellant was charged with the offence of defilement Contrary to Section 8(1) (2) of the *Sexual Offences Act* No. 3 of 2006 and that the particulars of the offence were that on the 20<sup>th</sup> day of May, 2016 between 0000hours and 0200 hours in Kigumo Sub county, intentionally caused his penis to penetrate the vagina of NW a child aged 11 years.

In the alternative count, he was charged with the offence of committing an indecent act with a child Contrary to Section 11(1) of the *Sexual Offences Act*. The particulars were that on 20<sup>th</sup> May, 2016 between 000hours and 0200 hours in Kigumo Sub-County, intentionally touched the vagina of NW a child aged 11 years with his penis.

2. The appellant having been dissatisfied with the judgment appealed seeking the following orders: -
  - a. That conviction be quashed



- b. That sentence be set aside.
3. The appellant's seven (7) grounds of appeal as stated in his memorandum of appeal are as follows: -
- i. That the learned trial Magistrate erred in matters of law and fact by failing to find that the age of the complainant (pw1) was not ascertained.
  - ii. That the learned trial Magistrate erred in matters of law and fact by failing to find that the appellant herein was not properly identified as the perpetrator of the offence(s) charged.
  - iii. That the learned trial Magistrate erred in matters of law and fact by failing to find that the objective conduct of the key prosecution witness (PW) was incompatible with that of a truthful witness.
  - iv. That the learned trial Magistrate erred in matters of law and fact by failing to find that the complainant (PW1) did not implicate me, the appellant herein, out of her own volition but was evidently coerced to do so.
  - v. That the learned trial Magistrate erred in matters of law and fact by failing to find that would be vital prosecution witnesses were not produced.
  - vi. That the learned trail Magistrate erred in matters of law and fact by failing to find that the evidence on record is tainted by material contradiction.
  - vii. That the learned trial Magistrate erred in matters of law and fact by failing to resolved the strong evidence of grudge in favour of the appellant as representing a strong motive for implication.
4. The court directed that the appeal be disposed off by way of written submissions. The parties filed their submissions as follows: -

### **Appellants Submissions**

#### **Failure to prove age of the Complainant**

5. The appellant submitted that the different witnesses gave different ages of the complainant. He submitted that on the 28<sup>th</sup> of March 2018 the complainant said that she was 16 years old but when warned by the prosecutor she said she was born on 24<sup>th</sup> March 2005 therefore she was almost 13 years old. He faulted the trial court for relying on the notification of the birth form given the testimony of the complainant. He dismissed the notification of birth form as false document procured by the prosecution in order to secure a harsh sentence against him. He faulted the trial court for not conducting its own investigation to establish the correct age of the complainant.

#### **Failure of Positive Identification**

6. The appellant submitted that he was not properly identified by the complainant for the following reasons: -
- i. At first the complainant said together with her sister she met two men who were strangers to her but later she said that the appellant was a neighbour whose house was 10 to 15 meters away from their home. PW4 also said when he visited the scene he saw the complainant's home was between 10 and 15 meters away from the appellant's home. He maintained that whoever assaulted complainant was a stranger to her, for if they were neighbours at the first place she should not have said he is a stranger. It appears that she was forced to say that it was the appellant who defiled her.



- ii. PW2 testified that pw1 the complainant told her that Antony Njogu had dragged her to his house and spoiled her. He questioned how pw1 could mention the names of a person she had previously said that was a total stranger to her.
- iii. PW2 also testified that the appellant was a stranger to her and that it was her daughter (complainant) who took her to him. On this he questioned how could pw2 not have known her next neighbour.

### **Incredible and untrustworthy evidence of the Complainant**

- 7. The appellant further submitted that the complainant was not a credible and trustworthy witness who could be believed. Thus, her evidence has no probative value for she lied that she had been taken to the appellants house by force but later she told the court that she went there willingly and she also lied to her mother PW2 that she was on her monthly period. To the appellant this shows that the complainant was a person with a propensity to tell lies.
- 8. He further submitted that PW1 testified under influence and coercion for the following reasons: - I quote has he stated in his submissions: -
  - i. “PW1 testified that she was 16 years at the time of giving her testimony. However, the prosecutor threatened her with consequences for alleged lies about her age and forced her to just accept the age stated in the questionable birth notification.
  - ii. PW1 had a reason for lying to her mother PW2 that she was on her period. The reason, FEAR.
  - iii. PW1 had a reason for having lied in her witness statement that she had been taken by force when in reality she had willingly gone with the perpetrator. The reason, Fear of being jailed.
  - iv. Even in court she stated that she was still afraid at page 31 line 14 thus: “I am scared of being jailed.”
  - v. See the learned trial Magistrate’s own sentiments at page 9-10 of the trial court judgment thus: “there was obvious attempt by the complainant to initially shield the accused from the consequences of his actions.” Why would a victim who had suffered immensely go to such lengths of telling open lies in an attempt to shield an accused? It is humbly submitted that the only logical inference would be that she was haunted by her own conscience, knowing well that the accused person was innocent!

