



**Director of Public Prosecutions v Jefa (Criminal Case E016 of 2020)  
[2023] KEMC 266 (KLR) (17 August 2023) (Judgment)**

Neutral citation: [2023] KEMC 266 (KLR)

**REPUBLIC OF KENYA  
IN THE KWALE LAW COURTS  
CRIMINAL CASE E016 OF 2020  
ZK KAGENYO, RM  
AUGUST 17, 2023**

**BETWEEN**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... REPUBLIC**

**AND**

**NGOME JEFA ..... ACCUSED**

**JUDGMENT**

1. The accused person was arraigned on 18<sup>th</sup> February 2020 to face an indictment of defilement contrary to section 8 (1) as read with sub-section 8 (3) of the [Sexual Offences Act](#) No. 3 of 2006.

The particulars were that on the 3<sup>rd</sup> day of January the year 2020 at [Particulars Withheld] within Kwale county, intentionally caused his penis to penetrate the vagina of A.N a child aged 14 years.

In the alternative, he was charged for the offence of committing an indecent act with a child contrary to section 11 (1) of the [Sexual Offences Act](#) No. 3 of 2006.

The particulars were that on the 3<sup>rd</sup> day of January the year 2020 at [Particulars Withheld] within Kwale county, intentionally touched the vagina of A.N a child aged 14 years with his penis.

2. The accused denied the charges and a trial ensued. He conducted his case while in custody even though he had been granted personal bond of Ksh. 100, 000/= with one surety of similar amount.
3. The accused person was not represented. At all times of the trial, he was present in court. The matter was conducted in Kiswahili language, or its interpretation, the language of choice by the accused.

**The Prosecution's case**

4. The prosecution, to discharge their duty under section 107 of the [Evidence Act](#) called a total of 5 witnesses.



5. In her sworn evidence, PW 1, a juvenile A.L.N informed the court that on 3<sup>rd</sup> January 2021, at around 1600 hours, she had gone to look for firewood in the company of three other children known to her who are her schoolmates, at a place called [Particulars Withheld] area. She told the court that the area was forested and a man emerged from the bushes. According to her, that man had taken off his shirt and had tied his face to conceal it. PW 1 said that they told him that they had gone at that place to look for firewood whereupon he demanded to know from them the person who had authorized them to fetch firewood from that place. Suddenly, the man started chasing them and they ran away but unfortunately for her, among the 4 girls, PW 1 was the unlucky one as the man caught up with her and held her by her shirt by the collar at the back of the neck. When he held her as such, he told her that he would take her to the police. However, instead of taking her to the police, he took her deep into the forest where she had never stepped before. At that point of the forest, the man took off from her body, her shirt, skirt, biker and panty and sensing the imminent danger, PW 1 tried to struggle to rescue herself by running away but the man threatened her that he would kill her. As if the threats were not enough, PW 1 said that that man had a stick that he used to hit her by on her neck and thighs and that he slapped her on her right cheek. After the said animosity, the man pushed PW 1 onto the ground and took off the shirt from his face and he covered PW 1's face and he defiled her, touched her breasts and forcefully kissed her. While at it, PW 1 heard noises of people calling out her name but the man threatened her that if she dared respond, he would kill her. According to PW 1, when the voices got nearer, the man took away his shirt and it is at that juncture that PW 1 saw him clearly. He was Ngome! PW 1 said that she knew Ngome as she had previously seen him at the local shopping centre severally. She said that she had known him for a long time. The man then took his shirt and run away. Shortly after the man left, PW 1's brothers and her uncles and other villagers went where she was and found her naked on the ground where they helped her wear her clothes and took her to the police station and afterwards to the hospital at Kinango. As she summed up her examination in chief, PW 1 stated that she was wearing a T-shirt, skirt, biker and a white panty which she identified in court, and all which had blood stains. She identified as Ngome, the accused at the dock.
6. On her cross examination, PW 1 said that she knew the accused well as she used to see him everyday at the shopping centre. She further said that she saw the accused well when he took the shirt off her face and stood up to run.
7. PW 2, PW 1's father, D.N.D, told the court that he was at a place called Malomani in Samburu area when he received a call from his wife informing him that their 14-year-old daughter, PW 1, had been defiled. Having been so informed, he went to Vigurungani Police Station and made a report and as the police were preparing to take off the mission of finding PW 1, they were informed that she had been found and hence aborted the mission. PW 1 was then brought to the police station, but the defiler was yet to be arrested. PW 2 then took PW 1 to Kinango Hospital where she was attended to. PW 2 told the Court that after PW 1 was treated, her P3 form was filled up the following day and PW 2 took it back to the police station. He said that by the time he was returning the P3 to the police station, he had not known the defiler of her daughter even though PW 1 told him that she could identify her attacker if she saw him. Later, PW 1 was called from school to identify the attacker. PW 2 informed the court that he had never seen the attacker, but he was told his name is Ngome Jefa.
8. On cross examination by the accused person, PW 2 reiterated that he was just informed that the name of the attacker was Ngome Jafa.
9. PW 3, P.M, a 16-year-old juvenile told the court that on the 3<sup>rd</sup> January 2020, at around 1600 hours, she had gone to collect firewood at a place she called Bekazi's place. She said that she was in the company of 3 other children, PW 1, included. While at that place, a man emerged and started asking them what they were doing at that place. PW 3 said that that man had tied his shirt around his face under the eyes,



