



REPUBLIC OF KENYA



KENYA LAW
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**Njenga v Republic (Criminal Appeal E033 of 2021)
[2023] KEHC 3568 (KLR) (13 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3568 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E033 OF 2021**

**GL NZIOKA, J
APRIL 13, 2023**

BETWEEN

JOHN KIGO NJENGA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from conviction and sentence in the decision of; Hon. H. O. Barasa, Senior Principal Magistrate, delivered on, 28th October, 2021, vide Sexual Offence Criminal Case No. 41 of 2020, at the Senior Principal Magistrate's Court at Engineer)

JUDGMENT

1. The appellant was arraigned before the court on 6th August 2020, charged with the offence of defilement contrary to section 8 (1) (3) of the *Sexual Offences Act* No. 3 of 2006 (herein "the Act"), and an alternative count of, committing an indecent act with a child contrary to section 11 (1) of the Act. The particulars of the charges are as per the charge sheet.
2. He pleaded not guilty and the case proceeded to full hearing. The prosecution called a total of five (5) witnesses. The prosecution case in brief is that on 3rd August 2020, at around 5:00pm, the complainant was selling goods at her parent's shop, when the appellant who was selling cakes went to inquire whether the complainant would purchase some cakes. However, she informed him they did not require the cakes.
3. The complaint then went to the house to prepare supper. After a short while, her niece called her and informed her that there were people at the shop who wanted to purchase goods. She went to the shop and attended to three (3) people. That, she noticed that the appellant's motorcycle was still outside the shop.
4. That when the complainant went back to the house she found the door to the sitting room was locked. Suddenly the appellant grabbed her and threatened to stab her with a knife if she screamed. He then



- pushed her onto a chair next to the door and ordered her to remove her clothes. She tried to escape but the appellant was too strong for her and removed his trouser and inner pant and proceeded to defile her.
5. That PW3 S W W went to the shop and called the complainant out but the appellant instructed her not to answer. However, she managed to escape and ran to the shop and informed PW3 what had happened, in the meantime the appellant locked himself in the sitting room. After sometime he opened the door and a scuffle ensued between him and PW3 but with the help of a neighbour, the appellant was overpowered.
 6. The matter was reported to the complainant's mother and the Area Chief who interrogated the complainant and took her to Murungaru Police Station to lodge a complaint. She recorded a statement and was taken to Engineer Hospital where she was examined and treated.
 7. In the meantime, as the appellant was being taken to the Police Station he was rescued by his brother on a motorbike and escaped but was later re-arrested and charged as herein after the investigation.
 8. At the close of the prosecution case, the learned trial Magistrate ruled that the appellant had a case to answer and placed him on his defence. He elected to give a sworn statement and call a witness. He stated that, on 3rd August 2020 at around 5:00pm he went to the shop where he met the complainant and asked her if she wanted to buy his cakes but she declined.
 9. That he requested her for water to drink and she gave him. However, PW3 came and beat the complainant for giving him water and proceeded to call the PW2 and when PW2 arrived she called the Assistant chief who arrested him.
 10. That on the way to the police station, he took the motorcycle to go and look for the complainant's sister to explain what had transpired but he was arrested at Engineer and taken to Kinangop Police Station and charged.
 11. At the conclusion of the case the learned trial Magistrate found that the prosecution had proved the case beyond reasonable doubt, convicted the appellant and sentenced him to serve twenty (20) years imprisonment.
 12. However, he is aggrieved by the decision of the trial court and has appealed against it on the grounds as here below reproduced verbatim:
 - a. THAT, the Appellant pleaded not guilty in the instant case.
 - b. THAT the learned trial magistrate erred in law and fact when she convicted the appellant in a prosecution case where age was not proved.
 - c. THAT the learned trial magistrate erred in law and fact when she convicted the appellant in a prosecution case where penetration was not proved
 - d. THAT the learned trial magistrate erred in law and fact by applying wrong standards of proof in criminal case which was a standard of probability instead of reasonable doubt.
 - e. THAT, the learned trial magistrate erred in law and fact by convicting the appellant but did not consider the appellant's defence of alibi.
 13. The Respondent opposed the appeal vide grounds of opposition which states:
 - a. That in response to ground 1, the circumstances of the case were considered which informed the prima facie minimum sentence imposed.



