



**Republic v Godana (Criminal Case 332 of 2016)
[2018] KEMC 104 (KLR) (6 December 2018) (Judgment)**

Neutral citation: [2018] KEMC 104 (KLR)

**REPUBLIC OF KENYA
IN THE HOLA LAW COURTS
CRIMINAL CASE 332 OF 2016
PA NDEGE, PM
DECEMBER 6, 2018**

BETWEEN

REPUBLIC PROSECUTION

AND

ATHMAN MAALIM GODANA ACCUSED

JUDGMENT

Introduction

1. The defendant herein, Athman Maalim Godana, a village manual laborer from [Particulars Withheld] village, was on 30.11.2016 charged before Hon. M. D. Kiprono, with the offence of Defilement contrary to section 8(1) as read with section 8(3) and in the alternative, Committing an Indecent Act with a child contrary to section 11(1); all of the *Sexual Offences Act* No. 3 of 2006 (hereinafter abbreviated as SOA).
2. It was alleged; and he denied, that between 26.11.2016 and 28.11.2016 at [Particulars Withheld] village in Tana River sub-County, within Tana River County, he intentionally caused his penis to penetrate the vagina of E. R. J., a child aged 13 years. He also denied in the alternative charge that between those dates, and at the same place, he intentionally touched the vagina of the same child, aged 15 years, with his penis. (There is an alteration in the age of the child in the main count which was not explained or countersigned, but evidence of her exact age came from the exhibits produced during the hearing).
3. This case commenced before Hon. M. D. Kiprono. The complainant's evidence was taken before Hon. M. D. Kiprono, but when I took over the conduct of the trial, the parties herein agreed that she be recalled to testify afresh before me. Hearing therefore started afresh on 15/03/2017 with her fresh testimony. The prosecution called several other witnesses, including the medical practitioner who could not be easily traced. It therefore took long to have the matter concluded till 30.05.2018, when the prosecution closed its case.



4. On 06.09.2018, I found that pima facie case had been disclosed by the evidence and therefore called upon the defendant herein to make his defence, which he did on 25.09.2018 as schedules and then closed his defence.
5. This matter is therefore pending for this judgment. All the other adjournments and the reasons therefor have been sufficiently explained in the records of proceedings herein and as such, do not require any additional explanation herein.

Facts of the Case

6. According to the prosecution's case, the defendant herein took advantage of the poverty prevailing in this area when he deceived the complainant herein and her parents, PW2, S. Y., and PW3, S. J. G., to allow him go with the complainant herein to Bura where she was to be interviewed for consideration of a sponsorship deal for her education. After some deliberations, PW2, S. Y., the complainant's mother, who appears to have lost some diligence, allowed the defendant herein to go with the complainant on 26.11.2016. They did not however reach Bura as intimated.
7. According to the complainant, PW1, instead, the defendant herein took her to [Particulars Withheld] village at his parents' home. The defendant called the 'sponsor' who failed to turn up till 9.00pm. The defendant then took her to Wachakone. They went to a farm where the defendant told her to make love to him. she then described what happened in her evidence at page 23 of the handwritten proceedings thus:

...we removed our clothes. I lay facing up. He lay on me. He used his penis which he inserted inside my vagina. We did that once. We then slept till morning. I remained there till evening. We then went to [Particulars Withheld] to his mother. We then came back to the farm. We had sex again the following day once.
8. On 28.11.2018, the defendant went to the parents of the complainant without the complainant. The complainant's mother decided to go check on her at the defendant's parents' home. She went there and took her to the headman, PW5, Titus Kiribo Roka, who then sent the Kenya Police Reservist (KPR), PW4, Ayub Komora, to arrest the defendant. The KPR officers proceeded to the defendant's home and found him while resting with his wife. They told him that he was wanted by the headman. The defendant did not resist. They went with him to the headman where they found that the complainant's father, PW3, S. J. G., was making this defilement report. The defendant was then taken to the police station at around 11.00pm.
9. The following day in the morning, PW6, NO. XXX PC (W) Esther Mutemi, of Hola Police Station acted on the report and arrested the defendant herein. The complainant was then taken to Hola District Hospital where she was examined by Dr. Rahma who confirmed that she was defiled and that her age was 15 years. She had no hymen which was not freshy broken.
10. PW7, Dr. John Mwangi, of Hola County Referral Hospital, produced the Medical Examination Report (commonly known as P3 form) as PEXH. NO. 2.
11. Before the examination, the complainant was seen, and attended to, at the same hospital by PW9, Mohammed Ali Mwenje, of the same hospital. He also found her with a white discharge from her vagina which had a strong odor. Her hymen had then already been broken. Her genital had no injury. There was however no semen in her. He explained that it is not a must to find semen or prostrate fluids in the vagina after sexual intercourse since the fluids normally flow out after sex.