in that his eyes and forehead could be seen. She described the man as one who had covered his face from the nose to the chin, but his forehead and hair could be seen. She said that he had hair that was unkempt. At his hand, he was holding a stick and the man started running after the 4 children who in turn ran away in different directions. In the state of confusion, after the helter skelter run, PW 3 found herself at the point she had started running away from and when she looked up, she saw the man holding PW 1 by her dress on the back. Upon seeing that, she ran away and went home and found that the information had preceded her but nonetheless she narrated the ordeal to the people she found at home. Lucky for the other two girls, she got information that they had gotten at their homes unhurt. She was aware that the people went to look for Am...a and that she was found, but sadly for Am...a, PW 2 told this witness, PW 3, that PW 1 had been raped. As she summed up, she said that she did not know who Ngome Jefa was.

10. On her cross examination, PW 3 told court that she did not know the accused person's name and that she did not get to know the name of the attacker. She further told the court that she did not witness the rape as she ran away in fear. On a further re-examination, she told the court that PW 2 told her that the person who raped PW 1 was called Ngome Jefa.
11. Clinical Officer Mr. Moses Kasyoki testified as PW 4. According to the P3 form that he had filled on 3<sup>rd</sup> January 2020, he had observed, material to this case, that the patient A.L.N had a hymen freshly broken, she had a tear at her vagina at six o'clock, she had multiple bruises in the vagina and that she was oozing blood from the vagina. After the medical examinations, PW 4 made an inference of defilement on the person of the patient A.L.N.
12. On cross examination, PW 4 informed the court that he examined the patient on 3<sup>rd</sup> January 2020 and that the injuries were fresh. He further informed the court that the girl had been defiled the same day and that the culprit was not presented at the hospital. As he wound up, PW 4 stated that he neither knew the accused nor the assailant.
13. PW 5, NPS No. 258059 PC Fredrick Muove testified in his capacity of an investigating officer but on behalf of PC Naimodu Saitoti who had since been transferred to Mackinon on 5<sup>th</sup> April 2022. PC Muove told the court that upon taking over the file, he went through the file and also called the victim and her father and interviewed them. He informed the court that he was further apprised by the initial investigating officer who told him that the accused was arrested on 16<sup>th</sup> October 2021. He told the court that the accused had defiled the victim and as per the investigation diary the accused had been arrested on 17<sup>th</sup> February 2020 and arraigned on 18<sup>th</sup> February 2020. PW 5 told the court that the child informed him that the accused had covered his face but because she knew him, she identified him by his posture. By the time PC Muove was testifying, he told the court that he had interviewed the said minor about three weeks before that day and that he had read through the statements about 3-4 months before that day in court. According to PW 5, the accused upon defiling the complainant, he fled into hiding for sometimes and when the complainant's parents followed up, he was apprehended and arrested. As he summed up, PC Muove informed the court that since the accused had all along been in custody, he did not know him and could not identify him even while at the dock.
14. On cross examination, he said that he did not visit the scene of the incidence as it was unnecessary.
15. After the testimony by PC Muove, the Prosecution closed its case.

#### **Defence case**

16. The accused person was placed on his defence under section 210 of the Criminal Procedure Code, and section 211 of the Criminal Procedure Code and Article 50 (2) (i) having been explained to the



accused person, he, in person, elected to defend himself by way of tendering sworn evidence without calling any witness.

17. DW 1, the accused, vehemently denied the accusations against him. He told the court that before his arrest, he was living in Vigurungani as a farmer and one day, while at Makoloni village, as he was just seated, he saw two people who came by and asked him whether he was Jeffa Mwalewa whereby he retorted that he was Ngome Jeffa. He told the court that the two men seemed not to understand and they severely beat him up to the extent that they injured his ears, impairing his hearing to-date. DW 1 added that in the process of the beating, a neighbour came by and called the police alerting them that there was someone who was being beaten and when the police came, they took him to the police station and preferred the charges before court against him.
18. On his cross examination, DW 1 told the court that he had never seen the complainant before and that he did not know her and the day he saw her in court was the first day that he ever saw her. He said that the police found him at Makulani village and they had gone there to rescue him from the beatings by those other people. On further cross examination, he told the court that the people who were beating him were also taken to the police station. He denied knowledge of a person by the name Jefa Mwalewa and that the girl complainant was never taken to the police station.
19. After the testimony of DW 1, the Accused closed his case.
20. The Court invited the parties to put in their closing arguments, but none opted to put in any, each placing their reliance on the record in the court file.
21. Having heard both parties at their full lengths, the court retired to make its decision.

