



REPUBLIC OF KENYA



**Mwangi v Republic (Criminal Appeal E019 of 2021)
[2023] KEHC 19840 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19840 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL APPEAL E019 OF 2021
CM KARIUKI, J
JULY 6, 2023**

BETWEEN

ROSE WANGARI MWANGI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the Judgment of Honourable S N MWANGI
Senior Resident Magistrate delivered on 11th November 2021 in the
Chief Magistrate Court at Nyahururu criminal case No. 2426 of 2018)*

JUDGMENT

1. The Appellant was charged with obstructing Justice contrary to section 117 PC Cap 63 of the [Penal Code](#).
2. Particulars being that on October 13, 2018 at [Particulars Withheld] Location, Nyandarua County, jointly with others, undertook to defeat Justice by failing to report a defilement complaint of MNW child aged twelve (12) years.
3. The Prosecution called three (3) witnesses, and the Appellant opted to remain silent.
4. She was convicted and resented to serve eighteen (18) months. The verdict aggrieved her, and thus appealed with five (5) grounds:
 5. That the Learned Trial Magistrate erred in Law and fact in finding that the Appellant knew that the complainant had been defiled, whereas there was no evidence on record in support of such a finding.
 6. That the Learned Trial Magistrate erred in Law and, in fact, in finding that the Prosecution had proved a case of obstruction of Justice contrary to Section 117(a) of the [Penal Code](#), an offense touching on an alleged defilement contrary to the evidence on record.



7. The parties were directed to canvass appeals via submissions.
8. Appellant Submission
9. The Appellant submits that there is no such offense as obstruction of Justice created under section 117(a) of the *Penal Code*. The offense created under that provision of the Law is that of conspiracy to obstruct, prevent, pervert, or defeat the course of Justice, and the offense that the Appellant was charged and convicted of is not provided for in Law.
10. The Prosecution did not table any medical evidence to prove that the complainant had been defiled. In totality, there was no evidence in proof of defilement and the fact that the Appellant had knowledge of the defilement. Still, she failed to report it as the alleged defilement was first reported to the complainant's mother.
11. Respondent Submission
12. The respondent submits that P W 3, the complainant herein, testified on the 7th of September, 2021, that she was 16 years old and a resident of Karisha and schooling at [Particulars withheld] Primary School and in class six. She stated that the Appellant was her mother's friend, whom her mother had told her to live with in 2018.
13. On a Saturday, when her mother had gone to work, she went to wash clothes; a young man pulled her and took her to the forest where he told her not to scream and if she screamed, he would kill her.
14. She then told the Appellant about the provocation, but the Appellant refused to listen and said it was a lie.
15. She stated that the young man touched her face, took her to the forest, where he ordered her not to scream, and did bad manners to her. He removed her clothes, and then he raped her. By raping, she meant he touched the front middle part and also at the back using his hand.
16. The latter went to report at a police station which she could not remember/recall. Rose, the Appellant, still insisted it was all false and that she was lying.
17. The complainant stated that the person who did this to her was Kanyugo, whose name she even gave the Appellant.
18. Further, the complainant states that she told the Area Chief, who testified as PW 1, about the defilement ordeal and referred them to Mairo Inya Police Station the same day.
19. It's also interesting to note from the complainant's testimony that both accused were called by the police, and the Appellant told the police it was false.
20. I wish to submit that once this kind of report is made to the police station, it is incumbent upon them to commence investigations, including taking the minor to the hospital for examination and filing of P3 form instead of relying on the statement from the Appellant, which was all false.
21. It then appears from the totality of all the availed evidence that for this offense to have been seen to be proved, the initial offense of defilement or sexual assault ought to have been proved.
22. No medical evidence was produced to prove either of the offenses mentioned above, nor was there a birth certificate exhibited to prove the minor's age.
23. In the upshot, we thus concede to this appeal.
24. Issues, Analysis, and Determination



25. After going through the evidence tendered and the submissions on record, I find the issues are; whether the Prosecution proved its case beyond any reasonable doubt.
26. It is trite Law that the 1st Appellate Court must reconsider the evidence, evaluate it and draw its conclusion. See *Kerumpoti Leiyen VS Republic* [2016] eKLR. In the case of *Okeno v Republic* [1972] EA 32, *Pandya v R* (1957) EA 336, and *Ruwala v R* (1957) EA 570, which is to subject- the evidence as a whole to a fresh and exhaustive examination and for this court to arrive at its own decision on the evidence, it must weigh the evidence and draw its conclusions and its findings Any person who —
27. Conspires with any other person to accuse any person falsely of any crime or to do anything to obstruct, prevent, pervert, or defeat the course of Justice;
28. Section 117 of the *Penal Code* that provides for the offence of conspiracy to defeat justice states thus:
29. I have considered Section 117(a) of the *Penal Code* under which the Appellant was charged. A crime of conspiracy is committed when any person accuses another falsely of any crime or does anything to obstruct, pervert, or defeat the course of Justice.
30. W 3, the complainant herein, testified on the 7th of September, 2021, that she was 16 years old and a resident of Karisha and schooling at [Particulars withheld] Primary School and in class six. She stated that the Appellant was her mother's friend, whom her mother had told her to live with in 2018.
31. On a Saturday, when her mother had gone to work, she went to wash clothes; a young man pulled her and took her to the forest where he told her not to scream and if she screamed, he would kill her.
32. She then told the Appellant about the provocation, but the Appellant refused to listen and said it was a lie.
33. She stated that the young man touched her face, took her to the forest, where he ordered her not to scream, and did bad manners to her. He removed her clothes, and then he raped her. By raping, she meant he touched the front middle part and also at the back using his hand.
34. The latter went to report at a police station which she could not remember/recall. Rose, the Appellant, still insisted it was all false and that she was lying.
35. The complainant stated that the person who did this to her was Kanyugo, whose name she even gave the Appellant.
36. Further, the complainant states that she told the Area Chief, who testified as PW 1, about the defilement ordeal and referred them to Mairo Inya Police Station the same day.
37. It's also interesting to note from the complainant's testimony that both accused were called by the police, and the Appellant told the police it was false.
38. There is no such offense as obstruction of Justice created under section 117(a) of the *Penal Code*. The offense created under that provision of the Law is that of conspiracy to obstruct, prevent, pervert, or defeat the course of Justice, and the offense that the Appellant was charged and convicted of is not provided for in Law.
39. Further, the Prosecution did not table any medical evidence to prove that the complainant had been defiled. In totality, there was no evidence in proof of defilement and the fact that the Appellant had knowledge of the defilement. Still, she failed to report it as the alleged defilement was first reported to the complainant's mother.



40. The totality of all the availed evidence that for this offense to have been seen to be proved, the initial offense of defilement or sexual assault ought to have been proved.
41. No medical evidence was produced to prove either of the offenses mentioned above, nor was there a birth certificate exhibited to prove the minor's age.
42. Thus, the court agrees with the Prosecution in conceding the appeal, finds the appeal meritorious, allows the same, and makes the orders;
43. The appeal is allowed, the conviction is quashed, and the sentence is set aside.
44. The Appellant shall be released forthwith unless otherwise lawfully held.

DATED, SIGNED, AND DELIVERED AT NYAHURURU ON THIS 6TH DAY OF JULY 2023.

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CHARLES KARIUKI
JUDGE

