



REPUBLIC OF KENYA



**Kathure v Republic (Criminal Appeal 70 of 2017)
[2023] KEHC 3020 (KLR) (3 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3020 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL APPEAL 70 OF 2017
RM MWONGO, J
APRIL 3, 2023**

BETWEEN

MICHAEL NDWIGA KATHURE APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against Conviction and Sentence on 18th January
2017 of Hon. Andayi W.F - CM in Kerugoya S.O No 18 of 2014)*

JUDGMENT

Background

1. The Appellant was charged with defilement and in the alternative with committing an indecent act with a child. He was convicted for the main charge of defilement, and sentenced to twenty (20) years imprisonment. In rendering sentence, the trial magistrate indicated that the accused was guilty of “defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act*, 2006 (SOA). This incongruity is a central part of the dispute in the appeal filed by the appellant
2. The charge sheet itself stated that he had been charged with defilement Contrary to Section 8 (1) as read with Section 8(3) of the *Sexual Offences Act*. The particulars of the offence are that the appellant between 4th and 6th January 2015, at [Particulars Withheld] Village Kirinyaga County, unlawfully and intentionally caused his penis to penetrate the vagina of JWM a girl aged 14 years.
4. In his appeal, the appellant impugns the trial court’s judgment as erroneous on twenty grounds which are summarised as follows:
 1. That the trial court erred is not finding the charge sheet to be defective.
 2. That the trial court failed to consider that there was no Section 8(4) and 8(3) on the *Sexual Offence Act*.



3. That the motor bike rider who carried the complainant was not called to testify and corroborate the complainant's evidence.
4. That the P3 form was not produced nor was the examining clinical officer called.
5. The date of the complainant's injuries was not verified and noted to the "within days".
6. That penetration was not proved.
7. That the sentence meted was harsh and excessive.
8. That the prosecution evidence was full of contradictions.
9. That the Appellant's defence was not considered.
- 10 That the offence was not proved beyond reasonable doubt.

The Duty of this Court

5. The duty of this court as a first appellate court is to consider all the evidence on record, re-evaluate and weigh it, and come to its own conclusions bearing in mind that it neither saw nor heard the witnesses itself make due allowance in this respect See: *Okeno v R* (1973) EA 32, *Pardya v R* (1957) EA 336; *Ruwalle v R* (1957) EA 570).
6. The law on defilement is now settled in the authorities. In order to sustain a conviction in a defilement charge, the following elements must be proved beyond reasonable doubt:
 - a) Whether there was penetration of the complainant's genitalia.
 - b) Whether the complainant is a child and if no, of what age.
 - c) The identity of the offender, that is whether the penetration was done by the appellant.

The facts and submissions by the parties

7. The complainant testified on oath as PW1. She said that she was 15 years old; On 4th January 2015, she said, as she was on her way to church, the appellant and a motor bike rider offered her a lift. She wanted to visit her aunt's house. She knew the appellant from seeing him in the tea centres, but not the motor bike rider.
8. After she boarded, the motor bike passed her aunt's house despite her pleas to them to stop, and they rode on to the appellant's house. She disembarked the rider rode away, and she was left with the appellant. The appellant took her into his house, and twice asked her to remove her clothes. She declined. He grabbed her and forced her onto his bed, removed her trouser, pants pullover and T-shirt.
9. The appellant then removed his clothes and inserted his penis into her vagina, despite her protests. He then told her she would spend the night there and wait till his mother came. She agreed to stay there as she had no fare to travel back home.
10. The following day 5th January, 2015 the appellant's mother told her to go back home. She, the mother, gave the appellant money to get a motor bike. She took the money from him and went back home on 5th January, although she said, she recalls she slept two nights at the appellant's home. The appellant took her with him.
11. PW1 also said that on 5th January the appellant opened his house and let her go to his mother's house. That night when the appellant came back, he told her to remove her clothes but she declined. She was



in her mother's house. He forcibly removed her clothes, then removed his penis and inserted it into her vagina. She said he had his clothes on but later removed them. She did not allow him to do the act but he slept on her.

