



**Tadicha v Republic (Criminal Appeal E038 of 2022)  
[2023] KEHC 3517 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3517 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT LODWAR  
CRIMINAL APPEAL E038 OF 2022  
JK SERGON, J  
APRIL 20, 2023**

**BETWEEN**

**HALHANO GODANA TADICHA ..... APPELLANT**

**AND**

**REPUBLIC ..... PROSECUTOR**

**JUDGMENT**

1. Halhano Godana, Tadicha the Appellant herein was tried on a charge of two counts and alternative counts.
2. In Counts 1 and 2, the Appellant was charged with defilement contrary to Section 8 (1) as read with Section 8 (4) of the [Sexual Offences Act](#) No 6 of 2006. In the alternative count to both counts the Appellant faced a charge of committing an indecent act with a child Contrary to Section 11 (1) of the [Sexual Offences Act](#) No 3 of 2006.
3. After undergoing a full trial, the appellant was convicted and sentenced to serve Fifteen (15) years imprisonment on the main count for defilement. Being dissatisfied, the appellant preferred this appeal and put forward the following grounds in his Petition of Appeal:-
  - (i) That the Learned Magistrate erred in Law and fact in failing to consider the evidence tendered on behalf of the Accused Person.
  - (ii) That the Learned Magistrate erred in Law and in fact in failing to consider the submissions filed on behalf of the Accused Person.
  - (iii) That the Learned Magistrate erred in Law and in fact in holding that the Accused impregnated the Complainant and relying on extraneous matters against the weight of the evidence and material placed before him hence arrived at the wrong conclusion.



- (iv) That the Learned Magistrate misdirected himself in Law and in fact in failing to consider the Accused Persons defence of alibi on the 21<sup>st</sup> day of September, 2018 and relying on the Complainant's allegation of several sexual intimacies a fact not proved by the Prosecution.
  - (v) That the Learned Magistrate applied the wrong principles of Law in finding that the Accused Person had clearly made a case of having signed for the gun to be on duty and but holding that the place of work was near his area of residence which act had not been proved by the Prosecution.
  - (vi) That the Learned Magistrate erred in Law and in fact in convicting the Accused Person based on insufficient evidence full of material contradictions which did not establish the statutory ingredients of defilement.
  - (vii) That the Learned Magistrate erred in Law and in fact in relying on the Complainant's mother's word that she was sixteen years old at the time of the incident.
  - (viii) That the Learned Magistrate erred in Law and in fact in finding that no doubt had been raised to disturb the Prosecutions' case and in holding that the Prosecution had discharged its burden to prove the case beyond reasonable doubt.
  - (ix) That the Learned Magistrate erred in Law and in fact in denying the appellant the opportunity to examine one of their witnesses.
  - (x) That the Learned Magistrate erred in Law in convicting the Appellant without the Prosecution having proved all the ingredients of the offence.
  - (xi) That the sentence imposed on the appellant was harsh, excessive and punitive.
4. When the Appeal came up for hearing, this court gave directions to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial Court. I have further considered the rival written submissions. It is apparent from the record that the appellant put forward a total of eleven (11) grounds of appeal. However, those grounds may be summarized to two broad grounds vizly:
- First, whether the offence the Appellant was convicted for was proved to the required standards of beyond reasonable doubt.
- Second, whether the Appellant's defence of alibi was considered by the trial Magistrate.
5. Before delving deeper into the substance of the appeal, let me set out in brief the case that was before the trial Court. The Prosecution summoned eight (8) witnesses who appeared and testified in support of the Prosecution's case.
6. Evans Saitoti (PW1), a Medical Officer at Kakuma Mission Hospital testified before the trial court stating that he examined the victim and found her to be pregnant with a gestation period of nine (9) weeks and two (2) days. PW.1 said he did not do a DNA test to determine the paternity of the unborn child.
7. The second witness who took the witness stand is Dr Kinara Kinyoru (PW2) who produced the P3 Form prepared by Clara Matilda, a Medical Officer. In the P3 Form, the Medical Officer indicated that



