



REPUBLIC OF KENYA



**Ohola v Republic (Criminal Appeal E032 of 2022)  
[2023] KEHC 2241 (KLR) (10 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2241 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL E032 OF 2022  
PJO OTIENO, J  
MARCH 10, 2023**

**BETWEEN**

**ELIJAH OHOLA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the conviction and sentencing of Hon.  
J.N. Maragia RM in Kakamega S.O Case No. E075 of 2020)*

**JUDGMENT**

1. The appellant was arraigned before the Resident Magistrate at Kakamega in Sexual Offences Case No E075 of 2020 charged with the offence of defilement contrary to section 8 (1) as read with section 8(2) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence were that on the October 17, 2020 in Kakamega South Sub- County within Kakamega County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of CM, a child aged 12 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 whose particulars were that on the October 17, 2020 in Kakamega South Sub- County within Kakamega County, the appellant intentionally touched the private parts namely vagina, anus and buttocks of CM a child aged 12 years.
3. The appellant pleaded not guilty to the charge and the case proceeded to full trial.
4. Being a child, voire dire examination was conducted on PW1, the complainant, and upon the court being satisfied on her ability to speak truthfully, she testified on oath and told the court of being 14 years old and a class seven student at [Particulars Withheld] Primary School. That on October 17, 2020 she was sent by her mother to pick food stuffs from the accused person's shop. While there the appellant asked her to get his shoes from the corridor during which time the appellant followed her from behind,



- held her mouth and inserted his fingers in her vagina. On cross-examination she said that when she went to the shop, she did not find the Appellant who had gone to Shinyalu but waited for him to come back.
5. PW2, CM and mother to the victim testified that on October 17, 2020, which was a Saturday, she sent her daughter to buy food items and that when she returned home at 4PM she appeared sickly and was not talking. The following day she was unable to wake up and come Tuesday she could not walk and when she inquired from her and upon examining her vagina and finding it swollen and watery, PW1 informed her that she had been defiled by the man she had gone to buy food items from. The matter was reported to the area Chief and the minor subsequently taken to hospital and police, treatment administered and documents completed being P3 form and Post Rape Care Form. Even treatment notes, birth certificate and laboratory test results were produced as exhibits.
  6. On cross-examination she said that she would send the child to the shop even before and that she could not remember the exact date of defilement. She equally denied any relationship with M nor having her telephone number, but confirmed in re-examination that the incident was on October 17, 2020.
  7. PW3, Geoffrey Seru Ikutwa, the assistant chief of Shimanyiro sub location gave evidence that on October 19, 2020 he received a call from PW2 who informed him that her daughter had been defiled by the appellant. She led her to the assailant who was identified by the complainant and he arrested him. In cross-examination he said that he knew the accused and had not heard any such incident about him.
  8. PW4, Wycliffe Mark Angatia, a clinical officer at Matungu Sub County Hospital testified that on October 19, 2020 he examined PW1 and that her vagina wall had bruises and the hymen was absent. There was penetration to both her vagina and anus and he formed the conclusion that the object used was a penis.
  9. On cross examination he stated that for the accused to have defiled the minor, he ought to have had lacerations on his penis which he did not. He further stated that he could make a conclusive finding since the incident had happened three days prior.
  10. PW5, No xxxx Inspector Vincent Kimaywa of Malaika Police Station and the investigating officer testified that on October 19, 2021 he received a call from PW3 informing him that he had arrested the appellant for defiling PW2. He went to his office where the victim was brought by his mother. He then escorted the victim to the nearest government health facility and established that the appellant had a shop and that he lived behind the shop after which he recorded statements.
  11. When placed on his defence, the appellant herein testified as DW1 that on October 17, 2020 he was at his shop and left in the evening to get a meal leaving a neighbour at the shop. As he was returning he bumped on his credit card supplier who carried him on his motorbike. At the shop they found a customer, the complainant herein to whom he sold sugar and she left. He also sold some food items to the credit card supplier who also left. The following day he was arrested by the assistant chief and identified by the complainant. He was taken to the hospital for assessment and later released for lack of evidence and again re arrested.
  12. On cross examination he stated that the complainant was a regular customer of the adjacent shop and liked in the neighbourhood.
  13. DW2, Clement Abakaw testified that he was a sales agent of safaricom and that on October 17, 2020 he gave the appellant a ride back to the shop using his motorbike and that at the shop they found a girl to whom the appellant sold sugar and left. The two then remained at the shop, the witness was given a soda by the appellant. The witness then carried the appellant on his motorcycle and dropped him at where he was to buy his evening meal and the two parted.



