



**Kamunya v Republic (Criminal Appeal 195 of 2017)
[2024] KECA 1049 (KLR) (2 February 2024) (Judgment)**

Neutral citation: [2024] KECA 1049 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 195 OF 2017
W KARANJA, J MOHAMMED & LK KIMARU, JJA
FEBRUARY 2, 2024**

BETWEEN

AUGUSTUS MUGO KAMUNYA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at
Kerugoya (L. W. Gitari, J.) dated 5th October 2017 in HCCA No 10 of 2015))*

JUDGMENT

Background

1. The appellant, Augustus Mugo Kamunya, was charged before the Chief Magistrate’s Court at Baricho for the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the [Sexual Offences Act](#). The particulars of the offence were that on 2nd October, 2013 in Kirinyaga West District within Kirinyaga County, he intentionally and unlawfully caused his penis to penetrate the vagina of the victim, JWW (name withheld) a girl aged 16 years.
2. During the trial the prosecution called four (4) witnesses in support of its case. At the conclusion of the trial, the appellant was found guilty of the offence of defilement, convicted and sentenced to fifteen (15) years imprisonment.
3. Aggrieved, the appellant appealed against conviction and sentence before the High Court at Kerugoya (L. W. Gitari, J.). His first appeal to the High Court was unsuccessful, prompting this second appeal against both conviction and sentence.
4. The appellant filed an appeal to this Court on the grounds inter alia that the learned Judge erred in law: by relying on insufficient and incredible evidence adduced by the prosecution; by failing to consider



that vital witnesses were not called; and by upholding and accepting the contradictory and speculative evidence tendered by the prosecution.

5. The jurisdiction of this Court on a second appeal is well settled. In *Karani v Republic* [2010] 1 KLR 73, this Court expressed itself as follows: -

“This is a second appeal. By dint of the provisions of section 361 of the *Criminal Procedure Code*, we are enjoined to consider only matters of law. We cannot interfere with the decision of the Superior Court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.”

6. It is against that jurisdictional remit that we shall briefly examine the evidence that was tendered before the trial court and re-examined by the High Court in reaching the impugned judgment.
7. SM (PW1), who was a minor gave sworn evidence after a *voire dire* examination where the trial court found that he understood the nature of an oath and ordered that he give sworn evidence. It was his evidence that on 3rd October, 2013, he was at his home with his sister, JWW (the victim) when the appellant, Kaburu called JWW to the bedroom and defiled her on a plastic chair. It was PW1’s evidence that he was able to see what the appellant was doing to JWW through the keyhole on the door. It was PW1’s further evidence that the appellant left the house and PW1 informed one Kariuki and his grandmother what the appellant had done to JWW. PW1 testified that he knew the appellant who was a neighbour.
8. PW2 (the victim’s mother) testified that on the material day she left the victim at home at 7.30am and went to work. It was her testimony that she left the victim with PW1. It was her further testimony that the victim was 15 years old at the time of the incident and was born on 22nd July, 1997 as evidenced by the birth certificate produced in court.
9. It was her further evidence that upon returning home from work, she found the victim asleep and one Muriuki told her to ask PW1 what had transpired. She testified that upon enquiry, PW1 informed her that the appellant had eaten food in their house and then defiled the victim while sitting on a plastic chair. She further testified that she checked the victim and saw blood stains on her genitalia and reported the matter to the police. She was referred to Baricho Health Centre and subsequently to Kerugoya County Hospital for further medical treatment. It was PW2’s further evidence that the victim was admitted in hospital for two (2) days. PW2 testified that she knew Kaburu who is the appellant and who is known as Augustus Mugo. PW2 testified that the victim who communicated with her through signs and had informed her that the appellant had defiled her. PW2 identified the appellant as the perpetrator.
10. Denis Senelwa (PW3) a Clinical Officer attached to Kerugoya District Hospital produced the P3 form filled by Maina Njagi who was not available to testify. PW3 testified that he was familiar with Maina Njagi’s handwriting and signature. PW3 testified that the victim was a mentally retarded girl and that upon examination, he concluded that she had been defiled.
11. Patrick Ithili (PW4), the Investigating Officer testified that he received a report from PW2 that the victim had been defiled. He testified that the appellant had gone to PW2’s home on the material day. He confirmed that it was possible to see what was happening inside the house through the keyhole. He produced the victim’s birth certificate in evidence.



12. The appellant was put on his defence and gave unsworn evidence. He raised the issue of bad blood between him and one Charles Kariuki Kamau with whom they had a land dispute. It was his evidence that Charles Kariuki forced the victim to lodge the complaint against him. He stated that he was framed and that the victim was not able to explain whether the appellant removed his trousers during the incident or whether he and the victim lay down during the incident. It was his further evidence that he was arrested after one week of the alleged offence which is a clear indication of the frame up.

