



REPUBLIC OF KENYA



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**Ongule v Republic (Criminal Appeal 49 of 2015)  
[2016] KEHC 3746 (KLR) (10 May 2016) (Judgment)**

*George Ochieng Ongule v Republic [2016] eKLR*

Neutral citation: [2016] KEHC 3746 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL APPEAL 49 OF 2015**

**JA MAKAU, J**

**MAY 10, 2016**

**BETWEEN**

**GEORGE OCHIENG ONGULE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against both the conviction and the sentence delivered on 7.5.2014 in Criminal Case No. 253 of 2013 in Siaya Law Court before Hon. M.S. Kimani – R.M.)*

**JUDGMENT**

1. George Ochieng Ongule was charged with an offence of Defilement Contrary to Section 8 (1) (2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the Offence are that on the 1st day of May, 2013 at [particulars withheld] Location in Gem District within Siaya County, intentionally caused his penis to penetrate the vagina of V A A a child aged nine (9) years.
2. The complainant V.A.A. testified that she was 9 years old and that on 1.5.2013 the accused who they refer to as “Ja Ugenya” went to V.A.A.’s home and found V.A.A. in company of her mother whereby the “Ja Ugenya” requested her mother, to let PW1 go and buy Kerosene for him at “Kwa Chege”. The Appellant gave PW1 Kshs.20/= and she was required to buy Kerosene for Kshs 10/= and balance was for buying “Mandazi”. PW1 and her younger sister M A alias “Mum” went and bought the items which the appellant required. The Appellant took the Kerosene, one “Mandazi” and handed the other to “Mum” who he asked to wait outside. He then gave the other “Andazi” to PW1, then locked the house, removed PW1’s pantie, removed his trouser and did bad manners to PW1, by putting his penis into PW1’s vagina. That immediately PW1’s mother, E came and called out “Ja Ugenya’s” name as she pushed the door “Ja Ugenya” responded as he shoved PW1 underneath the bed. He then opened the door, PW1’s mother entered and removed PW1 from underneath of the bed. That was after PW1’s