### **Analysis and Determination**

22. Section 8(1) of the *Sexual Offences Act* provides the key elements of the offence of defilement. The said elements were also stated in the case of George Opondo Olunga -v- Republic [2016] eKLR where the court held thus;  
the critical ingredients forming the offence of defilement are;
  - a. Age of the complainant;
  - b. Prove of penetration; and
  - c. Positive identification of the assailant.
23. These elements were said that the prosecution must prove each of them beyond reasonable doubt by the Court of Appeal in John Mutua Munyoki -v- Republic [2017] eKLR.

### **Age of the Complainant**

24. Rule 4 of the Sexual Offences Rules of Court, 2014 states that;  

When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document.
25. By way of a Certificate of Birth produced as P. Exh 3, indicating the Date of Birth as 2<sup>nd</sup> January 2005 and its holder as A.M daughter of D.N.D and M.D.N, the element of age was proved beyond reasonable doubt. The authenticity of the said document or any entry within it was not attacked by the accused. Through it, it can therefore be said that, as at 3<sup>rd</sup> January 2020 the complainant was 15



years and one day old hence a minor as defined in section 2 of both the retired *Children Act*, 2001 and the current *Children Act*, 2022.

### **Penetration**

26. By way of oral evidence by PW 1, the complainant, she said that the man penetrated her vagina by his penis.
27. When examined by the medical practitioner on 3<sup>rd</sup> January 2020 and documented in the Form P3 (P.Exh 1) and Treatment Notebook (P. Exh 4), the observations showed that the features on the body of the complainant herein proved that there was penetration, and that the same was a very recent penetration. There has been debate and findings that breaking of hymen could be caused by many factors, but the medical observation coupled with the oral evidence of the minor, this court finds that it can only make an inference of penetration by a penis.
28. It is therefore my finding that there was penile penetration in the vagina of the complainant herein.

### **Positive identification**

29. The complainant stated that a man defiled her. She identified the accused at the dock as the assailant. The accused stated that he has never seen the complainant and that he was being crucified over sins he knew not of. All along the trial, the prosecution bore the singular duty of proving the guilt of the accused beyond reasonable doubt while on his part, the accused did not bear any duty to prove his innocence.
30. This court once again cautions itself that the standard beyond reasonable doubt is not to be elevated to a beyond a shadow of doubt as the same would fail the law in protecting the society.
31. This court is called upon to make a finding whether it has been proven beyond reasonable doubt that indeed the accused is the person who defiled the complainant. The evidence available on identification of the accused is that by the complainant and at this stage, I must warn myself on reliance of uncorroborated evidence. Section 124 of the *Evidence Act* excuses the evidence of a victim of sexual violation from mandatory corroboration given the circumstances in which such violations occur by stating thus,

Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him: Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth. (underline mine.)

32. A reading of the section requires the court to record the reasons that makes it believe that that particular witness is telling the truth.
33. This court took up the task to reproduce the pieces of evidence by each of the prosecution witnesses as accurately as they adduced it and recorded by my predecessor Hon. Omido, SPM. The question that craved for an answer is, was the accused positively identified?



34. I did not have the benefit of having sight of the initial report by PW 2 to the police neither did I have the benefit of knowing for sure when statements were recorded with the police but it would appear that as at 4<sup>th</sup> January 2020 PW 2 had not known who the assailant was. I say this given the statement by the father that,

.....She was treated and given drugs. She had been defiled. The next day (must be 4<sup>th</sup> January 2020) her P3 form was filled. I returned the P3 to the police station. By then I did not know who had defiled her. She told me she could identify her attacker if she saw him. Later, she was called from school to identify the attacker....

35. I read this statement of PW 2 while well aware that in her evidence in chief, the complainant, PW 1, told the court that when the man uncovered her face, she instantaneously identified him as Ngome Jefa as she knew him before. My question is, why didn't she tell her father this name on the 3<sup>rd</sup> or 4<sup>th</sup> January 2020 and only await the undisclosed "later" to be called to identify him? Didn't she know him before? It can be argued, and rightly so, that the complainant was so much traumatized not to mention the assailant but again a look at the manner in which she informed the police that she could identify the assailant sets some doubt in motion as it can be inferred that she did not recognize the assailant but rather could only identify him by posture, and that is why while still pondering on the same issue, I looked at the evidence of PW 5, and even though he was not the initial investigating officer, he said that the information that he got was that ,

...The child said accused had covered his face because she knew him, she identified him by his posture...

