



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Njoroge v Republic (Criminal Appeal E015 of 2022)  
[2023] KEHC 1312 (KLR) (1 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1312 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
CRIMINAL APPEAL E015 OF 2022  
CM KARIUKI, J  
MARCH 1, 2023**

**BETWEEN**

**HARUN MWANGI NJOROGE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from the Conviction and Sentence of Hon C. Obulutsa, Chief  
Magistrate in Nyabururu Chief Magistrate's SOA No. 2 of 2018)*

**JUDGMENT**

1. The Appellant herein was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act* No. 3 of 2006 particulars being that on the 19<sup>th</sup> day of December 2017 within Nyandarua County, the Appellant intentionally and unlawfully caused his penis to penetrate into the vagina of MWK, a girl aged 16 years.
2. In the alternative count, he 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.
3. After the trial, the Appellant was found guilty of defilement contrary to Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act* No. 3 of 2006 and was sentenced to 15 years imprisonment.
4. The Appellant was dissatisfied with both the conviction and sentence and filed this appeal based on the following 12 grounds of appeal: -
  - i. That the learned trial magistrate erred in law and in fact in finding that the Complainant had been defiled on 19/12/2017 whereas there was no medical evidence.
  - ii. That the learned trial magistrate erred in law and in fact in failing to find that the evidence of the Complainant's mother contradicted the medical evidence on the issue of defilement.



- iii. That the learned trial magistrate erred in law and in fact in failing to find that the delay occasioned in reporting the matter to the police and taking the Complainant to hospital was not explained despite the offence being alleged to have been reported immediately after it was committed.
  - iv. That the learned trial magistrate erred in law and in fact in believing the evidence of the Complainant which evidence was not corroborated as per required and in failing to warn himself of the danger of relying on the said evidence.
  - v. That the learned trial magistrate erred in law and in fact in disregarding the evidence of PW2 the Complainant's sister who testified that she didn't see the accused on the material day which contradicted the evidence of the Complainant.
  - vi. That the learned trial magistrate erred in law and in fact in ailing to summon the nurse from Ngano Health Centre who first saw the Complainant on 19/12/2017 and concluded that there was no defilement and the officer from Ngano Police Post who first received the complaint, arrested the Appellant and later released him for lack of evidence.
  - vii. That the learned trial magistrate erred in law and in fact in finding that the mere fact that the complainant's hymen was broken was enough proof that she was defiled by the Appellant on 19/12/2017 whereas the age of the breakage was not indicated in the medical records and no tears or lacerations were seen to confirm it was fresh.
  - viii. That the learned trial magistrate erred in law and in fact in failing to find that the particulars of the charges didn't corroborate the evidence where it was alleged that the Complainant was mentally retarded but the Appellant was charged with defilement and no medical evidence was produced to prove mental illness but the Complainant was treated as a mentally retarded witness in the proceedings.
  - ix. That the learned trial magistrate erred in law and in fact in failing to find that the alleged defilement took place in broad daylight at public place a quarry where the Complainant is said to have been in the company of her two sisters but no one saw the Appellant with the Complainant or witnessed the offence and the Complainant did not scream or call for help.
  - x. That the learned trial magistrate erred in law and in fact in finding that the fact that the Appellant was found at the quarry was evidence he had defiled the Complainant despite the Appellant explaining that he used to work at the quarry.
  - xi. That the learned trial magistrate erred in law and in fact in disregarding the Appellant's defence and the fact that he did not run away when confronted by the Complainant and her mother at the quarry.
  - xii. That the learned trial magistrate erred in law and in fact in disregarding the Appellant's defence and the fact that he did not run away when confronted by the Complainant and her mother at the quarry and that he presented himself to the police which was a pointer of his innocence.
  - xiii. That the learned trial magistrate erred in law and in fact in failing to write a judgement in conformity to Section 169 of the Criminal Procedure Code.
5. Reasons wherefore the Appellant prayed for the judgement delivered on 27/4/2022 be set side in its entirety and for the Appellant to be set at liberty.