- mother had asked the appellant where PW1 was and he lied that PW1 had not returned from the shop. That is when PW1's mother yanked at the blankets from the bed and spotted PW1 under the bed and pulled her out as she was screaming for help. The neighbour came to the scene and at that time PW1 was without pantie which was on top of appellant's bed. It was taken to Police Station. PW1 was then taken to Yala Police Station and thereafter to Yala Level IV Hospital. PW1 testified that the person who she was referring to as "Ja Ugenya" was the accused person at the dock. During cross-examination PW1 testified that immediately the appellant did bad things to her, her mother came and found them adding that she did not notice anything on her private parts after appellant did bad things to her.
3. PW2 E A testified that on 1.5.2013 at about 4.00 p.m. she was at her shamba weeding when her child M A alias "Mum" called her asking her to go home as she was crying as she told PW2, V.A.A. was inside the house of "Ja Ugenya" That PW2 proceeded to "Ja Ugenya's" house and found the door locked from inside. She called him thrice, responding at the third time as he was trying to open the door. On being asked where PW1 was, he said she had not returned from the shop as he was standing at the door blocking PW2 from seeing inside of the room, however she could see through his bedroom hence she found her way in the room and found blankets and sheets to the bed covering underneath the bed, forcing her to lift them and she saw PW1 underneath the bed. She pulled her out. She unveiled PW1's dress and found her without her pantie. PW2 screamed causing her neighbours to come to the scene. They found PW1 and PW2 outside "Ja Ugenya's" compound. The appellant was immediately arrested by neighbours and taken to Nyawara Administration Police Station. PW2 and PW1 proceeded to Yala Police Station, then Yala Level IV Hospital where V.A.A. was examined. P.3. form was filled by the doctor who examined V.A.A. PW2 testified that earlier on "Ja Ugenya" had sought PW2's permission to send PW1 to the shop but she refused and on his persistence she agreed. She testified the pantie which PW1 was wearing was found at the appellant's house and was retrieved and taken to Nyawara A.P. Post, who asked her to wear it. She testified that PW1 was born on 15.7.2004 and identified P.3. form which they were issued with as MFI-P1, medical treatment notes as MFI – P2, laboratory results as MFI-P3, PW1's, child's Health Card as MFI – P4. She identified the appellant in dock as the person who she had found with PW1 and who she referred as "Ja Ugenya". During cross-examination PW2 testified that it is not true they were quarrellings about money owed to the appellant by PW2 adding that she had not stolen anything from the appellant as suggested to her by the appellant.
  4. PW3 No. 23 8986 APC Isaac Nyaega Ombori testified that he was serving at Nyawara Administration Police Camp/Post and he knew the accused who was in the dock. That on 1.5.2013 at around 4 p.m. he was on duty when the appellant was taken by members of public to Nyawara A.P. Camp in company of E A (PW2) on allegation that he was caught in his house with a child V.A.A. who was found underneath the bed. It was suspected that the appellant had defiled the child. PW3 then re-arrested the appellant and escorted him to Yala Police Station. He subsequently recorded his statement. During cross-examination he stated there were members of public who volunteered to record statements and he took them to Yala Police Station. He stated he did not know if their statements were taken. That V.A.A. and PW2 went to the Station also accompanied by members of public, PW3 testified that they used the motorbike to ferry him and themselves to Yala Police Station.
  5. PW4 Sadik Mwita, a licenced Clinical Officer attached to Sauri Health Centre testified that he had formerly served at Yala-District Hospital and he recalled that he filled a P.3. form in respect of V.A.A. a minor aged 9 years as of 2.5.2013. That on examination of her genitalia he noted a whitish discharge on the vulva, bruises on the labias thus majora labia but the hymen was intact. He concluded that there was some kind of struggling but the penetration was not complete. He produced P.3. form which he had completed on 2.5.2013 as exhibit P.1. He testified that he also carried out examination on George Ochieng, the suspect on 2.5.2013 after he was taken to him, under Police escort on allegation of defilement of a minor. He was H.I.V. Positive on examination his genitalia revealed



nothing significant. He filled his P.3. form and produced the same as exhibit P.5. He stated that he perused the treatment notes made by his colleague Everlyn Odhuno in respect of V.A.A. and noted that she made similar observation on physical examination and that on laboratory examination, H.I.V. test was non-reactive for PW1. That she was put on PEP, VBRL was negative. That urinalysis was not carried out. He produced treatment notes (MFI – P2) and laboratory results (MFI P3) as exhibit P2 and P3 respectively. During cross-examination PW4 testified that he tested the appellant and found him positive however the victim was negative adding that it was quite early for the virus to be detected. That the white discharge was not confirmed to be spermatozoa. That the victim's genitalia was bruised on the labia, however the hymen was intact as there was attempted penetration evidenced by bruised labia and the whitish discharge on the vulva. He opined that there was no penetration but there was an attempt and/or struggle to do so.