- the victim had told her that she lived with her boyfriend for two months during which time, they had sexual intercourse.
8. In the P3, it is also noted that the genitalia was normal with no bruises nor bleeding. It is also indicated that the nature of offence is rape and that the victim was aged 16 years. The report further indicates that there was evidence to confirm penetration.
  9. PW2 in Cross-examination stated that unless examination is done, no one would know there was sexual intercourse. PW2 further stated that there were no signs of forceful penetration.
  10. The victim (FA) testified as PW3. She told the trial Court that she does not know the date she was born. She stated that on September 29, 2018, she met the Appellant at a Market where she had been sent by her mother to do shopping. She said she had a conversation with him and came to know him as a serving Administration Police Officer who always carried a rifle.
  11. PW3 stated she visited the Appellant's house and that he would pay for her ride to and from her home which was about a kilometre away. The victim stated that she visited the Appellant's home on several occasions and that each time he would touch her private parts and breasts.
  12. PW3 claimed that the Appellant threatened to shoot her if she did not visit his house and that is why she made a habit of visiting his house on a daily basis. She said she spent the night with the appellant, sleeping on the same bed.
  13. PW 3 further stated that she had sexual intercourse with the Appellant. PW 3 said that she conceived a child which aborted after having sexual intercourse with the Appellant. She said she used to frequent his place for sexual intercourse. PW 3 said that the Appellant was the one who was responsible for her pregnancy. She claimed he impregnated her at the station in Kakuma 2. She said that her first sexual encounter with the appellant was at a place where she was collecting firewood. She said she also used bars in other encounters.
  14. In cross-examination, PW 3 said she was aged 18 years at the time of testifying i.e. on March 16, 2022. She however said she did not know her age in the year, 2018. She averred that she had not been asked to bring the case in order to secure a chance to go to America. PW3 claimed that the Appellant was the only person she had sexual encounters.
  15. Hashim Osman Abdi (PW 4) stated that the victim (PW 3) who is her sister started going out in the month of September, 2018 and that on September 20, 2018, she went out and did not return home. PW 4 said that upon searching for her, she found her at the AP Camp where PW.3 informed her that she had a boyfriend living in the AP Camp. PW 4 said her sister (PW 3) said that the appellant was her boyfriend.
  16. PW 4 stated that the Doctor examined PW.3 and found her to be pregnant. In cross-examination PW 4 said that in 2018 her sister (PW 3) was aged 16 but at the time of testifying, she was aged between 18 and 20 years. PW 4 said she did not witness the Appellant having sexual intercourse with PW 3.
  17. Yurup Abdi Yusuf (PW 6) said that her daughter (PW 3) did not return home on September 20, 2018 – prompting her to make a report to the police. PW 6 also said that her daughter (PW 3) was found at the AP Camp at Kakuma and later told her that she had a boyfriend whom she spent the night with her.
  18. Hamdi Mohamed Ahmed (PW 5) stated that PW 3 was her friend. PW 5 said that they (herself and PW 3) spent the night of September 20, 2018 visiting various joints in Kakuma.