As such, the mind is only left to toy with the high probability that PW1 willingly went out with another male person but when it dawned on her that she could not conceal her indulgence, she must have picked on the appellant herein as scapegoat. There could be no other way of explaining her chain of lies and explanations, being a person capable of lying under duress to justify herself.”

### **None -production of vital Prosecution Witnesses**

- 9. The appellant submitted that the prosecution failed to call vital witnesses without satisfactory explanation and called the court to draw adverse inference that if called they would have given adverse evidence against the prosecution case. He specifically questioned why pw1 (complainant) sister whom it was alleged they were together when they met the two men who were strangers to her and anyone of the members of the public who were allegedly led by PW1 to the appellants house, who beat him up



and arrested him. To him if these witnesses were called they would have told the court the truth. He referred the court to the case of *Paul Kanja Gitari v Republic* (2016) eKLR held:

“The state of the evidence tendered with all of its inconsistencies means that the appellants complaint that some vital witnesses were not called is also not idle. It is of course trite that there is no number of witnesses required for the proof of a fact. See Section 143 of the *Evidence Act*. However, it has a long been the law that when the prosecution calls evidence that is barely adequate, then the failure to call vital witnesses may entitle the court to draw an inference that had such witnesses been called, therefore evidence would have been averse to the prosecution case. See *Bukenya & Others v Uganda* (1972) EA 549.

given the totality of the evidence and the specific circumstances of this case, we are not satisfied that evidence was tendered that proved the case against the appellant. His conviction was unsafe and this entitles us to interfere.”

### **Material Contradictions**

10. The appellant further submitted that the prosecution evidence was contradicted for: -
  - i. PW1 claimed she was not known to the two men they met but later said the appellant was her neighbour.
  - ii. The witnesses could not agree on the time the offence was allegedly committed and what time PW1 reported to her mother PW2
  - iii. PW1 said she voluntarily went to the appellants house while PW2 said she was dragged and carried there by the appellant.
  - iv. PW1 said she was with her sister when they met the two men while her mother on cross examination said the complainant was alone when she was going home.

### **Motives for Implication**

11. The appellant maintained that he was innocent, he was only implicated by PW2 the mother of the complainant for there was an existing grudge between them. PW2 influenced her daughter to falsely testify against him.
12. He also opined that PW1 may have engaged in voluntarily sexual indulgence but when things went wrong for her, she had no alternative other than seeking out an innocent victim to save her own self, and to protect her “boyfriend,” with whom she had willingly indulged with, while shielding herself from her own internal fears.
13. He further submitted that the two hypotheses (12 and 13 above) logically explain the gaps in the prosecution narrative as well as explaining PW1’S peculiar conduct before and during the trial.

### **Respondents Submission**

14. In response the Respondent submitted as follows: -

#### **a. Proof of offence to required standard**

15. The respondent submitted that the offence of defilement which the appellant was charged with was rooted on three main ingredients being the age of the victim which he said must be a minor, penetration



and the proper identification of the perpetrator as provided for under Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No. 3 of 2006.

#### **b. Age of the victim.**

16. The respondent submitted that PW1, the minor had initially stated that she was 16 years during voire dire examination. However, later when she was warned against being untruthful, she confirmed that she was 13 years old at the time of giving evidence. Rule 4 of the *Sexual Offences' Rules*, 2024 provides what is to be considered in determining the age of that person. It provides that: -

“When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school document or in a baptismal card or similar documents”

17. Prosecution Exhibit 3 was a copy of the birth notification which indicated she was born on 24<sup>th</sup> March, 2005. The age as per the birth notification was 11 years at the time of the offence.

#### **c. Identification of the Perpetrator**

18. The Respondent submitted that on the material day of the incident, the minor and her sister were heading home from a funeral and had parted ways. It was then that the appellant approached her, seduced her and they went home together and that is when the appellant defiled her.
19. The respondent further submitted that as per the proceedings on Page 31, PW1 was able to testify that on the fateful night, she saw the appellant twice. The first time when the appellant blocked her path and asked her to go home with him which she refused and the second time when she met him on her way home and consequently was defiled. The following day the mother observed that the minor was bleeding, a report was made and the minor eventually led the members of public to the appellants house. PW4 the investigating officer testified that the distance between the appellant's house and the victims was about 10 to 15 metres apart, and all the prosecution witnesses were able to place the appellant at the locus quo as the one who defiled the victim.

