



**Khalumba v Republic (Criminal Appeal E013 of 2023)
[2024] KEHC 14449 (KLR) (20 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14449 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E013 OF 2023
DR KAVEDZA, J
NOVEMBER 20, 2024**

BETWEEN

DANCUN KHALUMBA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered on 31st October 2023 by Hon. A. Mwangi (CM) at Kibera Chief Magistrate's Court Sexual Offences Case no. 10 of 2020 Republic vs Dancun Khalumba)

JUDGMENT

1. The Appellant Dancun Khalumba was charged and after full trial convicted by the Subordinate Court for the offence of defilement contrary to section 8(1) as read with 8(3) of the [Sexual Offences Act](#). The particulars were that on 9th December 2019 in Kibra Sub county within Nairobi county, he intentionally and unlawfully caused his penis to penetrate the vagina of AAI a child aged 14 years. He was sentenced to serve twenty (20) years' imprisonment.
2. Being dissatisfied, the appellant filed an appeal against the conviction and sentence in line with his petition of appeal. He submitted written submissions, which I have considered, and there is no need to rehash them herein. In his appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted. He argued that the prosecution's evidence was marred with contradictions and that the prosecution failed to prove its case beyond reasonable doubt. He urged the court to quash his conviction and set aside his sentence.
3. This is the first appellate court and in *Okeno v R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence which was before the trial court and come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.



4. To succeed in a prosecution for defilement, it must be proven that the accused committed an act that caused penetration with a child. "Penetration" under Section 2 of the Act means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person."
5. Further, section 8(1) and (3) of the [Sexual Offences Act](#), No 3 of 2006 provides thus: -
 8. Defilement
 - (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
6. The prosecution's case against the appellant was as follows: PW1, the complainant AAI(name withheld) told the court that she was born on 24th December 2005 and was in Form One. She recounted that on 9th December 2019, she was alone in the house, since her mother had left and her younger sister was playing outside. The appellant who was their neighbour came into the house and locked the door behind him. He then commanded her to remove her clothes, and when she declined, he forcefully undressed her. She began to scream no one came to her rescue.. The appellant then pushed her to the seat and inserted his penis into her vagina. When he finished, he left.
7. The complainant told the court that her mother came back around 1 pm. She narrated her ordeal to her. Together, they proceeded to the Olympic Police Post where the matter was reported. They were referred to Nairobi Women's Hospital for examination and treatment.
8. Upon re-examination, she averred that when the doctors at Nairobi Women's Hospital found that she had not been defiled, they proceeded to Kenyatta National Hospital where the doctors found that she had been defiled. She also visited Kibera Health Centre.
9. PW3, the complainant's younger sister, gave an unsworn statement after a voir dire examination. She identified the appellant as someone who lived in their apartment building. On the day in question, she was playing outside their house when the appellant gave her Kshs 200, which she used to buy a cake. Upon returning home, she found the complainant crying but did not receive an explanation and went back to play.
10. PW4, the complainant's mother, testified that on 9th December 2019, she returned home at 4 p.m. and found the complainant had not finished her chores. Upon further questioning, the complainant remained silent until a neighbour informed PW4 that something serious had happened. The mother then learned of the alleged incident with the appellant, reported it to the police, and took the complainant to Nairobi Women's Hospital.
11. PW2, Alice Gori, a healthcare worker at Kibera Health Centre, testified that on 20th December 2019, the complainant visited the facility with her mother. The complainant reported that the incident had occurred on 9th December 2019. Upon examination, Alice found the complainant's hymen broken and painful, observed a whitish smelly discharge, healing wound scars on her genitalia, and dark reddish discolouration in the area.
12. During cross-examination, PW2 confirmed that the complainant had attended multiple health facilities, leading to three different PRC forms, with the one from Kibera Health Centre being correct. PW2 added that the child had experienced stomach aches due to an infection reportedly transmitted by the appellant.



