



**Anyango v Republic (Criminal Appeal E055 of 2023)  
[2024] KEHC 15923 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 15923 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL APPEAL E055 OF 2023  
REA OUGO, J  
OCTOBER 11, 2024**

**BETWEEN**

**ANDREW OSALE ANYANGO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal arising from the conviction and sentence passed on 7th August 2023 in  
Kimilili SPMC SO Criminal Case No E017 of 2021 by Hon. W.K. Onkunya PM)*

**JUDGMENT**

1. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No 3 of 2006. The particulars were that on 16<sup>th</sup> November 2021, within Bungoma County, intentionally and unlawfully caused his penis to penetrate the vagina of JNM a child aged 8 years. The appellant pleaded not guilty.
2. A trial followed and, in the end, the trial magistrate found that the prosecution had proved the offence of defilement against the appellant to the required threshold of beyond reasonable doubt. The appellant was convicted and sentenced to serve life imprisonment.
3. The appellant dissatisfied with the conviction and sentence has lodged his petition of appeal dated 14<sup>th</sup> August 2023 it has Nine (9) grounds:
  1. That the learned trial magistrate erred both in law and fact when she convicted the appellant yet the charge was not proved beyond reasonable doubt.
  2. That the learned trial magistrate erred in both law and fact for when she failed to consider the appellant's submissions.
  3. That the medical evidence that the court relied upon was contradictory.



4. That the learned trial magistrate was biased against the appellant when she deliberately chose to fill in the gaps that were left in the prosecution case in particular and while analyzing the evidence of Pw2, Pw3 and medical documents which she found to be inaccurate but decided to sue it in convicting the appellant hence occasioning a miscarriage of justice.
  5. That the learned magistrate was biased against the appellant and in particular when she relied only on the evidence of complainant Pw2 and disregarded the evidence of the appellant and his witnesses.
  6. That the learned trial magistrate was biased against the appellant when she failed to appreciate that treatment of 22/11/2021 contradict that of 24/11/2021 and Pw3 confirmed that such injuries can be caused by stick as alleged by complainant Pw2.
  7. That evidence of Pw1 and Pw2 was so contradictory that raise doubt hence it was unsafe for the trial magistrate to rely on it hence occasioned miscarriage of justice.
  8. That the learned trial magistrate erred in both law and fact when she misinterpreted the provisions of section 124 of the *Evidence Act* Cap 80 Laws of Kenya hence occasioning a miscarriage of justice.
  9. That the sentence meted upon the appellant was harsh.
4. This being a first appellate court, I am to analyze and evaluate afresh all the evidence adduced before the lower court and draw my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses testify (see *Okeno vs. Republic* [1972] EA 32).
  5. EN (Pw1) testified that on 21/11/2021 she was washing her children's clothes when she noticed her daughter's undergarment was dirty. She examined JN (Pw2) and noticed that the vagina has some whitish discharge. She asked Pw2 to bend and saw bruises on her vagina. Pw1 asked the complainant what happened but she remained quiet. Pw1 took Pw2 to the hospital the following day and the doctor examined her and thought that there was penetration. Pw2 told the doctor that a stick pricked her vagina. Pw2 received treatment and they went home. On Tuesday morning, Pw2 experienced lower abdominal pain and when asked by Pw1 what happened, the child confessed to being raped on 16/11/2021 between 1:00 p.m. and 3:00 p.m. Pw2 told her that the perpetrator had an issue with his eye and that she knew his mother and their cows despite not knowing him by name. The incident took place in a thicket near school and the appellant threatened to kill Pw2 if she spoke of what happened. Pw1 reported the matter to Kapchonge Police Station and was issued with a P3 Form. The child led Pw1 to the scene and saw the appellant in a car and pointed him out as the perpetrator.
  6. On cross-examination, Pw1 testified that she knew of the assault 5 days after the incident. She testified that she bathed the child on alternate days and did not see anything on her private parts on 17<sup>th</sup> and 20<sup>th</sup> November 2021. Pw1 testified that the underwear she wore on the day she went to the posho mill has some blood stains and was at in her house. She denied ever having a land dispute with the appellant.
  7. JN (Pw2) testified that on the evening of 16/11/2021 she passed a bridge into the forest and saw the appellant who was looking for some cows. The appellant pulled her into the forest, removed her clothes including her stocking, and lay on her. He threatened to stab her. The appellant removed her inner pants and then did bad manners to her. After he was done, Pw2 wore her clothes and proceeded to the posho mill. She did not tell anyone as she had been threatened. When her mother asked her about the



discharge from her vagina, she told her she was pricked by a stick. Pw2 later told her mother that it was the appellant who had harmed her. She told Pw1 that the assailant had one bad eye.

