



REPUBLIC OF KENYA



**KENYA LAW**  
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**Chea v Republic (Criminal Appeal E026 of 2022)  
[2023] KEHC 743 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 743 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CRIMINAL APPEAL E026 OF 2022  
A. ONG'INJO, J  
FEBRUARY 9, 2023**

**BETWEEN**

**TEDDY GUNGA CHEA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the judgment in Voi Principal Magistrate's  
Court Sexual Offence No. E010 of 2022, Republic v Teddy Gunga  
Chea delivered on 27th April 2022 by Hon. D. Wangeci (PM))*

**JUDGMENT**

**Background**

1. The Appellant Teddy Gunga Chea was charged and convicted for the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars of the offence are that on the 21<sup>st</sup> April 2021 at around 2300Hrs at Mazeras Area in Voi Sub-county within Taita Taveta County, the Accused person intentionally and unlawfully caused his male genital organ to penetrate the vagina of STM a girl aged 16 years.
3. The Appellant was also charged with an alternative count of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006.
4. In consideration of the six prosecution witnesses' evidence and in consideration of the Appellant's defence as well as the Appellant's witness defence, the trial magistrate came to the conclusion that the Appellant was guilty and convicted him. The Appellant was subsequently sentenced to serve 20 years imprisonment.
5. The appellant was aggrieved by the conviction and sentence and he preferred the appeal herein on the following grounds: -



- 1) That the learned magistrate erred in law and fact by failing to find and rule that the evidence adduced by the prosecution was insufficient to sustain the conviction and sentence of the Appellant.
  - 2) That the learned magistrate erred in law in convicting the Accused on unreliable, untruthful and uncorroborated evidence of the prosecution witnesses without evaluating it and making a finding on it.
  - 3) That the learned magistrate erred in law in not considering the reasonable doubts available in the case against the Appellant and erred in law in not giving the Appellant the benefit of those doubts.
  - 4) That the learned magistrate erred in law in convicting the Accused without the prosecution having proved all the ingredients of the offence.
  - 5) That the learned magistrate erred in law and in fact by convicting the Accused person without taking into consideration that crucial medical treatment did not confirm that the Accused person was the one who committed the alleged offence.
  - 6) That the learned magistrate erred in law and fact by finding out that there was communication between the Complainant and the Accused person yet there was no such proof tabled in court,
  - 7) The learned magistrate erred in law and in fact by disregarding the evidence of the doctor that the hymen was not freshly broken and that the whitish discharge was not scientifically examined to confirm the genetic components of the discharge was from the Appellant.
  - 8) The learned magistrate erred in law and in fact by not taking into consideration that the Appellant was arrested few hours after the alleged offence and was in the custody of the police and was never examined by the doctor as in the case of the victim.
  - 9) The learned magistrate erred in law and in fact by failing to consider that if the alleged offence happened and there was presence of whitish discharge, the same should be evident in the inner wears of the Complainant and the same was not produced to confirm such grave allegations.
6. The appellant prayed that the appeal be allowed, conviction quashed and sentence set aside.
7. PW1, Stanley Mwale, states that the Complainant is his daughter and that he has a copy of her birth certificate – PMFI 1. He states that he recalls 21.01.2021 at around 11 pm he was asleep when his younger son by the name Brian John aged 6 years woke up in their bedroom and called out his mother’s name and told them that Teresia was not in her room and that he was alone. That the mother went and confirmed and that they went out and inquired from the neighbour. PW1 states that none knew where they were. That he went outside the gate and after around 30 minutes he decided to go back to the house and switched off the lights. That after a while, the security lights were on and that Teresia went in through the fence. That she went and opened the door. That PW1 asked her where she was coming from and that they beat her and she took them where she was. That she took them to where Teddy lives. PW1 states that they knocked on the gate but nobody answered. That Victor found them outside and they explained to him what took them there. That he went over the gate and knocked one of the doors and was directed to the person in custody of the keys to the gate. PW1 states that they knocked all the houses in the plot and that Nyumba Kumi was also present and that everyone came out. That Teddy came out in the company of another man and that the Complainant identified Teddy. That PW1 took Teddy to his house and interrogated him and that after that they took him to the police station. PW1 identified Teddy as the accused in court. That Teddy is known to him and that he is involved in sales



