



REPUBLIC OF KENYA



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**Mwangangi v Republic (Criminal Appeal 044 of 2022)
[2023] KEHC 2092 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 2092 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL APPEAL 044 OF 2022
F WANGARI, J
FEBRUARY 16, 2023**

BETWEEN

NICODEMUS MWANGANGI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of Hon. J.W. WANG'ANG'A
(P.M) in Mutomo SO Case No. 3 of 2020 delivered on 6/1/2021)*

JUDGMENT

Background

1. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8 (4) of the *Sexual Offences Act*. Particulars of offence that on 8th November 2020 at about 4pm, at (withheld) within Kitui County, intentionally and unlawfully caused his penis to penetrate the vagina of RM a child aged 16 years.
2. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. Particulars of offence are that on 8th November 2020 at about 4pm, at (withheld within Kitui County, intentionally touched the vagina of RM a child aged 16 years with his penis.
3. The appellant was convicted in the main charge and was sentenced to serve imprisonment period of 15 years. Having been dissatisfied with the judgment, conviction and the sentence imposed the appellant lodged this appeal. This being the first appellate court, I am guided by the principles as set in the case of *Ganpat v State of Haryana* (2010) 12 SCC 59, as cited by Mativo J in *Makau v Republic* as hereunder;
 - a. There is no limitation on the part of the appellate Court to review the evidence upon which the order appealed against is founded and to come to its own conclusion.



- b. The first appellate Court can also review the trial court's conclusion with respect to both facts and law.
 - c. It is the duty of a first appellate Court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the decision appealed against or the entire proceedings if they are flawed.
 - d. When the trial Court has breached provisions of the *constitution* or ignored statutory provisions, or misconstrued the law, or breached rules of procedure, or ignored crucial evidence or misread the material evidence or has ignored material documents, or in any manner compromised the accused rights to a fair trial or prejudiced the accused etc. the appellate court is competent to reverse the decision of the trial court depending on the materials in question.
4. Also in *Okeno v Republic* and *Kiilu & ano. V Republic*, the court is required to review the evidence on record and come to a conclusion as to whether or not to uphold the conviction bearing in mind that the court did not hear or see the witness in order to assess their demeanor.
 5. The Court of Appeal has also pronounced itself on this issue. In Civil Appeal 79 of 2012 *Peter M. Kariuki v Attorney General* where the court held inter alia as follows: -

“We have also, as we are duty bound to do as a first appellate court [to] reconsider the evidence adduced before the trial court and re-evaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence”

Summary of Evidence

6. The complainant (PW 1), gave evidence that her mother had sent her to the shop. On returning home, she found their worker, who told her to accompany him to the shamba. When they got to the shamba, the accused defiled her by removing her clothes and inserting his penis into her vagina. She went back home and the accused went to graze the cows. Her mother asked her where she was. She told the mother what had happened between her and the accused. When the accused returned home, he was confronted by her mother. The accused was tied with ropes and taken to the police the following morning. Her elder brother, another worker and a community policing member had been summoned by the complainant's mother and they assisted in restraining the accused. PW 1 was taken to hospital for medical examination and treatment. She identified the biker she was wearing at the time of defilement.
7. NM (PW2), mother to the complainant gave evidence that the complainant went to her shop to pick the house keys so that she could change from Sunday best clothes to home clothes. She saw the complainant use a different route. She got suspicious and she followed her. That is when she saw the complainant and the accused person meet and they entered the into shamba. That is when she witnessed the accused and her daughter having sex. She decided not to interfere and went back to the shop. Later when the complainant came back home, she asked her what she was doing in the shamba. That is when the complainant disclosed that she had been defiled by the accused person. The accused person who was her employee come back home. She confronted him and the accused person admitted to defiling the complainant and he sought for forgiveness.
8. She called the nyumba kumi elder, one Jeremiah Mutisia and Paul. They interrogated the accused person. She also called the police but they could not get a motor vehicle to go pick up the accused. The accused was restrained by tying him with the ropes and he was put in a certain room. The following morning the accused person was taken to the police station. Statements from witnesses were recorded