6. PW5 No. 7 2205 Cpl. Edward Thurania, testified that on 1.5.2013 one juvenile by the name V.A.A. (PW1) was brought to Yala Police Station escorted by her mother, PW2 on allegation that PW1, aged 9 years by then had been defiled by a well known person by the name George Ochieng Ongule. He recorded statement of PW1 and PW2 and issued a P.3. form to be filled at the Yala Hospital. That in evening the appellant, was escorted to the station by Administration Police Officer by the name Isaac Nyaega (PW3) who reported the appellant had been arrested by Members of Public and handed over to Nyawara A.P. Post. PW5 and P.C. Oscar Nthusa escorted the appellant to Yala Level IV Hospital. The appellant was subsequently charged with the offence before Court. He produced the victim's Health Care Card as exhibit P.4.
7. The trial court upon evaluation of the prosecution's evidence ruled that the appellant had a case to answer. The appellant opted to give sworn statement and opted to call no witness.
8. DW1 George Ochieng Ongule testified that the allegation against him were untrue and that the case against him has been brought in bad faith because of a "Shamba" dispute between his employer and the father of the complainant which dispute arose in 2012. That when the case was heard the dispute over boundaries was determined and boundary features put in place. That it was after that the parents of V.A.A. started acting in an ill way towards the appellant. That whenever he would plant maize they would let their livestock graze on the same. That he reported the matter to Village Elder and Assistant Chief but the problem was never solved. That it was then the parents of V.A.A. vowed they would make sure that the appellant would leave their neighbourhood. He reported to his employer who asked him not to leave as he was supporting him. That one day on his way from buying paraffin he met with son of the complainant's mother's co-wife in company of three girls who assaulted him. That he reported the girls to their mother in May 2013 and later got a surprise and unexpected visit by the complainant's mother, her step son, step daughter and other person. That they knocked his door and on opening the young men started beating him. The Village Elder was attracted by appellant's screams and on arrival the complainant's mother alleged that the appellant had sex with her child. He was then taken to Police Station, then Yala Hospital for examination together with the minor who was allegedly defiled. He concluded by stating that it is not true he committed the offence but he was framed.
9. The trial magistrate evaluated the prosecution and defence evidence and convicted the appellant for the offence of defilement contrary to Section 8(1) (2) of the Sexual Offences Act No. 3 Of 2006 and sentenced him to imprisonment for life.
10. Aggrieved by the learned trial magistrate's conviction and sentence, the appellant preferred this appeal setting out six (6) grounds of appeal being as follows:-
  - (a) That the trial magistrate failed in law and in fact by failing to observe that he was never furnished with witness statements before the case commenced as the law requires.



- (b) That had the trial magistrate erred in law and in facts by failure to put into consideration that the other essential witnesses were never summoned to collaborate and/or provide sufficient evidence for their case to be watertight.
  - (d) That the trial magistrate erred in law and in facts to by failing to consider the medical report on his side.
  - (e) That investigating officers only conducted shoddy investigations and consequently failed to table or present any prosecution material evidence e.g. exhibits.
  - (f) That the learned trial magistrate overlooked the defence case and put interest on the prosecution side.
  - (g) That since he could not recall all that transpired in court I beg to be supplied with the certified court proceedings in order to enable him raise further grounds of appeal.
11. At the hearing the appellant appeared in person whereas M/s. M. Odumba Learned Prosecution Counsel appeared for the State.
  12. The Appellant relied in support of his appeal on his written submissions in which he submitted that he was never furnished with witnesses statements before commencement of the case as law requires, that essential witnesses were never summoned to give evidence thus failure in-law, that medical report was not put into consideration, that prosecution failed to present material exhibits to confirm their case, that investigation was shoddy and that his fundamental constitutional rights were infringed and the appeal should be allowed.
  13. The State in opposing the appeal submitted that the appellants was supplied with witnesses statements before commencements of the trial, that essential witnesses were called adding that it is the discretion of the prosecution to call witnesses they deem fit to support their case adding the prosecution did not see the need to call other witnesses other than the 5 witnesses who they considered relevant, that the offence of defilement with which the appellant was charged with was proved by 4 witnesses and failure to call the father-in-law did not prejudice the appellant in anyway, on ground number 3 the state counsel submitted that medical report of the accused is not necessary nor is it a requirement for accused to be taken to hospital for an offence of defilement. On ground number 4 of the appeal, the State submitted to prove an offence of defilement there is no need of physical evidence other than the medical document, thus P.3. form to prove penetration and the witness who should include the victim. On ground number 5 of the appeal the state submitted the defence was considered and found to be an afterthought. The State urged that for an offence of defilement to be proved the essential ingredients, this penetration, identification lack of capacity to consent were proved and the appellant was rightly convicted. On sentence it was submitted the appellant was properly sentenced as per provisions of the law.
  14. The Appellant in a brief rejoinder submitted that it was true he was supplied with the witnesses statements and all relevant documents to the case but not with his personal documents which related to his treatments which were left at his home at the time of his arrest and which are not related or relevant in anyway to this appeal.
  15. The appellant on ground No. 1 of his petition of appeal contends that he was never furnished with witnesses statements before the case commencement before trial court..

