



**AMN v Republic (Criminal Appeal E108 of 2021)
[2023] KEHC 3370 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3370 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL E108 OF 2021
LN MUGAMBI, J
APRIL 20, 2023**

BETWEEN

AMN APPELLANT

AND

REPUBLIC PROSECUTOR

(An appeal from original conviction and sentence dated 14th October, 2021 in Criminal case (S.O) No. 26 of 2019 in Chief Magistrates court at Gatundu by Hon. L.M. WACHIRA- Chief Magistrate.)

JUDGMENT

1. The Appellant AMN 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.
2. The particulars of the offence were that on the 7th day of September 2019 in Gatundu North Sub-county, within Kiambu County, the accused person intentionally and unlawfully did an act which caused penetration with his genital organs namely his penis into genital organs, namely vagina of E.W.M a child aged 16 years.
3. He faced an alternative count of indecent act with a child contrary to Section 11 (1) of the [Sexual Offences Act](#) No. 3 of 2006.
4. The particulars being that on the 7th day of September 2019 in Gatundu North Sub-county, within Kiambu County intentionally and unlawfully touched the vagina of E.W.M a child aged 16 years old with his hands.
5. The Appellant was tried, convicted and sentenced to a term of twenty (20) years imprisonment on the 14.10.21.



6. Aggrieved by the decision of the trial court the appellant filed this appeal in which he raised nine (9) grounds of appeal as follows:
- i. That the trial Magistrate appreciated (sic) a defective charge sheet contrary to Section 134 and 214 (1) of the Criminal Procedure Code.
 - ii. That the trial Magistrate appreciated (sic) unfair trial embracing plea taking process which was flawed as per Article 47 (4); 50 (1) & (2) (b) of 2010 Constitution.
 - iii. That the trial Magistrate appreciated his interpretation of sentence evidence of PW5 contrary to Section 48 of the Evidence Act as she wrongly employed extraneous and far=fetched ideas which were detrimental to the defence.
 - iv. That the trial Magistrate disregarded vital features of the case appreciating scrutiny which was not free from cause and caution hence failure to consider the evidence objectively and dispassionately which gravely violated Section 107 of Evidence Act Cap 80 Laws of Kenya.
 - v. That the trial Magistrate appreciated (sic) a breach of legal burden and standard of proof contrary to Section 111 (2) of the Evidence Act Cap 80 Laws of Kenya.
 - vi. That the trial Magistrate appreciated(sic) failed to note crucial and essential witnesses were not availed for testimony and cross examination contrary to Section 146 of the Evidence Act cap 80 Laws of Kenya.
 - vii. That the trial Magistrate erred in rejecting the defence statement which was plausible, yet the same was remarkably comprehensive in casting considerable doubts to the strength of the Prosecution case and thus failed or fully violated the stipulation in 212 of the Criminal Procedure code cap 75 Laws of Kenya.
 - viii. That the trial Magistrate legally failed by not upholding the sentence provided by the Law.
 - ix. That the trial Magistrate failed to note the bad blood testified of the instant matter by the defence.
7. As the 1st appellate court my duty is to re-evaluate the entire case and arrive at my own conclusions giving allowance for the fact that I did not see or hear the witnesses testify (Pandya Vs. Republic 1957 EA) 336.
8. Briefly are the facts that led to the prosecution of the Appellant as narrated by the Prosecution witnesses.
9. The victim and the appellant were related as a daughter and step- father respectively. The Complainant was sixteen (16) years old at the time the offence was committed. It was her oral evidence and also through the birth certificate that was exhibited in this case (P. exhibit 1) that she was born on 8.7. 2003. The date of the offence was 7.9.2019 but she testified that it occurred firstly at 8.30 a.m. that day and then the appellant repeated the same act on again at around noon.
10. She said she was at home washing clothes. She had a swollen thigh due to a physical beating she had received from her mother the previous day. It was around 8.30 a.m. and her mother had left for the



market where she used to sell arrow roots. The step-dad (the appellant herein) approached her seeking to see the extent of the injury she had sustained from the beating. When she showed him, the appellant pulled her towards the house telling her that he wanted to massage the inflammation. He then placed her on the bed. He then dropped his pair of trousers and started rubbing his penis against her vagina and then had sexual intercourse with her while simultaneously sucking her breasts.