#### **Key prosecution witnesses untrustworthy**

20. The respondent submitted that the victim was a child aged 11 years she was scared of being jailed and she had undergone through a traumatic physical, emotional and psychological experience that is why she could sometimes not stick on her word when under pressure.

#### **None production of vital prosecution witness**

21. On the issue of none production of vital witnesses the respondent referred the court to the provisions Section 143 of the *Evidence Act* which provides that: “No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact” and on the cases of *Republic v George Onyango Anyany & another* (2016) eKLR and the case of *Bukenya & others v Uganda* (1972) EA 549 where the court addressed itself thus: -

- “(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.
- (ii) That court has right and the duty to call witnesses whose evidence appears essential to the just decision of the case.



- (iii) Where the evidence called is barely adequate, the court may infer That the evidence of uncalled witnesses would have tendered to be Adverse to the prosecution.”

### **Contradictions and Inconsistencies**

22. On contradiction and inconsistency ground of appeal the respondent referred the court to the case of *Robert Peter Kazawali v Republic* (2018) eKLR, and the case of *Philip Nzaka Watu v Republic* (2016) eKLR where the court of appeal stated:

“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and not two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this court, some inconsistency in evidence may dignify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.” And also, the case of *Dickson Elia Nsamba Shapwata & Another v The Republic*, Criminal Appeal No.92 of 2007 where the court of appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows: -

“in evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”

23. Relying on the above cases, the respondent submitted that the evidence adduced by the prosecution bears no contradictions and inconsistencies that are adequate to shake the prosecution case and further submitted that the prosecution case was proved beyond reasonable doubt.

### **Strong motives for Implication**

24. The respondent submitted and denied the appellants submission that there existed possible motives for implication, alleging two possible scenarios as below: -
- a. The respondent submitted that the alleged grudges pointed out by the appellant according to the defence that existed from PW2 which influenced PW1 to implicate the appellant; and also as pointed out by the trial court was an afterthought which were not raised during cross examination of PW2. Further the appellant gave unsworn testimony which was not subjected to cross examination to test its veracity and consequently it was of little probative value.
  - b. The respondent submitted and denied appellants submission that PW1 engaged in voluntary sexual indulgence and only changed when things went wrong by framing the appellant. The respondent further stated that the victim was 11 years and thus a child and could not be said to have voluntarily indulged in sexual activities, stating that the evidence showed that she was defiled and this led to her getting tears that needed stitching. It is on this ground that the respondent submitted that the prosecution witnesses had no reason to frame the appellant.



## **Sentencing.**

25. The respondent submitted that the appellant was sentenced to life imprisonment for the age of the minor at the time of defilement was 11 years and that the result of the incident left her with a tear that needed stitching which took long to heal, the minor was seen at the hospital at least 4 times after the initial treatment showing the extent of the injuries a state which affected the child emotionally and psychologically.
26. This being the first appeal, it is the duty of the Honourable court as the first appellate court, to re-examine, re-evaluate, and reconsider the evidence afresh and make its own conclusion on it. This was the holding of the court of appeal in *Okeno v Republic* (1972) EA 32 as thus; An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v Republic*) (1957) EA 336 and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (*Shantilal M. Ruwala v Republic* (1957) EA 570.) It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's conclusions. It must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See. *Peter v Sunday Post*, (1958) EA 424)."
27. I have looked at the charge, proceedings, judgment, the sentence and the submissions filed by the parties.

## **The Issues For Determination**

28. I shall adopt the issues for determination as outlined in the submissions filed by both parties and I will address each as set out in the submissions.

## **Determination**

29. The offence of defilement is provided by Section 8(1) of the [Sexual Offence Act](#) No. 3 of 2006.

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement”
30. Subsections (2) of Section 8 of the [Sexual Offences Act](#) provides penalty for committing the offence of defilement where a child is aged eleven years or less. It states “that the offender shall upon conviction be sentenced to life imprisonment”.
31. The prosecution has to prove three ingredients:
  - i. Age of the victim
  - ii. Penetration
  - iii. Identification of perpetrator



## The age of the victim

32. Rule 4 of the [Sexual Offences' Rules](#), 2014 provides what is to be considered in determining the age of a person. It provides that: -