Article 50 (1) (2) (b) (j) (m) of *the Constitution* of Kenya 2010 provides:



- “(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
- (2) Every accused person has the right to a fair trial, which includes the right-
- (b) to be informed of the charge, with sufficient detail to answer it;
- (j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;
- (m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;”
16. It is therefore in view of the above article, a fundamental Constitution right of the accused person to be supplied with the witnesses statements, before the trial begins failure whereof there is a breach of an accused's fundamental Constitutional rights to a fair trial for which an accused may be acquitted.
17. In the present case the trial court's proceedings reveal that on 18.7.2013 the appellant requested to be supplied with the prosecution witnesses statements and any document that the prosecution wished to rely on. The court made an order for such documents to be supplied to the accused. That on the same day at 3.00 p.m. the appellant confirmed the statements were supplied to him and sought adjournment or time to prepare for this case which request was granted. That when this case subsequently came up for hearing on 20.8.2013 the appellant did not object to the case proceedings to hearing. He told the court he was ready. On that day the trial commenced and the appellant had all information about the case as well as the statements and other documents related to the case. In his reply to State Counsel submissions on this point he stated he had been supplied with all witnesses statements and documents relating to this case. In view of the above it is my finding that the appellant's fundamental Constitutional Rights to be furnished with the information relating to the case and all relevant statements and documents was not breached or infringed or violated. I find no merits in ground No. 1 of the appeal the same is dismissed.
18. The Appellant contends that essential witnesses were never summoned to collaborate and/or provide sufficient evidence for the prosecution's case to be watertight. The prosecution in the present case called five (5) witnesses who they deemed fit to support their case against the appellant. The victim V.A.A. gave evidence, PW2 her mother who placed the appellant at the scene and from whose under-bed the victim was found gave evidence, PW3 the arresting officer gave evidence, PW4 the clinical officer who examined both the victim and the appellant gave evidence and produced P3 form for both the victim and the appellant, and gave evidence that there was incomplete penetration into vagina of the victim, the Investigation Officer, PW5 gave evidence as well. The appellant contends that failure to call his father-in-law compromised the prosecution's case. He did not state why it was essential and necessary to call his father-in-law and how the prosecutions failure to call his father-in-law prejudiced him. In my view there is no required number of witnesses to prove the existence of a particulars fact and appellant's claim that his father-in-law was not allowed to testify is baseless and not supported by any provision of law. In the case of Samwel Karanja Kuria V. Republic Criminal Appeal No. 459 of 2007 at Nairobi it was held thus:-
- “The appellant's suggestion that the potential witness who were not called to testify knew nothing about the killing was not supported by any evidence and the fact that they were not called as witnesses could not have reasonably invited an inference from the trial court because the prosecution evidence was already strong enough to support a conviction.”



I therefore find and hold failure to call the appellant's father-in-law did not prejudice the prosecution's case as the evidence of the witnesses called regarding the offence of defilement was in the circumstances of the case sufficient to have implicated the appellant with the commission of the offence with which he was charged. I therefore find no merits in ground No. 2 of the appeal and I dismiss the same.

