



**Lanagat v Republic (Criminal Appeal E042 of 2021)
[2024] KEHC 12574 (KLR) (22 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12574 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL E042 OF 2021
PN GICHOHI, J
OCTOBER 22, 2024**

BETWEEN

FRANLINE LANAGAT APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against conviction and sentence by Hon. E. S. Soita (RM) in Molo Chief Magistrates Court S.O Case No. 60 of 2020 in a judgment delivered on 23rd September 2021)

JUDGMENT

1. Franline Lanagat (the Appellant) appeared before trial court on 19/07/2022 where he was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(1) (3) of the [Sexual Offences Act](#) No. 3 of 2006. Particulars of the offence were that on the 7th day of June 2020 in Kuresoi South Sub-County within Nakuru county intentionally caused/his penis to penetrate the vagina of RC a child aged 15 years old.
2. In the alternative, he was charged with committing indecent act with a child contrary to Section 11 (1) of the Sexual fences [Act No. 3 of 2006](#). Particulars were that on the 7th day of June 2020 in Kuresoi South Sub-County within Nakuru county intentionally touched the vagina of RC a child aged 15 years old with his penis.
3. He denied the charges and after hearing both the prosecution and defence witnesses, the trial magistrate convicted the Appellant on the main charge and sentenced him to serve 15 years imprisonment.
4. He was aggrieved by both the conviction and the sentence and therefore preferred this appeal based on two (2) grounds as per his Amended Grounds of Appeal filed on 13th May 2024. These are: -
 1. That, the learned trial magistrate erred in law and fact by failing to appreciate that the prosecution case was not proved beyond any reasonable doubt as prescribed by the law.



2. That, the learned trial magistrate erred in law and fact by failing to consider the appellants defence yet the same was no rebutted by the prosecution.
5. He therefore urged that the appeal be allowed, the conviction quash, sentence set aside and he be set at liberty.

Appellant's Submissions

6. On the first ground that the Prosecution failed to prove their case beyond any reasonable doubt, the Appellant submitted that it was upon the Respondent to prove the three ingredients following critical ingredients of the offence of defilement being penetration, identity of the perpetrator and age of the complainant.
7. On the victim's age, he submitted that the evidence was contradictory in her sworn statement, the complainant (PW1) told court that she is 15 years old. On the other hand, her father PKC (PW2) said that she was 14 years of age. Further, he submitted that age assessment done on 1st June 2021 indicated that the victim is either 17+ or -1.
8. On identity of the perpetrator, the Appellant submitted the trial court failed to examine the credibility by the witnesses which evidence was contradictory. He submitted that the complainant's evidence was that she was sent by her mother in the evening to take a shawl to town. That on way back, she met the area OCS and since it was late, the OCS paid the Appellant who was a motor cycle rider to take her home.
9. On the way, the Appellant told her that the motorcycle had ran out of fuel. When they stopped, he told her to hold the fence. He removed her trouser forcefully but she could not scream for she would have been killed. That he inserted his penis into her vagina and they were facing each other when he was defiling her hence, she could see clearly his face.
10. The Appellant submitted that though the complainant testified that she was arrested with the Appellant, the OCS was not called as a witness to say how he arrested the accused with the minor.
11. He therefore submitted that the evidence tendered before the trial court shows that the OCS met an accused pushing his motor cycle and he arrested the accused and the minor just because it was late hours.
12. Further, he submitted that according to the minor, the OCS found the Appellant at diamond place and told him to go home. The OCS paid the boda boda to take the minor home and therefore, the OCS was a crucial witness and failure to call him was fatal.
13. Further, he submitted that the evidence by PW2 was contradicted and PW4 was contradictory and therefore could not be used to sustain a conviction. That according to PW2, he was called by the police who told him that his daughter was found at the bush near the road while the accused person was defiling her. That on the other hand, PW4's statement was that while on patrol on 7th June, 2020 at 2025 Hrs, they met one girl running towards their direction. They stopped the girl who informed them she had boarded a motorcycle which stopped and the rider defiled her. That the police were directed to the scene and found the accused person with motorcycle registration number KMDXXXX.
14. The Appellant further submitted that failure to subject him to any medical examination prejudiced him in this case. In the circumstances, he submitted that the penetration and identity were not proved.
15. On the second ground, the Appellant submitted that that his defence was that he was at work at the market. He was stopped by the OCS who had the victim also arrested for it was at night. They were



both taken to the police station. He submitted that the burden of proof never shifts to the defence. He therefore urged the Court to consider the evidence as a whole, allow his appeal.