“When determining the age of a person, the court may take in to account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar documents.”
33. I have seen birth notification form showing that the complainant was born on 24<sup>th</sup> march 2005, therefore the age of the complainant was 11 years at the time of the incident.
34. It is humanly to forget therefore the complainant cannot be faulted for not correctly remembering her age. The age stated in p3 form and treatment notes was possibly given to the makers of the documents by the complainant or her mother without referring to the birth notification form. If there was no birth notification form the court might have doubted the evidence of the complainant and the mother as to the age of the complainant. There is no evidence to show that the birth notification form was a forged document as alleged by the appellant.
35. On the issue of penetration, I would not be labour on it, it is not contested, neither is it a ground of appeal. There is clear medical evidence that there was penetration into the complainant's vagina.
36. On identification I will canvas it together with other grounds of appeal raised by the appellant against conviction for the grounds revolve around the question of identification of the perpetrator by the complainant.
37. From the evidence no one saw the appellant defile the complainant, this is understandable for the offence of this nature are not done in open therefore it is word of the complainant against the word of the appellant, what the court should satisfy itself is whether the complainant was truthful. The court is also alive to the provision of the Section 143 of the [Evidence Act](#) and 124 A of the [Evidence Act](#).
38. The trial court in its judgment warned itself the dangers involved in relying the evidence of the complainant.
39. The trial court captured it well that the discrepancies noted in complainants' evidence could rightly be attributed to the age of the complainant, the fear to be jailed as she explained and the traumatic nature of the ordeal.
40. I agree with the observation of the trial court for children traumatized can be erratic in their behaviour and especially if fear is instilled in them.
41. It is note worthy that the complainant told the court the appellant had warned her against disclosing what had happed to her.
42. I have re-evaluated the complainant's evidence and I have no reason to doubt that she told the court the truth for she is the one who led her mother to the house of the appellant.
43. There is no evidence to show that pw2 her mother had influenced the complainant to implicate the appellant.
44. As observed by the trial court, the appellant brought the issue of grudge between him and PW2 as an afterthought. The question is why did the complainant not pick on any other man within the vicinity.



45. The discrepancies (contradictions and inconsistencies) highlighted by the appellant do not shake the prosecution's evidence.
46. In the case of *Dickson Elia Nsamba Shapwata & Another v. The Republic*, Cr Appeal No. 92 Of 2007 court of appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows:
- “In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”
47. The above analysis makes me to arrive to a finding that the trial court correctly found that the appellant was the perpetrator. Therefore, he was properly convicted and I do uphold the conviction.

### Sentencing

48. The appellant never submitted on issue of sentencing, though one of grounds of appeal he faulted the trial court for sentencing him without considering his mitigation.
48. I have looked at the court's records, it is true that the trial court when passing the sentence did not indicate that it had considered the accused persons mitigation.
49. From the trial courts records, the appellant had this to say in his mitigation... “The only reason that I have been convicted is because I do not know how to defend myself. I have a problem with both my legs. I am not in a good place at the remand home. Sometimes both legs ache. My mother passed away while I was in custody. I do not have a family. I would like to have a family like other Kenyans so that I can build my nation - Kenya. I pray that the court considers that I have been in custody since year 2017. God has chosen this court to aid the week. I have no hard feeling against any of the witnesses. I pray that the court looks at those issues as I am suffering. That is all I want to say. God held me...”
50. The punishment prescribed by the law for the offence of defilement for a child of less than 11 years his life imprisonment which is a minimum mandatory sentence. I have considered the appellants mitigation.
51. Though I cannot blame the trial court for passing mandatory life imprisonment sentence, the emerging jurisprudence guards against imposition of mandatory life imprisonment for this takes away the courts discretion to meet out sentences commensurate to the circumstances of each case- see the case of *Joshua Gichuki Mwangi vrs Republic* Nyeri CA, CR Appeal 84 OF 2015 and *Martin Wekesa Simiyu vrs Republic* -Eldoret CA Appeal No. 112 of 2019.
52. Therefore, being guided by the above cited authority and upon considering the appellants mitigation and the circumstances in which the offence was committed, I hereby resentence the appellant to 25 years imprisonment for the offence of defilement Contrary to Section 8 (1) (2) of the *Sexual Offences Act* No. 3 of 2006. Pursuant to Section 333 (2) of the *Criminal Procedure* Cap 75 Laws of Kenya. I have taken into consideration the period the appellant spent in custody during his trial thus the term of imprisonment will be computed less days spent in custody from 27<sup>th</sup> May, 2016 to the 8<sup>th</sup> November, 2016.
53. In conclusion the appellant appeal against conviction fails and the appellants appeal on sentence partially succeeds as stated herein above. Right of appeal 14 days. It is so ordered.

**DATED SIGNED AND DELIVERED VIRTUALLY IN KAKAMEGA HIGH COURT ON 19<sup>TH</sup> DAY OF JULY, 2024.**



**SIGNED BY: -**

**HON. JUSTICE S. MBUNGI**

**JUDGE**

In the presence/absence of

Appellant-Present online

Respondent- Present Mr. Waweru for the DPP

Court Assistant-Elizabeth Angong'a

