



REPUBLIC OF KENYA



**JMN v Republic (Criminal Appeal E075 of 2012)  
[2023] KEHC 2235 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2235 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL APPEAL E075 OF 2012  
G MUTAI, J  
MARCH 17, 2023**

**BETWEEN**

**JMN ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon E. W. Wambugu  
(SRM) delivered at Kithimani Principal Magistrate's Court Sexual  
Offences Case No. 2 of 2020; Republic versus John Mbiri Ndungu)*

**JUDGMENT**

**Introduction**

1. The Appellant was charged with defilement contrary of Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#), Act No 3 of 2006 (hereafter "the Act"). The Appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the [Act](#).
2. The particulars of the 1<sup>st</sup> charge were that on December 30, 2019 in Yatta Sub County within Machakos County he intentionally caused his penis to penetrate the vagina of VKW, a child aged 9 (nine) years.
3. The Appellant pleaded not guilty to both charges and after a full trial the Appellant was found guilty of committing defilement contrary to Section 8(1) as read with Section 8(2) of the [Act](#) and was sentenced to life imprisonment, the mandatory sentence under the said law.
4. Being dissatisfied with his conviction the Appellant filed the Machakos High Court Miscellaneous Criminal Application No E072 of 2021; JMN v Republic vide which he sought to file his Petition of Appeal out of time. The said Application was allowed by GV Odunga, J (as he then was) on November 30, 2021. On the January 25, 2022 the Petition of Appeal filed by the Appellant was admitted. The Court directed the parties to file Written Submissions.



5. On January 18, 2023 this matter came for hearing before me. As the Appellant had filed his written Submissions, and there being no explanation for the default on the part of the Respondent, despite effluxion of 1 year from the date the directions were given to the effect that parties file written submissions, I fixed this Appeal for judgment on March 7, 2023.

### **Grounds of appeal**

6. The Appellant raised 4 grounds of appeal which I set out below verbatim: -
  - “1. The trial magistrate erred in law and fact while convicting the Appellant in reliance with section 124 of the *evidence Act* without considering that the act of penetration was in doubt as the record reveals;
  2. The trial Magistrate further erred in law and fact after being influenced with the adduced evidence by the whole set of prosecution witnesses and failed to observe the credibility of witnesses had been left in doubt and thus unsafe to base a conviction;
  3. The trial Court lost direction in evidence which rendered to a wrong conclusion while convicting the Appellant with charges which were not adequately proved thus defective charge sheet;
  4. The trial Magistrate erred in law while rejecting the Appellant’s defence which same was not displaced by the prosecution side as per section 212 of the *Criminal Procedure Code*, Cap 75 of the Laws of Kenya”.

on the basis of the foregoing grounds the Appellant sought to overturn the conviction and to have the sentence set aside.

### **Evidence adduced before the trial court**

7. It is settled law the duty of the first appellant court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion, bearing in mind that it neither saw nor heard the witnesses that testified (see *Selle & Another v Associated Motor Boat Co Ltd & Others* [1968]EA123, and *Okeno v Republic* [1972]EA32).
8. Thus although I am not bound by the findings of fact of the trial court, in reconsidering and re-evaluating the evidence so as to draw my own conclusion I must bear in mind that I nether saw nor heard the witnesses. I must therefore make due allowance in that respect.
9. What then was the evidence before the trial court? The Prosecution called 5 witnesses whereas the Appellant gave a sworn testimony and called 1 witness.
10. The 1<sup>st</sup> witness of the Prosecution was the complainant’s grandmother CMM (hereinafter “the PW1”). She testified that she was called by EW (hereinafter “the PW3”) on January 1, 2020, while attending a funeral and was informed that the Complainant had screamed when urinating and that upon examination it had been established that the Complainant had a wound on her private part. PW1 reported the matter to the Children Officer and thereafter to the Kenya Police Service. The Complainant was thereafter taken to the hospital. PW1 testified that she was told that it was the Appellant, who is also her grandson, that had defiled the complainant. PW1 produced the treatment note, the P3 form and the birth certificate of the Complainant.



