



**Mbaja v Republic (Criminal Appeal 9 of 2020)  
[2023] KEHC 545 (KLR) (Crim) (7 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 545 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL APPEAL 9 OF 2020  
DO OGEMBO, J  
FEBRUARY 7, 2023**

**BETWEEN**

**ROMARIO MBAJA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence arising from  
Criminal Case No. 25 of 2018 in Principal Magistrate's court at  
Kibera, Hon. Ombewa, PM, and Judgment delivered on 6.12.2019)*

**JUDGMENT**

1. The appellant, Romario Mbaja, was charged before the lower court the offence of Defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*, No 3 of 2006 . That on April 7, 2017 in Kibera Sub-County within Nairobi County, he intentionally and unlawfully caused his penis to penetrate the vagina of MIM , a child aged 13 years.
2. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, No 3 of 2006. That on April 7, 2017, in Kibera Sub-County within Nairobi County, he intentionally and unlawfully touched the vagina of MIM , a child aged 13 years with his penis.
3. After full trial, the appellant was on October 11, 2019 convicted. He was subsequently sentenced to serve 20 years' imprisonment on the main charge. This was on December 6, 2019.
4. The appellant has appealed to this court against the conviction and sentence. In the memorandum of appeal filed herein on January 29, 2020, the appellant has listed the following grounds of appeal;



1. That the learned trial magistrate erred in law by failing to observe that the prosecution had failed to prove its case to the standard required, that is proof beyond reasonable doubt.
2. That the learned trial magistrate erred in law by failing to observe that the case for the prosecution contained contradictions and inconsistencies thus contrary to section 163 of the *Evidence Act*.
3. That the learned magistrate erred in law by failing to observe that the evidence relied upon by the prosecution fell too short of the certainty required in law in cases of this nature.
4. That the learned magistrate erred in law in failing to observe that the provision of section 169(1) of the *Criminal Procedure Code* was contravened.
5. The appellant urges that this appeal be allowed, the conviction quashed and the sentence set aside. Parties canvassed this appeal by way of written submissions.
6. In the submissions of the appellant, the appellant submitted that the act of penetration was not proved beyond reasonable doubt. He relied on *Sekitoliko v Uganda* (1967)EA 53 , that:
 

The prosecution has a duty to prove all the elements of the offence beyond reasonable doubt and that the conviction of the accused is depended upon the strength of the prosecution case and not the weakness of the defence case.”
7. That the evidence of PW1 contradiction the earlier statement that she had been kidnapped by 2 unknown men and gang raped. He relied on the 2 cases of *Mohamed Swale Kaeze v Republic* (2005)eKLR, and *Ndungu Kimanyi v Republic* (1980)KLR 282 , on the importance of credibility of a witness. Also that the medical examination conducted on the same day revealed that nothing had happened, which findings the trial court ignored. The appellant also noted that the Doctor, PW4, had opined that there was no evidence of defilement. He otherwise admitted that the 2 other ingredients, age of the victim and identity of the perpetrator were established. The appellant further went on that no P3 form was produced in evidence to confirm the element of penetration.
8. It was further submitted that the prosecution’s case was riddled with material contradictions, discrepancies and inconsistencies material in nature. He pointed out the evidence of PW1 on the date of the alleged offence and also date of arrest of the appellant (PW3). He relied on the case of *John Mutua Musyoki v Republic*, Criminal Appeal No 11/2016, where it was held;
 

To our mind, these contradictions and inconsistencies are not minor as submitted by the Respondent. They were critical and go to the root of the prosecutions case and whether the complainant was a credible and truthful witness. If the complainant could lie as to what had led her to report to school late, what else did she lie about?”
9. On the same point, appellant relied on *Philip Nzaka Watu v Republic* (2016)eKLR.
10. The appellant further submitted that upon transfer of the previous trial magistrate, the incoming trial magistrate did not explain to the appellant his rights under section 200 of the Criminal Procedure Code , and thereby violating the rights of the appellant. And that the proceedings are nullity. (*Raphael v Republic* (1969)EA 544.)
11. Also that the Voire Dire examination was not properly conducted before the court allowed the complainant to give sworn evidence. He relied on the 2 cases of *Patrick Wamuyu Wanjiru v Republic*, Criminal Appeal No 6 of 2009 and *Joseph Opondo v Republic*, Criminal Appeal No 91/99. Also the case of *Peter Kariga Kiume v republic*, criminal Appeal No 77/1982 . That the ascertainment of whether



such a witness understands the meaning of taking an oath cannot be taken lightly as an accused person can be convicted on the basis of sworn evidence of such a witness.

