



REPUBLIC OF KENYA



**Njoroge v Republic (Criminal Appeal 26 of 2018)
[2023] KEHC 3803 (KLR) (18 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3803 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL 26 OF 2018
SC CHIRCHIR, J
APRIL 18, 2023**

BETWEEN

STEPHEN GITHAE NJOROGE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Sexual Offence Case No. 60 of 2016 at the Principal Magistrate's Court at Kandara on 20th March 2018 by Hon. M. Kinyanjui -SRM)

JUDGMENT

1. On December 13, 2016, the Appellant was charged at the Senior Resident Magistrate's Court at Kandara with the offence of defilement contrary to section 8(1)(2) of the *Sexual Offences Act* No.3 of 2006 (The Act). It was alleged that on the 7th day of December 2016 in Gitanga sub-county within Murang'a County, intentionally and unlawfully caused his penis to penetrate the vagina of LW a child aged 7 years.
2. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 6 of 2006.
3. He was convicted of the first charge and sentenced to life imprisonment. Aggrieved by the outcome, he filed this appeal.

Grounds Of Appeal

4. In this Amended petition of Appeal (handwritten), the Appellant set out 5 grounds which I have paraphrased as follows:
 - a. That the prosecution's case was full of contradictions and inconsistencies



- b. That an essential witness was not called to testify.
- c. That the trial court failed to take into account that his prosecution was motivated by a family feud.
- d. That the medical evidence adduced was not reliable enough to secure a conviction.
- e). That the trial court erred in failing to consider his unsworn and unchallenged evidence.

Appellant's Submissions

5. It is the Appellant's submission that the complainant contradicted herself as to whether she used to visit the Appellant's home or not. Another contradiction, the Appellant points out, is when the complainant allegedly told the police that the person who defiled her was one Joseph Njoroge while she told the court that the person was a Githae.
6. The Appellant further submits that the prosecution failed to summon the father of the complainant and two other persons who participated in the arrest of the Appellant. He added that failure to call these witnesses prejudiced his defence. He also takes issue with the fact that the medical report was produced by a person who did not author it. To buttress his submissions, the appellant has relied on the case of *John Kenga vs. Republic* CR. Appeal No. 1126 of 1984 and *Bukenya and Another vs. Republic of Uganda* (1972) E.A. 549
7. It is further submitted that the charge against the Appellant were a fabrication by PW2 against him in retaliation for refusing to allow himself to be distorted of his money.
8. On the medical evidence, it is his submission that it was produced by a doctor who did not examine the complainant and that section 124 of the *Evidence Act* was not complied with. He further submits that on his part, he was not subjected to the medical examination to ascertain whether he was the perpetrator of the alleged crime.
9. That the parties are family and the charges were motivated by a family feud.
10. Finally, it is submitted that the case was not proved beyond reasonable doubt.

Respondent's Submissions

11. On the contradictions highlighted by the Appellant, the Respondent submits that the contradiction as to whether the complainant had been to the Appellant's house or not, didn't go into the substance of the case.
12. On the conflict of the names of the perpetrator, the Respondent argues that the Appellant was identified by recognition and that the complainant could not have been mistaken since the defilement had taken place more than once. It is further submitted that the discrepancy in names was sufficiently explained. The Respondent relied on the following past decisions to buttress their submissions in this regard:
 - a). *MW v Republic* (2019) eKLR.
 - b). *Joseph Maina Mwangi vs. Republic*. Cr. Appeal No. 73 of 1993.
 - c). *Eric Onyango Odeng' v. Republic* (2014) eKLR.
13. On the alleged failure to summon crucial witnesses, it is the Respondent's Submission that the 5 witnesses summoned were sufficient to prove the case. The respondent has relied on section 143 of the



Evidence Act and cited the case of Keter v Republic (2007) 1 EA 135 and Republic V George Onyango Anyang & another (2016) eKLR.

15. Responding to the alleged distortion for money which allegedly was the reason for the prosecution, the respondent submits that the evidence available point to the fact the Appellant and his family were actually the ones on a mission to subvert the course of Justice in this case.
16. On the defence's case, which was allegedly not taken into consideration, the Respondent points out that the Appellant gave an unsworn statement which has no probative value. The Respondent relied on the case of KOO v Republic (2020) eKLR in this regard.
17. On sentencing, the prosecution submits that the victim must have been traumatized, and taking into account the age of the victim, the sentence meted out was reasonable.

Determination

18. I have perused the record of the trial court, Amended Petition of the Appeal, rival submissions and the accompanying authorities.

The duty of this court as the first appellate court, as set out in the case of Okeno vs. Republic (1972) E.A.32 is to have a fresh look at the evidence presented at the trial court, evaluate it and arrive at its own conclusion while giving allowance to the fact that the trial court had the benefit of seeing and hearing the witnesses first hand.

I will proceed to consider the grounds as set out before:

Whether the prosecution's case was full of contradictions.