12. PW9, Mohammed Ali Mwenje, produced the treatment notes and the Post Rape Care (PRC) form as PEXH. Nos. 1 and 3, respectively. The complainant's birth certificate confirmed that she was born on 06/03/2003. It was produced herein as PEXH. NO. 4.
13. The defendant in his evidence-in-chief (DW1) informed the court that he was away in Mombasa and that he travelled back on 28/11/2018, and arrived at [Particulars Withheld] village at 1.00pm. He then spent with his family till 9.00pm when he was woken up by KPR officers who searched his house for a girl that was alleged to be inside there. They did not find any girl there except his wife. Amongst the KPR officers was, PW4, Ayub Komora. He was taken to the headman. He was informed of the report herein which he denied. That the headman then entered his house and came out with the complainant herein and her mother. He was told to pay Kshs. 10,000/- so as to have the matter settled. He however insisted that he did not stay or go away with the complainant herein. The chief was called. They looked for a boda boda which took them to the police station. He stated that the father of the complainant herein, Mzee Hussein, has a land boundary grudge against him. He thus therefore alleged that he had defiled her daughter-in-law – the complainant.
14. The defendant called his wife, DW2, Amina Jibo, to support his defence. The wife supported his alibi defence and also his defence on how he was arrested.

Issues, Burden and Standard of Proof

15. The offence herein is either defilement or indecent act. Defilement has been defined in section 8 of the SOA thus: 'A person who commits an act which causes penetration with a child I guilty of an offence termed defilement'.
16. Justice George Dulu, in Jumaahiribaekomora vrs Republic (high Court of Kenya At Garissa Criminal Appeal No. 53 of 2017, UR), at page 7, paragraph 9, held that in a defilement case, 3 elements are to be proved by the prosecution beyond reasonable doubt. They are firstly, the age of the complainant, secondly penetration, and thirdly the identity of the culprit.
17. Justice Majanja, in Peter Mokami Nahashon vrs Republic [2014] e KLR, stated as follows on the offence of Defilement: -
 13. A person is said to have committed an act of defilement under section 8(1) of the *Sexual Offences Act* when the person commits an act which causes 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 (Emphasis supplied)
 18. Indeed under section 2(1), SOA, penetration means the partial or complete insertion of the genital organ of a person into the genital organ of another person. Genital organs have been defined as the whole or part of male or female genital organs and include the anus.
 19. Section 2(1) of the same Act defines indecent act to mean: -

...unlawful intentional act which causes – (a) any contact between any part of the body of a person with the genital organs, breast or buttocks of another, but does not include any act that causes penetration; (b) exposure or display of any pornographic material to any person against his or her will.
 20. In the alternative charge, the prosecution was just therefore supposed to prove to the same standards of beyond reasonable doubt that the defendant herein intentionally touched the vagina of the same complainant with his penis.