- and marketing. That Teddy admitted to have engaged in sexual intercourse with his daughter and that was the first time. PW1 states that Teddy sought for his forgiveness and that Teresia is in school.
8. PW2, Victor Bighai, states that on 21.4.2021 at around 11 pm, he had dropped a friend who lives near Stanley and that he found Stanley beating their daughter and they told him that their daughter had left home at night and returned at 11 pm and that is why they were beating her. That they were in the process of establishing where she had been. PW2 states that that the daughter took them to the plot 5 minutes - walk away and that they knocked on the gate but there was no response. That PW2 went over the gate and knocked all the doors and that one of the residents opened the gate for them. PW2 states that everybody in the plot also came out including Teddy. That two men came out of one of the houses and the girl identified Teddy as the person she had been with. PW2 identified the accused by pointing at him. That they went to the station but later to Stanley's house where Teddy was interrogated. PW2 states that they were using his motor vehicle and that at the station, they booked their report. He states that they went to hospital where the girl was examined and that they went home.
  9. PW3, S. T. M. states that she was a student Voi Primary at standard 8 and that during the April school recess on 21.4.2021, Teddy called her and asked to meet him at his house within Mazeras where she also lives. That she never went into his house. That she was outside his house till 11 pm. PW3 states that he first called her through Pendo's phone and that they exchanged SMS. She states that she lives with her parents and that she did not leave immediately the message went in. That she waited for her parents to go to bed and that is when she left. She states that their house and where Teddy lives is not very far and that she walks back. PW3 states that he used to live with his friends and that when they were outside, he got hold of her, pushed her to the wall, held her waist, lifted her dress and did tabia mbaya to her. She states that Teddy was not her boyfriend and she was just starting to know him. That he removed his cloth and did the act and when he was done, she went back home. PW3 states that when she got home, she found her parents who asked her to take them to where she was and she took them to where Teddy lives. That the gate had been locked. That one of the men who was with them jumped over the gate and woke everyone up. PW3 states that she identified Teddy whom she stated was before court and that she was taken to hospital and treated. She stated that was the first time she had been to his place.
  10. PW4, Angelina Kasyoka Mwale, states that on 21.4.2021 at 11.00 pm, her son aged 6 years woke her up telling her that he was alone and their daughter was not in their bedroom. That she went to the bedroom and confirmed the report that she was not in the house. PW4 states that she woke up the father and they went out to look for her. She states that she found some girls out but they never found her. That they told her that she had gone behind the compound and one of the girls made a call. That she told PW4 that STM was with her phone but she never picked the call and that she was nowhere to be seen. That the Complainant later returned home at around midnight or thereabout. PW4 states that she was in the house, they met at the house and she told them that she was behind the house. That they beat her and in the process a message came in asking "umefika vizuri baby" PW4 states that she is the one who read the message and that she showed it to her father. That another message came in asking her to give a response. That they beat her and that is when she took them to where she had been. That Victor accompanied them and that when they got there the gate was closed. That Victor went over the gate and the caretaker opened it. That Victor insisted that everyone in the compound comes out and that Teddy eventually came out and the Complainant pointed at him. PW4 states that she knew Teddy very well and that they went back to the house and interrogated him. That they went to the police station and the hospital where she was treated. She states that she was not given a P3 Form.
  11. PW5, NO. 93625, Corporal Elma Mtwana attached at Voi Police Station Crime Branch states that on 22.4.2021 at around 8.00 am she was in the office when the OCS instructed her to investigate a case of defilement reported on 21.4.2021 and that the suspect was arrested and in custody. She states that the



