



**TW v Republic (Criminal Appeal E005 of 2024)  
[2024] KEHC 10848 (KLR) (18 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10848 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL APPEAL E005 OF 2024  
LM NJUGUNA, J  
SEPTEMBER 18, 2024**

**BETWEEN**

**TW ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal arising from the decision of Hon. J.W Gichimu, SPM in Runyenjes Magistrate’s Court Sexual Offence Case No. E001 of 2023 delivered on 17th January 2024)*

**JUDGMENT**

1. The appellant, being dissatisfied with the decision of the trial court, filed a petition of appeal dated 31<sup>st</sup> January 2024, seeking that the appeal be allowed, conviction be quashed and the sentence be set aside. The appeal is premised on the grounds that the learned trial magistrate erred in both law and fact:
  - a. In failing to adequately evaluate the evidence and exhibits tendered by PW1 and the prosecution witnesses and therefore arrived at a decision which was not sustainable in law;
  - b. In believing the evidence adduced by PW1 which was uncorroborated and full of inconsistencies and gaps;
  - c. By disregarding the fact that the evidence of PW3 contradicted that of PW1 and PW4 that no blood-stained panty or clothes were presented to the medical officer on 15<sup>th</sup> August 2022 when PW1 was examined;
  - d. By disregarding the fact that PW1 was not tested for any drugs in her blood despite the fact that she claimed to have been drugged the previous day;



- e. By disregarding the fact that failure to call one I who would have been a crucial prosecution witness as the person who saw the appellant with the complainant on the morning of 15<sup>th</sup> August 2022 was fatal and created reasonable doubt and gap in the prosecution case;
  - f. By totally disregarding the submissions by the defense dismissing the sworn evidence adduced by the appellant and his father;
  - g. By disregarding the many and obvious inconsistencies and gaps in the prosecution case and in finding the evidence adduced by the prosecution as credible;
  - h. By arriving at an erroneous decision and conviction which are not sustainable in law;
  - i. By evidently shifting the burden of proof to the accused person to prove his innocence; and
  - j. By imposing a sentence of 20 years upon the appellant who was 18 years at the time of commission of the alleged offence which is excessive in the circumstances and in total disregard of the mitigation offered on behalf of the appellant.
2. The appellant was charged with the offence of defilement contrary to section 8(1) as read together with section 8(3) of the *Sexual Offences Act*. The particulars of the offence are that on 14<sup>th</sup> August 2022, in Embu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of MNN, a child aged 16 years. He faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, whose particulars are that on 14<sup>th</sup> August 2022, in Embu County, the appellant intentionally touched the vagina of MNN, a child aged 16 years with his penis.
  3. The appellant pleaded not guilty to the charge and the plea was duly entered. The matter proceeded to full hearing.
  4. PW1, the victim, stated that on the day of the incident, she was on the way to Kathageri at around 3PM and the appellant, who is her cousin, accompanied her. That at some point they parted ways but she ran into him again and this time, he gave her a soft drink called ‘predictor’ which she drunk it. That after drinking it, she started feeling weak and she lost consciousness. That she regained consciousness at around 4AM the next morning and she discovered they were at the appellant’s friend’s home and she was feeling pain in her private parts.
  5. She stated that the appellant denied having done anything to her. That she had Kshs.200/= in her pocket but the appellant said that he had used it to pay for bodaboda to transport them to the house. That the appellant called a bodaboda to take her to her cousin’s place (I) and when she arrived, I called her parents who took her to Runyenjes Level 4 Hospital and they reported the matter at Runyenjes Police Station. She produced her birth certificate showing that she was 14 years at the time of the incident. On cross-examination, she stated that when the incident occurred, it was during school holidays and that the appellant is her cousin.
  6. That she could not tell what happened between the time she took the drink and when she woke up the next morning at 4.00 a.m when she found herself in the same bed with the accused without her underwear. That she did not see the appellant defiling her but she woke up with a headache and there was no one else in the compound where they were. That she could not recall the direction of the home where she was because she left when it was raining and on a motorcycle. That it was I who gave her the phone she used to call her parents and she doesn’t know who paid for the motorcycle that took her home. That her mother advised her not to take a bath and she took her to hospital where she was examined and treated and then the matter was reported at the police station the following day. That at