21. As noted herein, the burden of proof herein lies with the prosecution. The standard of proof is beyond reasonable doubt. It was therefore sufficient for the defendant, in his defence, to raise any doubt herein that would make the prosecution's evidence insufficient and will lead to an acquittal.
22. The defendant herein raised an alibi defence though belatedly. The burden of proof in criminal trials however remains with the prosecution, even in instances where a defendant raises specific defence e.g. an alibi. It was held in *KIARIE VRS REPUBLIC* [1984] KLR 739, that an alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer. It is therefore sufficient, as aforesaid, if an alibi introduces into the mind of the court a doubt that is not unreasonable.
23. This therefore means that the defendant herein, having put forward the alibi as an answer to the charge herein, does not assume any burden of proving the same. (see also *Jonathan Mutisya vrs Republic* (criminal Appeal No. 123 of 2001 – C/A at NBI) and *Ssentale vrs Uganda* (1968) EA 266.)
24. The prosecution still has a duty to displace the alibi raised herein.

Determination

25. On the sexual penetration herein or indecent act herein, it is the victim's sole evidence that implicated the defendant herein. She is a victim of a sexual offence. The proviso to section 124 of the *Evidence Act* provides as follows:

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.

26. Going by the provisions hereinabove, for me to believe the evidence of the complainant, without corroboration, so as to convict, I must state the reason for that belief in the judgment. That brings me to the issue of credibility of the complainant herein.
27. A credible witness is one who is competent to give evidence, and is worthy of belief. In *Ndungu Kimanyi vrs Republic* [1976 – 1980] KLR 1444, the Court of Appeal said: -

We laydown the minimum standard as follows. The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person or raise a suspicion about his trustworthiness or to do or say something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence

28. Having commented on the above factors that affect credibility, I do find the complainant herein, who re-testified before me and upon the application by the defendant himself, to be consistent, straightforward, and did not appear belligerent, or trying to hide anything from the trial herein. She spoke all to the best of her abilities. Her evidence was not challenged that much even in cross-examination. I do not find any other fact or evidence that might make me disbelieve her evidence which has in fact been corroborated by her parents. She in fact described the events and the place where she was taken by the defendant herein in detail. Also, the sexual penetrative acts on her. The fact that the defendant herein took her upon deceiving them that she was to be given an opportunity for sponsorship has sufficiently been corroborated by the evidence of her parents. They could not have given her to the defendant and left her for all those days with him if at all they had a grudge against him as has been claimed by the defendant herein. Such kinds of evidence that mainly prove the opportunity



to commit defilement were found to be corroborative even in those old days when corroboration of the evidence of a child offenders was required by law; the old section 124 of the Evidence Act before the enactment of the proviso. The Court of Appeal in *Sibo Makovu Vrs Republic*, The Court of Appeal At Nakuru Criminal Appeal No. 39 of 1996 (UR) stated as follows: _

This corroboration was provided by PW1 (the victim's mother) who said that PW2 (the victim) was outside the house when the appellant left the house and her frantic effort to reach the appellant's house... This factor was further indirectly corroborated by the appellant himself who confirmed that he saw PW2 on the road when she was allegedly coming to his (the appellants') house to borrow 'unga'. There was no need for PW3 to go borrow flour at the appellant's house. What the appellant said confirms that he was with PW3 after he left the house of PW1.

29. I do therefore find credibility and corroboration in the evidence of the complainant herein. The defendant had no reason to cheat the complainant herein with the sponsorship issue. The complainant and her parents could not have cooked or fabricated the sponsorship issue herein if they had a plot to fix the defendant herein. This evidence sufficiently displaces the defendant's alibi raised belatedly towards the tail end of the trial process. I do not find any doubt raised by the alibi on the impressive, consistent and sufficiently corroborated evidence that the defendant was with the complainant on the dates alleged after having tricked them that he was taking her away from her parents for purposes of assisting her with sponsorship to further her education. He thus had the intention and opportunity to defile her.

30. The evidence of penetration herein is however oral as the medical evidence adduced herein did not reveal much to confirm that the complainant herein was defiled on those dates. The High Court considered a similar scenario in *Peter Mokami Nahasjon Vrs Republic* [2014] e KLR; an appeal from my judgment and sentence in a trial where the medical evidence of penetration was not adduced, a fact which made me to find that penetration and hence defilement was not proved, but I still proceeded to convict in the alternative charge of Committing an Indecent Act. In the appeal case, Justice Majanja held as follows: _

18. In my view, the medical evidence would only go to corroborate the testimony of PW1. The testimony of PW1 does not require corroboration as the proviso to section 124 of the Evidence Act (Chapter 80 of the laws of Kenya states that,

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.