Respondent's Submissions

16. The Respondent opposed the appeal vide submissions filed on 28/05/2024 by Mr. Kihara, the learned Prosecution Counsel. While summarising the evidence advanced by the complainant (PW1), her father (PW2), the Clinical Officer (PW3), the Arresting Officer (PW4) and the Investigations Officer (PW5), he submitted that the prosecution had proved all the ingredients of the offence of defilement. That the Appellant's defence was considered by the trial court. That the said defence did not dislodge the evidence by the prosecution.
17. In regard to age, he submitted that the evidence showed that the complainant was 15 years old.
18. He submitted that the identity was positively established. That it was the complainant's testimony that her mother sent her to town at around 5 pm to take a shawl. That she met the Appellant who she could not see him properly and had not met him before. She however recalled what the Appellant wore that day. That she also met with the OCS of Keringet who prompted her to go home as it was getting late.
19. That she boarded the Appellant's motorcycle and, on her way home the Appellant informed her that the fuel had been depleted. He requested her to alight and take another motor cycle but she declined. He grabbed her and pinned against a fence. He forcibly pulled her trousers down and removed her pant. He threatened that she would be killed if she screamed. The Appellant had sex with her for 5 minutes as she faced him.
20. The Respondent submitted that after the act, the complainant informed the Appellant that she could not go home as it was dark and that they should go back to town. That while on the way with the Appellant pushing his motorcycle, they met police officers. She informed the officers what had transpired and they were both arrested and taken to police station.
21. It was his submissions that in cross-examination, the complainant told the court that the defilement took place at around 8 pm. She recalled that the OCS even paid for the transport home which he gave the Appellant. That the Appellant confirmed to the OCS that he was familiar with the area. He further submitted that in re-examination, she confirmed she saw the Appellant's face though he had a cap on as there was sufficient light at that time.
22. The Respondent further submitted that PW4 who was an officer based at Keringet Police Station was on patrol when he saw the complainant running towards him. He asked her what she was doing outside and she explained that the boda boda had exhausted fuel and the Appellant had defiled her. They immediately arrested the Appellant.
23. Further, the Respondent submitted that the Clinical Officer (PW3) produced the P3 Form and PRC Form. She examined the complainant after 12 hours and noted bruises on her labia minora and hymen broken. She also noted redness and tenderness and some discharge. She concluded that it may have been caused by sperm or bacteria. She confirmed that both the victim and Appellant were examined.

Analysis And Determination

24. As the first Appellate Court, this Court is duty bound to re-evaluate the evidence was adduced before the trial court and come up with its own conclusions bearing in mind that this Court never saw or heard the witnesses as they testified. (See *Okeno v Republic* [1972] EA 32.)
25. In fulfilment of that duty, the issues for determination in this appeal are: -



1. Whether the Respondent discharged its burden of proof on the charge of defilement.
 2. Whether the trial court considered the defence.
 3. Whether the Court should interfere with the conviction and sentence.
26. To discharge its burden, the Respondent had to prove the age of the complainant, that there was penetration and that the Appellant was the perpetrator.
 27. Regarding age, it is now settled law that age can be proved by documentary evidence such as birth certificate, baptism card, or by oral evidence of the child if possessed of enough intelligence to testify or the evidence of the child's parent or guardian or by medical evidence among other credible form of proof.
 28. In this case, the charge sheet indicates that the complainant was aged 15 years when she was allegedly defiled on 07/06/2020. The outpatient record from Keringet Sub – County Hospital dated 08/06/2020 indicates her age as 15 years. The same age is indicated in her P3 Form. Her PRC form indicates her date of birth as 13/04/2005.
 29. The complainant testified on 21/10/2020 that she was aged 15 years but the Birth Certificate was misplaced. Her father (PW2) testified on 01/12/2020 that the complainant was aged 14 years and in class seven. The age assessment carried out on the complainant on 01/06/2021 gave the complainant's age as 17 years (+ or – 1). This Court is satisfied with this record and also with the trial court's finding that the complainant's age was 15 years.
 30. In regard to penetration, it is the complainant's evidence that she was defiled by the Appellant on the material date. That both were arrested and taken to Police Station on the same date. She was taken to hospital the following day on 08/06/2020. This was the same date indicated in the out -patient card, P3 Form and PRC Form.
 31. PW3 examined the complainant 12 hours after the alleged defilement and filled the P3form indicating that the complainant had bruises on the labia major/ minor. The vagina and cervix were intact. The hymen was broken. She concluded that the complainant had been defiled.
 32. Section 2 of the *Sexual Offences Act* define penetration and “the partial or complete insertion of the genital organs of a person into the genital organ of another person.” This court is satisfied that the complainant was indeed defiled.
 33. On identity of the perpetrator, the trial court held: -