19. The appellant contends that the trial court made an error in law and fact by failing to consider his medical Report. PW5 escorted the appellant to Yala Level IV Hospital PW4 examined him and completed his P.3 form exhibit P.5. Which showed nothing substantial was found in relation to the offence. The trial magistrate in his judgment considered the evidence relating to to the defilement and the fact that he said nothing about the medical Report on the appellant, I find that the appellant was not prejudiced by such failure because in an offence of defilement it is not a legal requirement or an ingredient of the offence to consider the accused medical report especially when the examination is made after a lapse of a long period and when the results obviously due to delay cannot show any conclusive results. I therefore find no merits in ground No. 3 of the appeal and the same is dismissed.
20. The appellant contends that the investigating officer conducted a shoddy investigation and consequently failed to table or present any prosecution material evidence, such as exhibits. The appellant under this ground did not specifically state what the investigating officer was required to do and failed to do so, so as to justify his contention that the investigation was shoddy. The investigating officer recorded witnesses statements which the appellant was supplied with and he had the victim examined by the doctor and P.3 form filled, which was produced as exhibit P1, treatment notes of the victim produced as exhibit P.2. Laboratory results produced as exhibit P.3, child Health card produced as exhibit P.4. The appellant's P.3 form produced as exhibit P.5. The evidence produced by prosecution witnesses and exhibits were sufficient to implicate and cause conviction of the appellant. It cannot by all standard be said the investigating officer's investigation was shoddy investigations as urged by the appellant. I therefore find no merits in ground No. 4 of the appeal and I dismiss the case.
21. The Appellant in grounds Nos. 5 of the appeal contends that the Learned Trial Magistrate overlooked the defence and put interest on the prosecution's side. The issue for my consideration here is whether the prosecution proved the offence of defilement before the conviction of the appellant and whether his defence was considered.
22. For the offence of defilement to be proved the prosecution is supposed to prove the following three ingredients of the offence of defilement beyond reasonable doubt thus:-

Identification of the offender.Penetration.Lack of consent or lack of capacity to consent

23. On identification of the offender, PW1 in her evidence testified that she was called by "Ja Ugenya" and send her to do some errands for him. She testified "Ja Ugenya" is the accused person sitting in the dock. PW2 testified she went to the house of "Ja Ugenya" who she found with the PW1. That earlier on "Ja Ugenya" had sought her permission to send "V.A.A." to do some errands for him. The person PW1 and PW2 referred to as "Ja Ugenya" they said was the accused person who the neighbours refer to as "Ja Ugenya." The appellant in his defence confirmed he knew PW1 and PW2 who were his neighbours. PW1 and PW2 placed the appellant at the scene of the incident from where he was arrested from his house. I therefore find that the prosecution witnesses identified the appellant as the person from whose house the victim was found at the material date the offence was committed during broad day time and I find no error in identification of the appellant by PW1 and PW2.



24. On Penetration, Section 2 of the *Sexual Offences Act*, defines penetration as follows:-

“Penetration” means the partial or complete insertion of the genital organ of a person into the genital organ of another person”

PW1 testified that the appellant locked her in his house, he then removed her panties and also removed his trousers then he did bad manners to her and put his penis into her vagina. She did not feel pain. PW2 testified that she lifted the blankets and sheets and saw PW1 underneath the bed, pulled her out, unveiled her dress and found her without her pantie. PW4 testified on examination of the genitalia of PW1 he noted whitish discharge on the vulva, bruises on the labia but hymen intact. He stated that he concluded there was some struggle but the penetration was not complete. The P.3. form exhibit P.1. confirmed that there was as per PW4 attempted defilement however in his evidence he made it clear that the penetration was incomplete.

25. To prove penetration the prosecution is required to prove that there was either partial (incomplete) penetration or complete penetration. PW4 a medical officer opinion was that there was in his own words and I quote:

“I proceeded to examine her genital parts. I noted a whitish discharge on the vulva she also had bruises on the labia in majora labia. The hymen was intact. I concluded that there was some kind of struggling but the penetration was not complete. The hymen was intact ....”

It is in view of the above that PW4 was of the view that the penetration is not complete. It is clear from the evidence of PW4 the hymen was intact and this was what informed his opinion that the penetration was not complete. To constitute an offence of defilement there must be penetration. It does not have to be complete because any penetration even the slightest penetration is sufficient as per definition under Section 2 of the *Sexual Offences Act* to construe that there is penetration even if hymen is not broken. The depth of penetration is immaterial, so what is needed to prove penetration, is that there is penetration, however slight it is and there is no need of proving the rupture of the hymen as the slightest penetration is enough to prove defilement even in absence of semen or any discharge. Defilement in my view is deemed complete upon proof of penetration and the depth of insertion of the male organ whether portion or complete is immaterial. (see Halsbury's Laws of England 4th Ed. Vol II page 653).