Submissions by Counsel

13. During the hearing of the appeal, the appellant was represented by learned counsel Mr. Okero Gilbert Ombachi who relied on his written submissions.
14. The respondent was represented by Mr. Ben Ngetich, prosecution counsel from the office of the Director of Public Prosecution who relied on his written submissions.
15. In the written submissions, the appellant with regard to whether the conviction was based on a misapprehension of the evidence on record and therefore the offence was not proved as charged, counsel submitted that the learned Judge relied on insufficient and incredible evidence which was contradictory, non-corroborative and speculative. Counsel submitted that the victim did not testify on account of her mental disability and that the trial court relied on a psychiatrist's report produced by an investigating officer without examining the victim to ascertain whether or not she could give evidence.
16. Counsel submitted that the victim was declared a vulnerable witness on the basis of a report allegedly prepared by a psychiatrist who was never called to produce it. Further, that the trial court did not assess the victim independently to confirm the averments of the said report and whether or not she could understand the questions put to her and give rational answers to them. Counsel further submitted that the victim's testimony was dispensed with yet PW1 testified that the victim did not have any mental challenge and that he was left in the victim's care on the material day.
17. Counsel further submitted that the failure of the maker of the psychiatrist report to produce it in court denied the appellant an opportunity to cross-examine the said witness as the victim was never put on the stand to testify thus her evidence was not challenged by the appellant. Counsel submitted that this was a miscarriage of justice contrary to the spirit of Articles 49 and 50 of the Constitution and that the appellant was therefore denied a fair hearing.
18. Counsel further submitted that PW1 and PW2 gave contradictory evidence regarding their relationship as PW1 identified the victim as his aunt and PW2 as his grandmother while PW2 testified that PW1 is her son aged seven years. Counsel further submitted that PW1 testified that the appellant defiled the victim in the bedroom while PW4 stated that the incident occurred in the table room. Counsel further submitted that given that the victim did not testify, the trial court should have taken these contradictions and discrepancies into consideration.
19. As regards the P3 form and the treatment notes, counsel submitted that the same as produced by PW3 were not conclusive and raised doubt as to whether the victim was defiled. Counsel further submitted that penetration was not proved to the required standard and it is trite that the benefit of doubt should always be resolved in favour of the appellant.
20. With regard to the failure of the trial Judge to re-evaluate the evidence on record, it was submitted that the learned Judge found that the prosecution witnesses were reliable. Counsel submitted that the 1st appellate court failed to perform its duty and merely scrutinized the evidence. Further, that had the 1st appellate court re-evaluated the evidence, it would have concluded that PW3's and PW4's evidence was insufficient to found a conviction and would have given the appellant the benefit of doubt. Counsel



- submitted that this was in view of the fact that the medical reports did not prove penetration and the trial court did not examine the victim independently as per Section 125 of the *Evidence Act*.
21. In response to the appellant's submissions, Mr. Ngetich, learned Prosecution Counsel (PC) submitted that for an offence of defilement to lie, the prosecution must prove the essential ingredients of the offence. These are age, penetration and the identification of the perpetrator. With regard to the age of the victim, counsel submitted that the prosecution must prove that the victim was a minor at the time the offence was committed. Counsel submitted that the prosecution through PW4 produced the victim's birth certificate as evidence that the victim was born on 22nd July, 1997 and was therefore 16 years old at the time of the commission of the offence.
 22. On the question whether penetration was proved, counsel submitted that penetration according to Section 2 of the *Sexual Offences Act* is partial/complete insertion of the genital organs of a person into the genital organs of another person. Counsel submitted that medical evidence adduced by PW3 proved that the victim had been defiled.
 23. As to whether penetration was occasioned by the appellant, counsel submitted that PW1 testified that the appellant was a person known to him as Kaburu and that they lived in the same neighbourhood. PW1 testified that he knew the appellant very well and this was not therefore a case of mistaken identity. Counsel emphasized that since the offence was committed during the day, PW1 could easily identify the appellant. Counsel asserted that the prosecution proved its case beyond reasonable doubt.
 24. On the question whether the victim was correctly declared a vulnerable witness, it was submitted that Section 31(2) of the *Sexual Offences Act* gives discretion to the prosecution or the court suo moto to declare a child a vulnerable witness. It was submitted that in this case, the prosecutor after obtaining a psychiatric report in respect of the minor applied to the court that she be declared a vulnerable witness. Counsel submitted and that the court rightly declared the victim a vulnerable witness and dispensed with her testimony.
 25. Counsel submitted that the prosecution presented a psychiatric report in court prepared by Dr. Thuo J. N., a Consultant Psychiatrist. In that report, Dr. Thuo concluded that the victim "has a mental retardation. She cannot give evidence in a court of law." Counsel further submitted that the trial court relied on Section 31(4)(e) of the *Sexual Offences Act* and declared the victim a vulnerable witness. Counsel submitted that the law allows a magistrate to make appropriate orders and to receive evidence material to the case and protect the rights of the victim.
 26. Counsel further submitted that PW3, the clinical officer also testified that the victim was mentally challenged and produced the P3 form and the treatment notes which clearly show that the victim was mentally challenged. Counsel further submitted that the psychiatric report was produced in court by PW4, the Investigations Officer and the appellant did not challenge the production of the report, nor did he cross-examine PW4 with regard to the mental status of the victim.
 27. In conclusion, the Prosecution counsel submitted that all the ingredients of the offence of defilement were proved. Further, that Section 31 of the *Sexual Offences Act* was properly applied as it was demonstrated that the victim was a vulnerable witness. Counsel prayed that the conviction be upheld and the sentence confirmed.