“PW1 testified that she boarded the accused person's motor cycle and when the accused was defiling her, she could see the face of the accused person for they were facing each other when the incident occurred. PW4 PC Ngetich stated that when on patrol they saw a girl who was the victim running towards their side and informed them that of the issue. Later on, they went to arrest the accused person who was still at the scene with motor cycle registration number KMDXXXXX blue in colour. During defence hearing, the accused person stated that he was at the Centre working and was arrested and he thought his offence was for Covid-19 related offences. From the evidence adduced court finds identity has been proved.”
 34. From the trial court's record, the complainant testified as follows: -

“I was sent by my mother to town to take a “leso”. While coming back, I met with my friend Linet. We did talk and I did escort. She resided at Kimalan. I went to take a boda boda. I was



found with OCS of Keringet, who paid for me for it was late. He told to go home. I did see the person of boda boda but I could not see his face. We went and on reaching the way, he stated that the fuel was finished, and I was told to alight. He told me to take another boda boda and I refused. I tried to defend myself but he told me to hold the fence. While touching the fence, he said I pull my trouser downwards. He did push my trouser downwards by force. I had to push it downwards. He did bad manners to me., he removed my panty and he did sex to me. He also removed his trousers and did not use a condom, he used his penis to enter my vagina. I did feel pain. I could not scream for he would have killed me. I was holding the fence while facing him. We were both standing. I could see him. He had sex with me for five minutes. Afterwards, I told him I could not go home for it was dark. We went back to town and we met police officer. The accused person was pushing his boda boda and I informed police who were on the road and he was arrested. We were taken by police officers, accused person and me. I was very scared at that time. The accused person was taken to police. The accused had jean, sport shoes and the red jacket, the one he has in court.”

35. During cross - examination by the Appellant, she told the court: -

“One person was stopped who had a motor cycle. It was around 2000 hours... you took us with your motor bike and you said your fuel ended...The OCS found me at Diamond place and told me to go home. He paid for boda boda. You said you know the area. You were paid kshs. 100. You said you come from Seguton.”

36. This incident occurred at 8.00 pm. She had not met the Appellant before. This was therefore identification at night which calls for proper scrutiny by the court. Indeed, the Court of Appeal in [*Wamunga v Republic*](#) (1989) KLR 426 had this to say on the issue: -

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.”

37. In re- examination, the complainant told the court: - “When the OCS paid for the motor cycle, there was light and I could see the accused person. It was on the road. I could recognize the accused person but he had a cap. I was able to see the Appellant. I did board the boda boda and after the incident, he pushed the boda boda for he did not have fuel until we met the police officers...Motor cycle had light, but it was very dark.”

38. From this evidence, it is apparent that the circumstances of identification were not favourable. There was a possibility of error.

39. The court is alive to the provision of Section 124 of the [*Evidence Act*](#) which provides that: -

“Notwithstanding the provisions of section 19 of the [*Oaths and Statutory Declarations Act*](#), where the evidence of alleged victim 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. 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.”

40. From the trial court’s proceedings, it is apparent that the trial court carried out examination of the child before she testified. For purpose of this quotation, this Court will protect the identity of the victim. The trial court recorded: -

“Voir Dire

I am R.C. I am 15 years old. I school at Seriot primary school. I am in class seven. I go to church.

Court: Witness to give sworn evidence.”