12. On 6th January 2015, the appellant's mother told him that she, PW1 had to go back home and gave him money for the motor bike. On reaching home, she found her mother there, and they went and recorded a statement with the police. Thereafter she was taken to Kerugoya General Hospital and examined.
13. In cross-examination PW1 said that she decided to go to her aunt's place because the appellant had said he and the motor bike rider were going to go through "Kimunye route". She said that when they got to the Appellant's house at about midday, she entered his house because she was tired. She entered the bedroom, by- passing the sitting room, as the appellant told her to go there.
14. Asked why she did not scream when she was being defiled, she said the appellant had threatened her, and that she had heard that people in Kimunye area are strangled.
15. PW2, the complainant's mother testified she had left for church and left PW1 taking a bath. She did not see PW1 at church, nor when she returned home at lunch. When she asked her other daughter where the complainant was, she said she did not know.
16. By 8.00 pm the complainant had not come back home, and PW2 called her aunt, Purity, who said she had not seen her. The complainant did not come back that night, nor the next day. Her father went to report to the police.
17. On Tuesday 6th January at about midday, the complainant came back home. She declined to say where she had been. Eventually, she revealed that she was carried on a motor bike to Kimunye area. This was after she was beaten by her father.
PW2 said that her daughter was born on 19.5.2000 and identified her birth certificate as MFI - 3.
18. PW3 AMN, JWM's father, testified that on 4.1.2015 her daughter went to church but did not come back straight home. He thought she was with her school friends. She failed to come home on Monday, and on Tuesday PW3 reported at Kerugoya Police Station that she was missing. As he returned from the police station, his wife called him and told him JWM was back.
19. When she got home, JWM did not want to talk. PW3 threatened to beat her. So, she opened up and said she went to her friend's house to get her to attend church with her. On her way, a motor cycle with a passenger stopped, and asked her where she was going. When she told them, they said they could give her a lift to her aunt's home in Kimunye.
20. She got on to the motor bike as she recognised the passenger as a man who delivered tea at a nearby tea buying centre. The motor bike passed her aunt's place and on to the passenger's home. She said the man locked her in his house till evening. She said she did not scream because she had been threatened.
21. PW3 later went with JWM who showed him where her assailant lived. She pointed out the house from a car. Later, PW3 went back to the police station and took them to Kimunye Factory where the accused worked. He was arrested.
22. In cross-examination, PW3 confirmed that he took JWM to hospital on 6th January 2015 but she was not examined due to the long queue. He took her back again on 7th January, 2015 and she was examined. He said he was issued with P3 forms at the police station.
23. Corporal Betty Chelagat of Kerugoya Police Station testified as PW4. She stated that on 6.1.2015 she was at the station when PW3 reported there with his daughter, complaining of defilement.