12. The Respondent, on the other hand, submitted that the ingredients of the offence under section 8(3) of the Act, are proof of age, penetration and the identity of the assailant. That prosecution duly proved the elements of age of the complainant and identity of the appellant, who was well known to the complainant. And that at page 40, the trial magistrate duly complied with the requirement of section 200 of the *Criminal Procedure Code*. And that on the issue of *voire dire*, the court at page 7 clearly observed that the child was intelligent enough and able to understand meaning of oath (*John Muiruri v Republic*(1983)KLR 447 and *Kivevelo Mboloi v Republic* (2013)eKLR. The Respondent maintained that this appeal lacks merit and should be dismissed.
13. As a 1<sup>st</sup> appellate court, this court is bound by the decision in *Okeno v Republic* (1972)EA 32, that the duty of the 1<sup>st</sup> appellate court is to itself weigh conflicting evidence and to draw its own conclusion. It therefore follows that this court must reconsider the whole evidence as presented by the parties before the trial court and to come to its decision.
14. From the proceedings filed herein, the case of the prosecution commenced with the evidence of PW1 MIM, a 14 year old girl whose evidence was that she was in class 7. That on April 7, 2018 at 6:00pm, her father HM sent her to the shop to buy tomatoes and onions when she met the appellant by the road. That appellant stopped her and led her to his mud walled house. That he led her to the bed and told her he would buy something for her. He then undressed her skirt, skintight and pant as he also removed his jeans trouser and pant. He then lay on her and had sex with her, inserting his penis in her vagina. She heard her uncle DK calling appellant out as he was still in the act. That on threatening to break the door, appellant opened and went out but locked the complainant inside. The door was broken and she was rescued. She was taken to Nairobi Women's Hospital for examination. Her post rape care form (MFI-1) was filled.
15. This witness confirmed that she was born on November 29, 2004. A P3 form (MFI-2) was later filled for her. She testified that she knows the appellant as Mbaja.
16. EM, PW2, is the mother of PW1. Her testimony was that on 7/4/2018, she had gone to work, coming back at 7:00pm. On the way her husband HM called and told her that PW1 had delayed to come. While she looked for PW1, her brother ID called her and told her PW1 was inside a house locked with a padlock. The door was broken and PW1 found inside she reported the matter and also took her to hospital. She produced the birth certificate of the complainant showing she was born on November 29, 2004 and was then 14 years old (MFI-3).
17. The 3<sup>rd</sup> witness, PW3 was DK, an uncle to PW1. His testimony was that on 7.4.2018 at about 8:00pm, his brother called to tell him that PW1 had not returned home. He traced her at the house of the appellant where she was found while hiding under the bed. This witness saw the appellant as he left his house locking it. He added that the scene was well lit with security lights.
18. Peter Wanyama, a clinical officer was PW4. He produced the PRC form filled for the complainant on April 7, 2012. He confirmed that on examination, her genitalia was normal, and urine and blood samples were okay. And PC Robina Oye, PW5, recalled that on April 18, 2018 she received the report of the complainant. She later rearrested the appellant and had him charged in court. She produced the birth certificate as exhibit.
19. Upon the appellant being placed on his own defence, he gave unsworn defence that he did not defile the complainant. That he had a grudge with complainant's uncle after the uncle refused to refund Kshs 20,000/= he had lent him. He denied knowing the complainant. He called no witnesses.