26. Having considered the evidence of PW1 and PW4 as well as the exhibit P1, P2 and P3 and notwithstanding that penetration was not complete, which may have not resulted in the rupture of V.A.A. Hymen, and the fact that she testified she did not feel any pain, I find there was slight penetration with the perpetrator's penis coming into contact with PW1's vaginal orifice which essentially comprises the labia majora and labia minora, resulting to the bruising of the labia majora. The source of a whitish discharge on the vulva of V.A.A. was not explained as further tests were not conducted and same could have occurred for various reasons not associated with the defilement but that in itself do not affect the prosecution case so long as penetration is proved. I therefore find and hold that the prosecution in the present case proved there was penetration into genitalia of organs of V.A.A. by genital organs of the appellant.

27. On the ingredient of consent Section 42 of the *Sexual Offences Act* provides:-

“For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice.”

28. In the instant case PW1 testified that she attends [particulars withheld] Primary School and was in Nursery School. That her age is 9 years. PW2 mother to PW1 testified that PW1 was born on



- 15.7.2004. She identified PW1's Health Card MFI – 4. PW4 testified that PW1 was aged 9 years. PW5 produced PW1's Health Care card showing amongst other things the birth of PW1 was on 15.7.2004. That though the best document to establish date of birth of a person is birth certificate, that is not the only document that can be relied upon to prove the age of a victim in a Sexual Offence. There are other many documents that can be relied upon to prove the victim's age. The age of a complainant or a person can be established through other documents such as Health care documents, Baptism card, National Identity card, leaving Certificate amongst many other documents.
29. In the present case no birth certificate of the complainant was produced, however from the evidence of PW1, PW2 and PW4 as well as from the exhibits thereto her age can be determined. It is clear from the exhibits produced that the complainant was as of the time of commission of the offence aged 9 years, the prosecution having proved that the complainant at the time of commission of offence was aged below 18 years, thus she has 9 years old, proved that she had no capacity to consent to Sexual Intercourse. The third ingredient of an offence of defilement is therefore proved. I therefore find the prosecution proved the three ingredients of an offence of defilement to the required standard of proof.
30. The defendant gave a sworn defence. The trial Court in its judgment stated that it did not believe the appellant person who said the case was a frame up orchestrated by V.A.A.'s parents. The court further found it was doubtful that V.A.A. parents had ill will against the appellant. The court noted V.A.A.'s father who the appellant alleged to be his number one tormentor never even testified on behalf of the prosecution against the appellant. The court very carefully evaluated and analyzed the appellant's defence and found the appellant's kind of defence to be an afterthought as he never built his defence through cross-examination of witnesses and the court rejected the defence. I have very carefully perused the lower court proceedings and trial court's judgment and the appellant's defence and have indeed noted that the appellant never during cross-examination of PW2, mother to the complainant raise the issue of grudge or being framed. He raised such defence during his defence for the first time. I find the defence to be an afterthought. I therefore find that the appellant's defence was properly considered and found to be an afterthought and not worthy believing.
31. Section 8(1) (2) of The Sexual Offences Act, No. 3 of 2006 under which section the appellant was convicted provides for only one minimum sentence of life imprisonment. The appellant was sentenced to life imprisonment as per provisions of the law. The sentence is lawful and this court cannot interfere with it as it is the only sentence provided for and is a mandatory sentence.
32. The upshot is that the appeal is dismissed. The conviction is upheld and sentence of life imprisonment confirmed.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 10TH DAY OF MAY, 2016.**

**J. A. MAKAU**

**JUDGE.**

Delivered In The Open Court

In The Presence Of:-

Appellant in person: Present

M/s Odumba for State: Present.

Court Clerk: 1. Kevin Odhiambo

Mohammed Akide:

