



REPUBLIC OF KENYA



KENYA LAW
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**Ngugi v Republic (Criminal Appeal 42 of 2019)
[2023] KEHC 2725 (KLR) (21 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2725 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL 42 OF 2019
SC CHIRCHIR, J
MARCH 21, 2023**

BETWEEN

ABRAHAM KIMANI NGUGI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to Section 8(1) (3) of the *Sexual Offences Act* No. 3 of 2006 (The Act). The particulars were that on the 13th day of October 2017, at around 23 hours at [Particulars withheld] village in Gatanga Sub- within County Murangá county intentionally caused his penis to penetrate the vagina of EWN a child aged 12 years.
2. He also faced an alternative charge of committing an indecent Act with a child contrary to section 11(1) of the *Act*.
3. The Appellant pleaded not guilty to the charges, was tried, convicted on the first charge, and sentenced to 20 years in prison.
4. Being dissatisfied with the judgment, he filed this Appeal Grounds of Appeal:-
5. In his amended grounds, the Appellant has set out 4 grounds which may be summarized as follows:
 1. That penetration was not proved
 2. That the Appellant was not properly identified as perpetrator of the offence.
 3. That the prosecution's Evidence was full of material contradictions, inconsistencies and incoherence.
 4. That Prosecution's essential witnesses were not summoned.



Summary of evidence before the trial court.

6. PW1 was the complainant. Following a vore dire examination she gave a sworn testimony. She told the court that on the material day she was on her way to school at about 8 am, when she met “Kimani”(The Appellant). The Appellant carried her to his house and on reaching there, the Appellant tied her on the hands and legs with a sisal rope. Her hands were tied behind. And mouth was sealed with a cello tape.
7. The Appellant then locked the door and left. He came back at about 11PM. On coming back, he untied her, removed her clothes, put her on the bed and defiled her. He inserted his penis to the complainant’s vagina. (“The thing he uses to urinate” is the description she gave.) The Appellant warned her not to tell anyone, otherwise he would kill her. Having done with his act, he told her to go and never come back otherwise he would kill her. She went to a buying center where someone recognized her, she was taken to her grandmother’s place, where she used to stay. She reported what had happened. She and her grandmother then went to the Appellant’s home.
8. At the Appellant’s home, the complainant was asked to narrate what had happened in the presence of the Appellant, the Appellant’s parents and complainant’s grandmother. When she was about to start narrating the incident, she was slapped by the Appellant. His grandfather confronted the Appellant, thereupon which a fight ensued between the two. She told the court that the Appellant was their neighbour.
9. On cross examination, she reiterated her evidence in chief, and denied the suggestion that she was hiding in the shamba on the material day so as to avoid going to school.
10. PW2 told the court, he worked at Ngere tea factory and he had just ended his nightshift. It was about midnight. That near the factory gate he noticed a group of people. On checking, he noticed the complainant. The complainant looked familiar to him. That he had previously seen the complainant with one Kevin Njehia (PW3) and on asking her about the said Kevin, she indicated that she knew him. She took the complainant to Kevin’s house and on reaching Kevin told him, that the complainant was his cousin.
11. PW3 described himself as the cousin of the complainant, and from his narration, he used to reside in his grandmother’s house together with the complainant. He told the court that the complainant failed to return home on the material day. That when he reached home, there was a search going on for the complainant. That at about 11pm, the Appellant arrived at the grandmother’s house and informed them that he would be bringing the complainant, who was in his house. That they waited for them but the Appellant never came back with the complainant.
12. That at around midnight, he received a call from PW2 asking him to go for a job at Ngere factory but he later found out that PW2 actually wanted him to go and identify the complainant. The complainant never told him that she had been defiled, but she told PW2. He knew the Appellant that the Appellant was his uncle.
13. PW4 told the court that she is the guardian to the complainant and two other children. That the complainant did not turn up at home on the material day. She went looking for her but did not find her. That they went to sleep, that the Appellant later went to their house while drunk and informed them that, he will bring EWN .
14. That she later went to the sitting room and saw the complainant with PW3; that she accompanied the complainant to the house of the parents of the Appellant; that when the complainant was about to narrate what happened, the Appellant slapped her, prompting the Appellant’s father to confront the Appellant. The following day, she took the child to Ndakairu police station, then to Kirwara hospital.



