

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL APPEAL NO. E057 OF 2024

JOSHUA USHINDI.....APPELLANT

VERSUS

REPUBLIC.....

.....RESPONDENT

(Being an appeal from original conviction and sentence by Hon. E. Kadima, SRM, in Garsen Principal Magistrate`s Court Sexual Offence Case No. E005 of 2022 delivered on 29/8/2023)

JUDGMENT

1. The Appellant was convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on diverse dates between 10th October 2021 and 12th October 2021 at (name withheld) village, Ngao Location Tana Delta sub-county within Tana River County, he intentionally and unlawfully caused his penis to penetrate the vagina of S.C. (herein referred to as the complainant/victim), a child aged 15 years.
2. The Appellant was sentenced to serve 18 years imprisonment. He was aggrieved by the conviction and the sentence of the trial court and lodged an appeal on the following amended grounds of appeal:

- 1) That the learned trial magistrate erred both in law and fact by failing to consider that the prosecution case was never proved beyond reasonable doubt.
 - 2) That the learned trial magistrate erred in law and fact by ignoring the contradictions and inconsistencies by the prosecution witnesses thereby arriving at an unsafe conviction.
 - 3) That the trial magistrate failed to take into consideration the defense of the appellant.
 - 4) That the learned trial magistrate erred in law and fact by shifting the burden of proof from the prosecution to the appellant.
3. The prosecution called 5 witnesses in the case while the Appellant defended himself and did not call any witness.

Prosecution's case

4. The case for the prosecution was that the complainant (PW2 in the case) was at the material time aged 15 years and was living with her father PW3. The Appellant is her neighbour.
5. It was the evidence of the victim that she was on 10/10/2021 she was going to the shops when the appellant asked her to go to his house. She followed him and on entering the house, he started caressing her. He removed her clothes, led her to his bed and inserted his penis into her vagina several times. He then sent her home. That this happened again on 12/10/2021 at the appellant's house. That after about a month, she missed her periods. She later informed her teacher that she was

pregnant. The matter was reported at Tarasaa police station. She was taken to hospital.

6. The father to the victim PW3 testified that the victim was at the material time aged 15 years. That on 14/1/2022 he was at home when the headteacher to the victim`s school went to his home and informed him that his daughter was pregnant. His wife confirmed that it was true. He said that the appellant was his brother-in-law.
7. A clinical Officer at Ngao sub county hospital PW1 told the court that the victim was taken to their medical facility on 20/1/2022 alleging that she had been defiled by a person known to her. That tests were conducted that revealed that she was 15 weeks and 3 days pregnant. Her genitalia was normal. He completed her P3 form.
8. The case was investigating by PC Emmanuel PW4 of Tarasaa police post. It was his evidence that the case was reported at the station. He went to the village where the appellant lived in the company of one of the parents of the complainant and arrested the Appellant. He was charged with the offence. During the hearing, he produced the victim`s birth certificate as exhibit. It indicated that the victim was born on 21/6/2007. The clinical officer PW 1 produced the P3 form, the treatment notes, lab results and the obstetrics ultra sound as exhibits, P.Exh. 1 - 4 respectively.

Defence case

9. When placed to his defence, the Appellant stated in a sworn statement that he is a casual labourer. That he was

arrested on 20/1/2022 at 9am at his house. He was not told the reason for his arrest. He was booked at Hurara police post and then taken to Tarassa police station. He was arraigned in court. He denied committing the offence.

Submissions

10. The appeal was heard by way of written submissions.
11. The appellant submitted that the burden of proof is vested with the prosecution to establish whether the appellant committed the act which caused penetration as alleged and that the burden never shifts to the appellant. He faulted the trial court on its failure to order for a DNA test to be conducted on the baby born to the complainant.
12. The Appellant submitted that the medical evidence that was presented before the trial court did not prove that there was any penetration on the complainant occasioned by him. It was also his further submission that the court did not consider that the entire evidence relied upon by the prosecution and particularly the evidence by the complainant was not credible. He submitted that there were material contradictions in the evidence adduced by the prosecution. Further that the trial court did not consider his defence.
13. The Respondent on the other hand submitted that the prosecution proved its case beyond reasonable doubt. That all the ingredients of the offence were proved. That the age of the complainant was proved by the Birth Certificate confirming that she was 15 years at the time of the offence. That the element of penetration was proved

by the testimony of the complainant who narrated the ordeal of that day and the same was corroborated by the evidence of PW1 who examined her and formed the opinion that her vagina had been penetrated. On whether the appellant was positively identified, it was submitted that there could have been no mistake as the appellant was well known to the complainant.