12. When he was done, he ordered her to continue with the washing. He came back later at around noon and repeated the same act.
14. In the evening she informed her mother what the step-father had done to her. The mother confronted the appellant who did not utter a word when she asked him.
15. The mother reported the matter to Kigaa Police Post. The complainant was taken to Gatundu Level 5 hospital for treatment and her P3 form was filled there as well.
16. On cross examination, the Complainant stated that she was aware the appellant was her step-father. She also stated that in the year 2017 and 2018, she ran away from home because the step father was beating her and telling her to leave the home. She denied that she had hatched a scheme with her mother to fabricate the charge against him.
17. The mother H.N. who testified as (PW2) told the trial court that the Complainant was born on 8.7.2003. At the time the offence was committed she was a class eight pupil. She said that on 7.9.19, she had left home at around 7.30 a.m. to go to her business where she was selling arrow roots. In the evening she found her daughter (PW1) in bed complaining of stomach ache. She went to the kitchen and the daughter followed her there. She then informed her that the father had forced her into a sexual intercourse with him.
18. H.N. then went and asked the appellant who just stared at her without uttering a word. She reported the matter at Kigaa police station and they were referred to Gatundu District Hospital for treatment and medical examination.
19. She explained that she got married to the Appellant 13 years ago and her daughter (the complainant) was 4 years old at the time.

Testifying about the relationship between the Appellant and her step-daughter, she testified as follows:

“... the Accused really hates the child and beats her so much. He doesn't like her.... It is accused who chased Elizabeth in 2017 and went to live with my mother (grandmother) she only came back in April this year...”

20. She however dispelled a suggestion that she could be framing the appellant and said she could not since he was her husband.

On why she had beaten her daughter the previous day, she explained that it was because she had found out that the daughter had been given a phone by a boy. She also denied that they had disagreed with the appellant on the sale of a cow and insisted that the issue of selling the cow came up after the incident as appellant wanted to raise money so that he could escape.

21. George Gitahi (PW3) of Kigaa Police Post testified that on 7.9.2019 at about 7.45 p.m a report of defilement against the Appellant was made at the Police Post. In company of the Assistant Chief that night, they went to look for the appellant but they could not trace him. The following day, on 8.9.2019, they received information that the appellant was at a place called Kibichoi where he was selling a cow. They rushed and found him. They then arrested him.



22. The Investigating officer, P.C. Phebe Asiyo (PW4) produced the complainant's birth certificate (P. exhibit-1). She testified about the recording of statements, the issuance of P.3 forms as the steps she took in piecing together the case before charging the appellant with the offence.
23. Dr. Wambui Kimari (PW5) of Gatundu level 5 hospital produced the P3 form on behalf of Dr. Murithi who had left for study leave. She had worked with him for a month and was conversant with his handwriting.
24. In her testimony, she testified as follows:
- “Patient was E.W.M 16 years from Kigaa. She had been defiled by her father (step). The father had been defiling her from age 4. She had been coerced. On the said date the father defiled her six (6) times. She was locked in the bed-room and released later to go do chores. HIV status was not known. She was a virgin and there was violence... the doctor noted she was at fertile period. The patient was in fair general condition. Sexual assault was confirmed. Urinalysis and HIV was done. Pregnancy and HIV were tested. Her clothing was stained and hymen was not intact, meaning penetration had occurred.
25. She then went ahead and produced the treatment card as P. exhibit-2 and P3 form as P. exhibit- 4. On cross examination, she testified that patient was seen on the same date by Dr. Omondi and that it was her first time to have sexual intercourse.
26. I was able to read through the medical history captured in the treatment card- P. exhibit 5 from which PW5-Dr. Wambui Kimari was retrieving the information she was introducing in evidence before the trial court. I decided to set it out verbatim because it is legible. This is what the treatment details in regard to the medical history.
- “P/C: raped by father today.
- [P]: The patient was coerced by the father (step father since 4 years) while the mother was away at work at 8.00 a.m. in the morning and lured and threatened and sexually assaulted her virginally (sic) 6 times throughout the day. She was meanwhile locked in the father's bedroom while she was forced to go about the chores in the home as usual and released at noon.
- She reports she didn't shower but the soiled clothes are still at home. There is no prior episode of sexual assault or sexual harassment. The HIV status of perpetrator is unknown. The Patient was a virgin. There is a history of domestic violence in the home and a history of drug abuse. Underlying motive suspected as forceful marriage and discontinue the girl's education. They were unable to find the man after discovery of assault.
- L.M.P 27.8.2019. 4/25 within fertile window currently. The man was just about the home doing chores as if nothing happened. Only left after the mother/ reacted in anger after the daughter revealed what had happened. Have already reported to the police and headmen.”
27. According to the P3 form that was filled later (P. exhibit-4) the complainant was treated with antibiotics, emergency contraceptives and analgesics. The finding of the examination was that the hymen was not intact, which meant that penetration had occurred.



