



**Kinyanjui v Republic (Criminal Appeal 73 of 2019)
[2023] KEHC 2940 (KLR) (4 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 2940 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL 73 OF 2019**

AC MRIMA, J

APRIL 4, 2023

BETWEEN

THOMAS KARIUKI KINYANJUI APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal arising out of the conviction and sentence of Hon P K Mutai
(Senior Resident Magistrate) in Kitale Chief Magistrate's Court
Criminal Case (S O) No 178 of 2018 delivered on 5th July 2019)*

JUDGMENT

Introduction:

1. The Appellant herein, Thomas Kariuki Kinyanjui, was charged with the offence of Defilement contrary to Section 8(1) as read with Section 8 (3) of the *Sexual Offences Act*. The particulars of the offence were that on October 8, 2018 at [Particulars Withheld] village within Trans-Nzoia County, the Appellant intentionally caused his penis to penetrate into the vagina of LW, a child aged 14½ years old.
2. The Appellant was alternatively charged with committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on the same day and in same place, the Appellant intentionally caused his penis to touch into the vagina of LW, a child aged 14½ years old.
3. When the Appellant was arraigned before the trial Court to answer to the charges, he pleaded not guilty to both. After a full trial, the Appellant was convicted on the main charge of defilement and sentenced to serve 10 years imprisonment.



The Appeal:

4. Dissatisfied with the findings of the trial Court, the Appellant filed the present appeal. He filed Grounds of Appeal and a Further Amended Grounds of Appeal as well as written submissions. The submissions were filed by Messrs Bikundo & Company Advocates who appeared for the Appellant in the appeal.
5. He observed that the trial Court convicted him on inconclusive, contradictory, scanty and falsified evidence. He accused the Court of failing to consider that he was framed. He was not convinced that the prosecution had discharged its burden of proof being beyond reasonable doubt. He further lamented that the charge sheet was defective and thus he should not have been condemned to trial.
6. He also urged that Article 25(c), 49 and 50 of the *Constitution* had been violated. In the premises, therefore, the Appellant urged the Court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.
7. During the hearing of the appeal, parties relied on their written submissions.
8. The Appellant submitted that Article 49 of the *Constitution* was violated because the arresting officers did not testify at all as to shed light on the circumstances that led to his arrest. In his view, they were crucial witnesses; the absence of their testimony rendering the conviction unsafe.
9. He challenged the wordings embedded in the Charge Sheet for omitting the word ‘unlawful’. The particulars of the offence were thus inconclusive rendering the charge sheet defective. He submitted that during cross-examination of PW1, he raised the issue of being framed. That ground of appeal was, therefore, not an afterthought.
10. The Appellant then addressed the Court as to whether the ingredients to a charge of defilement had been proved to the required standard. Firstly, on penetration, the Appellant submitted that the evidence advanced could not sustain the charges preferred.
11. On the identification of the perpetrator, the Appellant submitted that it could not be achieved as the offence took place in the dark hours of the night. He warned that there was a danger in relying on the testimonies of the witnesses since they were all related.
12. Lastly on age of the Complainant, the Appellant submitted that the lack of documentary evidence did not ascertain the Complainant’s age.
13. The appeal was opposed by the prosecution. Learned Counsel for the State submitted that all the ingredients to a charge of defilement had been established to the required standard.
14. Counsel dismissed allegations that Article 49 of the *Constitution* had been violated as an afterthought. She also termed the allegation that the evidence tendered being effectuated upon malice as an afterthought since he did not raise those issues at trial.
15. The State prayed that the conviction be upheld and the sentence be affirmed.

Analysis:

16. This being a first appeal, it’s the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See *Okono vs Republic* [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in *Ajode v Republic* [2004] KLR 81.



17. Having carefully perused the record, this Court is now called upon to determine whether the offences of defilement or Committing indecent act with a child were committed, and if so, whether by the Appellants.
18. For the prosecution to establish the charge of defilement, it must establish the following crucial ingredients: -
 - a. Age of the Complainant;
 - b. Penetration and;
 - c. Identification of the perpetrator.
19. Before this Court ascertains whether the above ingredients were proved, first the facts of the case.
20. According to the fact sheet, the Complainant (L W who testified as PW1) was a Form 1 student at [Particulars Withheld] Secondary School. She Went to a nearby shop on October 08, 2018 at 7:00 p.m. and on her way home, she met the Appellant, her neighbour. The Complainant and Appellant retreated to an avocado tree. The Appellant then removed his clothes and lay her down. He placed a condom on his penis and then sexually assaulted her. It wasn't their first time.
21. The Appellant and the Complainant were caught red handed in the act by the Complainant's brother JG, PW2. The Appellant fled the scene. This led PW2 to raise an alarm. PW2 had already recognized the Appellant whom he knew very well with the aid of a torch light. The Appellant would later be nabbed by the Complainant's brother called S.
22. PW3, James Ndung'u's testimony was that on that night, he was going to assist his brother David when he heard PW2's alarm. On his way, he managed to arrest the Appellant. PW3 was in the company of one Isaac Ngugi (did not testify). He alerted the Complainant's mother one AM, PW4, after the Appellant had been taken in police custody.
23. PW2 called PW4 and informed her what had transpired. PW4 took the Complainant to Kitale District Hospital on January 09, 2018 where she was examined by PW5 one John Koima, a Clinician. PW5 observed that her hymen was torn and old looking. PW1 had suffered injuries on her labia. He identified pus cells in her urine. He filled the P3 form (Prosecution Exhibit 1) concluding that there was evidence of penetration.
24. PW5 further produced the Appellant's treatment notes from Kitale District Hospital and Masho Medical Centre as exhibits.
25. The Appellant and Complainant were taken to Bahati Police Post and later to Kipsaina Police Station. The Complainant was received by PW6, P C John Mwembe.
26. The Appellant was escorted to the said Police Station by the Anti-Stock Theft Unit personnel. PW6 conducted investigations, recorded witness statements, gathered evidence and charged the Appellant with the present offence. He also produced the Birth Certificate as Prosecution Exhibit 3.
27. After close of the prosecution's case, the trial Court found that the Appellant had a case to answer and was placed on his defence.
28. The Appellant raised an alibi. His unsworn testimony advanced that he had been framed. He stated that he was the Treasurer of a youth group in which the Complainant's mother was a member. She had requested for a loan. On his way to take the said funds to the Complainant's mother, the Appellant was accosted and robbed. He was subsequently arrested. The Complainant's mother and officers rescued