- the time of the medical examination, she was wearing a different under pant from the one she had at the time of the incident since she had left the other one in the house where she was held.
7. PW2 was the victim's mother, who stated that PW1 had told her that she was to visit her grandmother but she did not go back home. On making enquiries, she was told PW1 had been seen with the appellant on their way to Kathageri. That both the accused and the victim did not have phones and there was no communication throughout the night. That she reported to the police and later, the appellant called his mother and told her that he was in Chuka and that he did not know where PW1 was. That PW1 called her and said she was at Kathageri and was on the way home when she arrived home, PW1 told her that the appellant had given her alcohol causing her to lose consciousness and she was feeling pain in her private parts.
  8. That she (PW2) and her husband took PW1 to hospital where she was examined and treated and they later reported the matter to the police. On cross-examination, she stated that she had not sent PW1 to the market at Kathageri and that it was the appellant's mother who told her that she saw PW1 with the appellant heading to Kathageri. That I also told her that he saw the appellant with PW1. She further stated that PW1 told her that she had been given a drink by the appellant and she lost consciousness before waking up in a house that is 4KM from Runyenjes. That she had an exhaust-pipe burn on her leg, showing that she could have been carried on a motorcycle while unconscious. That the underpants and trouser that she was wearing on that day had blood stains and discharge and the items were given to the police. That the appellant was about to sit for his national examination and so the police did not arrest him but they summoned him.
  9. PW3 was Dennis Mwenda, a clinical officer at Embu Level 5 Hospital. He stated that upon examination, PW1 had a black trouser which was soiled between the legs with vaginal discharge and blood. That there was also a white and pink panty soiled with blood. He observed that the hymen was lacerated and there was blood oozing and the tissue around the genitalia was tender and swollen and blood was oozing. A high vaginal swab showed pus cells and blood and urine samples showed red blood cells confirming trauma on the vagina. He produced the P3 and PRC forms and he identified the trouser. On cross-examination, he stated that he is not related to the family of the victim. That when he examined the victim, PC Patricia was present.
  10. PW4, P.C. Patricia Kimela of Runyenjes Police Station was the investigating officer in the case. She stated that the case was reported at the station on 16<sup>th</sup> August 2022 by the complainant, who was accompanied by her parents. That she referred them to hospital for filling of the P3 form since the complainant had already been seen by a doctor. The victim's birth certificate was produced and it showed that she was 14 years old at the time of the incident. She stated that the victim said that she had left her underwear in the house where she spent the night with the appellant but the trouser was taken as evidence. That the appellant was charged and arrested. On cross-examination, she stated that the victim had already been treated before the incident was reported at the police station. That the appellant was summoned at the police station and he went. That the complainant could not lead them to the home where the incident happened as she had forgotten the location and her cousin I refused to record a statement because he is related to the appellant.
  11. At the close of the prosecution's case, the appellant was placed on his defense, having been found with a case to answer.
  12. DW1, the appellant, stated that on the material day, he went with his mother to visit his grandmother where they met PW1. That at around 4.00 p.m, the complainant requested him to accompany him to Kathageri market to buy a hoodie but they did not find the hoodie he was looking for. That he left the complainant at the market and he went to Runyenjes and then home since he needed to prepare



to return to school the following week. That he asked PW1 for fare to Runyenjes where he went by motorcycle and then he played play station until 8.00 p.m after which he walked home, arriving at 9.00 p.m. That he found his father at home alone since his mother was still at his grandmother's place and he never left home until the following week when he left for school. That when he heard the police were looking for him, his parents escorted him to Runyenjes police station and he was arrested and charged. He denied having committed the offence and he said that he never visited I with PW1 the day after the incident. On cross-examination, he denied committing the offence and stated that he was with PW1 at 4.00 p.m on that Sunday.

