



**Were v Republic (Criminal Appeal E069 of 2023)
[2024] KEHC 11186 (KLR) (Crim) (23 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11186 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E069 OF 2023
LN MUTENDE, J
SEPTEMBER 23, 2024**

BETWEEN

VINCENT MUNGOMA WERE APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal against the original conviction and sentence in S. O. Case
No. 3152 of 2015 at the Chief Magistrates' Court Makadara)*

JUDGMENT

1. Vincent Mungoma Were, the Appellant, was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. The particulars of the offence being that on the 7th day of October, 2015 at Mathare North Area 1 estate within Nairobi, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of M. N. a girl aged 12 years.
2. In the alternative, he faced the charge of committing an Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act*, following allegations that he touched the private parts, namely vagina of M. N. child aged 12 years.
3. Having denied the charges, he was taken through full trial, convicted on the main charge of defilement and sentenced to serve twenty (20) years imprisonment.
4. Aggrieved, the appellant proffered this appeal on grounds of appeal as amended, that:
 - The court used draft typed proceedings which were not certified. The proceedings omitted certain proceedings making the findings of fact wrong.
 - That the court findings were not based on the evidence.



- That the court did not comply with Section 200 of the Criminal Procedure Code.
- The court erred in relying on the complainant's evidence which was contradicted. The complainant was also deviant and prone not to tell the truth.
- The court erred in finding that medical evidence and testimony established defilement.
- The court failed to give weight to the fact that the birth certificate bore names of a different person.
- That the court heard the case on 31/5/2022 in the absence of the appellant thus causing him prejudice.
- The court did not consider the appellant's authorities cited in his closing submissions.
- The court erred in finding that the prosecution failed to prove and meet its obligations.
- That the sentence was excessive.

5. The appeal was disposed through written submissions. It is urged by the appellant that following change of magistrates the succeeding one used a draft typed copy of proceedings that was incomplete and omitted parts of evidence of witnesses. That the judgment was therefore incorrect and contrary to the evidence and did not capture the accurate testimony, which was detrimental to the appellant.
6. The appellant also submits that the offence was not proved and that the evidence was contradictory. It is argued that the date the complainant was examined is contradicted. The Post Rape Care form and the P3 form, the evidence of the medical officers was not corroborated.
7. Further, that the medical evidence did not prove penetration. There was evidence that the victim had an old tear at 9 O'clock and at 7 O'clock, on examination, the victim was said to be calm. She did not suffer from physical injuries, her genitalia was also normal and did not have tears or lacerations.
8. That the medical evidence only proved that the complainant was not a virgin and that she was sexually active before the date of the offence .
9. That it was expected that the Post Rape Care form would settle doubt on whether there was penetration, but no sperm was seen despite high vaginal swab being done on the victim and no protection being used during intercourse.
10. The credibility and truth of the complainant's evidence is also challenged. The appellant has cited various contradictions in the complainant's evidence and further details in her testimony which would prove that she is prone to deceive.
11. That the court was duly bound to indicate if the complainant was truthful and record reasons for believing her evidence; and, any doubt established should be resolved in favour of the Appellant.
12. Further, that the birth certificate indicated the name as M.L.N. but the case concerned M. N. a grave contradiction that was overlooked by the court.
13. That the court failed to comply with Section 200 of the Criminal Procedure Code (CPC) that makes the entire decision wrong. That on 2/11/2021 the court did not advise the appellant on his right to recall witnesses; the appellant wanted the case to start afresh but this was declined by the court. That the delay in the case which made the court decline his prayer was caused by the prosecution's failure to procure witnesses.
14. That the succeeding magistrate only heard PW3 to PW6 but she did not see the previous 2 witnesses to be sure of the evidence recorded which required the court to strictly follow Section 200 of the CPC.



15. That the appellant's constitutional rights were also violated, as he was not informed of the reasons for his arrest and his rights. No medical report was tendered to prove that he was treated as a suspect of Sexual Offence as per Section 6(2) of the Sexual Offenders medical treatment *regulations of 2012*. That the identification of the appellant was also erroneous; and, the court shifted the burden of proof to the appellant.
16. The State /Respondent opposes the appeal. It is submitted that the ingredients of the offence were proved. It reiterates that the age of the victim was proved as per the birth certificate adduced in evidence. That the child was born on 2/4/2022 and was 13 years at time of the offence.
17. That penetration was also proved as per the Post Rape Care form and examination after the incident which indicated that the hymen was broken with an old tear. The complainant testimony also proved defilement, and the appellant knew the complainant.
18. That the minor testified that she met the appellant at the bus stage and her mother was to send her fare .The appellant assisted her but later took her to his home where he defiled her and locked her in. She was helped by a neighbour who heard her scream and ran away. She was arrested and her mother came to the Police Station. She was taken to hospital and medical records showed she had an old broken hymen, the vagina was pinkish, however, no spermatozoa were seen.
19. What can be gleaned from the facts leading to the matter in question is that the complainant purportedly ran away from school in Kitale and travelled to either Nairobi or Mombasa. On the 7th October,2015, PW4 Sylvia Sebo went to the Ruaraka Police Station with a friend and found the complainant who turned out to be a daughter of her former house-help. She was being held allegedly following complaints of theft. The child was entrusted unto her as she had alleged that her mother was dead, but, she was to take her back so as to be taken to a children home.
20. Two days later on a Sunday she left her at home but later got a call from the caretaker that the complainant left carrying a bag. She confirmed that the girl had stolen from her hence reported to the officer who allowed her to go with her. Later she learnt that the complainant was being held following defilement allegations.
21. PW5 Samson Ouma who took the complainant to the Police Station testified that he found people beating her on allegations of having stolen.
22. However, on the part of the complainant, she testified that she was at Country Bus Station on 7th October 2015, and since she did not have any money for fare, she rang her mother and informed her. But, since her mother did not trust her she wanted to send the money to the driver of the vehicle. The phone she was using went off hence the communication was cut.
23. At that point in time, a person the complainant identified as the appellant herein appeared and was able to convince her to seek refuge at his house. During the night he violated her sexually. That in the morning he locked her inside the house and left. She shouted and banged the door and a lady who was passing by rescued her and took her to the Police Station.
24. PW6 the Administration Police Constable who effected arrest of the appellant stated that the complainant made a report of sexual assault on 8th October 2015, and they caused her to call the assailant who agreed to meet her at Mathare Social Hall where he was arrested.
25. PW7 Chief Inspector Lucy Waithera stated that she was instructed by the OCS-Ruaraka Police Station to record a statement under inquiry from the appellant on 13th October,2015. She also recorded statements from the complainant and her mother. Subsequently she met the appellant and the



- complainant's mother at the office as they wanted to reconcile. By then the complainant had been examined by the medical personnel.
26. On cross examination she stated that the first time the complainant was taken to the Police Station it was following a case of stealing hence she was retained as a child in need of care and protection. In the course of her investigations she visited the appellant house and found it was a single room with a bed and a two-seater seat. That she talked to Mugambi the owner of a nearby shop who confirmed that the minor went to the shop in the morning of 7th and went back to the house of the appellant. She also confirmed the allegation that the girl was locked up in the house.
 27. Upon being placed on his defence, the appellant admitted having met the complainant on 7th October, 2015, but, argued that it was at Limuru road while on his way home, at Mathare. That the victim said she was lost and asked to be shown the way to Kitale. He asked for her parent's number and even communicated with her mother who requested him to take her to Country Bus Station. He did but she did not send the money for fare. They stayed until 10:00pm but the mother did not send money.
 28. He decided to go home leaving her at the Climax Bus stage. However, she followed him. He called the mother and informed her of the intention to take her to Kamukunji Police Station but the mother advised that he accommodates her at his house and she could send money the following day. That he lived with a wife and two brothers. They slept and he left early having asked his wife to tell the complainant to wait.
 29. He went to borrow Ksh. 2000/- and when he returned home in the evening the complainant was missing. He inquired from the nearby shopkeeper who told him that she had taken soda on credit. On calling her mother she demanded to see her daughter. After a while he got a call from a strange number. The caller asked him to go to the Social Hall which he did only to be arrested.
 30. I have considered rival submissions and the authorities cited. The first appellate court has the duty to re-evaluate the evidence recorded at the subordinate court and come up with its own conclusion bearing in mind that unlike the trial magistrate the High court did not see or hear the evidence and also observe witness demeanor. (See Okeno -Vs- Republic (1972) E.A.32).
 31. In the case of Gabriel Kamau Njoroge -Vs- Republic (1987) eKLR, the Court of Appeal held that:

“It is the duty of the first Appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this.”
 32. It is contended that Section 200 of the Criminal Procedure Code (CPC) was not complied with. The alluded to provision of the law refers to procedural steps taken after a new magistrate takes over trial proceedings. Section 200(3) of the CPC provides that:

Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.
 33. An accused person has the options to either request the matter to start afresh or recall witnesses. The section must be read and explained to the accused and failure to do so would render the case a mistrial.



The right to recall or start denovo is however within the court's discretion and may be denied where it is not justified or affect expeditious determination of the case.

34. The matter was first heard by Honorable Kithinji A. PM who recorded evidence of six (6) prosecution witnesses. He was succeeded by Honourable Onkwani PM who complied with Section 200(3) of the CPC. The appellant was represented by counsel and he elected to proceed from where the matter had reached.
35. He was also represented during the trial and PW1 and PW2 who had testified before a previous magistrate were re-called and cross-examined. The appellant who had the benefit of legal counsel and did not make a further application cannot purport to have been prejudiced.
36. The appellant claims that his arrest was unprocedural and noncompliant with *the constitution*. Such a ground must be raised before the trial court to enable the Investigating Officer and the Arresting Officer respond. The burden of proof was upon him which was not discharged hence no constitutional violation was demonstrated. In any case the allegation at the appellate stage appears to be an afterthought in this appeal.
37. As to whether, the ingredients of the offence were proved beyond reasonable doubt. In a case of the offence of defilement the elements of the offence are: the age of the victim, an act of penetration within the meaning of Section 2 of the *Sexual Offences Act* and identification of the perpetrator.
38. On whether the age of the victim was proved, in the case of Francis Omuroni -Vs- Uganda, Criminal Appeal NO. 2 OF 2000, the Court of Appeal of Uganda held thus:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense...”.

39. The amended charge sheet indicated the age of the complainant as 13 years. An age assessment was carried out on the complainant and it was established that she was 13.3 years old. The accused acknowledged the complainant being a child. Section 2 of the *Children Act* defines a child to be any human being below the age of 18 years.
40. The argument raised was that the birth certificate availed was not for the victim due to the variance in names, namely MN and MLN. Per the argument, the names were for a different person. Section 137(d) of the CPC provides that:

Description of persons.—the description or designation in a charge or information of the accused person, or of another person to whom reference is made therein, shall be reasonably sufficient to identify him, without necessarily stating his correct name, or his abode, style, degree or occupation; and if, owing to the name of the person not being known, or for any other reason, it is impracticable to give such a description or designation, a description or designation shall be given as is reasonably practicable in the circumstances, or the person may be described as "a person unknown";

42. The complainant herein was referred to as M even by the appellant, she was reasonably identified. The birth certificate which was obtained at a later time bore the name M with other middle names that were not alluded to by either the prosecution or defence during trial. The appeal cannot be allowed on that ground because the reasoning behind it is not sound.