him. The Complainant bribed officers stating that her sister came with the police. He stated that since the witnesses came from the same family, he must have been framed. He denied committing the offence.

29. With the foregoing factual case, the question which must be answered is whether the prosecution discharged its burden of proof to the required standard? A look at the ingredients of the offence of defilement now follows.

Age of the Complainant:

30. The prosecution relied on the Birth Certificate in proof of age. It disclosed that the Complainant was born on November 20, 2004, which when computed ascertained her age at the time of the offence to be just short of 14 years old.
31. This Court, therefore, finds and hold that the Complainant was a child within the meaning ascribed to the term under Section 2 of the Children's Act.

Penetration:

32. The evidence of penetration was by two witnesses, PW1 and PW5. It was PW5 who examined PW1 and observed that her hymen was torn and old looking. He also noted that PW1 suffered injuries on her labia. He identified the presence of pus cells in her urine.
33. PW1 testified that she had sexual intercourse with the Appellant. She described how the Appellant's penis was inserted into her vagina.
34. The combined evidence of PW1 and PW5 leaves no doubt that indeed a penis was inserted into PW1's vagina. That is proof of penetration.

Identity of the perpetrator:

35. Had the Appellant been positively identified as the perpetrator? The evidence on the identity of the assailant was led by PW1, PW2 and PW3.
36. There is no doubt that the three witnesses knew the Appellant well. None was mistaken on the identity of the Appellant. PW1's evidence was duly corroborated by PW2 and PW3.
37. The Appellant tendered his unsworn defence. This Court has, on numerous occasions, rendered the position that unsworn testimony has extremely low probative value, if any. The reason is that the other party is not accorded an opportunity to test that evidence on cross-examination and as provided for in the Evidence Act.
38. Be that as it may, the alibi was not established. Further, the issue as to the Appellant being fixed by the witnesses who were family members, was not also established. In sum, the defence was a sham, an afterthought and aided the Appellant not.
39. The totality of the evidence, therefore, placed the Appellant at the scene as the perpetrator. He was positively identified as such. The prosecution's evidence was, therefore, not inconclusive, contradictory, scanty or falsified as alleged by the Appellant.

Other issues:

40. The Appellant also raised other issues worth consideration. There was the issue as to whether the Charge sheet was defective for not bearing the word 'unlawful'.



41. This Court has carefully considered the Charge Sheet. It bore the charge of defilement contrary to Section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#). The particulars explained the actions which the Appellant was alleged to have committed which were contrary to the cited law.
42. The Appellant participated fully in the case knowing that he had been accused of having a sexual affair with PW1 and that the act was against the law. He even preferred an appeal on conviction and sentence. Throughout the trial, the Appellant who was in possession of the Charge Sheet, never raised the matter. He knew the charges he faced and fiercely defended himself.
43. It is the finding of this Court that the omission complained neither went to the root of the case nor occasioned any miscarriage of justice on the Appellant. The omission is safely curable under Section 382 of the [Criminal Procedure Code](#). The contention is, therefore, dismissed.
44. On whether Articles 49 and 50 of the [Constitution](#) were violated, the Appellant failed to furnish particulars of such violations. Those grounds are dismissed. (See the Supreme Court in [Communications Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 Others](#) (2014) eKLR).
45. The upshot of the above is that the prosecution discharged their burden to the required standard of proof and the trial Court, rightly so, found the Appellant guilty and convicted him.
46. Consequently, this Court finds that the appeal against the conviction lacks merit and is hereby dismissed.

Sentence:

47. The Appellant was sentenced to 10 years imprisonment. The trial Court considered the mitigations and exercised its discretion in accordance with the current law as set by the Supreme Court of Kenya.
48. The Court in *Wanjema v Republic* (1971) EA 493 laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.
49. In this matter, the Appellant did not establish the infringement of any of the above parameters by the sentencing Court. The sentence remains lawful and it ought not to be disturbed.
50. The appeal on sentence also fails.

Disposition:

51. Drawing from the above discussion, it is apparent that the appeal is wholly unsuccessful.
52. In the end, the following orders do hereby issue: -
 - a. The appeal is wholly dismissed.
 - b. The file is marked as Closed.Orders accordingly.



DELIVERED, DATED AND SIGNED AT KITALE THIS 4TH DAY OF APRIL, 2023.

A C MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr Bikundo, Learned Counsel for the Appellant.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Regina/Chemutai – Court Assistants.