girl's parents were at the station and the girl was 15 and a student at Voi Primary School class 7. PW5 states that she was furnished with a copy of the birth certificate marked PMFI 1. That the mother had already taken the girl to the hospital the same night. That she further escorted the girl to Moi Hospital where she was further examined and a P3 Form filled. She states that she went back to the station and recorded their witness statement and she told her that she had been in a relationship with the accused since the beginning of April 2021 and that they were in communication via mobile phone and that on 21.4.2021, at around 9.00 pm, she was at their house when the accused sent her a text message asking her to meet him. That PW3 told the accused that her parents were awake and they agreed that they wait for her parents to sleep and then she would leave which she did. That she met with the accused at his house. That she did not get into the accused's house and that she had a brief chat outside the house and later had sex with the accused. That she went back to her home and found her parents awake. That she was interrogated and she stated that she was from the accused's place. That the parents asked to be taken to the accused's place. That the girl took them there and they found the accused's friend and that the girl identified the accused positively and was taken to the house of the girl's parents and later to the police station. PW5 states that she later charged the accused with the offence before court. That the suspect who was taken to the station was before court.

12. PW6, Joyne Wali Mott, produced the P3 Form for S. M. aged 16 years who had been taken in for the alleged offence of defilement on 22.4.2021. She states that she is the one who filled the P3 Form and that there was no staining or tear on clothing noted. That there was one-day history of defilement by a person known to her on 22.4.2021 at 0230hrs. PW6 states that there was no sign of intoxication on Section C, the offence is defilement and age is 14 years. PW6 states that on examination of genitalia, the external genitalia was normal, hymen missing and not freshly broken, and a clear discharge was noted in the vagina. She stated that with hymen missing means that there was penetration at one time of her life. PW6 produced the P3 Form – Pex 2. She also produced treatment notes – Pex 3.
13. The accused, Teddy Gunga Chea, states that he worked as an administrator with RVG. He states that he had worked with the company for 6 months and that he started working with the company in October 2020 and transferred to Voi Branch in 2020 at Mazeras. The accused states that he is aware of the charges before court and that he used to live with Jonathan and Elias and that they worked part time and in the evening. He states that he left at 8.00 pm, bought groceries and after dinner they took a short break before retiring to bed. That the landlord's child went and knocked at their door at around 11.00 pm and they all went out and found a crowd outside. That they identified some of the people who were their neighbours in the same plot. The accused states that there was a lady by the name Angela who said they were looking for a person by the name James but there was no such person. That the girl was told to identify the person she had been with. That the lady asked Elias to produce his colleagues. That she ran towards them and grabbed him by the neck and he was taken by surprise. The accused states that they asked him to join them. That the accused learnt her name in court. That initially he thought there was an emergency at the boarding section at their offices at Mazeras as Angela has also rented a house in the same compound with them and it is a big house and that they shared the same gate. The accused states that Elias could not join them as he went in and got dressed. That they went up to the office and found a vehicle parked outside and that they went to their house. The accused states that they asked him to explain himself and that they alleged that he had slept with their child. He states that he was with his colleagues all along. That one lady slapped him six times and that there was Victor who was smoking and threatened to kill him. That the accused advised them to take their daughter for examination and that he was ready to meet the cost. That they asked for Kshs. 100,000 which he did not have then. That they told him that they would escalate the matter. That Elias and Jonathan managed to arrive on time before he could be taken to the police station. He states that the village elder was also present. He states that they went to Voi Police Station and he gave his details to the police. He



states that he was booked in and that the girl was taken to Moi Hospital for examination. That he was taken to hospital on 22.4.2021 and was tested for HIV, his private parts were examined and that the charges before court are fabricated and that they wanted money from him.

14. DW2, Elias Baya, stated that he lived in Mazeras Voi. He states that the accused was a colleague and friend and that they used to work together. He stated that he was in court because of the charges levelled against the accused. That on 21.4.2021 at 11.00 pm, the landlord knocked at their door and asked them to get out. That he lived with the accused and that they were asleep. That when they got out, they found a crowd of people and among them were their neighbours. That one of the ladies asked for James. That she asked the girl to clarify further. That the girl pointed at the accused. That DW2 went to the house and dressed up and that he was with the accused the whole day. He states that they left the office at 8.00 pm, went home and after dinner they retired to bed. That they followed them to the girl's house and that they were told to follow them to the police station. That it was during curfew time and that they decided to go back the following day. That Jonathan was transferred to Ukunda and the accused to Malindi.
15. This appeal was canvassed by way of written submissions.