11. On Cross Examination by the Appellant PW1 denied that she had a grudge against him. She stated that the Appellant had lived with her for 2 months and that she loved him.
12. The Complainant was the Prosecution's second witness. As she was 10 years old at the time of her testimony she was subjected by the court to *voir dire* examination. The Court, upon being satisfied that Complainant understood the nature of the oath that was about to be administered to her and the need to speak the truth, allowed her to give sworn evidence.
13. The complainant stated that she was sent to Makutano Town to buy soap by her aunt, EW, on December 30, 2019. On the way to the said place she met the Appellant, who is her cousin. She testified that he dragged her into a bush and removed her trouser and pants. She said that the Appellant was wearing a black trouser which he proceeded to remove and thereafter lay on top of her and did "tabia mbaya" to her on her "susu" by inserting his "susu" on her. She said that she did not report the incident to anyone. It is only when she screamed while urinating that PW1 and PW3 became aware. She was taken to the Children Office, the police and thereafter to Matuu Hospital. The Complainant testified that it wasn't the first time that the same act had happened to her. She identified the Appellant as the person who defiled her.
14. On being cross examined by the Appellant the Complainant stated that although she had been taken by the PW1 to the police, PW1 had not told her what to say. She denied that she had been defiled while the Appellant was in custody.
15. EW, the complainant's aunt, was the Prosecution's third witness (hereafter "PW3"). She testified that she was left with the Complainant on January 1, 2020 by her mother (PW1). At around 2pm when the Complainant went for a short call she (the Complainant) screamed. When asked why she screamed she said that she felt pain while urinating. The Complainant didn't reveal details of what took place at first, but upon enquiry she stated that a very dark person had laid her down in a bush near their home and removed her panty and inserted his penis in her vagina. It is at that point that PW3 called a neighbour BK. They observed that her vagina was swollen and reddish in colour. The Complainant indicated that it was the Appellant that had defiled her and that it wasn't the first time, but the third, that he had done so. In the first two instances he hadn't penetrated her. PW3 stated that the defilement took place on December 30, 2019.
16. On Cross examination PW3 stated that the Appellant is her sister's son. She further stated that she had been told what had happened by the Complainant and that she had also seen the child's private part.
17. Sergeant GM of Yatta Police Station Crime Branch Gender Section was the Prosecution's 4<sup>th</sup> witness. She testified that a report was made to her on January 2, 2020 at 1302 hours by PW1, PW2 and PW3. She stated that she commenced investigations and recorded the Complainant's statement. She further stated that the Complainant was taken to Matuu Level 4 Hospital where she was examined and P3 Form was duly filled by a doctor. Thereafter the Appellant was arrested at Mamba and charged. PW4 stated that at the time of the defilement the Complainant was 9 years old having been born on August 5, 2010. She produced the Complainant's birth certificate.
18. During cross examination PW4 testified that although she did not find the Appellant in the act the Complainant had identified him as her assailant. PW4 stated that she was unaware of any grudge between the Appellant and his grandmother. She further stated that the Appellant had been identified by the Complainant and there was medical report from the doctor confirming that the Complainant had been defiled.
19. The Prosecution's last witness was DM (hereafter "PW5"). PW5 was a Clinical Officer based at Matuu Level 4 Hospital at the time of the incidence. Mr Musyoka produced the P3 Form and Lab Report



- for the Complainant as well as the P3 Form. It was his testimony that upon examination of the Complainant he found that she had a broken hymen.
20. PW5 confirmed that the Complainant was brought to the Hospital on January 2, 2020. He stated that the said hospital does not have the capacity to test DNA samples.
  21. After the Prosecution closed its case the trial court found that the Appellant had a case to answer and put him on his defence.
  22. The Appellant opted to give a sworn testimony. He stated that he lived in Mamba while the Complainant stayed at [Particulars Withheld]. He further stated that on December 30, 2019 he was with his uncle and that they were hired by the latter's neighbour to slash vegetations on his (neighbour's) land. He testified that they worked at the same place until 5pm and that thereafter he left with his uncle, to the uncle's house. He stated that on January 3, 2020 while working in Mamba he was arrested for reasons that he does not know to date.
  23. He accused his grandmother of having a grudge against him arising from a charcoal burning venture the two had. He claimed that his grandmother had taken possession of all charcoal and that when he asked for his share PW1 had told him that "she would do an act for me to remember her". It was his testimony that the Complainant lived with PW1 and that the last time she went to his grandmother's home was in 2018.
  24. During cross examination the Appellant also accused PW3 of having a grudge against him arising out a charcoal burning agreement that also went sour. He states that PW3 had told him that there was in nowhere he would take her when he asked for his share of the charcoal proceeds. He claimed during re-examination that the complainant had been defiled when the Appellant was in remand.
  25. The Appellant had 1 witness, AM. AM is the Appellant's uncle, I shall henceforth refer to him as "DW2". "DW2" testified that he lives in Mamba. According to him Mamba and Makutano Ya Ndalani are about 45 minutes walk apart. He testified that on December 30, 2019 he was working at home, together with many people, among whom was the Appellant, and that they worked until 5pm. He further testified that the Appellant lived with him and that he was arrested at his home.
  26. During cross examination the DW2 stated that they were working at a neighbour's land. He further stated that after work he and the Appellant stayed at home. He denied knowledge of any grudge between the Appellant and PW1 and stated categorically that he enjoyed good relationship with his mother-in-law, PW1.