13. DW2 was MG, the appellant's father who stated that PW1's father had threatened to teach the appellant a lesson. That the appellant was summoned to the police station and he was escorted there by his mother, where he was arrested in connection with PW1's defilement. That on the day of the incident, the appellant and his mother had visited the appellant's grandmother and he asked his wife to send the appellant back to prepare for school. That the appellant returned home at around 9PM and they ate supper and slept. That they stay in the same house but in different rooms and he did not hear the appellant leaving the house that night. The appellant told him that he had parted ways with PW1 at Kathageri. He stated that there was animosity between him and PW1's father over some land that the appellant's mother was supposed to be given by her parents.
14. At the close of the defense case, the trial court convicted the appellant and sentenced him to 20 years imprisonment.
15. In this appeal, the court directed the parties to file their written submissions but only the respondent complied.
16. The respondent submitted that the elements of the offence were proved beyond reasonable doubt. It relied on sections 2 and 8 of the *Sexual Offences Act* and stated that the victim's birth certificate showed that she was 14 years old at the time of the incident. It relied on the cases of *George Opondo Olunga v. Republic (2016) eKLR*, *Reuben Taabu Anjononi & 2 others v. Republic (1980) eKLR*, *Kaingu alias Kasomo v. Republic Criminal Appeal No. 504 of 2010 (unreported)* and *Benard Kiptoo v. Republic (2021) eKLR*. It was its argument that the evidence was sufficient and admissible according to section 124 of the *Evidence Act* and that it did not need corroboration.
17. That there is no Legal requirement that the prosecution calls a specific number of witnesses in support of its case and that failure to call I as a witness did not prejudice its case. It referred to section 143 of the Criminal procedure Code. Further reliance was placed on the case of *MTG v. Republic (2016) eKLR* and the prosecution submitted that even if there were inconsistencies in the testimony of the prosecution, they did not go to the root of the case. That the defense provided was not believable and it did not raise any reasonable doubt. It urged that the sentence was appropriate as prescribed by the Act and should be upheld, citing the case of *Republic v. Nicholas Wambogo (2022) eKLR*.
18. The issues for determination are as follows:
  - a. Whether the prosecution has proved the case beyond reasonable doubt;
  - b. Whether there were inconsistencies in the prosecution's case; and
  - c. Whether the sentence should be set aside.



19. It is the role of the first appellate court to review the evidence at trial and reach its own conclusion. These were the sentiments of the Court of Appeal in the case of *Okeno vs. Republic* [1972] EA 32 I agree with the court when it held:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate’s finding 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.”

20. Under section 8(1) of the *Sexual Offences Act*, the prosecution had the burden of proving the elements of defilement beyond reasonable doubt. These elements are:

- a. The age of the complainant- that the complainant was a child;
- b. Penetration occurred; and
- c. The perpetrator was positively identified.

21. According to the minor’s birth certificate produced by PW1, she was born on 30/10/2007 meaning she was 14 years old at the time of the incident. It is clear that PW1 was a minor within the meaning provided under the *Children Act*. The second element to be proved is penetration. In the case of *E E v Republic* [2015] eKLR the court expressed itself on the question of penetration as follows;

“Penetration is defined in section 2 of the *Sexual Offences Act* as:

‘Penetration’ means the partial or complete insertion of the genital organ of a person in the genital organ of another person.’

The penetration or act of sexual intercourse has therefore to be proved to sustain a charge of defilement. In *Bassita Hussein – VS – Uganda*, Supreme Court criminal appeal No. 35 of 1995, the court stated,

“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims over evidence and corroborated by medical evidence or other evidence.”