13. PW5, John Njuguna, a clinician at Nairobi Women's Hospital, produced the complainant's P3 form on behalf of Edwin Omwenga who was not available to testify. He stated that on 9th December 2019 when she arrived at Nairobi Women's Hospital for treatment, she had not changed her clothes. Upon examination, there were no physical injuries and there were no tears on her vagina. Her hymen was also intact. He stated that the whitish discharge she had was normal.
14. PW6, PC Cynthia Mutisya recounted that at the time the incident was reported, she was stationed at Kilimani Police Station and was the investigating officer of the case. She stated that the appellant had been arrested by police officers from Sarangombe, and that she was called to re-arrest him. He refused to record a statement when called upon to do so. She proceeded to take the complainant to Kenyatta Hospital for a third medical opinion since she had observed that the two reports from Kibera South Hospital and Nairobi Women's Hospital differed. She identified the appellant in court.
15. In his defence, the appellant maintained his innocence. He testified that on 9th September 2019 at around 9:48 p.m., he arrived home to find two police officers waiting. They informed him he had a case to answer and took him to Lang'ata Police Station. His neighbours, including PW4 (the complainant's mother), soon arrived. She declined to discuss details with them, citing the case. The next day, he was transferred to Kilimani Police Station, where he informed his family of his arrest and charges. Following questioning by the investigating officer, he was released on cash bail. In February 2020, he was re-arrested and later arraigned, denying the offense.
16. In his submissions, the appellant challenged the totality of the prosecution's evidence against which he was convicted. He maintained that the prosecution's evidence was marred by contradictions and inconsistencies. In addition, the prosecution witnesses were unreliable.
17. Bearing in mind the above provisions, I will now analyse the evidence on record to ascertain whether the essential ingredients of the offence preferred against the appellant were established to the required standard of proof. Regarding proof of age, I wish to state at the outset that the importance of proving the age of a victim, proof of penetration, and positive identification of the assailant in sexual offences is paramount.
18. The complainant testified that she was born on 24th December 2005. Her birth certificate was produced to that effect. She was therefore a few days short of fourteen (14) years at the time of the offence. There is therefore no doubt that the complainant was a child within the meaning of the law.
19. The question I must now grapple with is whether the prosecution adduced sufficient evidence to prove that the appellant defiled the child victim as alleged. The complainant gave evidence that the appellant who was their neighbour came to their house while her mother was away and defiled her. She maintained that she tried to scream but no one came to her rescue.
20. On 9th December 2019, following the alleged incident, the complainant was examined at Nairobi Women's Hospital. Medical evidence by PW5 indicated normal outer and inner genitalia, an intact hymen, and a whitish vaginal discharge, which was considered normal. PRC and P3 forms reflected these findings, though the medical examiner noted that penetration could not be excluded.
21. The complainant underwent a second examination at Kenyatta National Hospital, but the findings were not presented in evidence. On 20th December 2019, a third examination at Kibera Health Centre revealed a broken hymen, painful hyperaemic vaginal areas with notches at 7 am and 11 am, whitish smelly discharge, and dark reddish discolouration. The PRC and P3 forms documented these findings.



22. In evaluating, assessing, and reconciling the evidence to determine whether there are contradictions discrepancies, and or inconsistencies in the prosecution evidence that prejudiced the appellant, this court has to attempt to fit in the shoes of the trial court.
23. The alleged incident took place on 9th December 2019, with the complainant being examined the same day without a change of clothes, rendering this examination crucial to corroborate her account of penetration. However, the medical findings from 9th December reveal an intact hymen and no injuries to the outer or inner genitalia, an outcome difficult to reconcile with claims of defilement involving an adult male. Despite the presence of whitish discharge, no specimen was collected to determine if it was seminal or vaginal fluid, a crucial omission given the lack of physical injuries, which necessitated laboratory analysis.
24. The complainant was examined a second time at Kenyatta National Hospital; however, these findings were notably absent from court records, and prosecution witnesses did not address them. A third examination, conducted 10 days later, presented starkly different findings: a broken hymen with notches at 7 and 11 o'clock, painful on touch, along with whitish smelly discharge and signs of infection reportedly from the appellant. However, the medical examiner did not specify the infection type or confirm if it was sexually transmitted, given the lack of laboratory testing leaving significant evidentiary gaps.
25. Further, the complainant's first examination following the alleged defilement on 9th December showed normal findings, yet 10 days later, medical evidence indicated penetration. Judicial experience in handling sexual offence cases suggests that an initially normal examination would not abruptly show such changes; if the hymen was intact initially, it implies that any defilement occurred within the intervening period, potentially involving another individual.
26. The issue that this court has to grapple with is whether the contradictions and inconsistencies outlined in the foregoing analysis are so trivial so as to be ignored, or whether they are substantial and fundamental to the issues for determination. In *Richard Munene v Republic* [2018] eKLR, the Court of Appeal stated as follows about contradiction or inconsistency in the evidence of the prosecution witness:

“Contradictions, discrepancies, and inconsistencies in evidence of witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused.

It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily create some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.”

27. The test as to whether the contradictions are minor or substantial was laid out in the case of *Sigei v Republic* [2023] KECA 154 (KLR):

“In assessing the impact of contradictory statements or discrepancies on the prosecution's case, our understanding is that firstly, for contradictions to be fatal, it must relate to material facts. Secondly, such contradictions must concern substantial matters in the case. Thirdly, such contradictions must deal with the real substance of the case.”



28. From the above authorities, it is clear that contradictions and inconsistencies, unless satisfactorily explained, would usually, but not necessarily, result in the evidence of a witness being rejected. The contradictions must be grave and point to deliberate untruthfulness.
29. Having analysed and re-evaluated the evidence on record, it is my finding that the complainant was an untruthful witness by the contradictions in the medical evidence. The said contradictions are so substantial as they relate to material facts. I therefore disagree with the trial magistrate that she believed the minor was telling the truth and disregarded the first medical examination done after the incident.
30. For the foregoing reasons, I find the appeal merited and hereby quash the conviction and set aside the sentence of twenty (20) years imprisonment imposed by the trial court. The appellant is thus set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 20TH DAY OF NOVEMBER 2024

D. KAVEDZA

JUDGE

In the presence of:

Ms. Madodo for the Appellant

Mburugu for the Respondent

Achode Court Assistant