- b. That in response to ground 2, the Respondent proved their case beyond reasonable doubt.
 - c. That in response to ground 3, the appellant defence was taken into consideration but deficient in merit.
 - d. That the petition is devoid of merit and ought to be dismissed forthwith and conviction and sentence upheld.
14. The appeal was canvassed through filing of submissions, wherein the appellant, in his submissions filed on 16th September 2022 submitted that the sentence of twenty (20) years imposed upon him by the trial court was the mandatory sentence imposed by section 8(1)(3) the Sexual Offence Act.
 15. That the sentence being mandatory, it prejudiced his right to a fair trial under Article 50(2)(q) of *the Constitution* of Kenya 2010, as his sentence cannot be reviewed by a higher court thus denying him justice and contravening Article 48 of *the Constitution*.
 16. Further the mandatory sentence deprived the courts of judicial discretion to consider mitigation provided for under section 216 and 329 of the Criminal Procedure Code, during sentencing which is an important element of fair trial.
 17. Furthermore, the trial court in passing its sentence failed to consider the time he was in custody as provided for under section 333 (2) of the Criminal Procedure Code therefore the court should order that his sentence run from the date of his arrest. He relied on the case of Ahamad Abolfathii Mohammed & Another vs Republic (2018) eKLR.
 18. He further submitted that to prove a charge of defilement, the prosecution must prove the victim was a minor, penetration occurred and that the assailant was known as held in the case of Charles Wamukoya Karani vs Republic, which the prosecution failed to do as the case was all about suspicion which cannot form the basis of conviction as held in Geoffrey Thiongo Wangui vs Republic.
 19. That, the age of the victim is an important aspect to prove, as the sentence to be meted out is pegged on it as was stated in the case of Francis Omuroni vs Uganda Court of Appeal Criminal Appeal No 2 of 2000; Kaingu Elias Kasomo vs Republic Court of Appeal at Malindi Criminal Appeal No. 504 of 2010; and Alfayo Gombe Okello vs Republic (2010) eKLR.
 20. However, the age of the complainant herein was never proved to the required standard as no document was produced to prove the same, in that the doctor never conducted an age assessment.
 21. Further, section 2 of the *Sexual Offences Act* defines penetration which definition was fortified by the Court of Appeal in Mark Oiruri Mose vs R [2013] eKLR. That the complainant and the doctor's evidence was not sufficient to prove penetration. That no one witnessed the offence and therefore the complainant being the only witness, her evidence must be taken with a lot of caution.
 22. Furthermore, the learned trial Magistrate misdirected herself by placing a high weight on the evidence of the doctor that the complainant's hymen was broken and cited the case of; P.K.W vs Republic where the court discussed ways in which the hymen may be ruptured other than by sexual intercourse.
 23. The appellant argued that the trial magistrate failed to consider his sworn statement of defence where he blamed PW3 S W W for framing him. That, under section 107 (2) of the *Evidence Act*, the prosecution has the burden of proving its case and that it never shifts to the defence and cited the case of Ouma vs Republic (1986) KLR 619. He faulted the prosecution for failing to call the arresting officer to testify on what had transpired.



24. That the court failed to test his defence of alibi against all the evidence to establish his guilt beyond reasonable doubt as held in the case of *Karanja vs Republic* [1983] KLR. He further submitted that, the conviction and sentence was not based on sound evidence and urged the court to allow his appeal, quash the conviction, set aside the sentence and set him at liberty.
25. However, the respondent filed submissions dated 3rd November 2022 and argued that the ingredients to be proved for the offence of defilement are whether there was penetration of the complainant's genitalia, whether the complainant was a child and whether the penetration was by the appellant as outlined in the case of; *Charles Wamukoya Karani vs Republic* Criminal Appeal No. 72 of 2013.
26. That in the present case, the appellant was not a stranger as he was known to PW1 and PW2 as he supplied cakes to their shop and therefore this was a case of recognition. Further, that the incident took place at 5:00 pm and was not a single event and therefore in the circumstance nothing hindered the appellant's recognition.
27. That the age of the complainant was proved as the prosecution produced the birth certificate that indicated that she was yet to attain the age of fifteen (15) years at the time of the offence.
28. Further, that the complainant gave graphic details of how the appellant defiled her. That, her evidence was corroborated by the medical evidence of PW4 and there was no doubt that the appellant had defiled her.
29. Furthermore, that the appellant defence was considered. The respondent relied on the decision of the Supreme Court of the South Africa in *Mokela vs The State* (135/11) [2011] ZASCA 166 cited by the court in *Kipkurui Kimoni v Republic* (2019) eKLR where it was stated that sentencing remains pre-eminently the discretion of the sentencing court and that an appellant court does not enjoy a *carte blanche* to interfere with sentence properly imposed and urged the court to dismiss the appeal.
30. Having considered the appeal, I first note that, as held by the Court of Appeal in the case of; *Okeno vs. Republic* (1972) EA 32, the role of the first appellate court, is to re-evaluate the evidence afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses. The court thus observed: -

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya V R* 1975) E.A. 336 and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M. Ruwala V. R* [1957] E.A. 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that, the trial court has had the advantage of hearing and seeing the witnesses”.