8. Perpetua Okwaro (Pw3) testified that she is a clinician at Ndal Health Centre. She produced the treatment notes made by Koech Alex and the P3 Form. She testified that the patient had a history of defilement on 16/11/2021. Pw2 had pains on the lower abdomen, her labia minora was bruised and her hymen was fresh (inflamed). The vagina had no discharge. After laboratory tests, pus cells were seen in the urine. However, according to the treatment notes of Alex Koech of 22/11/2021 the patient fell and a stick pricked her genitals but there was no defilement.
9. No. 111426 PC Mwita Chacha (Pw4) testified that the complainant and her mother on 24/11/2021 reported that the minor had been defiled on 16/11/2021. He recorded their statements and issued them with a P3 form. Pw4 also visited the scene with Officer Kiplimo on 11/12/2021 and arrested the appellant. Pw2 told them that the assailant was a neighbour who had one eye. Pw4 on cross-examination testified that the parties knew each other but the appellant was not mentioned by name. Pw4 arrested the appellant but did not record any statement from the appellant.
10. In his defence the appellant testified as Dw1. He told the trial court that he operates a butchery with his friend Wanjala Kiloki and go to the shop from Monday to Sunday. On the material day he was at the shop with Wanjala Kiloki. He testified that he was framed as Pw1 used to work for his father, was dismissed and unceremoniously left. He explained that there is yet another neighbour, Francis Wawire that has a bad eye and he is not the only one with one bad eye. Dw1 testified that there is also a third person.
11. Kilwake Wanjala (Dw2) testified that the appellant is his business partner. On 16/11/2021 the appellant was at the shop at 2:00 p.m. as he opens the shop from 7:00 am to 9:00 pm. On cross-examination, he testified that on 16/11/2021 he left the appellant in the shop.
12. Melzedek Oluoch (Dw3) testified that he was employed by the appellant's father as a herdsman. He testified that the appellant works at the butchery and has never taken care of the cows.

### **Analysis And Determination**

13. The main issue raised by the appeal is whether the prosecution proved its case beyond reasonable doubt.
14. The appellant submits that if the victim was defiled on 16/11/2021, Pw1 should have noticed the cuts, stains, and discharge earlier than 21/11/2021. The evidence of Pw1 and Pw2 was full of contradictions. They also submit that the complainant confirmed that she had never seen the appellant and never knew the person who lay on her. They faulted the prosecution for failing to call the doctor from Nalu Health Centre who had a contrary opinion to that of Pw3. In any event, Pw3 testified on cross-examination that the injuries could have been caused by a stick. The appellant submits that the trial magistrate misinterpreted the provisions of section 124 of the *Evidence Act* as the evidence from the victim and documents are so contradictory that they raise serious doubt. The medical evidence did not corroborate the victim's evidence.
15. The respondent opposed the appeal. They submit that to prove a charge of defilement, the prosecution must prove age, penetration and linking the suspect to the offence. They submit that Pw2 testified that the appellant did 'tabia mbaya' as she pointed to her vagina and her evidence was corroborated by Pw3. It was submitted that the appellant was positively identified by recognition as the court noted he had one bad eye. The prosecution maintains no contradiction in medical evidence tendered by Pw3. The contradiction in the testimony of Pw1 and Pw2 was not material, for example, while Pw1 testified that



she bathes herself, Pw2 testified that she washes her clothes. They also submit that the trial magistrate cited section 124 of the *Evidence Act* verbatim, applied the same to this case, and cited a High Court authority.