36. What came out as the evidence of PW 1 was that she identified the assailant by recognition having been a person she had frequented but what came out from the evidence of PW 2 and PW 5 was that identification of the assailant by the complainant was primarily by physical identification on physical attributes subject to an identification parade.

37. The entire series of accounts is silent on the juncture at which the police or any other authority came to know the name or identity of the assailant as there was no information of how PW 1 divulged the same to any other prosecution witness apart from at the time she was testifying. From the entire evidence of PW 5, the investigating officer, there was no mention of the basis in which the police apprehended the accused person or from which information they were acting on, and probably that could have been overlooked by PW 5 as he started to testify on the assumption that the accused was the assailant.

38. PW 2 stated that later PW 1 was called to identify the assailant at the police station. I say this with the information from PW 5 that said that PW 1 stated that she could identify the accused by posture. The accused person having been arrested on 17<sup>th</sup> February 2020, as indicated on the face of the charge sheet and as one of the dates given by PW 5, that period being 45 days post the ordeal and PW 2 stating that her daughter was called to identify the assailant at that time, isn't it safe to infer that for that period his name had not been mentioned until PW 1 identified him? How was his identification? I am afraid to make a finding that despite the description of the man by PW 1 and PW 3, there was no identification of a suspect compliant with Chapter 42 Paragraph 7 of the National Police Service Standing Orders and accordingly any subsequent dock identification was worthless as was held in *Gabriel Kamau Njoroge –vs- Republic (1982-1988) 1KAR 1134*, thus,

A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted parade. A witness should be asked



to give the description of the accused and the police should then arrange a fair identification parade.”

39. I must warn myself that both PW 2 who was older than PW 1, and PW 3, agemate to PW 1, testified that the accused was a stranger to them. Not even hearsy from the village, 2 years post the heart wrenching ordeal would make them relate with the knowledge of the accused. I verily know that it is unsafe to proceed on assumptions or to appear as if not believing the version of a victim of sexual violence, but yet again I verily know that what the accused is accused of doing is heinous and unforgivable act that deserves condemnation in the strongest ways possible and hence it is my finding that if the accused frequented the township where PW 1 lived, PW 2 whose daughter had been defiled and who testified 18 months later could have heard something about the accused that would make him relate with the accused as from that village or ever having been seen in the village but none of these was forthcoming. PW 3 could equally not recount ever seeing him even after seeing him at the dock.
40. Turning on to the defence of the accused person, he said that two men came and asked him whether he was Jeffa Mwalewa. If I would be made to believe the defence by the accused, it would appear that the name Jeffa was a common denominator in suspicion to the heinous act but how it originally came to be a name of interest is still veiled to this court. His mode of arrest was not controverted neither a different version of his arrest given by the State and hence the only version to go by is that by the accused person.
41. In the end, I find that the accused may be or may be not the one who defiled the complainant given that there is no established nexus that is free from doubt.
42. In Elizabeth Waithiegeni Gatimu vs. Republic [2015] eKLR, Mativo J, as he then was reminded this court thus,
- The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea.
43. Similarly, the doubts that are arising from the prosecution’s case goes in favour of the Accused. in my view, they are not mere doubts but are reasonable doubts.
44. It is sad and very unfortunate that the child A.L was defiled in a heinous manner described in a very graphic and traumatizing account but the one thought of having done so shall not be convicted and not because I say so but only because the law dictates to me that I should only convict where I am free of doubt in my mind into the commission of the offence, and this outcome adds up to the piles of the befogged mystiques of its kind and only hope that someday the truth shall be unraveled.

### **Disposition**

45. Having found so, this court hereby dismisses the case against the accused person and forthwith acquits him under Section 215 of the Criminal Procedure Code for both the main count of defilement of a child aged 15 years proscribed under section 8 (1) as read with section 8 (3) of the *Sexual Offences Act*, 2006 and for the alternative count therein of committing an indecent act with a child proscribed under section 11 (1) of the *Sexual Offences Act*, 2006.
46. Accordingly, I order that the accused be set at liberty forthwith unless he is otherwise lawfully held.

**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT KWALE ON THIS 17<sup>TH</sup> AUGUST 2023.**

**KIONGO KAGENYO**



**RESIDENT MAGISTRATE**

In the presence of :

Mr. Archibald Kimbada - Court Assistant.

Ms. Nandi, ADPP, for the State

Ngome Jefa -Accused

