



**Mugo v Republic (Criminal Appeal E157 of 2022)  
[2024] KEHC 14788 (KLR) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14788 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL E157 OF 2022  
LW GITARI, J  
NOVEMBER 7, 2024**

**BETWEEN**

**VINCENT GICHUNGE MUGO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. This appeal arises from the proceedings in Meru Chief Magistrate’s Court Sexual Offences Case No.E001/2021 wherein the appellant was charged with the offence of defilement contrary to Section 8(2) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the charge are that on 10/4/2021 at Buuri West Sub-County the appellant caused his genital organs to penetrate the genital organs of namely vagina of BN a child aged 3 ½ years. The appellant was also charged with the offence of committing an indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The appellant denied the charges. The court proceeded and conducted a full trial. At the conclusion of the trial, the appellant was found guilty, convicted and sentenced to serve twenty five years imprisonment. The appellant was dissatisfied with both the conviction and sentence and filed this appeal praying that the conviction be quashed, sentence be set aside and he be set at liberty. The appeal was opposed by the State and has urged the court to dismiss it.

**The Prosecution’s Case**

2. The prosecution’s case is that on the material day, 10/4/2021 the complainant’s mother in the morning hours the appellant reported to the home of the complainant’s parents where he was working as a farm hand. The complainant had two other siblings and one of them suffers from cerebral palsy which requires regular medication. On that material day, 10/4/2021, went to buy chipo for her child VK who suffers from Cerebral Palsy. The complainant’s mother (PW1) left her under the care of the appellant



who was to baby sit her and her siblings until she returned. PW1 then left the home to go and buy drugs and upon her return, PW2 the complainant told her never to leave her with anyone again. She assured her that she would never leave her again.

3. After a couple of days, the complainant (PW2) surprised her mother when she asked why she never “digidigi” her like her uncle does. It is then that the complainant revealed to her mother that when she left her with the appellant, he took her to the farm, lowered his trousers and then he “digidigi” with his ‘nunu’ on her ‘nunu’. PW2 told the court her mother that the appellant fondled her like ‘Maria’ the TV soap Opera which they watch at home. The complainant demonstrated to her mother how the appellant penetrated her and she felt pain in her genital organ. PW1 informed the complainant’s father who informed elders and reported the matter to the police.
4. The appellant was summoned to the complainant’s home and she narrated what the appellant had done to her. The appellant denied and suggest that the matter be settled to home. The Chief was called and the complainant narrated what the appellant did to her. He was arrested and charged.
5. PW3 JMM is the complainant’s father. His testimony was that he went home on his off day and was informed that her daughter (PW2) had been defiled by the appellant. He went and reported at Gachuiya Police Post. He gave evidence that the appellant was paid all his dues and was not owed any money.
6. (PW5) P.C Hosea Kiptum arrested the appellant while PW6 was the investigating officer.
7. The prosecution called Doctor Gideon Mutai Kirimi (PW7) a medical officer of health based at Timau Sub-County Hospital who examined the complainant and filled a P3 form. He testified that on examination he found that the complainant was 3 ½ years old. On examination of the genitalia the outer genitalia was normal, the hymen was broken. There was redness of the vaginal surface which was noted on the entrance of the viginia. The degree of injury was harm. There was also a whitish discharge noted from the viginia. A P.R.C form was filed on 27/4/2021. He produced the P3 form as exhibits 1 and P.R.C form as exhibit 3. He testified that the child was examined seventeen days after the incident.
8. According to PW6, P.C Nicholas Bitek who is the investigating officer the appellant was taken to the police station by police officers from Gachurio on allegation that he had defiled a child. He was placed in the cell. She referred the child to hospital. She recorded a statement from the complainant (the child) and she explained that she was defiled. The report was made by the complainant’s mother (PW1). PW6 produced the birth certificate of the complainant as exhibit-1 to prove that she was 3 ½ years at the time she was defiled.

#### **The Defence Case:**

9. The appellant gave unsworn defence and stated that when the offence was committed he was not in that area. He told the court that he was framed for this offence. He further told the court that the complainant did not identify him as the perpetrator.

10. The appeal:

The appeal was canvassed by way of written submissions.

Appellant’s submissions:

The appellant relies on the case of Maina –v- Republic (1970).