16. The applicable law in this case is section 8 of the *Sexual Offences Act* and the relevant provisions are as follows:

“ 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.
- (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.
- (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”

17. In this case, it is not disputed that Pw2 was 8 years old at the time of the offence. Pw2’s age was proved by her Certificate of Birth produced as evidence.

18. The main issues challenged in the appeal are whether there was penetration and whether the appellant was responsible. The trial magistrate in concluding that penetration was proved considered both the medical evidence and the testimony of Pw2.

19. The *Sexual Offences Act* further defines “penetration” as the partial or complete insertion of the genital organs of a person into the genital organs of another person.

20. There is uncertainty surrounding the cause of penetration. According to section 2 of the *Sexual Offences Act*, penetration must be caused by the perpetrator’s genital organ. The treatment notes from Ndaluh Health Centre indicate there were bruises and the hymen was not intact as a result of penetration. However, the injuries were caused by a stick. The clinician Alex Koech did not arrive at the opinion that the child had been defiled despite looking at the injuries sustained solely based on the history given. Pw3 noted that there were lacerations on the labia minora and the hymen was absent. However, because of the history taken from the patient, her finding was that there was defilement. Having considered the two reports the opinion of the two clinicians was solely based on the narration of the patient taken during her history as opposed to the injuries that she sustained. Even though Pw2 admitted to having lied to her mother and the doctor, in my view the medical opinion concerning what caused the injuries ought to have been based purely on the injuries sustained. If at all the child presented the element that her history was made on account of threats, then they could have offered counselling before arriving at a final diagnosis. In this case, Pw3 testified that the possibility of the injuries being caused by a stick could not be excluded. Given that the two reports contradicted each other they offer no help to the court the court must consider section 124 of the *Evidence Act*.



21. The trial magistrate invoked section 124 of the *Evidence Act* however did not give any reason why it believed the child to be telling the truth. During cross-examination, Pw1 also stated that she did not observe any injuries on the child when she bathed her on both November 17<sup>th</sup> and 20<sup>th</sup>, 2021. It is unlikely that the injuries could have suddenly appeared on November 21<sup>st</sup> after the incident, which occurred on November 16<sup>th</sup>, 2021. Although Pw4 testified that the appellant was known to the complainant, the evidence from Pw2 reveals the opposite. Pw2 in her voire dire exam told the court that she did not know the appellant. Pw2 testified during cross-examination that she never knew the person who lay on her and that had never seen him before.
22. Although in her examination in chief Pw2 testified that the assailant had one bad eye, Dwi testified that the area has two other people with bad eyes and even mentioned a neighbour Francis Wawire. However, no other person was investigated as the investigating officer Pw4 testified that there was no need to take the appellant's statement. The assailant was unknown to Pw2 and with the area having 2 other persons with a bad eye, an identification parade ought to have been carried out. In my view, identification was not safe.
23. The appellant also submitted that the trial magistrate disregarded his submissions and defence. The respondent on the other hand submitted that the appellant's submissions and the evidence from his witnesses were considered. The trial magistrate in his judgment found that the Dw2 and Dw3 did not testify that they were with the appellant. Dw2 testified that he had left the appellant at the butchery working, however, the evidence of Dw3 also does not place the appellant with the cows as alleged by Pw2. Dw3 testified that he left to herd the cattle and did not see the appellant until 9:00 p.m. His evidence was that the appellant was never with the cows as he is the herdsman. The appellant did raise a defence of alibi and challenged his identification as the assailant solely based on the fact that he had a bad eye on the ground and that there were two other people in the neighbourhood with bad eyes. The prosecution ought to have considered the appellant's defence of alibi and looked into the other two suspects which it did not.
24. Having considered the appeal in its entirety, I find that the respondent failed to prove their case beyond reasonable doubt. The conviction and sentence of the lower court is set aside and the Appellant shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

**DATED, SIGNED, AND DELIVERED AT BUNGOMA ON THIS 11<sup>TH</sup> DAY OF OCTOBER 2024.**

**R.E. OUGO**

**JUDGE**

In the presence of:

Andrew Osale Anyango/ Appellant

Mr. Wattangah For the Appellant

Mr. Ayeka -For the Respondent/ State

Wilkister -C/A