Analysis and determination

14. This being a first appeal, the court has a duty to re-evaluate and re-consider the evidence on record and come to its own conclusion. The court should also appreciate the fact that unlike the trial court it did not have the advantage of seeing and hearing the witnesses. These principles were re-stated by the Court of Appeal in the case of **Kiilu & another v Republic [2005]1 KLR 174**, thus:

An appellant on 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 first appellate court must itself weigh conflicting evidence and draw its own conclusions.

It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; only then can

it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

15. The appellant was facing a criminal charge. Proof in a criminal trial is that of beyond reasonable doubt. Lord Denning in **Miller v Ministry of Pensions (1947) 2 All ER, 372** stated as follows on the standard of proof in criminal cases:

"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice."

16. For the offence of defilement to stand, three ingredients must be proven. These ingredients were outlined in the case of **George Opondo Olunga v Republic [2016] eKLR** proof of the age of the victim,

positive identification or recognition of the offender and penetration.

17. On the question of age, it is trite that the age of a person can be proved in various ways including by way of documentary evidence, by oral evidence of the parents or the child if the child is old enough to know her age or even by observation of the court. In the case of **Mwalongo Chichoro Mwajembe v Republic, Msa Cr.App. No. 24 of 2015 (UR)**, the Court of Appeal held as follows:

“... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim’s age, it has to be credible and reliable.”

18. It was the victim’s testimony that she was at the time aged 15 years. Her father PW3 said that she was aged 15 years. A birth certificate was produced that indicated that the complainant was born 21/6/2007 thereby placing her age at 14 years at the time of the commission of the

offence in October 2021. The age of the victim was thereby proved at 14 years at not 15 years.

19. Moving on to the element of penetration, the same is defined in Section 2 of the Sexual Offences Act as:

“The partial or complete insertion of the genital organs of a person into the genital organ of another person.”

20. The Appellant faulted the trial court for not making an order that a DNA analysis be conducted on the baby born to the victim. The law is that penetration in a sexual offence may be proved by oral evidence or by circumstantial evidence and not necessarily by way of medical evidence. The Court of Appeal in answering the question of DNA in sexual offences stated the following in the case of **AML vs. Republic (2012) eKLR**:

“The fact of rape or defilement is not proved by D.N.A. test but by way of evidence.”

21. In the case of **Kassim Ali v Republic (2021) eKLR** the same Court stated that:

“...the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence”

22. The complainant testified that she was going to the shops when the appellant asked her to go to his house. She followed him and on entering there, he started caressing her and removed her clothed/ He led her to his bed and inserted his penis onto her vagina several times.

He then sent her home. That this happened again on 12/10/2021 at the appellant's house. When she was later examined at the hospital on 20/1/2022 she was found to be 15 weeks pregnant.

23. The medical evidence of the clinical officer did not connect the Appellant with the defilement on the complainant as there was no evidence of fresh injuries on her genitalia that would have connected the Appellant with either the events of 10/10/2022 or 12/10/2022. There was thus no medical evidence to support the offence.

24. However, in view of the fact that defilement can be proved by other ways other than by way of medical evidence, the question is whether there was oral or circumstantial evidence to prove the charge. Section 124 of the Evidence Act allows the court in sexual offence cases involving children to convict on the sole evidence of the child victim if the court is satisfied that the child is telling the truth and gives reasons for such a finding.

25. The trial court in convicting the Appellant of the offence stated that the Appellant was a person well known to the complainant victim. That her evidence was not shaken during cross-examination.

26. I have considered the evidence adduced against the Appellant and weighed it against his defence. I am convinced that the complainant was telling the truth that the Appellant defiled her on the material dates. The victim and the Appellant were neighbours. There was no evidence of bad blood between them. There was thereby

no reason for the victim to lie against the Appellant. Her evidence was not discredited in cross-examination. Her evidence was sufficient to prove the charge even without a DNA test being carried out on her baby. There was no possibility of mistaken identity on the Appellant as he and the complainant were neighbours. Identification of the Appellant was by way of recognition which is more reassuring.

27. I have gone through the evidence adduced by the prosecution witnesses and I do not find any contradictions that would cast doubt on the prosecution case. In my consideration, the Appellant`s defence was a mere denial that could not stand in face of the overwhelming evidence adduced by the prosecution.

28. In view of the foregoing, I find that the Appellant was convicted on credible evidence. The appeal lacks merit and is thereby dismissed.

Delivered, dated and signed at GARSEN this 8th day of May 2026.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Oluoch for Respondent

Appellant- present virtually at GK Prison Malindi

Court Assistant: Nasra