15. PW5 was a clinical Officer at Kirwara sub-County hospital. She produced a P3 form that had been filled by another clinical officer. She testified that the examination showed that her hymen was broken and her vagina had whitish discharge. She had epithelial cells. She came to the conclusion that the complainant had been defiled

Submissions

16. The Appellant's submission was that penetration was not proved. That since the complainant was reportedly HIV Positive, he ought to have been tested to check if he had Contracted or had the virus also; that breaking of the hymen is not a conclusive proof of penetration. That there was no spermatozoa seen.
17. On identification, the Appellant submits that he was not identified and the prosecution gave contradicting names of the Appellant.
18. It is further submitted that the prosecution failed to produce essential witnesses and that the prosecution's case was full of material contradictions. The Appellant relied on the case of [*Donald Majiwa & others vs. R*](#) (2009) eKLR.

Respondent's submissions

19. On the issue of penetration, the Respondent's submit that the complainant's evidence and corroboration by the clinical officer proved penetration. That the presence of epithelial cells and the torn hymen was sufficient proof of penetration; that the absence of spermatozoa can be explained by the fact that there were 3 days difference between the date of the defilement and date of medical examination.
20. On identification, the Respondent submits that the Appellant was both relative and a neighbor of the complainant, that moreover, the Appellant waylaid the Complainant at about 8 am on her way to school and that that the evidence of PW3 and PW4 were consistent on the identification of the Appellant.
21. On the alleged failure to summon essential witnesses, the Respondent relied on the case of [*Keter vs Republic*](#)(2007) eKLR and [*James Mukobo – vs- R*](#)(2019)eKLR and Submits that the Respondent only needed to call, such witnesses as are sufficient to establish the charge beyond reasonable doubt. The prosecution also relied on section 143 of the [*Evidence Act*](#) which provides that there is no specific number of witnesses to be called unless otherwise specified in law.
22. On the Appellant's submission that the charges were motivated by a family feud, the Respondent asserst this was raised at the tail end of the case and was hence an afterthought, and there was no evidence in support of the alleged family disagreements.

Determination

23. I have considered the evidence and the rival submissions of the parties. This is the first Appeal, and the duty of the first appellate court is to re-assess the evidence afresh and arrive at its own determination. This court will also bear in mind the fact that the trial court had the benefit of hearing and seeing the witnesses first hand.(see [*Okeno vs Republic*](#) (1972) EA 32)
24. In my views the following issues lend themselves for determination.
 - i. Whether the ingredients of defilement were proved beyond reasonable doubt(Grounds 1 and 2)



- ii. Whether the prosecution's evidence was full of contradiction, inconsistencies and whether these inconsistencies if any were material enough to affect the prosecution's case?(Ground3)
- iii. Whether the prosecution failed to call essential witnesses.(Ground 4)

Whether the charge of defilement was proved.

25. The charge of defilement has 3 ingredients namely age of the victim, Identification of the perpetrator and penetration. All the ingredients must not only be present, but also proved beyond reasonable doubt (see *John Mutua vs. R* (2017) eKLR.

26. Were the 3 ingredients proved as aforesaid in this case?

a. Age of the victim.

The age of the complainant, was indicated as 12 years at the time of defilement. This fact has was not contested in the Trial court or in this Appeal and therefore, I will not address myself to it.

b. Identification

The appellant's contention is that he was not properly identified and bases his contention on the fact that different witnesses referred to him using different names. However, it clearly emerges from the evidence that prior to the commission of the offence, Appellant was well known to the complainant, the guardian (PW4) and PW3. Indeed PW3 told the court, that the Appellant was his uncle a fact which was not challenged by the Appellant in cross examination. PW4 told the court that "Kimani" (the Appellant) came and told me "Aunt, EWN is in my house." Questioned by the Appellant on cross examination, PW3 respondent "You told me you will bring the child when you didn't come, I thought she would sleep at your mother's."

The complainant told the court " I was going to school, I met Kimani on the road, he lifted me and took me to his house – Kimani does not live far from us. We went to Kimani's home

The testimonies of the complainant, PW3 and PW4 leaves no doubt in my mind that the three were all relatives of, and neighbours with, the Appellant. They knew each other very well and knew each other's homes too.