20. This, basically is evidence on record. This is a case of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offence Act*, No 3 of 2006. It is therefore important to consider what defilement means. Section 8(1) of the *Act* defines the same thus;

A person who commits an act which causes penetration is guilty of the offence termed defilement.

Penetration is defined at section 2(1) of the Act, as;

Penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

21. From the above definition, even partial insertion of the genital organ of one into the other would amount to defilement.
22. The ingredients of defilement are well settled. In *Charles Wamukoya Karani v Republic*, Criminal Appeal No 72 of 2013, the court of Appeal held:

The critical ingredients forming the offence of defilement are age of the complainant, proof of penetration and positive, identification of the assailant.”

23. There is no doubt as to the fact that the complainant herein was a minor at the time of this incident. A birth certificate was produced herein showing that she was born on November 29, 2004, and so was 13 years at the time this incident occurred on April 7, 2017. There is also no doubt as to the fact that the complainant knows the appellant. In her testimony, she called out the appellant by name. They are also close neighbours. And even the family members of the complainant, including her mother, PW2, and uncle, PW3, know the appellant well. There is therefore, no doubt that the identification of the appellant as the perpetrator herein is not accurate.
24. On the next issue of proof of penetration, the prosecution’s case was based on the evidence of the complainant (PW1) on how the appellant lured her to his house, had her undress before he also undressed. That the appellant then had sexual intercourse with her. Of course, there was no eye witness to this incident. But there was corroboration from the evidence of both PW2, her mother and PW3, her uncle, who managed to trace PW1 at the house of the appellant after searching for her. Both these witnesses testified on several material factors. They both witnessed as the appellant who and been with the complainant came out of the house and locked the door from inside with the complainant inside the house. That the padlock had to be broken for the search team to enter the house. That the complainant was then found hiding under the bed. These circumstances put together convince this court that the appellant had been defiling the complainant in his house when PW2, PW3 and the other search team came and knocked on his door.
25. It is noted otherwise, that on being examined, no results were noted pointing towards penetration. But does it prove that there had been no penetration? I think not. The evidence of PW1 was clear on how the appellant inserted his penis into her organ. The absence of positive findings can only mean one thing. That this was a case of partial insertion. I say this in view of the fact that the appellant was still in the act when the door was knocked.
2. On the defence of the appellant, the appellant testified that he was charged with this offence out of a grudge between him and PW3 after PW3 failed to repay him a sum of Kshs 20,000/= he had loaned to PW3. If this be the case, I do not see why the appellant had to wait till the defence stage to raise this issue. The witness (PW3) gave evidence in court and the appellant had the opportunity to cross



examine him. He did not raise this issue of the loan with the witness, leaving his defence, not made on oath totally unpersuasive and lacking in any merit. I dismiss the same.

26. I have otherwise considered the various issues that the appellant has raised in the submissions. On the manner in which the voire dire was conducted, I find that the same was properly done and the trial court properly made a finding that PW1 understood the meaning of taking an oath and could give her evidence on oath. In any case, at 14 years, the witness was not of tender age. As to alleged contradictions or inconsistencies in the prosecutions case. I do not find any material contradiction or inconsistency in the evidence of the prosecution.
27. I am in the circumstances convinced that the prosecution herein duly proved this case against the appellant beyond any reasonable doubt as required by the law.
28. Section 8(3) of the Act prescribes for a sentence of not less than 20 years imprisonment. The appellant was sentenced to serve 20 years imprisonment. This sentence is both legal and proper and I have no reason to interfere with the same. The appellant shall serve the sentence as ordered by the trial court. The same shall however run from court. The same shall however run from April 20, 2018, the date he was first arraigned in court pursuant to section 333(2) of the Criminal Procedure Code. it is so ordered.

**HON. D. O. OGEMBO**

**JUDGE**

**7<sup>TH</sup> FEBRUARY, 2023.**

**Court:**

Judgment read out in court (on-line) in presence of the appellant (Kamiti Maximum) and Ms. Adhiambo for the state.

**HON. D. O. OGEMBO**

**JUDGE**

**7<sup>TH</sup> FEBRUARY, 2023.**