28. The Appellant gave a sworn statement in which he briefly stated as follows:

“I did not do it as I was not there. Since 2017 we had disagreed with the girl and she took off.”

On cross examination by the Prosecutor he conceded that the girl took off in 2017 but she had come back in 2019, he said.

“Yes, the date of alleged offence she was at home.”

29. Asked what the source of disagreement with her was, he answered:

“She had bad manners playing with the boys.”

He said he had issues with her mother hence the reason they had teamed up to frame him. He stated:

“... I had issues with her mother. She would take off and she declined that I sell the cow”.

30. Both the Appellant and the Prosecution filed written submissions in support of their rival positions. However, rather than set them out separately, I will consider the submissions simultaneously as I make my findings on various issues that were raised by both sides in this appeal.

31. The Appellant submitted that there were various legal flaws in this case beginning with the charge sheet which he termed defective in ground one of his appeal. He pointed out that the inclusion of alternate charge of indecent assault was improper as the section of the law under which the charge is anchored does not provide that an alternative charge can be framed alongside that charge.

31. The Prosecution did not respond to this particular submission raising a point of law. The appellant was charged with the main charge of defilement, in the alternative indecent assault.

Was there anything legally wrong in framing the charges that way? I think not for the following reasons.

32. A charge of indecent assault and that of defilement are closely related and share similar elements to a large degree save that the offence of defilement has more elements that require proving compared to that of indecent assault. In other words, if it was to be compared to a destination where someone is travelling from one direction, one would reach the destination that is called indecent assault and cover a few more kilometres to reach the destination called defilement along the same highway, same speed. The two offences thus belong to the same category or species but defilement is the greater offence since it has more elements to prove than indecent assault which is therefore the lesser offence and has fewer elements.

33. In that case, it is proper to charge the two offences, not as separate independent counts but as alternative counts to each other as defilement is an ‘included offence’ of defilement. It cannot stand alone as an independent count with defilement in the same charge sheet.

Black’s Law dictionary defines what constitutes an alternative charge as follows”

“An ancillary count in an indictment information or presentment stated to be distinct from, and usually less serious than, the immediately preceding count, in such a way that the jury, if not satisfied that the defendant is guilty of preceding count, may acquit on that count but find the Defendant guilty of the second one.”