- and the complainant was taken to hospital for examination. P3 form was subsequently filled. She identified the biker that her daughter was wearing at the time of defilement. On cross examination, she said they did not force the accused person to admit committing the offence. She also confirmed that she had witnessed the accused defiling her daughter.
9. Jeremiah Mutisia Munyao (PW 3) a nyumba kumi elder gave evidence that he was called by PW2 to her house. That is when he was informed that the accused person had defiled the complainant. He interrogated the accused, and he admitted having defiled the complainant. The complainant did not deny that she had sex with the accused. They restrained the accused and locked him in one of the rooms. The following morning, they took the accused to the police, and the complainant was taken to hospital for examination. He denied forcing the accused person to admitting that he committed the offence.
 10. Phillip Mutua (PW 4), a clinical officer at Ikanga Sub County Hospital, gave evidence that the complainant was presented with a history of being sexually assaulted by a person known to her. He examined her and noticed that she was also mentally retarded. There were no injuries noted in the genitalia. However, a whitish discharge was noticed indicating a possibility of sperms in the vagina. It was found that she had been sexually assaulted. In determining her age, the dental formula and also history of the mother were relied on. On cross examination he said he could not tell who defiled the complainant. He also said it was the role of the police to conduct a DNA test.
 11. George Angila (PW 5), the investigating officer, gave evidence that he received a report from the complainant's mother who was in the company of the complainant, together with the accused who was tied using ropes, that the accused person had defiled the complainant. He received a torn biker which was dirty suggesting that the victim slept on a dirty ground. The complainant was taken to hospital for examination. Thereafter the accused was charged with this offence. He produced birth certificate indicating that the complainant was born on 11/11/2004.
 12. In his defence, the accused said he was a form 3 student at [Particulars Withheld] Secondary School, but due to lack of school fees, he was employed by the complainant's family as a herds' boy so as to raise school fees. He said the complainant's mother failed to pay him his salary. When he reported the matter to the police, he was framed that he defiled the complainant.
 13. Joshua Musembi Kimonyi (DW 2), a pastor, gave evidence that the accused who was his church member was unable to raise school fees. He was employed by PW2 in order to raise school fees. The accused later called him and told him he had been arrested after he was framed with a defilement case. This was after he complained against PW 2 for failing to pay him his dues.
 14. Rhoda Kavutha (DW 3), aunt to the accused gave evidence that the accused was framed because the employer had refused to pay his salary. She said the church has been paying his school fees. Faith Nzau (DW 4) gave evidence that her husband had been employed by PW 2. He suffered the same fate as the accused because he was framed with the offence of defiling the complainant in this case, and he was never paid his salary.
 15. After considering the entire evidence on record, the honorable magistrate found the accused person guilty of the main count and he sentenced him to serve a 15 year imprisonment term.

Grounds of Appeal

16. Being dissatisfied with the judgment and the sentence, the appellant lodged an appeal on 16 grounds summarized as hereunder;



- a. The trial magistrate erred in matters of law and fact by convicting the appellant on evidence that was below the standard of proof
- b. The trial magistrate erred in matters of law and facts in relying on contradicting evidence by the prosecution witnesses
- c. The trial magistrate erred in matters of law and facts in failing to consider the grudge between the accused and PW 2
- d. The trial magistrate erred in law and facts in failing to give reasons of dismissing the defence evidence.

The state was directed to put in its written submissions by 27/1/2023. At the time of writing the judgment, both parties had not filed their submissions.

Issues for Determination

17. The issues arising from this appeal are;
 - a. Whether the elements of the offence of defilement were proved
 - b. Whether the sentence meted against the appellant is safe

Whether the elements of the offence of defilement have been proved

18. On the first issue, sections 8 (1) and 8(4) of the *Sexual Offences Act*, under which the main charge is founded provides as follows: -
 - (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - (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.
19. The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and identification of the perpetrator. The age of a victim in a case of defilement is crucial because under Section 8 of the *Sexual Offences Act*, age determines the sentence. It must therefore be proved to the satisfaction of the court. It cannot be gainsaid that the prosecution must prove all the three elements.

Age of the Complainant

20. Interrogating the first element, the minor was said to be 16 years at the time the alleged offence was committed. The prosecution produced a birth certificate for the victim which showed that the victim was born on 11/11/2004. As at 8th November, 2020, the victim was said to be 16 years. Even without the birth certificate, it has been held that age can be proved through other means other than a birth certificate.
21. In *Salim Ego Hassan v Republic*, it was held thus;

“...The age of the victim in sexual offences can be proved by documentary evidence such as birth certificate, notification of birth, or baptismal card. It can also be proved by medical age assessment; direct evidence of parents or guardian or by observation by the court...”



In the present case, a birth certificate was availed and it is thus not in dispute that the victim was a minor at the time of the alleged offence.

Penetration

22. On the second element, proof of penetration is key. Penetration is defined under section 2 of the [Sexual Offences Act](#) as follows:

“Penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person.”
23. It is trite that courts mainly rely on the evidence of the complainant corroborated by medical evidence. In this case, the victim (PW1) gave evidence that on 8/11/2020 at around 3.00 p.m., the appellant asked her to go to the shamba where he had sex with her. PW2 confirmed that he saw the appellant having sex with her daughter but she restrained herself from interfering. PW4, the clinician produced treatment notes and the P3 form which noted that there was a whitish discharge from her vagina. To this end, I am satisfied that there was penetration.
24. Was the appellant the perpetrator? To answer this question, it is imperative to consider the evidence in its entirety. Though PW1 stated that the appellant did the act by force, the medical evidence suggests otherwise. PW4 noted that on vaginal examination, there were no cuts or bruises on both labia minora and labia majora. On re-examination, PW4 stated that this meant that it was not the first incident on her. It would have been expected that if indeed force was used, there would be bruises, cuts and reddening of the vaginal area. Further, he testified that there was whitish discharge that suggested the presence of semen. The complainant was in hospital. If there was the presence of semen, it would have been indicated in the treatment notes and the P3 form. That was not done.
25. PW1 never led any evidence to suggest that the appellant had repeatedly defiled her. PW4 led evidence that PW1 was mentally retarded. In fact, the treatment notes indicated that PW1 was mentally challenged. Her testimony ought to have been treated with a lot of caution. I note that the trial court dispensed with *voir dire* on account that PW1 was old enough. Considering her mental condition, it was crucial for the trial court to conduct *voir dire* examination.
26. Further analysis of PW1’s testimony shows a lot of inconsistencies. On one occasion, she said the appellant was at home when she came to change clothes. On another occasion, she said the appellant was herding cows and goats. This jumbled up account of events leaves this court with doubt on the chronology of events. This coupled up with the mental state of PW1 leaves a lot to be desired from PW1’s testimony.
27. In his defence, the appellant stated that his predicament started when he demanded his dues from PW2. He called 3 witnesses who gave a similar account of events. The trial court dismissed the defence as an afterthought for reasons that it was never raised in cross examination. However, having gone through the proceedings, I note that PW4 was cross examined by the appellant on his relationship with PW1’s family. He responded that he did not know anything about the appellant and how he related with PW1’s family.
28. It is not in doubt that the appellant was PW2’s employee. Equally, PW2 confirmed that whenever she employed someone, she used to ask for their identity cards (IDs). PW4 confirmed this state of affairs indicating that her husband used to work for PW2 and to date, she has been holding her husband’s ID. PW2 is a church minister and I do not think it was fair for the trial court to describe the appellant’s witnesses as witnesses for hire. They testified under oath.



29. Further, PW2 said she saw the appellant in the act but refrained from acting. If indeed this was true, it was expected that she would raise alarm. Similarly, she needed not to wait until darkness sets in to take action considering the time the alleged offence took place. Her conduct was not one of a prudent mother and I find favour with the appellant's defence.

Identification

30. On the issue of identification, it is trite that the best evidence of identification is that of recognition as was held by the Court of Appeal in *Francis Muchiri Joseph – V- Republic* [2014] eKLR where it stated that: - “In *Lesarau – v-R*, 1988 KLR 783, this court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name....”
31. PW1 mentioned the appellant by name and added that he had worked at their home for 2 years. PW2 equally confirmed that he had employed the appellant. From the evidence above, the Appellant was well known to the complainant and her family and was properly identified. There was no possibility of mistaken identity. However, for the reasons stated in the preceding paragraphs, a positive identification alone is not enough.
32. In criminal cases, it is old hat that the standard of proof is beyond reasonable doubt. Mativo, J (as he then was) in *Elizabeth Waithiegeni Gatimu v Republic* expressed himself as follows; -

“To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty...Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favorite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.”

33. I have considered the prosecution's case vis vis the defence offered and I am persuaded that this was a case that the appellant deserved benefit of doubt in respect to the main charge. I find that the conviction on defilement as was decided by the trial court was unsafe.
34. Considering that the trial court convicted the appellant on the main count, there was no basis to consider the alternative count as it carried lesser sentence than the main count. However, in the present case, I am required to make a determination on the alternative count.

Alternative Charge

35. I now consider whether the alternative charge of committing an indecent act with a child was disclosed.



The offended section of the law is section 11 of SOA It states as follows: -

“ 11.

- (1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.”

36. Section 2 of the *Sexual Offences Act* also defines what entails an indecent act. provides as follows: -

“indecent act” means an unlawful intentional act which causes-

- (a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.
- (b) Exposure or display of any pornographic material to any person against his or her will.”

37. Noting that I have already concluded that the offence of defilement was not proved to the required threshold, it is even harder for this Court to determine that an indecent act occurred where the evidence available does not point to it. None of the elements of indecent act come out in the victim’s testimony and as such, I also find that the alternative charge has not been proven.

Conclusion

38. I think I have said enough to show that the conviction and sentence was not safe. The appellant was sentenced to 15 years’ imprisonment. At the time of conviction, he was a school going student and he deserves a chance to finish his studies and chart out a course for his future.

39. In the present case and after carefully considering the defence and prosecution evidence, I find that there was reasonable basis for creating reasonable doubts as to the guilt of the appellant. I allow the appeal in its entirety. The upshot is that this appeal succeeds. I hereby quash the conviction and set aside the said sentence. The appellant is at liberty unless lawfully held.

DATED AND DELIVERED AT MOMBASA THIS 16TH DAY OF FEBRUARY, 2023.

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F. WANGARI

JUDGE

In the presence of;

Pauline Mwaniki for State

Appellant present

Court Assistant - Guyo