24. The report was minuted to her for investigation. She recorded the father's statement and established JWM was aged 14. She interviewed JWM who told her that on 4.1.2015 she was headed to church when she met the accused on a boda boda. He insisted she accompany him to his house and she did not decline. She spent two days at his house, and was released on 8.1.2015.
25. According to PW4, JWM said that she had visited her aunt. She issued the father with a P3 form which was then completed by a doctor. Later, PW4 proceeded to the accused's house, arrested him and charged him with the offence, after hearing from the complainant that the accused had had intercourse with her. This was confirmed by the P3 form. PW4 also produced JWM's birth certificate as PExb 3.
26. In cross-examination PW4 stated that JWM's father first made a police report on 6.1.2015 about the missing child. This was at about 10.45 am. At about 4.00 pm he came again with JWM and made the report about defilement. She also said the complainant had changed her clothes, but had not gone to hospital.
27. When recalled for further cross-examination, PW4 stated that she was the Investigating Officer, that she was the one who issued the P3 form and produced JWM's birth certificate as PExb 3. It is clear however from the record of proceedings that there was another officer who was the investigating officer but who could not attend to give evidence due to an emergency the officer had.
28. PW5 Hezron Macharia, was a clinical officer of thirteen years' experience from Kerugoya County Hospital, testified on behalf of his colleague Ethan Maina Mbugi who examined JWM. He said he knew Mbugi's handwriting and signature. He testified without objection by the defence.
29. PW5 stated that, on examination, JWM clothes were neither blood stained nor soiled. On physical examination, she did not show signs of any injury. On examination of her genitalia, she had bruise wounds at the entry point of her sexual organ on the labia minora and labia majora. The hymen was also broken. She had a whitish discharge which was not foul smelling.
30. On laboratory examination, non-motile spermatozoa were noted, a test for HIV and syphilis were negative. Urine analysis revealed nothing abnormal. The age of the injuries was state as consistent with "days". The patient was estimated to be aged 14 years. The witness produced the P3 form as Exb 2, outpatient card as PExb 1 B and Lab examination Report and prescription as PExb 1 A.
31. In cross-examination, it was clear that JWM was examined on 7.1.2015 although she had also reported on 6.1.2015. There was no indication that she had changed her clothes. Further, there was no specific indication of how old her injuries were.
32. In his defence, the accused gave sworn testimony. He said that on 4.1.2015 he was at home doing laundry at about 3.00 pm. He denied picking JWM on a motor bike. He said she was unknown to him, and that he came to know JWM's father on 5.1.2015 when he was picking his tea and the father threatened him. On 5.1.2015 he went to work at Kimunye Factory. He did not see the complainant that day. He worked till 3.00 am but he met the complainant's father.
33. On 6.1.2016 at 7.30 a.m. he reported to work and left at 3.00 a.m. as they went to many to buying centres collecting tea leaves. He said he is not aware of the offence. He further stated that it was after he told JWM's father that his tea leaves were poor quality that the allegations facing him were launched.
34. In cross-examination, the accused said he washed his clothes from 8.00 am to 3.00 pm on 4.1.2016. On 5.1.2015 he reported to work. He said he did not know the complainant's father but had seen him at the tea buying centre; that he inspected his tea leaves and found them to be of poor quality. On that day he left work at 3.00 am. He swore he did not board a motor bike on 4.1.2015.



35. Juliana Wanjiru, the accused's mother, testified on the accused's behalf as DW2. She stated that on 4.1.2015 she went to church in the morning and returned at 10.00 am. She stayed home the whole day. Her house is next to the accused's house - about 3 metres away.
36. She said that on 4.1.2015 the accused did some laundry, and she did not see him with a visitor. The following day, he went to Kimunye Factory and the day after that too. He normally left at about 7.30 a.m. She said she did not know Joan (JWM's aunt) or JWM's parents.
37. In cross-examination, DW2 stated that she often went to the accused's house to cook for him; or he would come to her house to eat. On 4.1.2015 he did not come with the complainant. She arrived from church at about 10.00 am and the accused was washing clothes. He did so upto 1.00 pm. The accused did not go anywhere that day. She denied giving the complainant any fare to go back home.

Analysis and Determination

38. For the prosecution to succeed in a case of defilement, it must prove:
 - That the victim's genitals were partially or wholly penetrated;
 - That the penetrator who did the act was the accused; and
 - That age of the victim is as per the charge sheet.
39. Starting with the age, it is clear from the birth certificate of JWM that she was born on 19.5.2000. Thus, she was 15 years, and 8 months old at the time of the alleged incident. This is not a contentious point.
40. The next issue is whether JWM was partially or wholly penetrated in terms of Section 8 (1) and 8 (3) of the *Sexual Offences Act*. Those provision are as follows:
 - “(1) A person who commits an act which causes penetration with a child is guilty of a offence termed defilement

 - “(3) A person who commits an offence of defilement with a child between the age of twelve and fourteen years is liable of conviction to a term of Imprisonment not less than fourteen years”.

41 “Penetration” is defined in Section 2 of the Sexual Offence Act as:

“The partial or complete insertion of the genital organs of a person into the genital organs of another person”
42. There is no doubt that JWN was penetrated. The evidence of PW5 Hezron Mwangi the clinical officer, on behalf of his colleague Ethan Maina Mbugi who examined JWM on 7.1.2015, is clear. JWN had bruises on her labia minora and labia majora; she had a broken hymen, and the laboratory examination disclosed non -motile spermatozoa found in JWM's vagina. Thus, there can be no doubt that the offence of defilement was committed against JWM.
43. The only question is: who was the perpetrator?
44. JWM's story was that she was carried on a motor bike and taken to the appellant's home on 4.1.2015, against her wish. She was there from 4.1.2015 to 6.1.2015, when she was released by the appellant after he had sexual intercourse with her over a period of two days.