41. That is not sufficient examination of victim who with all intent and purposes, is a child within the meaning provided for under Section 2 of the Children’s Act that defines a child as “any human being under the age of eighteen years” and which definition is adopted in the *Sexual Offences Act*. There is nothing in the trial courts judgment that the court was satisfied that the victim was telling the truth.
42. In the circumstances of this case, there was necessity to establish if there was evidence to corroborate complainant’s evidence in regard to identity of the offender.
43. From the trial court’s judgment, it is apparent that court sought and found corroboration on the issue of identity in the evidence of the complainant and PW4. However, that evidence reveals otherwise. According to the complainant, the Appellant was not arrested at the scene. She walked together with the Appellant as he pushed the motor cycle and they met the police to who she reported the incident and both were arrested and taken to the station.
44. PW4 stated that they were on patrol at the edge of the market. They saw the complainant running to their direction and they stopped her. She reported to them how she had paid for the boda boda and when it ran out of fuel, the rider defiled her. She took them back to the scene about 200 m where they found the Appellant pushing the motor cycle. They arrested him and took both to the police station.
45. Further, regarding the identity, the Investigating Officer (PW5) testified that in her recorded statement to police, the complainant said “she could know well the accused for she used to know him.” Further he testified during cross -examination that the Appellant and the complainant resided at Barge area and used to know each other. That directly contradicts the evidence the complainant gave before the court that she did not know the accused before.
46. Further, PW5 testified that according to the complainant’s recorded statement, the complainant stated that after the incident she sought to be taken to her home. That Officers who were on patrol on curfew saw them from far and at that time, the victim noticed it was police. She ran to the police and informed them. That “accused started running away and a chase was done, accused was arrested and taken to police station.” That contradicts the evidence by the complainant and the Arresting Officer (PW4).
47. Further, it was the complainant’s evidence that the OCS Keringet saw her at Diamond and told her to go home. He paid the boda boda person. She said that she did not know the OCS but she used to deliver milk to him. In cross examination, the Investigating Officer (PW5) stated that he did not know who paid for the complainant the boda boda fare. If it was the OCS who had stopped the boda boda and paid the rider to take her home, and it was alleged that the rider defiled her, then it was imperative to call him as a witness but he was not.



48. On his part, the complainant's father (PW2) testified that he was called to the Police Station. The police officer informed him that he found the victim and accused in the bush near the road while the accused was raping the victim and that the accused person was chased and arrested. In cross examination, he maintained that he was telling the truth. This Court notes from the evidence on record that no witness including the alleged police officer testified to have seen the complainant being defiled.
49. In his sworn statement in defence, the Appellant told the court that he was a boda boda rider. He was at Keringet town on the material date which was a market day. He had dropped a customer to Olenguruone. He was stopped by OCS and asked why he was still working and it was at night. He asked for forgiveness. The OCS was with the victim who he had arrested. Two police officers came and found OCS and the victim.
50. He was taken to police station. At the gate, he was searched and Mr. Ngetich (PW4) took Kshs. 12, 420/- from the Appellant and told him that he would be released if he left the money there. The Appellant knew that his case in court was for due to Covid- 19 Regulations. He told the OCS that that his money was taken. He was brought to court. It is noted that on cross examination, PW4 denied asking the Appellant for money so as to let him go.
51. As earlier stated, there is no doubt that complainant was defiled. Both the complainant and the Appellant were arrested on the same night. It is also clear that contrary to the submissions by the Appellant, both were examined and their medical reports prepared and produced in court.
52. On examination, the complainant was found to have some discharge on the vagina. The Clinical Officer (PW3) opined that it could have been caused by sperms, bacteria. She however went on to say that no sperms were found.
53. Regarding examination of the Appellant, everything was found to be normal as indicated in his P3 Form and according to PW3 during cross-examination, "the accused person had no problem."
54. From the above analysis, this Court is satisfied that even if the complainant herein was defiled, which is very unfortunate, the circumstances under which the offence was committed and the identity of the Appellant as the perpetrator, were marred with material contraction and gaps. That was fatal and therefore, the conviction was not safe.
55. In conclusion therefore, this Court allows the appeal, sets aside the conviction and sentence, and sets the Appellant at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 22ND DAY OF OCTOBER, 2024

PATRICIA GICHOHI

JUDGE

In the presence of:

Frankline Langat- Appellant

Mr. Kihara for Respondent

Ruto - Court Assistant