## 6. Appellant's Submissions

7. The Appellant asserted that the trial court ought to have gone to a greater length to ascertain that indeed PW1 was mentally retarded and that the lack of evidence and independent examination by the court itself vide a voire dire examination ruling on the particular date that she was declared mentally incapacitated was material to the case. In addition, the Appellant testified that trial magistrate directed PW1 give unsworn evidence and that her testimony was of no probative value.
8. Reliance was placed on Section 107 of the *Evidence Act*, Section 19 of the Oaths and Statutory Declaration Act, MM v Republic [2014] eKLR, Johnson Muiruri vs R [1983] eKLR cited in Brain Wetoto Onguya vs Republic [2019] eKLR
9. Further, it was contended that the appointment of an intermediary who was to testify on behalf of PW1 was marred with irregularities which is material to the case. The Appellant submitted that sexual offences cases place a very unique role on the Complainant as a witness who experienced and witness the sexual act thus without PW1's evidence it leaves a lot to be desired from the prosecution.
10. It was averred that of PW2's testimony was contradictory to PW5's account of what happened and that the evidence of PW4 was shaky. The Appellant cast doubts on how PW2 arrived to the conclusion of 2 days injury on the hymen.
11. The Appellant questioned why there was a delay in taking the Complainant to Olkalou County Hospital and why the reports of the previous examination were not tabled before the court. They asserted that due to the alleged inconsistencies there were doubts as to whether penetration occurred.
12. As to the issue of the perpetrator's identification, the Appellant pointed out that it had taken the police 11 days to record the matter yet PW2 and PW5 testified that they went to the police station on the same date the offence occurred.
13. Secondly, PW1 went and touched the Appellant herein and identified him but the Appellant stated that the her testimony cannot be relied on and was inconsistent because the evidence of mental incapacitation was not proved at all resulting to PW1's unsworn evidence being of no probative value, PW2 did on testify on behalf of PW1 and that there was no other witness who saw the Appellant part from PW1 who saw the Appellant.
14. Moreover, the Appellant stated that the trial court did not comply with Section 169(2) of the Criminal Procedure Code as it did not frame issues for determination, analyze the evidence including the Appellant's defence and give reasons for his findings. That no reasons were recorded for convicting on uncorroborated evidence of the Complainant this being a sexual offence.
15. On sentencing, the Appellant relied on the case of Joshua Gichuki Mwangi vs Republic, Criminal Appeal No. 84 of 2015 in stating that mandatory minimum sentences were declared unconstitutional. Additionally, the stating that taking into account the Complainant's willingness to withdraw the matter and that the Complainant had since moved to Lamu, they urged the court to place the Appellant to a non-custodial sentence as per the recommendation of the probation officer in the per the pre-sentence report.

## 16. Respondent's Submissions

17. The respondent stated that the age of the Complainant had been proved to be 16 years as per her mother's testimony and the minor's immunization card.
18. Reline was placed on Mwalango Chichoro v Republic Msa C. Appeal No. 24 of 2015 [UR]



