



**Olando v Director of Public Prosecutions (Criminal Appeal
E013 of 2021) [2023] KEHC 21429 (KLR) (1 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21429 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E013 OF 2021
WM MUSYOKA, J
AUGUST 1, 2023**

BETWEEN

YUSUF OLANDO APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

JUDGMENT

1. The appellant was convicted, on January 21, 2021, of defilement of TN, a child aged 13, and was sentenced to serve 15 years in jail. He was aggrieved and preferred an appeal. He alleged that there was no positive identification, there was a grudge between him and M, crucial witnesses were not summoned, he was not medically examined to link him to the crime, evidence on penetration was flimsy, the medical findings were inconclusive and evidence was inadequate, the evidence had inconsistencies and contradictions, his submissions were disregarded, his defence was not considered, and burden of proof was shifted to him.
2. The factual background was that the appellant burst into the house where the complainant, PW1, was with her brother, ordered her brother to go to bed, pulled PW1 on to the wall, removed her underpants, and inserted his penis into her vagina. She reported to her mother, PW2, shortly thereafter, a report was made to the police. PW1 was taken to a medical facility and the appellant was arrested.
3. Was there positive identification? There was. As the appellant was exiting the house after defiling PW1, he met PW2, and shortly thereafter PW1 narrated to PW2 what had happened, and action was taken immediately thereafter, which led to the arrest of the appellant in less than 23 hours. There was light in the room, as PW1 and her brother were reading, the appellant had met and spoken to PW2 some minutes before he defiled PW1. There is overwhelming evidence that the identification was positive.
4. Was it a grudge case, on account of bad blood between the appellant and M? M was the person who assisted with the arrest of the appellant. PW2 said he was her friend. It was the appellant alleging that



there was a grudge, and that case was animated by that grudge. That was his defence. The burden was on him to establish the grudge, and how it influenced the prosecution. I have closely considered the defence statement he made on December 22, 2020, and the answers elicited from the prosecution witnesses when he cross examined them, and I have seen any evidence of any grudge, leave alone the same motivating his prosecution.

5. On crucial witnesses not being called, the appellant has M in mind, going by his written submissions. M featured quite prominently in testimony of PW2. He and the appellant were said to have been at the scene prior to the defilement, and it was M who assisted the police to arrest the appellant. Was he a crucial witness? He would have been useful, but was not altogether a crucial witness. The first report of the incident was not made to him by PW1. He would have shed light on the circumstances of the arrest, but altogether the case by the prosecution was still strong enough without his testimony. The prosecution is not bound to call any other person who has some information concerning the case. The duty is to call such number of witnesses as would be adequate or sufficient to establish the case against the accused person. The burden is to establish that there was penetration, the perpetrator was identified, and the age of the victim. The witnesses called by the prosecution were adequate to prove these 3 elements of the offence charged.
6. On the matter of his being medically examined to connect him to the offence, the *Sexual Offences Act*, No 3 of 2006, does not make it mandatory, that the suspected perpetrator be subjected to such examination. The evidence of the victim often suffices, so long as it is credible and reliable. In this case, PW1 testified in a straightforward manner, of how the appellant burst into her house and forced himself on her. PW2 also placed him at the scene seconds after the defilement. PW1 was the victim of the defilement. She narrated how it happened. There was corroboration from medical evidence and from the reports made by PW2.
7. On evidence on penetration being flimsy, PW1 was the victim. It happened to her. She described in clear terms how the appellant pulled her underwear down, how he gave it to her to hold, and then how he inserted his penis into her vagina. It happened at about 8.00 PM/9.00 PM. She had not yet retired to bed. She was reading when he came. She was wide awake, fully alert. Her evidence was corroborated by the medical evidence, that there was recent penetration.
8. He avers that the medical evidence was inconclusive. He submits that the only evidence relied on was the absence of hymen, which he submits is not adequate evidence of penetration. I agree with appellant, PW3 could have done better. He apparently only relied on the absence of hymen to conclude that there was penetration. He talked of dirt coming from the PW1's private parts, but he was not specific on what it was. On laboratory analysis he found pus in her urine. However, PW3 did not explain what that meant. During cross-examination, he based himself more on the history given to him by PW1, than on his own findings. I agree that PW3 did not sound like he was competent to handle the task that he was called upon to, or he was not articulate enough on his findings. However, medical evidence is not the only evidence that a court should rely on to establish defilement.
9. On contradictions and inconsistencies, I have noted a few in the record. Contradictions and inconsistencies are only relevant if they go to the core of the matter. They are to be expected, as when the happenings, unfold the witnesses do not anticipate that they would be expected to narrate them thereafter, hence the need to take a keener note. Such events unfold fairly fast, and witnesses often do not have the presence of mind to take note of everything that is happening. The inconsistencies pointed out by the appellant do not go to the core of the matter. On the age of PW1, for instance, whether the age established was 13 or 14 is not necessarily material, it would still account to defilement, the age would be of relevance only with respect to sentence, if at all.



10. On his submissions being disregarded, I have looked at the record, no order was made for filing of written submissions, but I see that the appellant filed written submissions on December 22, 2020, the day he made his defence statement. I note that the trial court considered the submissions, at page 3 paragraph 2 of the judgment, the relevant portion reads:

' The accused filed his written submissions in which he raised the issue of identification. He submitted that he was not properly identified. The evidence of identification was put forward by both PW1 and PW2 and I am persuaded that he was properly identified.'
11. The appellant submits that his defence was disregarded but the trial court considered that defence in a long paragraph at pages 2 and 3 of the judgment. There cannot be any basis for the submission that the defence was disregarded or was not considered.
12. On the burden of proof being shifted to him, the appellant has not pointed to any such incident, and I have not come across any in the trial court records.
13. On the whole, it is my finding that the prosecution had presented a case that established beyond reasonable doubt that the appellant defiled PW1, on the date alleged.
14. On the sentence, the birth certificate indicates that PW1 was born on October 14, 2015. That made her 14 years as at January 28, 2020. She was still 14 years old at September 15, 2020, when she and PW2 testified. The age stated by the investigating officer, and reflected in the charge sheet is not correct, but the misstatement of age is not fatal, so long as the correct age is ascertained. The age stated should affect the sentence prescribed in the *Sexual Offences Act*. However, in view of *Philip Mueke Mainigi & others vs Director of Public Prosecutions & another Machakos HCPet No E017 of 2021* (Odunga, J) and *Edwin Wachira & 9 others vs Republic Mombasa HC Petition No 97 of 2021* (Mativo, J), it may not matter.
15. Overall, the appeal herein has no merit, and I hereby, accordingly, dismiss it. The conviction is affirmed and the sentence confirmed. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 1ST DAY OF AUGUST, 2023

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant

Appearances

Yusuf Olando, appellant, in person.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the respondent.