Am satisfied that the Appellant was duly identified.

Penetration

27. On penetration, the complainant told the court, "He removed my clothes.....he also removed his clothes, he removed my pants and school uniform. He made me lie on the bed and lay on top of me. I lay on my back and he defiled me. He inserted his penis into my vagina (the thing he uses to urinate)"

PW5 the Clinical Officer told the court that the complainant's hymen was torn and lab test showed the presence of epithelial cell which according to her is indicative of bruising. She estimated that defilement could have taken place 3 days before. Thus the complainant's testimony on the act of penetration was corroborated by medical evidence.

The appellant contents that a broken hymen is not necessarily proof of defilement. While this contention is true, the broken hymen was not the only piece of evidence presented. In the case of *PKW vs. Republic* (2012) eKLR, which the Appellant was relied on to buttress his submissions, the court of Appeal was faulting the lower courts for having placed a high premium on a broken hymen at the expense of other considerations. In this case, the broken hymen was not the only piece of evidence.



I find no fault on the lower court's finding in this regard

28. I find that the 3 ingredients consisting defilement was proved beyond reasonable doubt.

**Whether the prosecution's evidence was full of contradictions, in consistencies and incoherence.-
Ground 3**

29. On the specific testimonies, the Appellant has cited the complainant's testimony where it is this indicated that the Appellant was "their neighbour," while PW4 stated that the complainant's family were good friends with Appellant's family'; that while the complainant talked of one incident of defilement, the doctor reported that the complainant told him that the defilement had taken place 3 times; that whereas the complainant told the court that she was locked in the Appellant's house the whole day, there was evidence by one Moses who told PW4 he could have seen the complainant running through a maize plantation.
30. In the case of *MTA vs. Republic* (Criminal Appeal E067 of 2021) (2022)eKLR. The court cited with approval the case of *Twehangane Alfred vs. Uganda* – (Criminal Appeal No. 139 of 2001 (2003) UGCA, where the court held : "With regard to contradictions in the prosecution's case, the law as set on in numerous authorities is that grave contradictions unless satisfactorily explained will usually, but not necessarily, lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the substance of the prosecution's case".
31. I find that there was no material contradictions on the prosecution's case. The Appellant could have been a neighbor but at the same time a relative to the complainant or friends to the family of the complainant. The fact of neighborliness/friendship are not contradicting references. The other alleged contradiction was on whether the complainant had been defied severally or once. The issue in my view is immaterial as the act of alleged defilement that was under trial was the one which was said to have taken place on 13th October 2017.
32. There was a reference to a Mr. Moses, who was reported to have seen the complainant running in a maize plantation. According to the appellant, this was said to have taken place around the same time that the complainant was locked up in the appellant's house. It is PW4 who told the court that she sent a Mr. Moses to look for the complainant. Moses reported back, stating that he saw the complainant but was not sure about what he saw as the person was raining. This piece of evidence was firstly, hearsay. Secondly, PW4 words were that Moses reported he was not sure of whom he saw. The above portions of evidence therefore of is both inadmissible and unreliable. It cannot be said that such inadmissible and speculative testimony should be considered to substantially contradict the direct evidence of the complainant.

I hold and find that there was no material contradiction or inconsistency of the prosecution's testimonies.

Were essential witnesses withheld?- Ground 4

33. The appellant argues that failure to call "Moses" referred to in PW4's evidence and "the people in the market" referred to in the PW2's testimony, was fatal to the prosecution's case. Section 143 of the [evidence Act](#) provides that there is no requirement for a particular number of witnesses to prove a case save as provided by law.



34. I agree with the Respondent's submissions that they are not obliged to "call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond reasonable doubt" I have already expressed myself regarding, the "evidence of Moses." And I need not revisit.

On the "people in the market" PW2 was one of such people. The appellant's complain in this regard is therefore without merit

35. The Appellant further faulted the trial court for failing to consider his alibi. I note however that the Appellant did not call any witnesses to back up this plea. I dismiss this complain.

36. The upshot of the foregoing is that this court finds that the appeal is without merit. It is hereby dismissed.

DATED, SIGNED AND DELIVERED AT KAKAMEGA VIRTUALLY THIS 21ST DAY OF MARCH 2023

S. CHIRCHIR

JUDGE

In the presence of:-