19. On the issue of penetration, the respondent stated that PW1 testified that on 19.12.2017, the Appellant removed her blue dress and did bad things to her. She then told her other PW2 who testified as her intermediary who testified that PW1 told her how the accused removed his clothes after having removed her clothes and inserted her penis into her vagina. That she was consistent during cross examination that after removing her clothes, the Appellant did bad things to her.
20. In addition, PW4 testified that the Complainant had bruises/ lacerations on peneriam. No discharge/ bleeding on the vaginal canal. Hymen was broken. She concluded that the Complainant had been defiled. Age of injuries was 2 days. She also concluded that the Complainant had epithelial cells meaning the membrane was shaken and there was presence of bacterial cells. She produced the P3 form as P.Exhibit 2. The respondent asserted that the evidence was not challenged in any way and the Appellant did not cross examine the witness thus the respondent concluded that penetration was proved.
21. On identity of the perpetrator, the respondent submitted that the Complainant testified that she knew the Appellant and she took PW2 to the scene after the incident and later to where the Appellant worked and identified him to her mother who slapped him. That she even touched him in court showing his identity was not mistaken as the Appellant worked in the same quarry as the Complainant's father.
22. Further, the respondent averred that the circumstances were tenable to enable the Complainant to identify and recognize the Appellant.
23. It was stated that there were no material contradictions in this case and that if there were any, they were minor and would not tilt the outcome of the case in the Appellant's favour. Reliance was placed on Twehangare Alfred v Uganda Criminal Appeal No. 139 of 2001.
24. On the issue of the Complainant being declared mentally challenged and declared a vulnerable witness leading to PW2 being allowed to testify as an intermediary, the respondent submitted that though no medical evidence was ever produced and/or tendered to prove the same, a voire dire was conducted and when she was put on the dock to testify the court noted that she was intellectually incapacitated for she was testifying with hesitation. That it was therefore proper for the prosecution to apply to the court to have PW1 declared a vulnerable witness and have PW2 appointed as an intermediary. It was argued that the same did not infringe any laws and it was not fatal.
25. It was further argued that the fact that the Appellant was found in the quarry did not exonerate him for he had done so to make one believe he did not commit the offence. Further, there was no evidence to suggest the Appellant was framed and there was no evidence of bad blood between the Appellant and Complainant's family to suggest framing.
26. As regarding the prosecution at one stage attempting to withdraw the case, it was submitted that the said request was rightly rejected by the court.
27. The respondent asserted that the trial court complied with the provisions under Section 169 of the Criminal Procedure Code as both issues for determination were framed in page 6 of the judgement and the trial magistrate continued to analyse and offer his determination.
28. In conclusion, the prosecution urged the court to consider the circumstances of this case and more so the mental incapacitation of the Complainant and find that the Appellant not only defiled the Complainant but also took advantage of the incapacitated intelligence to commit this otherwise serious offence thus the sentence of 15 years was merited.



## 29. Analysis and Determination

30. This being a first appeal, I am expected to review and analyse the evidence afresh in order to form an independent opinion and draw my own conclusions bearing in mind that I do not have the benefit of seeing and observing the witnesses. The principles were set out in the case of *David Njuguna Wairimu vs. Rep* [2010] eKLR where the Court of Appeal stated: -

“The duty of the first appellate court is to analyze 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 decision.”

31. (See *Okeno vs. Republic* [1972] E.A. 32 and *Kiilu & Another vs. Republic* [2005] 1 KLR, 174).
32. In a charge for defilement, the prosecution must prove age of the Complainant, penetration and the identification of the perpetrator of the crime.

### Age of the Complainant

33. In regards to the Complainant’s age, the same was uncontested. The prosecution produced the child’s immunization card which indicated that the Complainant was born on 10. 8. 02 proving that she was 16 years old when the incident occurred.
34. Before I delve into the next ingredients necessary for proving defilement, it is necessary to demystify the issue of the Complainant being declared a vulnerable witness due to mental incapacitation and an intermediary being appointed to testify on her behalf.
35. The Appellant asserted that the court misdirected itself in declaring the Complainant mentally retarded without a *voire dire* examination and that there was lack of evidence and independent examination that she was mentally incapacitated. Further, they argued that the appointment of an intermediary who was to testify on behalf of PW1 was marred with irregularities which are material to the case. The Appellant submitted that sexual offences cases place a very unique role on the Complainant as a witness who experienced and witness the sexual act thus without PW1’s evidence it leaves a lot to be desired from the prosecution.
36. Section 31(2) of the *Sexual Offences Act* allows the court, either on its own motion or on request by the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings, to declare any such witness, other than the accused, a vulnerable witness if in its opinion the witness is likely to be vulnerable on account of grounds including age, intellectual, psychological or physical impairment; trauma or such other reasons or factors as the court may consider relevant.
37. The role of an intermediary in a criminal trial, is to convey the substance of any question to the vulnerable witness, inform the court at any time that the witness is fatigued or stressed; and request the court for a recess.
38. It is at the discretion of the court to appoint an intermediary where the circumstances allow. An intermediary is a person authorized by the court, on account of his or her expertise or experience to give



evidence of a vulnerable witness and may include a parent, relative, psychologist, counsellor, guardian, children's officer or social worker as per Section 2 of the *Sexual Offences Act*.