### **Appellant's Submissions**

16. The Appellant submits that under Section 107 (1) of the *Evidence Act*, the prosecution bears the burden of proof on every element in a criminal charge beyond reasonable doubt as was held in the case of *Woolington v DPP* [1935] AC 462 and *Miller v Minister of Pensions* 2 ALL 372-273. The Appellant states that for the prosecution to secure conviction on the offence of defilement, the elements that must be proved beyond reasonable doubt include penetration, age of the child and positive identification of the perpetrator. The Appellant further states that when dealing with sexual offences involving under the age of majority the court is entitled to apply Section 124 of the *Evidence Act* on corroboration.
17. On whether there was penetration, the Appellant submits that this key element was not proved and that there was neither an eye witness nor circumstantial evidence to connect the Appellant to the offence. It is submitted that PW6, the doctor testified and stated that there was no blood, tears or lacerations. That the victim was examined 3 hours after commission of the alleged offence and the medical treatment did not any activity on the vagina of the victim. That PW3 told court that it was her first time having sex and this means that she was a virgin. Therefore, in case the alleged offence happened means there ought to have been tears, lacerations and blood both there was nothing. The Appellant cited the case of *Samuel Ithagi Muhira v Republic*, Appeal No. 113 of 2015 (unreported) where the Court of Appeal held that a P3 Form which fails to disclose the age of the injury in case of defilement cannot be relied upon to prove guilt of the accused. The Appellant also cited the case of *Patrick Mutwiri Gikonyo & Republic* [2018] eKLR and *F. O. v Republic* [2020] eKLR to that effect.
18. The Appellant states that the prosecution witnesses testified that there was communication through the phone between the victim and the Appellant that led to the victim sneaking home and going to meet the Appellant. That PW4 the mother of the Complainant told the court that while the victim arrived in the house, a message was delivered to the phone of the victim asking "umefika vizuri baby". That she read the message and shared the same to PW1 who during cross examination confirmed that when the victim went back home, she did not have the phone. That PW4 also told the court that she gave the messages to the police but PW5 told the court that she neither saw the phone nor the messages. Further, the Appellant's phone was not examined and investigated to see if he was in communication with the victim through Pendo's phone. That Pendo was not called as a witness to confirm those allegations that the Appellant was in communication with the victim through her phone.



19. On proof of the age of the victim, the Appellant submits that the age of the alleged victim is not disputed as the same was proved. The Appellant cited the case of Hillary Nyongesa v Republic, High Court Appeal No. 123 of 2009 and in two courts adopting the dicta in the case of Francis Onamu v Uganda where the court held as follows: -

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who would professionally determine the age of the victim. In the case of any other evidence apart from medical evidence age may also be proved by a birth certificate, the Victim’s parents or guardian and by observance and common sense.”

20. On identification of the Appellant as the perpetrator, the Appellant submits that PW3 testified that when they went to the Appellant’s compound, she was told to point out the person she was with and she pointed at the Appellant. That the Appellant together with his witness told the court that when the door was knocked and they came out, one lady asked for a person by the name James and there was no James. The next question was who works with DW-2 and it was the Appellant. The Appellant cited the case of Eliud Waweru v Republic [2019] eKLR.

### **Respondent’s Submissions**

21. The Respondent submits that the specific elements for the offence of defilement arising from Section 8 (1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are age of the complainant, proof of penetration positive identification of the assailant. The Respondent cited the case of Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013 on the same.
22. On the age of the complainant, the Respondent states that PW3, the Complainant, testified that she was a standard 8 pupil at Voi Primary School. Her birth certificate was produced by PW5 as exhibit 1 which showed that she was born on 1<sup>st</sup> February 2006. That the incident occurred on 21<sup>st</sup> April 2021 and at the time of commission of the offence the Complainant was 15 years old.
23. On proof of penetration, the Respondent cited Section 2 (1) of the *Sexual Offences Act* which defines penetration as the partial or complete insertion of the genital organ of a person into the genital organ of another person. The Respondent cited the case of Mark Oiruri Mose v R [2013] eKLR, where the court of Appeal stated that:
- “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 ingredients of the offence is demonstrated, and penetration need not be deep inside the girl’s organ.”
24. The Respondent in submitting states that the Complainant testified that she was in constant communication with the Appellant and that she sneaked out of the house at night and met the Appellant where he resides. The Respondent states they had intercourse outside his house and when they were done she went back home where she found her parents who interrogated her on where she had been and that she took them to the Appellant’s premises.
25. It is further submitted that the Complainant was taken to Moi hospital for examination where it was noted that the hymen was not present, an indication of penetration which was confirmed by PW6, Dr. Jayne Wali who produced treatment notes and P3 Form.