19. Taking PW1's testimony together with that of PW3 and PW4 and the chain of events leading to the arrest of the appellant, I find and hold that penetration was proved beyond reasonable doubt, lack of medical evidence notwithstanding.

31. In *Sibo Makovo vrs Republic*, supra, the Court of Appeal considered similar circumstances where the medical evidence was found to have been improperly received and hence was not to be considered in arriving at the decision therein. The Court of Appeal held as follows: _

The P3 form which was filled by the Medial Officer, Naivasha District, was produced by PW3 (a police officer). The record does not show that the contents of the P3 form were



explained to the appellant. Nor does the record show that the maker of the report (P3 form) was laid...However, the P3 form did not add to the prosecution's case in the magistrate's court. There was evidence of the condition in which PW2 was found which evidence showed that PW2 was in fact defiled.

Accordingly, we see no reason to differ from the concurrent findings of the two courts below and we order that this appeal be dismissed.

32. Having been impressed by the victim's evidence herein, and having found some elements of corroboration that the defendant herein had the opportunity to defile the victim herein after having tricked her away from her parents, and going by the above decisions, I do hereby find that the prosecution has proved its case against the defendant herein to the required standard of beyond reasonable doubt. Penetration has been proved by the impressive evidence of the victim herein by virtue of section 124 of the *Evidence Act*. In fact it was 2 separate acts of defilements which ought to have given rise to 2 separate counts.
33. As held by Justice Majanja in Peter Mokami Nahashon vrs Republic, supra, proof of age is required to establish that the victim is a child and secondly, to establish the level of punishment where the offence is that of defilement under section 8 of the Sexual Offences Act. Section 2(1) of the SOA refers us to the *Children Act* (cap 141, Laws of Kenya) for the definition of a child. Section 2 of the *Children Act* defines a child to mean any human being under the age of 18 years, where the age may also include the apparent age and not necessarily the exact age.
34. Proof of age is a question of fact and in this case, there is the birth certificate evidence which clears any doubt on the age of the child herein. Though the oral evidence of the age and those in the charge sheet may claim that the victim was 15 years, I do find and hold that from the birth certificate (PEXH. NO. 4), the victim was born on 06.03.2003 and was therefore apparently 13 years, 8 months and 20 days old as at 21.11.2016. I do therefore still find that defilement pursuant to section 8(1) as read with 8(3) of the SOA was proved as that section provides for defilement of victims between the ages 12 and 15 years. The charge of defilement in the main count has therefore been proved to the required standard of beyond reasonable doubt.

Conclusion

35. Pursuant to the provisions of section 215 of the Criminal Procedure Code, I do hereby convict the defendant herein of the offence of Defilement contrary to section 8(1) as read with section 8(3) of the SOA. I shall hereinafter receive the material and evidence relevant to sentencing.

DATED, SIGNED AND DELIVERED AT HOLA IN OPEN COURT (IN CAMERA) THIS 06H DAY OF DECEMBER 2018

A. P. NDEGE

PM

06/12/2018

In the presence of;

Buko court interpreter

Karanja present for prosecution

Defendant present

Victim absent



Victim's parent/ guardian absent

A. P. NDEGE

PM

06/12/2018

Karanja: No records of the accused person.

Accused in Mitigation in Kiswahili: I have orphans depending on me. Secondly, I have 2 children. The 1st one in Form I. the other one doing KCPE this year. Thirdly, I have small children, 4 in number who depend on me. Praying for leniency.

A. P. NDEGE

PM

06/12/2018

CT: Accused committed 2 defilements acts by way of treachery. Accused sentenced to serve 23 years imprisonment. Because the accused used treachery and did the act twice, I do hereby declare him a dangerous sexual offender. I will therefore require a Pre-Bail Report on his suitability to undergo long term supervision and rehabilitative care once and when released. The report to be presented on 07/01/2019. Right of Appel 14 days.

A. P. NDEGE

PM

06/012/2018