31. Be that as it were, the appellant was convicted of the offence of; defilement under section 8(1) of the Act, which states as follows: -

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement”

32. The elements of the offence are settled as; stated in the case of; *Agaya Roberts vs. Uganda*, Criminal no. 18 of 2002, where the Court of Appeal that, in order to constitute the offence of defilement the



following must be proved: (i) sexual intercourse (ii) victims age below 18 years (iii) the accused is the culprit.

33. Similarly, in *Bassita Hussein vs. Uganda Criminal Appeal No. 35 of 1995*, the Supreme Court of Uganda laid down the ingredients of the offence of defilement, which the prosecution must prove beyond reasonable doubt as; (i) the facts of the sexual intercourse (ii) the age of the victim being under 18 years (iii) participation by the accused in the alleged sexual intercourse.
34. As regards the issue of the age I find that it is settled law that, primary evidence in proof of the age of a person is; the birth certificate or a medical report and/or a document prepared by a competent medical practitioner. The secondary evidence would be; the evidence of a parent or guardian, or physical observation of the child and/or common sense (see *Hilary Nyongesa vs Republic (Uganda) HCCRA No. 123 Of 2009*).
35. Pursuant to the legal principles aforesaid and the evidence adduced I find that as regards the age of the child, the birth certificate produced proved that the complainant was born on 8th January 2005 and as correctly observed and held by the learned trial Magistrate, the child was fifteen (15) years, on 3rd August 2020, when the offence was committed. Therefore, that issue of age was proved.
36. As regards penetration, the Act defines it as the partial or complete insertion of the genital organs of a person into the genital organs of another person.
37. In this case, Dr M O, PW4 a doctor based at Engineer District Hospital produced the medical documents on behalf of his colleague, Dr. N K, who was off duty stated that the complainant genitalia was normal however her hymen was broke with fresh tags and had visible valval lacerations.
38. Furthermore, she had bloody mucoid discharge and epithelia cells were visible in her high vaginal swab test and urinalysis test. That the PRC indicated that her underpants were blood stained. He produced the P3 form, the PRC form and lab report as exhibit 2, 3 and 4 respectively. The medical evidence and/or reports confirmed that indeed the complainant was defiled.
39. In addition, PW2 the complainant's mother, PW3 Sylvester stated that the victim crying as she narrated the incident and even DW2 Paul Wangui stated that she looked traumatized and clearly distraught due to the incident. The appellant has not adduced any contrary evidence, therefore the conclusion is that she was defiled.
40. The last element relates to the identity of the appellant. As rightfully observed and conceded by both the prosecution and defence, the appellant used to supply cakes to the complainant's mother's shop. Therefore, he was well known to the complainant prior to the incident. He has confirmed he went to the shop on the material date of the crime. It is not in dispute that he was arrested at the scene where the offence was committed.
41. PW3 S W W stated that on the day of the offence at around 5:00pm he went to PW2's shop but did not find anyone. That after a few minutes the complainant came to the shop and asked him to help her as a man named K had defiled. PW3 went to the entrance of the house but found that it was locked and returned to the shop counter where he found the appellant trying to pull the complainant. PW3 rushed to the door and confronted the appellant as he tried to escape. That he tried to arrest the appellant and was assisted by a neighbour, P M.
42. If the appellant had gone to sell cakes or even sought for water as alleged, why would he have been struggling with the complainant. Indeed, I find the evidence of the appellant of being beaten because PW1 served him with water is an afterthought. He never put it to any witness.



43. Furthermore, there is corroborative evidence that the appellant escaped while on the way to the Police Station after he was arrested by members of the public. The investigation officer stated that the appellant was arrested at Mai Mahiu by Police officers from Murungaru with assistance of the members of the public and taken to Kinangop Police Station. Why was he escaping if he was innocent?
44. The appellant's witness Paul Wangui, was least helpful to him. He stated that on 3rd August 2020 at around 5:00pm, he went to the shop to buy cigarettes and found the appellant arguing with another man. That on inquiring what the issue was, he was informed that the appellant had defiled the complainant.
45. Having considered all the aforesaid, I find that all the ingredients of the offence of defilement were proved and the prosecution adduced adequate evidence to sustain a conviction, the sentence meted out is per the law. As such the appeal is dismissed in its entirety due to lack of merit.
46. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 13TH DAY OF APRIL, 2023

GRACE L NZIOKA

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

Appellant present in person, in court virtually

Mr. Atika for the Respondent

Ms Ogutu; Court Assistant