He submits that the learned trial magistrate erred in both matters of fact and law by failing the notice that the case was actuated by a grudge between him and the complainant’s mother. That the allegations against him are falsehoods by the complainant’s mother and the complainant. That the child was taken



to hospital seventeen days after the incident. That the learned magistrate failed to note the evidence by the doctor who explained the redness on the complainant's genitalia. The appellant has cited the case of P.K.W.-v- Republic (citation not given where it was held that the broken hymen can be as a result of many factors. The appellant further submits that his identification by the complainant is in dispute as the complainant testified that it was her first time to see the appellant. He relies on Kariuki Njiru & 7 Othes -v- Republic on the issue of identification. He further relies on Michael Mugo Musyoka (2015) eKLR, Joan Chebichii Sawe -v- Republic (2003) eKLR. The applicant further submits that he has the right to be presumed innocent until his guilt is proved. He relies on Republic -v- Lifchus (1997) S.RC 320, State -v- Coetzee (1997) 2LRC and Mbugua Kariuki- Republic (1979) KLR.

11. He submits that there was no direct cogent, convincing and compelling evidence to warrant the trial court to convict the appellant. That the evidence fell short of the standard required in a trial of this magnitude. He prays that the conviction be quashed and the sentence be set aside.

12. Respondent's Submissions:

The respondent relies on the case of Charles Wamukoya Karani -v- Republic Criminal Appeal No.72/2013 where the court stated that, "the critical ingredients forming the offence of defilement are age of the complainant, proof of penetration and positive identification of the assailant."

13. The prosecution submits that the age of the complainant was proved through a birth certificate which was produced in court and proved that she was three and half 3 ½ years old. She also relies on the case of Joseph Kieti Seet -v- Republic (2014) eKLR where the court stated that-

"It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuroroni -versus Uganda, Court of Appeal No. 2/2000. It was held thus:

In defilement cases of medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from the medical evidence, age may also be proved by birth certificate; the victim's parents or guardian and by observation and common sense."

14. On penetration, the respondent submits that the same was proved by the evidence of the complainant and the medical evidence adduced by PW7 the clinical officer who examined the complainant and found that her hymen was broken, had a discharge and redness on the vaginal surface and he concluded that there was penetration. The respondent further submits that the appellant was identified as the perpetrator as he was well known to the complainant and the offence was committed in broad daylight.

15. The respondent further submits that the evidence was free of inconsistencies and contradictions. That there was no evidence of grudges with complainant's mother. She relies on Section 143 of the *Evidence Act*, (Cap 80 Laws of Kenya) to submit that the witnesses called were sufficient in proving the case and there was no need of calling other witnesses.

16. On sentence, it is submitted that the trial magistrate considered the facts and the age of the complainant and passed a sentence that was deserved.

17. Analysis and determination.

I have considered the proceedings before the lower court, the submissions by the appellant and the prosecution. The issues for determination are:

1. Whether there existed a grudge between the appellant and the complainant's mother.



2. Whether the charge against the appellant was proved beyond any reasonable doubts.
18. This is a first Appeal. This court has a duty to re-evaluate the evidence, analyse its own independent finding. The court is supposed to leave room for the fact that it did not have an opportunity to see the witnesses when they testified and to assess their demeanor. See *Okeno-v- Republic (1972) E.A 32*. In *Kiilu & Another –v- Republic (2005)1 KLR 174*, Court of Appeal, it was stated as follows:
- “An appellant in a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision on the evidence. The appellate court must itself weigh conflicting evidence and draw its own conclusion.
- It is not the function of the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts finding and conclusions: it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s finding should be supported. In so doing it should make allowance for the fact that the trial court has had advantage of seeing and hearing the witnesses.”
19. The 1<sup>st</sup> appellate court has jurisdiction to consider facts and the law. Section 347 of the Criminal Procedure Code provides:-
- “Save as in this part provided:-
- A person convicted of on a trial held in sub-ordinate court of the 1<sup>st</sup> or 3<sup>rd</sup> class may appeal o the High Court and an appeal to the High Court may be on a matter of fact as well as on a matter of law.
20. The appellant was charged with defilement. The elements that the prosecution was supposed to prove are-
- Penetration
  - Age of the complainant
  - Identity of the perpetrator
- The prosecution produced evidence in support of the allegation of penetration. The medical evidence adduced by PW7 proved the fact of penetration. The fact of penetration is proved by the testimony of the complainant corroborated by medical evidence. The complainant narrated to the trial court what happened. The doctor stated that the hymen was broken and there was redness of the vagina. The complainant had a vagina discharge which on laboratory examination it was confirmed that it had an infection. For a three year old to have a broken hymen, redness on the vagina, discharge and infection, this is prove beyond any reasonable doubts that there was penetration.
- In *Kaingu Elias Kasongo-v- Republic Court of Appeal Malindi Criminal Appeal No.54/2010* held that age of the victim of sexual assault under the *sexual offences Act* is a critical component. It forms part of the charge which must be proved in the same way as penetration in cases of rape and defilement. It is therefore essential that the same be proved with credible evidence for the sentence to be imposed upon conviction will depend on the age of the victim.”
21. The prosecution produced the birth certificate of the complainant which shows that the complainant was born on 6/10/2017 so, when the offence was committed she was three and half years old. She was a child of tender years.