### **Analysis of the facts and the law**

27. I have looked at the grounds the Appellant has relied upon in his appeal. In my view these grounds raise the following issues: -
  1. Whether the offence of defilement was proved beyond reasonable doubt;
  2. Whether the charges facing the Appellant in the subordinate court were defective; and
  3. Whether the trial court failed to consider and give due weight to the Appellant's alibi.
28. Was the offence of defilement proved beyond reasonable doubt?

Section 8(1) and (2) of the [Sexual Offences Act, 2006](#) provides as follows: -

- "(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement; and



(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”.

29. To secure a conviction the Prosecution had to demonstrate that these 3 elements existed: -

1. There was a penetration of the Complainant;
2. The penetration was done by the Appellant; and
3. In respect of a charge of defilement of a child of eleven years or less that the complainant was eleven years or less at the time of the penetration.

*(see George Opondo Olunga v Republic [2016] eKLR)*

30. In the case of *Charles Wamukoya Karani v Republic*; Criminal Appeal No 72 of 2013 the court stated this “the critical ingredient forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant”.

31. The prosecution produced the birth certificate of the Complainant as exhibit 3. The same shows that the complainant was born on August 5, 2010. That being the case she was 9 years and 4 months old at the time the offence was said to have taken place. That being the case the 1<sup>st</sup> element was proved to the required degree.

32. Was there penetration of the vagina of the Complainant? The Appellant has submitted in his submissions that this element wasn't proved. He has urged Court to take note of the fact that there was a significant delay between the date of the offence (December 30, 2019) and the date of treatment (January 2, 2020). He submits that the Complainant, if she was defiled at all, could have been defiled by unknown people and that there are many ways in which the hymen could be broken that do not amount to defilement such as horse riding. He further submitted that the medical report did not show that there were injuries to the Complainant.

33. I have looked at the exhibits produced during trial at the subordinate court, in particular the Treatment Note dated January 2, 2020 (exhibit 1) and Medical Examination Report/P3 (exhibit 2). Exhibit 1 shows that the complainant's hymen had been broken, there was a tear around 3 o'clock and that her labia minora was swollen and edematous. In my opinion there is sufficient evidence proving that there was penetration of the Complainant. I am not convinced that the presence of a broken hymen could be explained by horse riding and must dismiss that contention as being fanciful. And whereas it would have been better had the complainant reported the assault earlier I am persuaded that the learned Senior Resident Magistrate was right to believe the evidence of the Complainant and her witnesses.

34. Did the Appellant penetrate the vagina of the complainant with his penis? The only witness of the act was the Complainant herself. Was it safe to convict the Appellant based on the evidence of a minor complainant?

Section 124 of the *Evidence Act* provides as follows: -

“Notwithstanding the provisions of section 19 of the Oaths of Statutory Declarations Act (cap 15), where the evidence of the alleged victim is 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 believe 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”.

35. In page 8 of the judgment the trial court noted as follows: -

“I had the opportunity of observing the Complainant when she testified. I noted she was confident and consistent during cross examination. She gave a detailed chronology of what befell her and was categorical that her grandmother did not direct her on what to tell the police. I believe her testimony and make a finding that she positively recognized the perpetrator”.

36. The Complainant and the Appellant know each well. They are cousins on the maternal side. The Appellant cast aspersions on the PW1 (his grandmother) and PW3 (his aunt) and claimed they had grudge against him. I am unconvinced by this line of defence as DW2 the Appellant’s own witness denied that there was animosity between the parties. Any animosity between the Appellant and his grandmother and aunt would have been known by the uncle. That he didn’t know about it speaks volumes about the veracity of the allegation.

37. Although there were minor discrepancies in the evidence presented by the prosecution I do not think that such discrepancies were so material as to displace the finding of guilt. The Court of Appeal in [SOO v Republic](#) [2018] eKLR stated thus: -

“That notwithstanding a bit of inconsistencies in the evidence of a child of 10 years which does not go into the core of the case and which is not material as was in this case. That in itself did not in manner distort or dislodge the defilement of the material day subject of the charge and of the other days as there was indeed penetration. The court must consider the evidence adduced as a whole and not selectively and the victims age and ability to recollect in a concise form ought to be factored in...”