22. PW1 testified that the appellant gave her a soft drink which she took and suddenly she felt tired and passed out. It was around 3PM and they were standing outside a kiosk at Kathageri shopping center. That she regained consciousness at about 4AM in a house where the appellant was with her in bed. That she felt pain in her private parts and she realized that her trouser and panty had been removed. That when she went to the toilet outside the house, she realized that the place was not familiar. She waited until morning when the appellant put her on a motorcycle to her cousin’s house, by name I who facilitated her transport home.
23. PW3 who examined PW1 observed that the hymen was torn and the tissue around the genitalia was tender and swollen and blood was oozing. A high vaginal swab showed pus cells and blood and urine samples showed red blood cells confirming trauma on the vagina. This is sufficient proof of penetration and the testimony corroborates that of PW1.



24. As to the identification of the perpetrator, section 124 of the *Evidence Act* provides that all evidence must be corroborated but in the case of sexual offence, the testimony of the victim alone is sufficient to identify the assailant and that there would be no need for corroboration. PW1 testified that she was with the appellant at her grandmother's place and then she later met him at Kathageri market where he offered her a drink that caused her to lose consciousness until the next morning when she found herself in a house in the same bed with the appellant having been defiled.
25. She stated that when she left the place where she had been held, she went to I's house and she used his phone to call her parents. She stated that the appellant followed her to I's place and then he went away. That she told I that she was with the appellant the previous night. In his defense, the appellant denied having committed the offence and stated that he parted ways with PW1 at Kathageri and he arrived home at 9PM. DW2 stated that the appellant did not leave the house that night since he would have heard any movement. I do not find this defense to be convincing so as to displace the testimony of PW1. In my view, the testimony of the victim is sufficient to identify the appellant as her assailant. Besides, the appellant is well known to her since they are cousins.
26. The appellant challenged the inconsistencies in the prosecution's case. PW1 stated that she left her panty at the house where she was held while unconscious. That when she left that place and was taken to hospital, she had worn a different pair of underwear but was in the same trouser she had. PW3 stated that at the time of examination, he saw a blood-stained panty which PW1 claimed was different from the one she had at the time of the incident. PW3 stated that the panty was not part of the evidence present in court but the blood-stained trouser was. However, PW2 testified that PW1 had the panty that she had worn at the time of the incident during the medical examination.
27. This is, indeed, an inconsistency in the testimony. However, the testimony of PW3 is that the trouser of the victim was recovered and it was blood stained. In my view, whether or not the victim's panty that she wore at the time of the incident was found, the trouser provides sufficient evidence. PW3 testified that the blood on the trouser is the same as the blood on PW1's genitalia. Inconsistencies may be there in evidence, but they do not affect the trajectory of the evidence itself. In my view, the evidence is sufficient to sustain a conviction, even considering the inconsistencies therein. I am guided by the case of *Joseph Maina Mwangi v Republic (2000) eKLR* where the court considered this issue and held that:
- “in any trial, there are bound to be discrepancies. An appellate court in considering these discrepancies must be guided by the wording of section 382 of the Criminal Procedure Code whether such discrepancies are such as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence”.
28. The appellant also challenged the sentence and asked this court to set it aside. Having reaffirmed the findings of the trial court on conviction, I do note that the trial magistrate sentenced the appellant to the statutory prescribed minimum sentence of 20 years imprisonment for this offence. Section 8(3) of the *Sexual Offences Act* provides:
- “(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”
29. The Supreme Court in the recent case of *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023)* [2024] KESC 34 (KLR) stated that



for as long as the sentences prescribed under section 8 of the Sexual Offences Act remain undisturbed/ constitutionally sound, the mandatory sentences ought to be applied as prescribed. It stated:

“(66) We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious.”

Given the recent guidance by the Supreme Court, it is unconscionable for this court to reconsider the sentence imposed,

30. Therefore, I find that the appeal lacks merit and the same is hereby dismissed.

31. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 18<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**L. NJUGUNA**

**JUDGE**

..... for the Appellant

..... for the Respondent