26. On positive identification of the assailant, the Respondent submits that the Appellant was positively identified. That he had been in communication even before the day of the incident and that the Complainant positively identified him at his premises.

### **Analysis and Determination**

27. This being the first appellate court, I am guided by the principles in *David Njuguna Wairimu v Republic* [2010] eKLR where the court of appeal held: -

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

28. After considering the grounds of appeal Records of trial courts and submissions, the issues for determination are as follows: -

- i. Whether the Appellant was convicted on evidence by prosecution witnesses which was unreliable, untruth and uncorroborated.
- ii. Whether conviction and sentence of the Appellant was based on insufficient evidence.
- iii. Whether the prosecution proved all the ingredients of the offence of defilement.
- iv. Whether any doubts were raised in the prosecution’s evidence.
- v. Whether the trial magistrate considered the medical evidence before convicting the Appellant.
- vi. Whether it was proved that the Appellant and the Complainant were in communication prior to the alleged offence.
- vii. Whether failure to take the Appellant to hospital for medical examination was fatal to the prosecution’s case.

29. All the issues will be consolidated and analysed generally to establish whether the offence of defilement was proved beyond all reasonable doubt against the Appellant.

30. The age of the Complainant was confirmed to be 15 years as at 21<sup>st</sup> April 2021 as she was born on 1<sup>st</sup> February 2006. PW1 and PW4 were alerted by their 6 years old son that their daughter was not in the bedroom at 11.00pm. They started searching for her and learnt from some girls from outside the house that she had taken a phone from one of them that when she was called she did not pick. When she returned to the house around midnight, she could not say where she had been until the parents PW1 and PW4 beat her up and in the company of PW2 she led them to the compound where she identified the Appellant as the one she had visited.

31. The Complainant was taken to hospital the same night and examined and PW6 established that her hymen was not freshly broken. The issue that arises is whether penetration that occurred less than 24 hours could have resulted into hymen that was not freshly broken. The other question that begs for an answer is whether the Appellant had sexual intercourse with the Complainant on the material night.



32. The Appellant denied having had an encounter with the Complainant on the material night. He said that when the Complainant went to their compound in the company of other people, they said that they were looking for James and his witness Elias Baya who confirmed that the people who went to wake them up were asking for James but when the Complainant was asked to identify, she pointed at the Accused. He said that they left the office at 8.00pm and after having dinner they retired to bed. As was held in the case of *Gillick v West Norfolk and Wisbech Area Health Authority* (1985) 3 ALL ER 402, the Complainant herein may not have attained the age of majority but she exercised her discretion and made an intelligent and informed decision to sneak out of the house after her parents had gone to sleep to engage in activities which her age does not allow morally or legally. Being that she had to be beaten by her parents to disclose where she had come from, it cannot be ascertained that her evidence is credible. The police had the phone that she allegedly used to communicate to the Appellant but the call logs and text message data was not produced to prove that indeed it is the Appellant or any other person that she was communicating to.
33. This court agrees with the Appellant that the evidence by the prosecution was indeed shaky and not sufficient to find that the offence was proved beyond all reasonable doubt.
34. In conclusion, this court finds that the appeal has merit and the same is allowed.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,  
THIS 9<sup>TH</sup> DAY OF FEBRUARY 2023**

**HON. LADY JUSTICE A. ONG'INJO**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

**In the presence of: -**

Otolo- Court Assistant

Mr. Sirima for Respondent

Mr. Mwazige Advocate for the Appellant

Appellant present in person at Manyani