45. The appellant's story is that on 4.1.2015 he was at home washing clothes. His mother who lives next to him, corroborated his evidence. According to him, on 5.1.2015 and 6.1.2015 he went to work at Kimunye Factory at 7.00 a.m. and returned on both days at 3.00 a.m. He said the never saw JWM and does not know her. He confirmed he knew her father from an incident where he rejected his tea at a tea collection centre due to bad quality.
46. Thus, the only real question is whether the evidence of JWM is credible.
47. JWM gave sworn testimony. However, no *voir dire* examination was conducted as is usual for children in terms of Section 19 of the [Oaths and Statutory Declarations Act](#). That provision requires that the evidence of a "child of tender years" be taken via *voir dire* examination first. Nevertheless, a child of tender years has long been held to be a child aged under fourteen years. This was so held in *Kibangeny Arap Kolil v R* (1959) EA 82 and also in [Patrick Kathurima v R](#) Criminal Appeal No. 131/2014 Court of Appeal.
48. In this case, failure to conduct a *voir dire* is not fatal as JWM was found to be aged 15 years and 8 months.
49. The testimony of JWM was consistent except with regard to the following: In evidence in chief (ROA page 6 line 23) she said the accused's:
- "Mother gave him money to get a motor bike to take me home. I took money and went back home on 5th.
- This cannot be correct.
50. However, she also said she recalled that she slept at the accused's house for two days, having arrived there on 4.1.2015. That would mean she left on 6.1.2015. That she slept at the accused's house on 5th appears to be the consistent story both in her evidence in chief and also in her testimony on cross-examination. She gave fairly graphic details of how the accused removed her trousers, pants, pullover and T-shirt before inserting his genital in her vagina. The trial magistrate noted that she explicitly mentioned the genital organs.
51. JWM also testified that on 5.1.2015 when the accused came back from work at night, he again forced her to remove her clothes.
- "He removed his penis and inserted in my vagina; he had his clothes on but he removed them after removing mine. I did not allow him to do the act. He slept on me."
52. In cross-examination her evidence held fast. She said she was afraid to make noise because she had heard that that area (Kimunye) was not good as people get strangled. She described the house, and said that the accused had told her to go out through the mother's kitchen, corroborating the evidence of DW2 that the mother's house was very near to the accused's. I have no reason to doubt her evidence.
53. The complaint by the accused that the trial magistrate convicted him under Section 8(1) as read with Section 8(2) so it is justified. However, this is an error correctable under the slip rule as the charge sheet clearly indicated the offence to be under Section 8(1) and the penalty under Section 8(2). The charge sheet was itself not defective, so the accused suffered no prejudice.
54. The failure to call the motor bike rider is not fundamental to the case. I agree with the prosecution that the rider's only role was to drop the accused and JWM.



55. Finally, the accused complained that the date (or age) of the injuries found by the medical examiner was not indicated. I have perused the P3 form carefully. In Section B of Part II of the form at paragraph 2, the printed question is as follows:

“2 Approximate age of injury (hours, days, weeks.....”.

The medical officer opted for the option “days”, and indicated as much. There is not inconsistency or error in the evidence on this aspect.

56. As for the sentence, the accused was sentenced twenty years imprisonment. He says this is harsh and unwarranted. Section 8(3) of the *Sexual Offences Act* requires that on conviction for defilement of a child of 15 years, the penalty is imprisonment for a term of not less than twenty years. Accordingly, the sentence meted by the trial magistrate was lawful.

Conclusion

57. All in all, having critically assessed and evaluated the prosecution and defence evidence, I see no basis for interfering with the trial court’s conclusions.

58. Accordingly, the appeal is hereby dismissed in its entirety. The conviction and sentence are hereby upheld.

DATED AT KERUGOYA THIS 3RD DAY OF APRIL, 2023

.....

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Doris Soiyen holding brief for Mamba for state
2. Court Assistant, Murage
3. Accused: Present in Person.