39. In *MM v Republic* [2014] eKLR, the Court of Appeal stated;

“It is clear from sections 31 (2) and 32 that, first and foremost it is the duty of the prosecution to ascertain the vulnerability of the witness and to apply to the court to make that declaration before appointing an intermediary. In addition, the court, as we have earlier observed, can on its own motion, through *voire dire* examination, declare a witness vulnerable and proceed to appoint an intermediary. Any witness (other than the one to be declared vulnerable) can likewise apply to the court for the declaration. The application must not be granted merely because the victim is young or too old or appears to be suffering from mental disorder. The court itself must be satisfied that the victim or the witness would be exposed to undue mental stress and suffering before an intermediary can be appointed.”

40. From the trial court proceedings:-

41. On 12/6/2018 the court conducted a *voire dire* examination and the trial court record clearly indicated that the minor understands the difference between the truth and lies but does not understand the meaning and input of an oath so she will give unsworn evidence subject to cross examination.

42. As PW1 began to testify the court noted that: -

“The minor is intellectually incapacitated and is testifying with hesitation. Some words are different for her to pronounce. She is not very audible and has to repeat the sentences several times for the interpretation to lean.”

43. PW1 then proceeded to testify before the prosecutor applied for adjournment and stand down of the witness so as to look for an intermediary to testify on her behalf as the minor appeared mentally incapacitated. The accused is recorded to have no objection to the same.

44. On 6/11/2018 the prosecutor requested the court to allow the mother of the minor to testify on behalf of the minor since the Complainant is mentally challenged and is not able to testify. The application was made under Section 31(4) of the *Sexual Offences Act*. The prosecution prayed that the Complainant be adduced as a vulnerable witness and for the mother to be appointed as an intermediary.

45. The accused objected this prayer stating that the child is the one who was at the scene.

46. The court then declared the Complainant a vulnerable witness and the mother was appointed to testify as an intermediary. Further the court directed that she will be cross examined on the evidence already tendered on 12/6/2018.

47. From the foregoing, the assertion that there was no *voire dire* conducted and that the appointment of intermediary was marred with inconsistency is baseless and untrue. The trial court record clearly conducted a *voire dire* examination and the court observed that the minor had intellectual incapacitation even when she began to testify.

48. The prosecution then requested to have an intermediary testify on behalf of the Complainant due to her intellectual incapacitation and the request was granted by the trial court.

49. Section 125 of the *Evidence Act* provides: -



“125(1) All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether body or mind) or any similar cause.

2) A mentally disordered person or lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them.”

50. I find that the learned trial magistrate had the opportunity to hear and see the Complainant and determine her level and capacity of understanding and therefore the declaration of the Complainant as a vulnerable witness and the appointment of an intermediary was warranted within the circumstances and procedural as per the stipulations of Section 31 (2) of the *Sexual Offences Act*. It is my opinion that the trial court in appointing the Complainant’s mother as her intermediary, gave the Complainant an opportunity to tell the court what happened, who defiled her and whether she could identify him. Notably, the Appellant was not denied an opportunity to cross examine the Complainant thus his right to a fair trial was not violated in any way. Further, the Appellant’s prolonged assertion that the unsworn evidence presented before the trial court had no probative value is misdirected and false.

51. That being the case, I shall proceed to examine the rest of the ingredients: -

### **Penetration**

52. PW1, the Complainant herein testified that she went to the river at around 3.00pm with K and N and the accused removed her clothes while her siblings were drawing water. She stated that she did not scream and after removing her clothes, the Appellant did bad things to her. She then went home and told her mother what had happened and took her to the scene of the incident then to hospital. PW2, the Complainant’s mother testified that the Complainant told her that the Appellant told her to remove her clothes and then inserted his penis to her vagina. She stated she examined the Complainant and her inner parts are wet and she had discharge. That she took her to Ndemi Hospital then to Ol Kalou Hospital.

53. PW4, the medical officer from Ol Kalou Hospital testified that when she examined the Complainant on 20/12/2017 there were no bruises/laceration on peneriam. No discharge/bleeding on vaginal canal. Hymen was broken. She stated that he concluded that the Complainant was defiled and the age of the injuries was 2 days.