19. PW 5 said the Appellant was the boyfriend of PW 3. PW 5 also stated that she did not witness the appellant and PW 3 having sexual intercourse. She also said she did not see the Appellant touch PW 3 inappropriately.
20. The Appellant (DW 1) testified in his defence and summoned two witnesses in support of his case. Halhano Godana Tadicha (DW 1) said he worked in Kakuma for 1 year 2 months with effect from January 1, 2018 but was transferred because of a complaint. He said he is a borana and not a Somali.
21. The Appellant stated that he did not know the victim (PW 3) and hence he did not have any relationship. He denied threatening the Complainant. DW 1 also denied committing the offence of defilement.
22. Mohamed Abdullahi Hillow (DW 2) told the trial Court that he came to know the Appellant (DW 1) from Gambela AP Post and since 2017. He said he did not see him with any girl. He also said that he has never stayed in any house within the Police Camp in Kakuma.
23. Sgt Patre Mathayo (DW 3) said that he is aware that DW 1 was assigned duties to guard World Food Stores (WFS) from 6pm to 6am and that at all times, he was issued with a gun. Basically, it is the evidence of DW.3 that the Appellant worked throughout the night of September 20, 2018.
24. Faced with the evidence tendered by both sides, the learned Principal Magistrate was convinced that the Prosecution proved the case against Appellant to the required standards. Having given a brief summary of the case that was before the trial Court, I now turn my attention to the substance of appeal.
25. The first main ground of Appeal is whether the case against the Appellant was proved to the required standards in Criminal Cases. It is the Appellant's submission that there was no credible evidence that the appellant was actually the one who defiled the Complainant since there was no prove of penetration of the Complainant. The Appellant further argued that the Prosecution failed to prove that the Complainant's hymen was torn by an act of defilement by the Appellant.
26. I have re-evaluated the case that before the trial Court. The Appellant denied knowledge of the Complainant. He also denied having any sexual relationship with the Complainant.
27. It was therefore the duty of the Prosecution to discharge the burden of proof.
28. The Appellant in his evidence stated that he was a Borana and not a Somali. The answer as whether there was credible evidence of penetration can be discerned from the evidence. The learned Principal Magistrate in his Judgment stated that it was evidenced further by PW 3 that the Complainant was examined and found to have been pregnant.
29. The aspect of pregnancy as confirmed by the medical officer confirms that the Complainant had been penetrated. It is apparent that the trial Magistrate believed the testimony of the Complainant.
30. The evidence presented indicates that the pregnancy was 9 weeks and 2 days. If indeed the Appellant had for the first time sexual intercourse with the Complainant in the month of September, 2018, then it is doubtful whether he was the one who impregnated the Complainant. By the time the appellant was alleged to have defiled the Complainant, the Complainant was already 9 weeks pregnant.
31. The Medical Report produced by the Prosecution indicate that the Complainant's hymen was missing. It was necessary for the Prosecution to tender evidence to show that the Complainant's hymen was torn by an act of defilement by the Appellant since it is not always automatic that proof of penetration is through a sexual act.



32. In the instant case, it is important to determine whether the Appellant was actually the defiler. The Complainant said that on her way, she met a Somali man. She further said the man resembles Somali. The learned Principal Magistrate further noted in his Judgment that the Complainant did not know the name of the Accused but that she knew his face. The question is whether the appellant was identified as the perpetrator of the crime committed on September 21, 2018?
33. In fact the Complainant is on record as stating that she did not remember what happened on September 21, 2018. The Appellant clearly stated that he was a Borana and not a Somali. There is doubt whether the Appellant was placed at the scene of crim. In the circumstances, the appellant should be given the benefit of doubt.
34. The second broad ground is whether the Appellant's defence of alibi was considered. In his Judgment, the learned Principal Magistrate stated that in his defence of alibi, the Accused availed evidence showing he was at his place of work on September 21, 2018. The learned Principal Magistrate went ahead to state that the Complainant had indicated that the Accused was her boyfriend whom they had several sexual intimacies. He however went further to state that the Accused had tendered evidence showing he signed for the gun to go on duty.
35. It is clear to this Court that the learned Principal Magistrate did not treat seriously the Appellant's defence of alibi. It is clear he set up the defence of alibi expressly stating that he was on duty on the material night. It would appear the trial magistrate placed heavy reliance on the Complainant's evidence that the Appellant was her boyfriend.
36. Having come to the conclusion that the Appellant's alibi defence was not displaced, the trial Principal Magistrate should come to the conclusion that the Prosecution had failed to disprove the defence of alibi.
37. The Appellant was emphatic that on the material night, he was on duty guarding the World Food Stores (WFS) from 6.00 pm upto 6.00 am It is therefore possible that the appellant was present at the scene to commit the offences he was convicted for. In my humble view, the Appellant should have been given the benefit of doubt.
36. In the end, I allow the Appeal. Consequently, the Appellant's conviction is quashed and the sentence is set aside. The Appellant is hereby set free forthwith unless lawfully held.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20<sup>TH</sup> DAY OF APRIL, 2023.**

.....

**J.K. SERGON**

**JUDGE**

**In the presence of:**

**C/Assistant – Chepkoech**

Appellant – Present in Prison

Onyango for the Appellant

No appearance for the State

