



**Njagi v Republic (Criminal Appeal E063 of 2022)  
[2023] KEHC 2549 (KLR) (22 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2549 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL APPEAL E063 OF 2022  
LM NJUGUNA, J  
MARCH 22, 2023**

**BETWEEN**

**BRIAN MURIMI NJAGI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence  
of Hon. W. Ngumi P.M. and delivered on 08.09.2022)*

**JUDGMENT**

1. This appeal arises from the judgment of the learned trial magistrate aforementioned. The appeal by the appellant challenges the determination on the grounds set out on the face of his petition of appeal.
2. The case against the appellant is one of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act*, 2006. The particulars of the main charge being that the appellant on April 26, 2020 at around 2100hrs in Kathoge Location within Embu County, intentionally and unlawfully inserted his penis into the vagina of O.N.N. a child aged 15 years.
3. He also 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 with particulars being that on April 26, 2020 at around 2100hrs in Kathoge Location within Embu County, intentionally and unlawfully touched the vagina of O.N.N a child aged 15 years with his genital organ namely penis.
4. At the conclusion of the trial, the trial magistrate convicted the appellant in the main charge of defilement contrary to Section 8 (1) as read with Section 8(3) of the *Sexual Offences Act*, 2006 and sentenced him to serve 20 years imprisonment, as provided under the *Act*.
5. It is the said conviction and sentence that forms the basis of the instant appeal.



6. The court directed that the appeal be canvassed by way of written submissions which directions only the appellant complied with.
7. The appellant submitted that his rights were infringed upon as he was not given a fair hearing. That despite making an application to recall PW1 and PW2 for further cross examination, the said witnesses were not availed. He stated that the trial court did not avail him court proceedings to adequately prepare his defence and further, decried the fact that no DNA test was ever carried out to prove that he was the perpetrator of the offence herein. The appellant placed reliance on the case of *Muruatetu 1* to support his case that indeed the right to a fair trial being a fundamental and inalienable right, was not accorded to him. Further, it was his case that the trial court was biased against him. He placed reliance on the case of *Evans Wanjala Siibi v Republic* [2010] eKLR.
8. This being a first appeal, this court is guided by the principles set out in the case of *David Njuguna Wairimu v Republic* [2010] eKLR where the Court of Appeal stated:-
 

“The duty of the first appellate court is to analyse 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.”
9. The elements of the offence of defilement which the prosecution must prove beyond reasonable doubt are:
  - i. Age of the complainant;
  - ii. Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*; and
  - iii. Positive identification of the assailant.
10. On these elements; “The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.” See (*Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013).
11. On the age of the complainant, the *Sexual Offences Act* defines “Child” within the meaning of the *Children’s Act* No. 8 of 2001 which defines a “Child” as “.....any human being under the age of eighteen years.”
12. In the case of *Martin Okello Alogo v Republic* [2018] eKLR the court stated that:-
 

“On the issue of whether the age of complainant was proved, the importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. The age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim. See *Alfayo Gombe Okello v Republic* Cr. Appeal No. 203 of 2009 (KSM) where the Court of Appeal stated:-

“In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim as necessary ingredient of the offence which ought to be proved beyond reasonable doubt.



That must be so because dire consequences flow from proof of the offence under Section 8 (1).....”

13. The complainant stated in her testimony that she was 15 years old at the material time when the offence was allegedly committed and PW2, who is her mother corroborated her evidence on her age. PW3 produced the complainant’s birth certificate which this court has perused and has noted that the complainant was born on May 14, 2005 while the offence herein was allegedly committed on April 26, 2020. As such, the same shows that the complainant was aged 15 years at the time when she was allegedly defiled. I am therefore convinced that the age of the complainant was determined appropriately.
14. On penetration, the *Sexual Offences Act* defines “penetration” as  
“the partial or complete insertion of the genital organs of a person into the genital organs of another person”
15. Further, the Court of Appeal, in the case of *Sahali Omar v Republic* [2017] eKLR, noted that:  
“.....penetration whether by use of fingers, penis or any other gadget is still penetration as provided for under the *Sexual Offences Act*.”
16. In the case herein, the complainant testified that the appellant forced her to have sex with him. That on the fateful day, the complainant was on her way to pick milk when she met the appellant who gave her his house keys. That at 1900hrs, they met at Botwana’s place and since it was raining, the appellant told her to accompany him to his place. It was her statement that they got to his house at 2100hrs when they ate supper and thereafter went to sleep and; that they had sex. In the same breadth, PW4 who examined the complainant testified that the complainant’s hymen was absent. It is therefore clear that the evidence adduced clearly showed that the prosecution did prove penetration.
17. On identification, the complainant stated that the appellant herein was a person known to her even prior to the alleged incident. PW2 also stated that she knew the appellant prior to the material date and the appellant did not deny knowing the complainant. [See Lord Widgery, C] comments in the case of *Republic v Turnbull* [1976] 3 ALL ER 549 at page 552].
18. It is my finding that the appellant in the instant case was properly and positively identified by recognition based on the testimony of the prosecution witnesses which confirmed that indeed the appellant was known to them.
19. The appellant has faulted the trial court for failing to recall the witnesses during the trial for further cross examination. It is trite that the law provides for the recalling of witnesses. Section 146(4) of the *Evidence Act* Cap. 80 provides that:-  
“The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so the parties have the right of further cross-examination and re-examination respectively.”
20. Section 150 of the *CPC* states as follows:-  
A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon



and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:

Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.”

21. The above provisions give the court the discretion to recall any witness who has already testified, however, a good reason must be given before the court can recall such a witness. In the present case, the appellant sought to have 1<sup>st</sup> and 2<sup>nd</sup> prosecution witnesses recalled, an application which the prosecution did not object to and which the court allowed. However, it remains unknown why the said witnesses were never availed for further cross examination as was requested by the appellant.
22. Article 50 (2) of the Constitution of Kenya provides that an accused person has a right to a fair hearing which includes: -
  - “(a) to be presumed innocent until the contrary is proved;
  - (c) to have adequate time and facilities to prepare a defence;
  - (g) right to choose and be represented by an advocate;
  - (k) to adduce and challenge evidence;”
23. Article 25 (c) of the Constitution further provides that a right to fair trial shall not be limited.
24. In the case of Joseph Ndungu Kagiri v R (2016) eKLR, Justice Mativo observed as follows:

“The question that arises is whether the further cross-examination was a good reason or whether it was necessary for the ends of justice. Counsel had just come on record, he had just been supplied with the proceedings and prosecution witnesses’ statements and the accused persons had hitherto been unrepresented and did not have the benefit of the witnesses’ statements at the time the trial proceeded nor did they have the benefit of legal representation. Counsel, in his wisdom deemed it fit to apply to cross-examine the said witnesses and the court overruled this application.”
25. Further, in the case of Kulukana Otim v R [1963] EA 257, cited by J. Ngugi, J in Stephen Mburu Kinyua v Republic [2016] eKLR, the Court of Appeal of Uganda, in considering Section 146 of the Ugandan Criminal Procedure Code, which is similar to our Section 150 of the CPC, stated that:

“It will be seen that the first part of the section confers a discretion, but under the second part, if it appears to a judge that the evidence of a person is essential to the just decision of a case, there is a mandatory duty on the judge (if the witness has not been called) to call him himself...”
26. The appellant was charged with the offence of defilement and the duty of the prosecution was to prove the age of the complainant, penetration and the identity of the assailant. In my considered view, the appellant did not establish that even if PW1 and PW2 had been recalled, his case would have vitiated the prosecution’s case that the Complainant was defiled.



27. In my considered view, the failure to re-call the said witnesses did not affect the appellant's defence and the prosecution had already established a water tight case against him.
28. In the case herein, the court notes that the appellant participated in the hearing process and cross examined the witnesses. The record shows that he participated in the whole of the hearing process and was not denied an opportunity to cross examine the witnesses as he alleges.
29. On the ground that the prosecution evidence was riddled with material contradictions. It is trite that contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. It is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. The correct approach is to read the evidence tendered holistically.
30. In the case herein, there is no evidence that has been presented before this court to show any form of contradiction and/or inconsistencies in the record which are substantial. Any contradictions if at all, do not go to the root of the case.
31. The appellant did not submit on the sentence but that notwithstanding, I note that he asked this court to quash his conviction and thereafter set aside the sentence of 7 year imprisonment. But of importance to note is the fact that the appellant herein was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act 2006 which provides that upon conviction the offender shall be sentenced to imprisonment for a term of not less than twenty years.
32. In light of the above, this court notes that the trial court exercised its discretion given the circumstances of the case herein in sentencing the appellant to 7 years imprisonment instead of 20 years. [See the Court of Appeal in the case of Dismas Wafula v Republic [2019] eKLR].
33. In my view, the appellant is lucky to have escaped with such a light sentence and because this court finds no reason to disturb the decision of the trial court, the appeal herein is dismissed.
34. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 22<sup>ND</sup> DAY OF MARCH, 2023.**

**L. NJUGUNA**

**JUDGE**

.....for the Appellant

.....for the Respondent