34. I thus find no merit in the submissions by the Appellant that the charge was defective for including indecent assault charge as an alternative count to the charge of defilement. It did not violate any of the rules of framing of charges. Also, the Appellant did not demonstrate that he suffered any prejudice as a result.
35. The Appellant also pointed out that the charge sheet did not comply with rule 137 (7) of the Criminal Procedure Code since it did not indicate the specific time the offence was committed.
36. It is apparent indeed that the charge sheet did not indicate the time of the offence was committed as submitted by the Appellant. However, this should be considered together with Section 134 of the Criminal Procedure Code which also provides:

“every charge or information shall contain and shall be sufficient if it contains a statement of the offence or offences as may be necessary for giving reasonable information as to the nature of offence charged...”
37. Other than the complaint about the omission to state the time, the charge against the Appellant had every other relevant information to sufficiently inform the appellant about the nature of the offence he was facing.
38. It is thus my considered view that the omission to state the time was not fatal, in any case, the specific timings when the offence was committed was clearly stated in the testimony of PW1. She testified that the Appellant first approached and defiled her at around 8.30 a.m. and thereafter repeated that same act at around noon the same day.
39. Submitting once more on the issue of time, the Appellant contended that the evidence of Investigating Officer, who is a crucial witness in the case was different from that of the Complainant as to the exact time the offence was committed.
40. It is my considered view of this court that the Complainant was the only eye witness of this crime. The Complainant was treated at Gatundu level 5 hospital that very day (Sept 7, 2019) and her medical history is consistent in regard to the the time she said the offence occurred (treatment card P. exhibit- 2).
41. The Investigating Officer was not at the scene of the offence when it was committed. He only relied on a report. Her evidence may thus not discredit the direct evidence of a witness whose testimony is also consistent with the medical history she provided when she sought treatment for the said sexual assault.
42. The Appellant also took issue with the medical history in which he contended that it had been indicated the by the Dr. Wambui Kimani (PW 5) that the Appellant had been defiling her from age 4 yet the same witness who produced the P3 form averred that she was a virgin, which made the said P.3 form self-contradictory.
43. I have carefully examined the evidence of Dr. Wambui Kimari (PW 5) who produced the P3 form (P exhibit .4) on behalf of Dr. Muriithi (who had filled the P3 form) but was on study leave at the time.
44. It was clear to me Dr. Wambui Kimari (PW 5) who testified on behalf of her colleagues misled the court by misrepresenting/mis-reading a portion part of medical history hence the confusion that seems to reign but in reality, reading the medical history as captured in the treatment card (P. exhibit 2) the alleged confusion/self-contradiction does not exist at all.



45. According to the medical history, the doctor who examined the complainant clearly recorded as follows:
- “The patient was coerced by the father (step father since 4 years) while the mother was away at work at 8.00 a.m.”
46. From the above reading of the history as per the medical card (PExh. 2) the doctor does not say the ‘Appellant had been defiling the complainant since she was four (4) years’ as doctor who testified on behalf of her colleague appeared to interpret that statement to the trial court.
47. It is obvious the part which is bracketed says (step father since 4 years). It shows the doctor was capturing the fact that the perpetrator was her step father since she was 4 years old; not that he had been defiling her since 4 years as Dr. Wambui Kimari (PW4) who produced the P3 on behalf of Dr. Muriithi misinterpreted her that portion of the medical history causing confusion. Luckily, the medical treatment card is not written in medical jargon but in plain English language which I could read and understand.
48. There is thus no merit in the submission that the medical history indicated the Complainant was a virgin and at the same time, it expressed that she had been defiled since she was four years old. The submission was orally meant to take advantage of distortion of plain English words by a witness which is not what the author of that document had meant them to be.
49. The Appellant further contended that he was denied legal representation during the trial.
50. The record does not show if the Appellant ever sought time to engage counsel during the trial and was denied.
51. The Appellant in his submissions referred to decisions of the High Court where it was held that failure to inform the Accused of his rights to legal representation under Article 50 (g) by the trial court vitiates the entire court proceedings (see High court of Kenya at Nairobi – Constitution Petition no. E385 of 2020 – Shema Litaam Vs. Shadrack Wambui – Vs Office of chief Justice & others [2021] eKLR.
52. This was a persuasive decision as it is a decision from a Court of coordinate jurisdiction. With all due respect, I do hold a contrary opinion. My view is whoever is complaining must go a step further and demonstrate that failure to inform him caused him prejudice. The unfairness or prejudice must be demonstrated or be evident from the reading of the court record itself.
53. My reading of the trial court record convinces me that the Appellant was not prejudiced by the failure of the trial court to inform him about his right to legal representation.
54. I say to because he conducted an extensive cross examination of each and every witness and in a manner that shows he was focused on eliciting key issues relevant to to his defence case.
56. On whether he was entitled to legal representation at State expense due to the nature and complexity of the charges against him, it is now settled law that the right is not an absolute right and that Section 40 of the [Legal Aid Act](#) provides that for the manner in which the person who requires legal aid should apply, it is upon application to the relevant agency that such application can be considered, and be granted or denied; it is thus not automatic.
- (See Criminal Appeal Application No. 2 of 2014 between Thomas Mugha vs. Republic) [2016’ Eklr.
57. The remaining issue is whether the charge of defilement against the Appellant was proved.