14. On cross examination he stated that customer kept coming in and out of the shop and he only remembered the complainant because the appellant had mentioned that she accused him.
15. Judgment was subsequently delivered and the accused person was convicted with the offence of sexual assault contrary to section 5 (1) b of the *Sexual Offences Act* and sentenced to ten years' imprisonment.
16. Aggrieved with the decision of the trial court, the appellant has lodged this appeal and preferred the following grounds:-
  - ' a) That the learned trial magistrate erred in convicting the appellant when there was no evidence that the appellant committed the offence.
  - b) That the learned trial magistrate erred in relying on contradictory and inconsistent evidence by the prosecution in convicting the appellant.
  - c) That the learned trial magistrate erred in law and fact by holding that the prosecution has proved its case against the appellant to the required standards of the law when the evidence on record is not sufficient to make such a finding.
  - d) That the learned trial magistrate erred in law and fact by holding that the medical evidence adduced proved an offence under the Sexual Offence Act whereas the medical evidence produced in court did not prove the ingredients of defilement under the *Sexual Offences Act*.
  - e) That the learned trial magistrate erred by passing a conviction and sentence not supported by proper and sufficient evidence.
  - f) That the learned trial magistrate erred by not properly analyzing the evidence adduced in court and hence arrived at a wrong finding.'
17. The appeal has been canvassed by way of written submissions as directed by the Court.

### **Appellant's Submissions**

18. The appellant has addressed three issues with the first being whether the prosecution has proved its case beyond reasonable doubt. On this issue, the appellant argues that it was not clear from the prosecution witnesses what the complainant was sent to buy from the appellant's shop. They contend that the evidence of the mother is doubtful since she mentions that the complainant returned home at 4PM and at the denovo hearing she stated that the complainant returned home at 5a.m. The appellant further contends that the evidence of the prosecution is doubtful since the complainant stated that there was a corridor whereas it was the testimony of the investigating officer that the appellant lived behind the shop. The appellant also notes a variance on the date when the act of defilement occurred since the mother to complainant noted changes in the complainant's behavior on October 16, 2020 whereas according to the charge sheet the offence occurred on October 17, 2020.
19. The appellant argues that the appellant was not properly identified by the complainant and that the charge sheet was defective for the reason that it indicated that the appellant used his penis against the complainant yet it was the testimony of the complainant that the appellant used his fingers.



## Respondent's Submissions

20. It is the submission of the respondent that the variance in the testimonies of the prosecution witness was occasioned by the complainant being disoriented because of the events and/or actions of the appellant towards her.

## Issues For Determination

21. Looking at the petition of appeal in light of the proceedings and submissions filed, this court discerns the following issues for determination: -
- a. Whether the charge sheet was defective
  - b. Whether the offence of sexual assault was proved to the required standard against the appellant
  - c. Whether the evidence of the prosecution witnesses was marred with inconsistencies and contradictions not safe to convict the appellant

## Analysis

### Whether the charge sheet was defective

22. The test used in determining whether or not a charge sheet is defective was reiterated by the Court of Appeal in *Sigilani vs Republic (2004) 2 KLR, 480* as follows: -

' The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.'

23. The particulars expected in a charge sheet are stipulated in section 134 of the [Criminal Procedure Code](#) which provides;

' 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 such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.'

24. Did the charge sheet fall short of the above provisions? The appellant contends that the charge sheet was defective for the reason that it indicated that the accused person inserted his penis into the complainant's vagina whereas the evidence of the prosecution witnesses was to the effect that the accused person inserted his fingers into the complainant's vagina.

25. The court of appeal in [Peter Ngure Mwangi v Republic \[2014\] eKLR](#) in observing that a charge is defective if it is variance with the evidence adduced in support held as follows;

' A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold, Criminal Pleading, Evidence and Practice (40th Edn), page 52 paragraph 53, this Court stated in *YONGO v R*, [198] eKLR that:



“In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:

- (i) when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,
- (ii) when for such reason it does not accord with the evidence given at the trial.’

26. The question here then is, whether the variance in the charge and the evidence of the prosecution witnesses occasioned a miscarriage of justice to the appellant. When the case commenced, the charges were read out to the appellant who pleaded not guilty. The offence read to the appellant was defilement the appellant was thus well aware that he was facing charges that related to an unlawful sexual act with a child. It is the finding of the court that the appellant was not ambushed in any way with the evidence that he used his fingers and not his penis. This evidence did not prejudice the appellant’s right to a fair trial to conclude that there was a mistrial and/or miscarriage of justice. Guided by the provision of section 382 of the criminal procedure code, this court will not interfere with the decision of the trial court on the ground that the charge sheet was defective. Section 382 provides as follows;

’ Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.’

27. While the court finds that no injustice was occasioned to the Appellant and that the objection ought to have been raised before the trial Court.

### **Whether the offence of sexual assault was proved to the required standard against the appellant**

28. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the [Sexual Offences Act](#) No 3 of 2006 and in the alternative, the offence of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) No 3 of 2006.

29. However, in the judgment of the trial court, the trial court invoked the provision of section 179(2) of the criminal procedure code, CAP 75 Laws of Kenya and convicted the appellant with the offence of sexual assault contrary to section 5 (1) b of the Act.

30. Section 179(2) of the criminal procedure code provides thus;

- (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.’



31. This section was interpreted by the Court of Appeal in the case of *Kalu vs Republic (2010) 1 KLR* where it was observed as follows: -

' With the greatest respect to the learned Judge there was no law which would authorize a judge on appeal to convict a person with an offence with which that person was never charged. All the provisions of the Criminal Procedure Code which are under the heading:-'Convictions for Offences Other than Those Charged' and beginning with Section 179 up to Section 190 deal with situations in which a court is entitled to convict on a minor and cognate offence where a person is charged with a more serious offence. Thus it is permissible to convict a person charged with capital robbery under Section 296(2) of the Penal Code for the offence of simple robbery contrary to Section 296(1) of the Code. It is also permissible to convict a person charged with murder under Section 203 of the Penal Code with manslaughter under Section 202 as read with Section 205 of the Penal Code. That is because the offence of manslaughter, for instance, is minor and cognate to that of murder. But where there is no charge of murder at all, and the only charge available on the record is that of manslaughter, it would be courageous for a trial court to convert that charge into murder simply because the evidence on record proves murder.'

32. It is trite that the law permits a person charged with an offence to be convicted of a minor one where the evidence proves the minor offence. The question then is whether sexual assault is minor to defilement? The comparison between two offences whether minor is measured on the gravity or severity of the punishment imposed by statute.

33. By dint of section 5 (2) and 8 (3) it is no doubt that the offence of sexual assault is minor to defilement hence the invocation of section 179 (2) was appropriate. However, noting that there was an alternative charge of indecent act with a minor that attracts same punishment as sexual assault, it would have been more appropriate to convict on that alternative charge which the court did not advert upon. It is however the finding of the court that no injustice was occasioned.

34. That said, was the offence of sexual assault proved against the appellant? the offence of sexual assault is created by section 5 of the [Sexual Offences Act](#) which provides that:

' (1) Any person who unlawfully:

(a) penetrates the genital organs of another person with—

(i) any part of the body of another or that person; or

(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;

(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.'



35. The essential ingredients of the offence of sexual assault were set out by the Court of Appeal in the case of *John Irungu V Republic [2016] eKLR* as follows:

' ....Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim's genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose.'

36. From the testimony of the complainant, she appeared not to remember much of what happened to her but stated that the Appellant inserted his finger into her vagina. She claims that she got confused and could not remember much. Being the only witness to the incident, it was mandatory that her evidence, even under section 124 *Evidence Act*, be cogent and not create an impression that the Accused could be innocent. In addition to the inconclusive evidence of the minor, there was the evidence that there were other persons nearby who would have witnessed the incident but apparently did not witness or were never called. I have in mind, the person named as Mercy who had told the complainant to wait for the Accused. PW3, the Chief describe the scene of crime as a busy open space and that the accused was not alone at his shop.

37. Those pieces of evidence when taken in totality with the evidence of the defence leaves in the mind of this Court an impression that there could have been another explanation to the injuries detected upon PW1 other than assault by Appellant. Such doubt whenever it surfaces must be resolved to the advantage of the Accused. I therefore do find that the conviction was unsafe.

38. It was also the evidence of the clinical officer that there was penetration of the complainant's vagina and anus and that the object used was a penis. He examined the appellant and found no evidence of lacerations to form the conclusion that the appellant had defiled the complainant. He however noted that he examined the appellant three days after the incident and that there was a possibility to not detect any lacerations. That again creates the reasonable doubt if indeed the complainant was penetrated by the accused.

39. The complainant was not certain on whether the appellant used his finger or not. The clinical officer confirmed that there was penetration into the complainant's vagina and anus by a penis. While these contradictions may not negate the fact that there was penetration into the complainant's private part, there is inconclusive evidence that the penetration was by the Appellant.

40. The appellant contends that he was not properly identified because no identification parade was conducted. An identification parade is only necessary where an assailant is not known to the victim. In this case, the complainant knew the appellant as she was a frequent customer at the appellant's shop. That said, I find that while the accused was properly identified by PW1 the offence of sexual assault was not proved against the appellant beyond reasonable doubt.

**Whether the evidence of the prosecution witnesses was marred with inconsistencies and contradictions not safe to convict the appellant**

41. Not every contradiction warrants the rejection of evidence. This was the holding of the court in *Jackson Mwanzia Musembi v Republic [2017] eKLR* where the court in relying on the case of Uganda Court of Appeal in *Twehangane Alfred v Uganda- Criminal Appeal No 139 of 2001, [2003] UGCA, 6*, held as follows: -

' With regard to contradictions in the prosecution's case the law as set out 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 main substance of the prosecution's case.'

42. The contradictions cited by the appellant not only relate to what the complainant was asked to buy from the shop, but also on when the incident occurred and if the complainant was assaulted by use of a finger or penis. While the court takes judicial notice that when the court records testimonies from witnesses, in most cases, a lot of time will have lapsed from when the incident occurred and therefore witnesses might fail to have a complete recollection of events, inconsistencies and contradictions can only be said to be grave where they raise doubt as to whether the offence ever occurred in the first place and in the manner alleged. Here, I do find that the inconsistencies positively identified are not trivial and the sole evidence of PW1 was not cogent enough to merit the conviction. The witness portrayed prospects of being mistaken and it was thus unsafe to base the conviction on her testimony.

### **Rendition And Final Orders**

43. Accordingly, for the reasons set out above, the appeal succeeds and is allowed. The conviction is quashed and sentence set aside. Let the accused be set free forthwith unless otherwise lawfully held.

**DATED, DELIVERED AND SIGNED AT KAKAMEGA THIS 10<sup>TH</sup> DAY OF MARCH 2023.**

**PATRICK J. O. OTIENO**

**JUDGE**

**In the presence of:**

Mr. Alego for the Appellant

Ms. Chala for the Respondent

Court Assistant: Polycap

