



REPUBLIC OF KENYA



KENYA LAW
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**Komba v Office of the Director of Public Prosecution (Criminal Appeal
21 of 2019) [2023] KEHC 1755 (KLR) (10 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1755 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL 21 OF 2019
PJO OTIENO, J
MARCH 10, 2023**

BETWEEN

DUNCAN KOMBA APPELLANT

AND

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

*(Being an appeal from the conviction and sentence of Hon.
Jacinta A. Owiti PM in Vihiga SO Case No. 5 of 2017)*

JUDGMENT

1. The Appellant was arraigned before the Principal Magistrate at Vihiga in Sexual Offences Case No. 5 of 2017 charged with the offence of defilement of a child contrary to section 8(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were given to be that on the 7th day of February, 2018 at Emuhaya Sub County within Vihiga County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of S.A a girl aged 13 years.
2. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on the 7th day of February, 2018 at Emuhaya Sub County within Vihiga County, the appellant intentionally touched the vagina of S.A a girl aged 13 years.
3. Towards the discharge of legal duty to prove the allegations against the accused, the prosecution called a total of Six (6) witnesses. The evidence of PW1, the victim, was that she was aged 14 years old, and that on 7/2/2017 at about 7 PM she left school heading home when he met the appellant who was with her schoolmate. On getting home her mother scolded her and she left for Timina's home and when she did not find her she decided to return home. On her way home she bumped on the appellant with whom they went to a house where phones were. The appellant spread a blanket on the floor, removed some money and a reddish object from his trouser and then removed his pants. He wore the



- reddish object on his penis and then inserted it into her vagina. The next day she went home from where she was escorted to the Assistant Chief to whom the name of one Justo was given as the person who knew the one who had detained her and the said Justo led the party to have the appellant arrested. The complainant was later taken to hospital where laboratory tests were done. The witness then identified the accused in the dock as the defiler.
4. In cross examination, the witness denied the suggestion by the appellant that she had lured him into the act nor that she had send either the sister nor Justo to lure him into the act.
 5. PW2, MM, mother to the victim testified that on 7/2/2017 she scolded PW1 for eating her sibling's chapatti and later noticed that PW1 had was not at home only to returned the next day and was escorted by her father to the assistant chief's office. She expressed familiarity with the appellant as one who takes care of his uncle's homestead and confirmed that the victim was born on 7/2/2003 by producing an immunization card in that regard.
 6. PW3, a village elder testified that on 8/2/2017, at the assistant chief's office, they interrogated the victim who disclosed that she slept at the appellant's home the night of 7/8th February, 2017. PW1 directed them to a student who knew the appellant well and the student led them to the arrest of the appellant.
 7. PW4, the assistant chief of Ebusubi sub location gave evidence that on 7/2/2017, the complainant was escorted by one Joel to his office where she disclosed that she had been accommodated by the appellant on several occasions. PW3 then accompanied Joel to the appellant's house and they later took the appellant and the complainant to Muricho police Post.
 8. PW5, John Shigali a clinical officer at Emuhaya sub county hospital testified that he examined the genitalia of the complainant. Her hymen was torn and the labia minora was painful. She also had a bacterial infection and numerous pus cells. He formed the opinion that the complainant had been penetrated via the vagina. He stated that he also examined the appellant whose urine disclosed that he suffered an infection similar to that of the victim. He produced an age assessment report of the complainant which indicated that she had 28 teeth and was approximately 14 years. In cross examination the witness told the court that he filled the appellants P3 form.
 9. PW6 No. 814/1 PC Thurania Dennis of Muricho Police Patrol Base and the investigating officer testified that he was at the station on 8/2/2017 when the complainant and the appellant were brought in. the complainant narrated how she was defiled by the appellant and on 9/2/2017 he took them to Emuhaya Sub-County Hospital for examination where it was concluded that the appellant had defiled the complainant.
 10. When put on his defence, the appellant gave unsworn statement and testified that on 7/2/2017 he was at home when the complainant greeted him and left for her home. She again came back and told him that she had been chased from home and he took her back home. He never saw her again and he was arrested the next day.
 11. Judgment was subsequently delivered and the accused person was convicted of the offence of defilement and sentenced to serve twenty years' imprisonment. He felt dissatisfied with the judgment of the trial court, the appellant has lodged a petition of appeal challenging the conviction and sentence on the grounds that; the trial court erred in law and facts by convicting and sentencing him without noting that the age of the complainant was not proved beyond reasonable doubt; erroneously relied on the prosecution witnesses to convict me without considering that the prosecution case was not proved beyond reasonable doubt hence the findings were unsatisfactory and insufficient in law; erred in law and facts by relying on the prosecution's evidence which was marred with contradictions and



inconsistencies and for failing to give his defence due consideration yet it was capable of awarding me an acquittal.

12. The court directed that the appeal be canvassed by way of written submissions and only the respondent has filed submissions by the time of preparation of this judgment. In the submissions the Respondent asserts that the age of the complainant was proved by the testimony of the mother, her immunization card and the age assessment report which all indicated that the complainant was born on 7/2/2003. On contradictions and inconsistencies, the respondent agrees with the appellant that the testimonies were marred with inconsistencies such as; that the complainant testified that she told the assistant chief that it was Justo who knew the identity of the person who defiled her and that it was Justo who led them to the appellant yet again the appellant referred to the appellant by name in her testimony and stated that he lived in a home next to theirs.
13. The prosecution then submits with ambivalence that the element of penetration was however proved and that despite complainant's shaky evidence, the prosecution proved its case beyond reasonable doubt, but urges the court to upset the conviction and sentence.
14. The court has in its mandate as a first appellate court reviewed and reappraised the record of appeal in full, considered the judgment, the grounds of appeal and the submissions by the respondent and discerns the issues for determination. The mandate of the court remains and it matters not that the prosecution has conceded to the appeal like in this case.

