



REPUBLIC OF KENYA



**Wafula v Republic (Criminal Appeal E129 of 2021)  
[2023] KEHC 3676 (KLR) (Crim) (12 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3676 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL**

**CRIMINAL APPEAL E129 OF 2021**

**GL NZIOKA, J**

**APRIL 12, 2023**

**BETWEEN**

**JESSY NYONGESA WAFULA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against conviction and sentence in the decision of; Hon. E. Boke, Senior Principal Magistrate, delivered on, 21st October, 2021, vide Criminal Case Sexual Offence No. 63 of 2018, at the Chief Magistrate’s Court at Kibera))*

**JUDGMENT**

1. The appellant was arraigned before the Chief Magistrate’s court on August 1, 2018 charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* (herein the “Act”) and an alternative count of committing an indecent act contrary to section 11 (1) of the Act. The particulars of each count are as per the charge sheet
2. The prosecution case is that, on the 27<sup>th</sup> day of July 2018, “JC” (herein the complainant) a child aged 9 years was going to the shop, when the appellant emerged wearing a mask and carried her to the bush, covered her mouth to stop her from raising an alarm then, removed her pant, stocking and skirt and defiled her. However, her companion with whom they were going to the shop managed to escape.
3. That after the appellant had defiled her he left her on the ground and ran away. That her cry attracted her father who went and picked her back to their house. She was taken to Nairobi Women’s Hospital for treatment and the matter reported to the police station. The suspect was thereafter arrested and charged accordingly.



4. At the close of the prosecution case, the court ruled that the appellant had a case to answer and placed him on his defence. He testified on oath to the effect that he attended to his daily and was informed that one Kamau was looking for him but didn't know the reason why.
5. That as he continued with his work, he saw Kamau in a company of twenty (20) people and he was requested to accompany them and asked if he could recall what he had done on Friday, he told them that the complainant and another Peter entered his house with mud and he warned her.
6. That, when the girl was asked who defiled her, she said as he was covering her eyes she did not know. However, her father threatened her, and she pointed at him. Later Mr Kamau demanded for Kshs 5,000 to settle the matter but he refused and was charged with defiling the complainant.
7. At the conclusion of the trial, the learned trial magistrate delivered a judgment dated October 21, 2021, in which she found the accused guilty of the offence of defilement and sentenced him to life imprisonment. However, the appellant being aggrieved by the decision of the trial court has appealed against it on the grounds as here below reproduced:
  - a. That, the Hon Trial Magistrate erred both in law and in fact by failing to find that one of the key ingredients of the offence was not established against the appellant herein.
  - b. That, the Hon Trial Magistrate erred both in law and in fact by failing to find that the minor's evidence did not meet the dictates laid down under section 124 of the *Evidence Act*, in terms of truthfulness of minor's evidence and thus ought to have properly corroborated.
  - c. That, the Hon Trial Magistrate erred in both in law and in fact by failing to find the minor's evidence was procured by threats and/or coercion hence therefore doubts abounded on the veracity of the allegations in question.
  - d. That, the Hon Trial Magistrate erred in both in law and in fact by failing to find that key necessary witnesses were not called upon to testify and this left waging gaps in the prosecution's case whose doubts should have been resolved in favour of the appellant herein.
  - e. That, the Hon Trial Magistrate erred in both law and in fact by failing to find that the prosecution failed in entirely to discharge the burden of prove as was mandated of it.
  - f. That, the Hon Trial Magistrate erred in law and in fact by failing to freshly, exhaustively, comprehensively and deliberately analyse, weigh and consider the strong defence case which exonerated the appellant from any wrong doing.
8. However, the respondent opposed the appeal vide grounds of opposition dated June 8, 2022 to the effect that: -
  - a) The Appellant is being dishonest and wants to mislead this court on factual issues.
  - b) The appeal lacks merits and has no chances of success.
  - c) The appeal is untenable as the sentence was legal and the conviction was safe.



9. The appeal was disposed of by way of written submissions. The appellant in his undated submissions stated he was not disputing the age of the complainant, and that penetration was sufficiently established. His only issue of contention was whether he was properly identified as the person who defiled the complainant.
10. That the evidence tendered by the complainant was full of contradictions and inconsistencies and therefore the learned Trial Magistrate erred in believing her testimony. Further, the trial court shifted the burden of proof to the appellant by believing her evidence due to her age.
11. The appellant relied on the case of; BCC vs Republic [2020] eKLR where the court held that, the learned Trial Magistrate misdirected himself in believing that a child of five (5) years old cannot tell a lie and that it amounted to shifting the burden of proof. Reliance was also placed on the case of; Jon Cardon Wagner vs Republic and two others [2011] and John Mutua Munyoki v Republic [2017] eKLR.
12. Furthermore, the evidence by the complainant was procured by PW2 through threats and coercion and thereby it was inadmissible. He relied on the case of; Paul Kanja Gitari vs Republic [2016] eKLR and John Mutua Munyoki v Republic (*Supra*).
13. The appellant further faulted the prosecution for failing to call crucial witnesses to testify being; the complainant's friend, who was present when she was accosted by her assailant; the government analyst who examined the DNA sample collected from the complainant; and the investigating officer and argued that the failure to call the witnesses went to the root of the charges as stated in; J A vs Republic (2016) eKLR, and created an inference that the evidence by the witnesses was adverse to the prosecution's case. Therefore, the inference should be exercised in his favour as held in the case of; Daniel Kipyegon Ng'eno vs Republic [2018] eKLR.
14. Finally, he submitted that the trial court failed to consider his defence which was corroborated by DW2, greatly prejudicing him. That the case was not proved beyond reasonable doubt and therefore he deserves the benefit of doubt. He urged the court to allow his appeal, quash the conviction, set aside the sentence and set him at liberty.
15. However, the respondent in their submissions dated June 8, 2022 stated that, the age of the complainant was sufficiently proved by PW2, the P3 form and PRC form all which indicated that she was 9 years old. Further, the trial court had the privilege of seeing the complainant and the age of the complainant is not challenged by the appellant. Reliance was placed on the case of; Fappton Mutuku Ngui vs Republic where it was held the conclusive age of the minor can be proved by other modes other than formal documents.
16. On penetration, it was submitted that PW1 testified that the appellant defiled her and pointed him out in court, while the medical evidence indicated that the hymen was partially perforated an indication of penetration. That, under section 2 of the Sexual Offences Act, partial penetration is considered as full penetration.
17. Furthermore, the appellant was positively identified by PW1 due to his sick eye, and he was PW1 and PW2's neighbour. Lastly, the sentence is legal as the law provides for a sentence of life imprisonment given the age of the minor. The court was urged to uphold the trial court conviction and sentence in order to rehabilitate the offender.
18. I have considered the evidence adduced in total and note that, the role of the first appellant court as well articulated in the case of Okeno v Republic [1972] EA 32, 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*) EA 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]* EA 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”.