54. It was her testimony that the Complainant had been treated at an outpatient department a day prior. Examination tests were done and bacterial cells were found and epithelial cells meaning the membrane was shaken. She produced medical notes as P. Exhibit 1a and lab request form P. Exhibit 1b and c, P3 Form P. Exhibit 2.

55. Penetration is defined in Section 2 of the *Sexual Offences Act* as the partial or complete insertion of the genital organs of a person into the genital organs of another person.

56. Accordingly, I am satisfied that there was proof of penetration. It is important to state that the evidence of the victim of a sexual offence does not require corroboration as per Section 124 of the *Evidence Act*. Nonetheless, in the present case penetration was proved by PW1’s evidence which was corroborated by PW2’s testimony and the firm and consistent medical evidence of PW4 who confirmed that from her examination, defilement had occurred.



## Positive Identification of the perpetrator

57. PW1 in her testimony stated that before going to the hospital on the material day, she took her mother to the where the accused was and her mother slapped him. This account was corroborated by PW2 who testified that when the Complainant told her what had happened, she asked her to take her to where the Appellant was. That the Complainant took her to the quarry where he found the Appellant and she confronted him about what he had done but he denied. On cross examination, she stated that the Appellant worked with her husband at the quarry. The Complainant also identified the Appellant at the dock by physically tapping him.
58. Accordingly, based on the evidence adduced in the trial court by the Complainant and PW2, I agree with the prosecution that the Appellant was positively identified as the perpetrator of the crime herein. It was the Complainant that was defiled and whether or not her siblings saw the Appellant, she was able to see him and later identify him, an account which I believe to be true. I find no material placed before this court to warrant interference with the findings of the trial magistrate.
59. The Appellant asserted that the trial court did not comply with Section 169 (2) of the Criminal Procedure Code as it did not frame issues for determination, analyze the evidence including the Appellant's defence and give reasons for his findings. I find this assertion misled as having carefully gone through the trial court record, the trial magistrate's judgement was absolutely compliant with the aforesaid Section 169. The Appellant's assertion was not only misguided but untrue.
60. Moreover, the Appellant detailed a myriad of inconsistencies and contradictions which they alleged cast doubt on the prosecution's evidence. I have had the opportunity to examine the said contradictions including the length of time it took to take the Complainant to hospital and record the matter at the police station etc. and I find that they are immaterial and are not fatal thus do not render the prosecution's case as falling below the required standard of proof. I agree with the respondent that there were no material contradictions in this case and that if there were any, they were minor and would not tilt the outcome of the case in the Appellant's favour. I find that there is no variance between charge and the evidence adduced. Further, I am guided by the finding of the Court of Appeal's holding in the case of *Richard Munene vs Rep* [2018] eKLR where it was stated that: -
- “It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from.”
61. In the result, I find that the prosecution proved its case against the Appellant beyond all reasonable doubt.
62. On sentencing, the Appellant relied on the case of *Joshua Gichuki Mwangi vs Republic*, Criminal Appeal No. 84 of 2015 in stating that mandatory minimum sentences were declared unconstitutional. Additionally, the Appellant stated that considering the Complainant's willingness to withdraw the matter and that the Complainant had since moved to Lamu, they urged the court to place the Appellant to a non-custodial sentence as per the recommendation of the probation officer in the pre-sentence report.
63. Looking at the circumstances in which the offence was committed, I find that the sentence of 15 years imprisonment meted out was harsh in the circumstances as he was a first offender and there was complainant's willingness to withdraw the same and that the Complainant had since moved to Lamu,



they urged the court to place the Appellant to a non-custodial sentence as per the recommendation of the probation officer in9 the pre-sentence report.

64. I thus find it justifiable to disturb the finding on sentence. Thus, court makes the orders that;
- i. The Appeal herein lacks in merit and I accordingly dismiss it and uphold the conviction
  - ii. On sentence, same is reduced to ten years (10) years from the date of lower court sentence-
  - iii. orders accordingly.

**DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 1<sup>st</sup> DAY OF MARCH 2023.**

.....

**CHARLES KARIUKI**

**JUDGE**