38. In [Simon Oduor Oloo v Republic](#) [2022] eKLR Aburili, J stated that “I find no ground upon which to differ with the trial court’s finding of fact that the Complainant was firm in her identification of the Appellant even though she testified that the Appellant was not known to her prior to the defilement”.

39. I am not persuaded by the argument made by that Appellant that the prosecution witnesses lacked credibility. They all gave evidence which were materially consistent and all of which point to the Appellant as the culprit. The Prosecution was able to adduce evidence of sufficient cogency and believability with the witnesses they called.

#### **Was the charge sheet defective?**

40. In his submissions the Appellant urges this court to find that he was wrongly charged with defilement. He argues that he should have been charged with incest contrary to section 20(1) of the [Act](#). Being charged with defilement, he claimed, was contrary to section 134 of the [Criminal Procedure Code](#) which provides that: -

“Every charge or information shall contain and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with particulars as may be necessary for giving reasonable information as to the nature of the offence charged”.



41. Section 20 of the *Sexual Offences Act*, Act No 3 of 2006 provides that: -

“Any male person who commits an indecent act or an act which causes penetration with a female person who is this knowledge his daughter, granddaughter, sister mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years provided that, if it alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person”.

42. The Appellant and the complainant are cousins PW1 is their grandmother. Their mothers are sisters. Section 20 of the *Act* does not list “cousin” as being among those penetrations of whom amounts to incest. The submissions of the Appellant to that effect are wholly without merit and must fail.

### **Was the alibi defence of the appellant given due weight?**

43. The Appellant testified that he couldn't have defiled the complainant as he was far from the location of the crime. His alibi defence was supported by his uncle AM who testified that on the material day both he and the Appellant worked for a neighbor and retired to his home at 5pm long after the offence took place.

44. He submitted that although he raised his alibi defence late the Prosecution could have sought leave of the court to introduce evidence to rebut his alibi. The Appellant relied on the case of *Victor Mwenda Mulinge v Republic* [2014] eKLR where the Court of Appeal stated thus: -

“it is trite law that the burden of proving the falsity of an accused person defence of alibi lies on the prosecution”

45. I am in the agreement with the Court of Appeal. That said the conduct of the Appellant and the decision to raise an alibi defence during the defence hearing stage of the proceedings should not escape scrutiny of the court. It was held in *R v Sukha Singh s/o Wazer Singh & Others* [1939]6 EACA 145 that: -

“if a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly if he does not bring it forward until months afterwards, there is naturally a doubt as to whether he has not been preparing it in the interim and secondly, if he brings it forward at the earliest possible moment it will give the Prosecution an opportunity of inquiring into the alibi and if they are satisfied as to its genuineness proceedings will be stopped”

46. I note that not once during the cross examination of the Prosecution's witnesses did the Appellant raise the alibi defence. Why didn't he do so given that his presence at a place different from the scene of crime was within his knowledge? By disclosing his alibi defence late, just prior defence hearing, he denied the prosecution a chance to investigate the same so that a decision could be made by them whether or not to proceed with the hearing.

47. The trial court, rightly in my opinion, weighed the evidence adduced by the prosecution against the alibi defence of the Appellant and found the Appellant guilty. I find noting to fault the learned Senior Resident Magistrate. I find and hold that the conviction of the Appellant was safe. The appeal against conviction is therefore dismissed



48. Regarding the sentence passed against the Appellant I note that the same was the only possible sentence that the Court could have passed at that time. In light of the persuasive judgment of Mativo, J in *Edwin Wachira Wachira & Others v Republic*; Mombasa High Court Petition No 97 of 2021, which I am in full agreement with, this Court may consider mitigating factors and pass appropriate sentence.
49. In my view punishment of offenders serves 5 main purposes. To deter crime, to rehabilitate criminals, retribution, restitution and incapacitation of the offender. I note that the Appellant is of relatively young age. Given the period he has been incarcerated he is now aware that what he did was harmful and shall affect the Complainant for the rest of her life. This matter calls for a sentence that will be both retributive and rehabilitative. In my view a sentence of 20 years imprisonment is called for in this case.
50. I allow the appeal against sentence. I set aside the life sentence passed against the Appellant and substitute the same with 20 years imprisonment. The said sentence shall take into account the period the Appellant was in remand prior to his conviction.
51. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAM AT MOMBASA THIS 17<sup>TH</sup> DAY OF MARCH, 2023**

**GREGORY MUTAI**

**JUDGE**

**In the presence of:-**

The Appellant (in person, present via Microsoft Teams from Kamiti Prison)

No appearance for the state

**Court Assistant – Winnie Migot**