Issues

- a. Whether the offence of defilement was proved against the appellant beyond reasonable
- b. Whether the testimonies by the prosecution witnesses were marred with contradictions and inconsistencies incapable of sustaining a conviction
- c. Whether the defence evidence was considered

Analysis and Determination

15. One commits the offence of defilement when he/she commits an act which causes penetration with a child. The ingredients of the offence of defilement is established with the proof of the age of the victim, proof of penetration and identification of the offender.
16. Ways to prove the age of a victim was settled by the Court of Appeal in *Edwin Nyambaso Onsongo v Republic* (2016) eKLR effect that the same can be by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof.
17. In this case, the complainant and her mother, PW2, testified that she was born on 7/2/2003 and an immunization card was produced in that regard. PW5, the clinical officer also testified that the complainant had 28 teeth and that she was precisely 14 years and he produced an age assessment report to that effect. The three pieces of evidence converge that the complainant was 14 years old and the court thus finds that it was proved, beyond reasonable doubt that the complainant was a minor born on 7/2/2003 and was thus aged 14 years.
18. Penetration, whether partial or full, may be proved by the sole evidence of the victim, pursuant to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya. However, if there be additional evidence in corroboration, it is well and good but a conviction is now automatically unsafe on account of lack of corroboration.



19. It was the evidence of the complainant that the appellant led her into a house with many telephone sets, spread a blanket on the floor, removed a reddish object from his pocket which he put on his penis and then inserted his penis into her vagina. It is to be noted that the accused was well known to the complainant by name and by place of residence.
20. It was the evidence of PW5, the clinical officer, that he examined the genitalia of the complainant. Her hymen was torn and the labia minora was painful. She also had a bacterial infection and numerous pus cells which pointed towards an infection similar to the one laboratory tests revealed on the complainant. He formed the opinion that the complainant had been penetrated by the appellant via the vagina.
21. On the basis of laboratory tests which revealed a common pathogen in both the appellant and the complainant, coupled with the evidence of the victim as corroborated by the medical evidence that the genital of the victim was painful on touch, the court finds that the element of penetration was proved by the prosecution.
22. The complainant identified the appellant as her defiler. The two were not strangers as they lived in the same neighbourhood and the appellant was known as a caretaker in the uncle's home and a phone repairer. In fact, in his cross examination the appellant was advancing the narrative that he was lured into sex by the complainant. In the end however, he abandoned that line and totally denied having had carnal knowledge of the complainant.
23. The complainant did testify that as she came from school she saw the appellant with a school mate. When she again left home, she bumped on the appellant with whom she chatted with. This statement is not refuted by the appellant who confirms that indeed he was with the complainant. It was further the statement of the complainant that when they got to the phone repair shop with the appellant, she turned on the phone light and watched as the appellant wore the reddish object, she thus could not have mistaken on the identity of the person who defiled her as they had chatted before, she lit the torch light before the defilement and since the appellant lived in the same area as the complainant. To top it all, the appellant in his unsworn statement, admitted being an acquaintance of the victim to whom the victim narrated having been sent away from home by parents and that the victim was like a sister to him. The totality of the evidence on record points without doubt that the appellant was well known to the complainant.
24. It is of no effect that the victim is said to have alleged that it is Justo who knew the appellant. I find such contradiction too trivial to be able to affect the general cogency of the prosecution's evidence and case.
25. In law, contradictions are said to affect conviction if they are grave leading to the conclusion that the offence never occurred and if at all it occurred, it was not committed by the accused person. This was the holding of the court of appeal in *Jackson Mwanzia Musembi v Republic* (2017) eKLR.
26. I have reviewed the evidence and I am not convinced that the evidence by the prosecution was marred with inconsistencies and contradictions capable of upsetting the conviction.
27. On whether the defence evidence was given due regard and consideration, I have looked at the judgment of the trial court and I have noted that the evidence of the appellant was indeed considered with the trial magistrate making reference to his testimony. For instance on page 4 it is noted: "DW1 averred being lured into...DW1 averred in cross examination that it is PW1 who had sent Justo and her siblings to him...Dw1 denied defiling the complainant on 7.2.2017 in his house averring that they were relatives" It is thus to the court clear that not only the unsworn statement was considered but also the evidence extracted in cross examination of PW1.



28. On the flip side, the court in its duty to review and reexamine the evidence afresh has not ignored what the appellant told the court. It is to court a truism that unsworn statement, of its own, is of little probative value. The Court of Appeal in *May v Republic* (1981) KLR had this to say of the weight and evidentiary value of an unsworn statement

“An unsworn statement is not, strictly speaking, evidence and the rules of evidence cannot be applied to an unsworn statement. It has no probative value, but it should be considered in relation to the whole of the evidence. Its potential value is persuasive rather than evidential. For it to have any value it must be supported by the evidence recorded in the case”

29. For the foregoing reasons, the court finds that the evidence of the accused person was considered by the trial court and that the evidence having been unsworn, its weight was incapable of controverting the otherwise cogent evidence of the prosecution. For those same reasons this appeal is bereft of merit and is thus dismissed.

DATED, DELIVERED AND SIGNED AT KAKAMEGA THIS 10TH DAY OF MARCH 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Appellant in person from Prison

Ms. Chala for the Respondent/Prosecution

Court Assistant: Polycap