43. According to Section 8 (1) of the *Sexual Offences Act*, a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
44. On the question of penetration, Section 2 of the Act refers to penetration as full or partial insertion of the male genitalia into the female genitalia. The proof can be by medical evidence, circumstantial evidence and more important by the victim's oral testimony.
45. Medical evidence adduced indicates that the child was examined on 9/10/2015 having taken a shower. There was evidence of old tears. Although no spermatozoa were seen, the pinkness of the vaginal entry showed there was recent sexual interaction. However, the appellant contends that the old injuries / tears proved that she was not a virgin and that there is no evidence proving that the appellant had defiled her that night. That spermatozoa was expected.
46. It has been held that the presence or absence of spermatozoa is not a strong ground to contest rape/ defilement. In the case of *Mark Oiruri vs. Republic Criminal Appeal 295 of 2012 [2013] eKLR*, the Court of Appeal held that:

“...and the effect that the medical examination was carried out on her on 16th November, 2008 five days after the event, and that during that time she must have taken a bath and no spermatozoa could be found. In any event the offence is against penetration of a minor and penetration does not necessarily end in the release of sperms into the victim. Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ...”

47. Evidence adduced established that the child herein was a truant, hence whatever she stated would be viewed with skepticism such that it had to be verified.
48. It is asserted that the victim's evidence was contradicted; her whereabouts before and during the eve of the offence was questioned; and, her testimony and character were questioned by people she had interacted with. The question begging is if a child who has been truanting can have her purity damaged and the perpetrator is left to go scot-free on that ground.
49. Contradictions were apparent in the matter, the obvious question invited is whether the stated contradictions go to the root of the matter. In the case of *Twehangane Alfred -Vs- Uganda, Crim. App. No 139 of 2001, [2003] UGCA*, it was clearly expressed that not every contradiction warrants rejection of evidence. The court delivered itself thus:

“With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.”

50. In the case of *AHM -Vs- Republic (2022) KEHC 12773 (KLR) Mativo J (As he then was)* held that:

“... inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected. That the question to be addressed is whether the



contradictions mentioned are grave and point to deliberate untruthfulness or whether they affect the substance of the charge. “

51. The alluded to inconsistencies were with regard to circumstances in which the child was in Nairobi, how the victim met the appellant, how the witness had stayed with PW4, and, how she was arrested on allegations of having stolen. All these did not water down the question of the victim having ended up at the house of the appellant. The defence put up was that in the house were other members of the family an allegation that was not established. The Investigating Officer visited the house, a single room which had a bed and a two-seater on which the victim slept prior to being molested according to her evidence. There is also the question of an attempt to reconcile that is not denied by the appellant. The question begging is what was the reconciliation for?

52. The alleged contradictions did not go to the root of the act of defilement hence was not fatal to the case. Evidence as to whether the child was defiled is that of the victim who stated that in the course of the night she was violated sexually. Section 124 of the *Evidence Act* provides that :

Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him: (Emphasis added)

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

53. The Oxford dictionary defines corroboration as evidence which confirms or supports a statement theory or finding. The trial magistrate did not specifically record reasons that made her believe the victim. However, evidence of the victim was corroborated by medical evidence which established existence of old tear scars in the vagina. But, there was evidence of a pinkish vagina which of course can be caused by sexual intercourse. The evidence supported or strengthened the evidence of the complainant. For that reason, the conviction was safe and is affirmed.

54. On the question of sentence, the provisions of Section 8(3) of the *Sexual Offences Act* provide as follows:

(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.

55. In the case of *Ahamad Abolfathi Mohammed & another -Vs- Republic* (2018) eKLR the Court of Appeal stated;

“As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive.”



56. The court meted out the minimum mandatory sentence prescribed. Although the appellant was a first offender, correct principles were applied which do not warrant interference. During trial the appellant was out on bond, therefore, Section 333(2) of the CPC is not applicable.
57. The upshot is that the appeal lacks merit. Accordingly, it is dismissed.
58. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT
NAIROBI, THIS 23RD DAY OF SEPTEMBER, 2024.**

L. N. MUTENDE

JUDGE