19. The first contradiction which the appellant has pointed out is where the complainant told the court firstly, that on 7/12/2016, she went to the house of the complainant then later on in her testimony, she indicated that she never used to go to the house of the appellant. Another contradiction was in the names of the perpetrator. It was alleged that in her statement to the police she had given the name Joseph Njoroge while in court she gave the name Githae.
18. The law on contradictions and inconsistencies has been set out in a number of decisions .In the case of Twehangane Alfred vs. Uganda (2003) UGCA 6 cited with approval in the case Eric Onyango Odeng vs. Republic the court held,

“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 a deliberate untruthfulness or if they do not affect the main substance of the prosecution's case”.
19. On whether or not the complainant used to visit the Appellant's home it would appear to me that “He used to come to our home” then, “I never used to go to their home” was a past reference and not necessarily the events of the December 7, 2006. On the other hand ,the report by the investigation's officer of what the child said/heard, which is indication of more contradiction according to the Appellant is hearsay and hence inadmissible.
20. On the discrepancy in the names, the complainant told the court that the perpetrator was one Githae Njoroge, she didn't know how the name Joseph Njoroge went to her statement. In any event, the investigation officer admitted that the use of the name Njoroge could have been a mistake on her part while recording the complainant's statement. This contradiction in my view, has been sufficiently



explained. Moreover, the same touches on the issue of identification, and identification in this case was by way of recognition. The complainant knew the Appellant very well, they were neighbours.

I find that the contradictions do not materially affect the prosecution's case.

Whether essential witness(es) were not summoned.

21. The Appellant's complain is that the father of the complainant, being the one who reportedly filed the report at the police station, plus some men who had accompanied him were not been summoned. Equally, he submits that the doctor who treated the complainant at St. Mulumba Hospital should have been summoned and that the report should not have been produced by a person who authored it.
22. I have perused the record and I note that the father of the complainant was not an eye witness. According to the Appellant, the complainant's Father was also among the people who were demanding money from him in exchange for dropping the charges. Curiously, this name, important as it seems to the Appellant, is being brought up for the first time in this Appeal. The allegations were too serious to be ignored. It was an attempt at subversion of justice. Why then would the Appellant choose to keep it from the trial court? It would appear to me that this allegation is being raised as an afterthought, and purely in an attempt salvage his defence in this Appeal.
23. The discretion of calling the witnesses is exclusive to the prosecution. Section 143 of the *Evidence Act* only require the prosecution to summon such number of witnesses as may be necessary to prove their case beyond reasonable doubt. I don't think that failure to call "these" other witnesses was fatal to the prosecution's case.
24. There is nothing untoward for the medical records being produced by a doctor who was not the maker of the document as long as the rules governing production by a person of than the maker are complied with.

There was also no objection raised by the Appellant at the trial on the production of the medical records by the person who had not authored them. It is too late for him to complain in this appeal

Whether the charge against the Appellant was motivated by a family feud.

25. I wish to point out that much as this issue has been extensively addressed in the appellant's submission, it is being raised for the first time in this appeal. The record shows that the appellant never mentioned any family feud during his defence at the trial court. Bringing up this issue on the appeal is merely an afterthought. Secondly, other than his own testimony which was unsworn, there was no evidence brought forth to back up claims of family feud. For an unsworn testimony to be of any evidential value, it must be corroborated.

I dismiss the Appellant's claims in this regard.

Whether the medical evidence produced was reliable enough to secure a conviction.

26. The medical evidence before the trial court was P3 form filed by a Dr. G. Kamau at Kirwawa sub-county hospital and a post rape care report form (PRC).

The Appellant has taken issue with the fact that the medical examination of the complainant was done in the absence of the police officer; that the examination was done 7/12/2016 yet the P3 form was filed on December 22, 2016 and that he was not subjected to medical examination. In his view, the above gaps make the medical evidence unreliable.



27. There is no legal requirement that the police must be present when a medical examination of the victim is being carried out. This complain is therefore without merit.
28. Contrary to the appellant's assertion the P3 form was filed on December 12, 2016 and not December 22, 2016, five days after the defilement. Again, the P3 form need not be filed on the same day of examination as P3 forms are ordinarily filed on the basis of initial treatment records, in this case, the PRC that was filled in at St. Matia Mulumba Mission Hospital.
29. There is no requirement either that the perpetrator must be subjected to medical examination. Medical examination of the perpetrator is only necessary when the identity of the perpetrator is unknown.

It is my finding that there is nothing that has been shown to this court that would have made the medical evidence unreliable.

Whether the Appellant's defence was ignored.

30. The record shows that contrary to the Appellant's assertion, the trial court considered his defence, but dismissed it as being unreliable. I am in agreement with the trial magistrate on her assessment of the Appellant's conduct upon being informed of the accusations raised against him. He told the court that he went to sleep after being informed that he was being accused of having defiled a child. Going to bed is not a typical reaction of an innocent person when confronted with such a serious accusation. An innocent person would have wanted to know the "who", "how" and "why" of the accusation before retiring to bed.
31. In any case, he told the court that he was with DW2 until 7:30 PM then he called his brother; even though the time of the call is not indicated it could not have been too late in the night to attend to such "alarming news". The Appellant's defence was not plausible at all.

Taking into account the totality of the evidence, I find that Appellant's conviction was valid.

Sentencing

32. On sentencing, the trial magistrate indicated that her "hands were tied". This assertion was understandably informed by the mandatory minimum sentences prescribed by the Act. The sentence also is not contested in this Appeal.

In conclusion, this Appeal is unmerited. It is hereby dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 18TH DAY OF APRIL 2023.

S. CHIRCHIR

JUDGE

In the presence of :

Susan- Court Assistant

Appellant- present

Ms . Muriu for the Respondent