To prove defilement the State submitted, and correctly so, that three key instruments must be established:

- i. Age
- ii. Genital Penetration
- iii. Identification of the perpetrator

58. The age of the Complainant was established by the evidence of the Complainant herself, her mother and the certificate of birth (P. exhibit 1). There was unanimity in the evidence that that she was born on 8.7.2003 as per birth certificate. The date of the offence was on 7.9.2019. She was thus 16 years and two months old at the time of the commission of the offence and was thus within the age bracket of the sexual offence that the Appellant was charged with.

59. Was genital penetration proved?

The evidence of the complainant was that she was penetrated sexually. Medical evidence presented through the medical card and the P.3 form (P. exhibit-3 & P. exhibit-4) confirmed that there was sexual penetration as demonstrated by absence of the hymen and the medical history.

60. I find thus agree with the findings of the trial court that sexual penetration of the complainant was proved beyond reasonable doubt.

61. Finally, is the question if the appellant was the perpetrator or not?

The Complainant (PW 1) testified that it was her step father (the appellant) who sexually penetrated her by. She described in minute detail how it all happened and that he did so twice that day, in the morning and again at noon.

62. She promptly reported him to her mother (PW2) when she came back home from the market in the evening. The mother confronted her husband who said nothing about the matter. He remained mute.

63. The mother thus reported the incident to the police where immediate action was taken by police and Assistant Chief that night but he could not be found. He was arrested the following day as he sold the family cow which PW 2 said was an attempt to raise money to flee.

64. Appellant denied that he sexually assaulted her step-daughter and insisted his evidence in chief and cross examination of the witnesses the mother and her daughter harboured a grudge against him which had motivated them to frame him up with these charges.

65. Certainly, it is evident there was some degree of bad blood between the father and step-daughter which was confirmed by the wife (PW2). The wife said the appellant was beating the daughter a lot and at one time, he even chased her away from home. On the flip-side also, the history of being beaten horribly by the appellant could also be the reason the daughter felt threatened and easily submitted to the sexual intercourse twice the same day from the appellant.

Further, even if there was tinge of bitterness because the step-dad used to beat her often, the fact that she was defiled was corroborated by medical evidence and she was clear on who defiled her.

67. She said the defiler was her step-dad who defiled her in broad-daylight inside the family house. She patiently waited for her mother to come from work and promptly reported him. She was scrupulous with every detail as she described how it all happened.



68. The defence by the appellant that he was framed does was properly rejected by the trial court. The complainant gave credible evidence. Her conduct in reporting the matter promptly to her mother is illustrative of great distress that this incident had on her.
69. This conviction was safe. The sentence imposed by the trial court was appropriate and I find no reason to disturb the same.

I uphold both conviction and sentence.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 20TH DAY OF APRIL, 2023.

L.N MUGAMBI

JUDGE

In Presence of:=

Coram- (ON-LINE)

Before L.N. Mugambi Judge

Court Assistant- Alice

Appellant-

Respondent-

Appellant Advocate-

Respondent Advocate-

Ruling delivered digitally to be transmitted by the Deputy Registrar to the Parties Advocates on record through their respective email addresses.

L.N. MUGAMBI

JUDGE

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