19. Be that, as it were, a case of defilement is proved if three elements are established. These ingredients were considered in the case of; *Agaya Roberts v Uganda*, Criminal no 18 of 2002, and *Bassita Hussein vs Uganda* Criminal Appeal No 35 of 1995, the Supreme Court of Uganda where court stated that, in order to constitute the offence of defilement the following must be proved: (i) sexual intercourse (ii) victims age is below 18 years (iii) the accused is the culprit. (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.
20. In the instant case, the element of defilement was proved by the medical evidence of PW3 where he testified that, the examination revealed that the child had a fresh injury on the hymen which was partially perforated and lower lip tear on the head and chest.
21. On the issue of the age, 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 can be deduced from the evidence of a parent or guardian, or physical observation of the child and/or common sense as held in; *Hilary Nyongesa v Republic* (Uganda) HCCRA No 123 Of 2009.
22. However, the fact that the parent of the child alludes to the child’s age and the court observes the child is of tender years, does not prove beyond reasonable doubt the exact age of the child for the purposes of sentencing. This is due to the fact that various factors, for example the child’s physical appearance can lead to a conclusion of an age that may not be correct. It is possible an appearance of a child may lead one to overestimate the age or even under estimate the same.
23. As such where the court has to accept the alternative age assessment, an explanation as to be offered as to why the birth certificate, or baptismal card or even an age assessment report could not have been availed and therefore these other alternative ways of proving age of the complainant should be sufficient to establish the exact age so that, the court can have a basis of ascertaining the relevant sentence under the law. In the instant matter the court relied on the verbal evidence of the child’s father to prove age without seeking for explanation of the absence of documentary evidence.
24. The last and critical issue is whether it is the appellant defiled the victim. The trial court in finding the appellant guilty relied purely on the child’s evidence pursuant to the provisions of section 124 of the [Criminal Procedure Code](#). However, this is a case where there was evidence that, samples were taken to the Government Analyst for DNA analysis. In fact, the prosecutor applied for summons to the Government Analyst to avail the results. Yet, without an explanation that evidence was shut out.
25. The record indicates that the court on declined to grant the prosecutor further adjournment on the ground that the case had taken too long in court. But prior to that, it is the accused who had sought



for a three months' adjournment and granted to find fare to return to court. So where was the delay coming from?

26. As much as the court is not condoning the laxity of the prosecution to avail the file and witnesses, the offence herein is of a seriously nature as evidenced by the serious sentence of life imprisonment imposed by the law and the psychological and social effect on the victim. Therefore, it is not the kind of a matter that the court should will fold back its hands and let crucial evidence be locked out.
27. How can justice be seen to be done, when a victim who has been defiled leaves court empty handed because the investigating officer was allowed to walk scot free for failure to avail the court file and witnesses. Why didn't the trial court summon the investigating officer to avail the same? Why didn't the court at most dispense with physical appearance of the accused until the prosecutor had gotten the DNA results. What was the hurry for? Doesn't the manner in which this case was concluded amount to travesty of justice. Why didn't the prosecutor seek to withdraw the charges when the adjournment application was declined?
28. It is noteworthy that, the accused was on bond. At most he was still free from custody. Wouldn't the DNA results not put beyond reasonable doubt as to whether it was the appellant who committed the offence or not. Isn't it trite law that failure to produce the evidence by the prosecution leads to a conclusion that it was favourable to the appellant, and therefore deserves the benefit of doubt.
29. This is the kind of a trial that leaves both the victim and accused wounded. The victim does not receive justice and the other hand the appellant innocence is not proved beyond reasonable doubt. It is a high time the court sought to ensure justice is not only done but must be seen to be done.
30. Furthermore, the defence adduced evidence to corroborate the appellant's and exonerate him yet, the victim's version of events that occurred could only be supported by the DNA results not produced.
31. In the circumstance and sadly so, the victim will not receive justice but the court has no alternative than quash the conviction and order that, the appellant be set at liberty forthwith unless otherwise lawfully held.
32. It is so ordered.

**DATED, DELIVERED AND SIGNED THIS 12<sup>TH</sup> DAY OF APRIL 2023**

**GRACE L. NZIOKA**

**JUDGE**

**In the presence of:**

The appellant present in court, virtually

Ms. Akunja for the respondent

**Mos. Ogutu Court Assistant**