In the case of *Marripet Loonkomok-v- Republic*, the Court of Appeal held that the definition of a child of tender years under the *Children Act* was held to apply with regard to Section 19 of the *Oaths and Statutory Declarations Act*. The courts have held that for the purpose of the *Sexual Offences Act* a child of tender years is one under the age of fourteen (14) years. See *Kibageny Arap Kolie –v- Republic* (195 and *Kathurima –v- Republic Nyeri Criminal Appeal 2014*. Under Section 8(1) (2) of the *Sexual Offences Act*, the offence of defilement is disclosed if the victim is aged eleven years or less.

I find that the prosecution proved the age of the complainant to the required standard by the production of her birth certificate.

22. The identity of the perpetrator.

The complainant identified the appellant as the person who penetrated her. She identified him in court by name and pointed him out. The appellant admitted that he had worked for the complainant as a casual labourer for close to two months. The complainant was staying at home throughout as he had not attained school going age. She could not have failed to know the appellant. When the complainant testified in court, she identified the appellant by name and pointed him out in court. It was her evidence which was not given on oath that she was left at home by her mother and the appellant took her to the farm where he lowered her clothes he then lowered his and defiled her. The appellant warned her not to tell anyone. The complainant's mother PW1 testified that on returning home on the material day the child told her never to leave her at home with the appellant again. She never enquired from why she said that and she did not suspect anything she did not ask her why and the PW2 kept it secret until much later when she told her mother what happened on the day she left her with the appellant. The complainant was taken to hospital and the doctor confirmed that she was defiled. The appellant was summoned to the complainant's home and elders were called. The complainant repeated what happened when she was left with the appellant. He denied then said the matter should be finished among themselves. The area chief was called. He questioned the complainant again and she explained that the appellant defiled her. This was corroborated by PW3 who is an independent witness. I find that sufficient evidence was adduced and proved that the appellant was the perpetrator who was identified by the complainant. The complainant's mother confirmed that she had left the complainant under the care of the appellant

23. The appellant alleges that he had grudge with PW2. I find that PW1 denied the existence of such a grudge and PW4 who was an independent witness never heard the appellant say he was framed. Instead he suggested that the matter be settled. The allegation of grudge is not true. It is an afterthought. In any case the appellant was working for the complainant, it beats logic how he could continue working who harboured a grudge with him. I find that this can't be.

24. On the issue that the complainant was taken to hospital after seventeen (17) days, I find that it is not denied. This did not interfere with the evidence as the doctor found that the child's hymen was broken and there was redness of the genital and a discharge. Section 2 of the *Sexual Offences Act* defines penetration as "the partial or complete insertion of a person's genital organ into the genital organ of another." Evidence of broken hymen confirms the allegation of complete insertion of the genital organ of the appellant into the victims genital organ. There is no limitation on the time one has to report a crime to the police. In this case the minor was traumatized and did not disclose to her mother. She informed her mother later and action was taken. Failure to report soon after the defilement cannot vitiate the trial. The report was made and there was every truth in it.

25. The appellant has faulted the investigations and that the case was not water-tight. On penetration, the clinical officer testified that the hymen was there but was broken. He cannot therefore rely on the case of *Maina-v- Republic* The medical evidence confirmed that the complainant was penetrated and broken



hymen was not the only evidence relied on. There was reddening of the genitalia and a discharge which while taken together shows that there was defilement. All in all it is my finding that this is a charge which was proved beyond any reasonable doubts. It was not based on the existence of grudge between the appellant and the complainant which was unsubstantiated and was denied.

26. Conclusion:

It is my view that the Judgment of the learned trial magistrate was sound. The appeal lacks merits and is dismissed.

**DATED, SIGNED AND DELIVERED AT MERU THIS 7<sup>TH</sup> DAY OF NOVEMBER 2024.**

**L.W. GITARI**

**JUDGE**

**7/11/2024**

Ms Mukangu (SC)

C/A Muriuki

Appellant –present

The Judgment has been read out in open court.

**L.W. GITARI**

**JUDGE**

**7/11/2024**