Determination

28. We have considered the record of appeal, the submissions, the authorities cited and the law. The appellant was charged with the offence of defilement. It is settled law that to warrant conviction for an offence of defilement under Section 8(1) of the *Sexual Offences Act* three elements should be satisfied



before conviction of an accused person can arise. These are penetration, apparent age of the victim and identity of the perpetrator. In *John Mutua Munyoki v Republic* [2017] eKLR, this Court stated that three critical ingredients need to be proved by the prosecution in a charge of defilement: - the age of the victim; proof of penetration; proof of the identity of the perpetrator.

29. In our evaluation, the issues arising for determination in this appeal are whether the charge against the appellant was proved to the required standard; and whether there were material contradictions in the evidence that ought to have been resolved in favour of the appellant.
30. It is evident that the appellant's conviction was hinged on the evidence of PW1, a minor who upon the trial court conducting *voire dire* gave sworn evidence. Under Section 31 of the *Sexual Offences Act*, in criminal proceedings involving the alleged commission of a sexual offence, the court can declare a witness, a vulnerable witness if such witness is a person with mental disability.
31. In the instant case, the victim was declared a vulnerable witness who needed the protection of the court. The trial court observed her and noted her mental incapacity from the psychiatrist's expert report that was produced. Dr. Thuo, who examined the victim opined that she was mentally challenged and that she was not fit to testify.
32. The trial court relied on the evidence of a minor, PW1. PW2 testified that she checked the victim's genitalia and noted some blood stains. PW2 testified that she was able to communicate with the victim who informed her that the appellant had defiled her. It was her evidence the victim communicated with her through signs. PW2's evidence was crucial as it was the evidence of someone with whom the victim was able to communicate after the incident. The evidence of PW1 was consistent with that of PW2. In the circumstances, the appellant's contention that the evidence was contradictory and that the victim did not testify is not of any consequence as the evidence of PW1, PW2 and PW3 was sufficient to prove the charge against the appellant.
33. On the question of proof of penetration, it is clear from the record that the victim's testimony was corroborated by medical evidence. It was confirmed by the Clinical Officer (PW3) that the medical examination on the victim revealed that there was vaginal penetration. PW3 produced the P3 form and treatment notes.
34. Regarding identification of the appellant, PW1 identified the appellant as the person who had defiled the victim. From the record, It was a case of identification by recognition as the appellant and PW1 lived in the same compound. PW2 also recognized the appellant and knew him by name as they were neighbours. The trial court believed and accepted PW1's testimony as truthful.
35. On the question of the age of the victim, we find that the same was proved by the evidence of PW2 who testified that the victim was born on 22nd July, 1997 as per the birth certificate that was produced in court. Further, the P3 form produced in court by PW3 indicated the age of the victim as 16 years.
36. The evidence of PW1, PW2, PW3 and PW4 therefore provided overwhelming evidence against the appellant and was consistent. We are satisfied that all the ingredients of the offence of defilement were established to the required standard and that the concurrent findings of the two courts below were based on credible evidence. From the foregoing, we are satisfied that in light of the overwhelming evidence adduced against the appellant, his defence denying having committed the offence was properly rejected. His conviction was therefore sound.
37. Having found that the elements for the offence of defilement have been proved beyond reasonable doubt, we find no basis to interfere with the findings of the trial court as upheld by the High Court. The upshot of the foregoing is that the appeal is dismissed in its entirety.



DATED AND DELIVERED AT NYERI THIS 2ND DAY OF FEBRUARY, 2024.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

