



**Mwilaria v Republic (Criminal Appeal 65 of 2019)
[2024] KECA 1019 (KLR) (26 April 2024) (Judgment)**

Neutral citation: [2024] KECA 1019 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 65 OF 2019
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA
APRIL 26, 2024**

BETWEEN

DOMINIC MWILARIA APPELLANT

AND

REPUBLIC RESPONDENT

((Being an appeal against the judgment of the High Court of Kenya at Meru (Gikonyo, J.) dated 20th February, 2018 in Criminal Appeal No. 52 of 2017))

JUDGMENT

1. The appellant, Dominic Mwilaria, was arraigned before the Principal Magistrate’s Court at Tigania on 27th December 2011, and charged with the offence of defilement contrary to Section 8(1) as read with subsection (3) of the *Sexual Offences Act*. The particulars of the charge alleged that on 23rd December 2011, at Rwanda Location in Tigania West District, Meru County, the appellant intentionally caused his penis to penetrate the vagina of I.N., a child aged 15 years. In the alternative, the appellant was charged with the offence of committing an indecent act contrary to Section 7 of the *Sexual Offences Act*. The particulars of the charge alleged that on the same date and place, the appellant did an indecent act to I.N. by touching her breasts and vagina using his hands.
2. The appellant denied the charges prompting the trial in which the prosecution called a total of four (4) witnesses. The complainant gave evidence as PW1. It was her testimony that on 23rd December 2011, she delivered milk worth Kshs.30 to the appellant at his home. The appellant promised to pay her the following day. While on her way to the market on the same day, she passed by the appellant’s house. He gave her Kshs.20, and asked her to give it to her mother. The complainant proceeded to the market where she gave the money to her mother. On her way back home, she testified that she noticed that the appellant was following her. When she got close to a bush, the appellant held her hand and refused to let go. He then held her waist and pushed her to the ground. She recalled that the appellant



- wanted to have sex with her but she resisted. She stated that her biker got torn in the course of the struggle. It was her evidence that the appellant had sex with her and that he ejaculated inside her vagina. The complainant stated that she bled as a result of the sexual assault. It was her testimony that on 25th December 2011, she declined to sell milk to the appellant. The appellant reported to her to mother. That was when she informed her mother of what the appellant had transpired a couple of days earlier and what the appellant did to her.
3. The complainant's mother, Agnes Wanja Muthee, testified as PW2. She told the court that she was at her shop on 25th December 2011, when the appellant came and reported that PW1 had refused to sell him milk as was the usual case. PW2 called the complainant who informed her that the appellant had followed her on her way home on the material day and defiled her. PW2 stated that she reported the matter immediately to a nearby AP Camp and later to Ngundune Police Station. She stated that the complainant was examined at Tigania Mission Hospital on 26th December 2011. It was her testimony that the complainant was born on 4th April 1996.
 4. PW3, Geoffrey Muthomi, a clinical officer at Miathene Hospital, produced the complainant's P3 Form, on behalf of his colleague. The P3 Form indicated that upon examination, the complainant was found to have normal genitalia, torn hymen with fresh bleeding, with a white discharge.
 5. The case was investigated by PW4, Angelo Itoto, who at the time, was stationed at Tigania Police Station. He told the Court that the complainant came to the station on 25th December, 2011, and reported that she had been defiled by the appellant on 23rd December 2011. After concluding his investigations, he arrested the appellant and preferred the current charges against the appellant.
 6. The appellant was placed on his defence. He made a sworn statement. He stated that the complainant was known to him as she was his neighbour. It was his testimony that on 24th December 2011, he visited the complainant's father at his place of work at [Particulars Withheld] Primary School, and asked for water. He stated that the complainant's father started hurling insults at him. He testified that he and the complainant's father had had differences in the past as the complainant's father had caused the appellant's children to be expelled from the said school. He stated that the complainant's father became aggressive and bit his hand. He reported the assault at Ngundune Police Station. He stated that PW1 and PW2 arrived at the station claiming that he had defiled PW1. The appellant testified that the charges that were laid against him had been fabricated.
 7. The learned trial magistrate upon assessing and analyzing the evidence tendered before the court, found the appellant guilty as charged in the main charge, convicted him and sentenced him to a custodial sentence of twenty (20) years with hard labour.
 8. The appellant, aggrieved by this decision, filed an appeal before the High Court sitting at Meru. In his petition of appeal, the appellant faulted the trial court for failing to appreciate that the element of the complainant's age was not sufficiently proved by the prosecution. He was aggrieved that the learned magistrate fell into error by relying on a P3 Form that was doubtful, and which failed to corroborate the complainant's testimony. He was aggrieved that the trial court convicted him on the basis of contradictory and inconsistent evidence. Lastly, it was his view that the sentence meted by upon him by the trial court was manifestly harsh and excessive in the circumstances.
 9. The learned Judge (Gikonyo, J.) after re-evaluating the record of the trial court and the evidence tendered before it, in light of the grounds of appeal argued before him, saw no reason to disturb the conviction and sentence of the appellant by the trial court.
 10. The appellant is now before this Court seeking to overturn the decision of the High Court, and has proffered four (4) grounds of appeal. He faulted the first appellate court for failing to appreciate the



evidence by PW3 that the medical officer who examined the complainant and filled her P3 Form was not qualified to do so. He took issue with the fact that the two courts below ignored the fact that a prior grudge existed between the appellant and complainant's father. The appellant averred that his Constitutional rights under Articles 50(2)(a) and (d), 49(1)(a) and (d), 22(1), 27, 29 and 48 of *the Constitution* were violated, thereby denying him his right to a fair trial. Lastly, the appellant faulted the first appellate court for failing to appreciate that the medical examination report adduced was in reference to one Glory Gakii and not the complainant in the case.

11. The appeal was canvassed by way of written submissions of both the appellant and respondent. The appellant appeared in person. It was his submission that the medical evidence adduced by PW3 failed to establish the element of penetration. He submitted that the P3 Form indicated that there were no signs of forceful penetration, no bruises and no discharge. He asserted that the evidence of PW3 further established that the clinical officer, Alex Mwanza, who examined the complainant and filled the P3 Form was not a qualified pediatrician, and was therefore incompetent to fill the P3 Form. He stated that the learned Judge put forward a theory not canvassed before the trial court by observing that since the complainant was examined 48 hours after the alleged defilement, changes might have occurred which affected signs of forced penetration.
12. The appellant faulted the learned Judge for failing to consider his defence that there existed a grudge between him and the complainant's father. It was the appellant's submission that his constitutional right to a fair trial, and right to freedom and security were breached by the Investigating Officer who arrested him while he was at the police station reporting the physical assault occasioned upon him by the complainant's father. He therefore urged us to allow his appeal as prayed.
13. In rebuttal, learned State Counsel, Ms. Nandwa, made submissions to the effect that the ingredients of the offence of defilement were established by the prosecution to the required standard of proof beyond any reasonable doubt. It was her submission that the age of the complainant was established by her testimony and that of PW2, as well as the P3 Form which indicated that she was 15 years old when the incident occurred. Ms. Nandwa urged that the complainant's evidence that the appellant penetrated her was corroborated by the medical evidence from the P3 Form which indicated that there was mild fresh bleeding from the freshly torn hymen. With respect to the assertion by the appellant that Alex Mwanza was not qualified to fill the P3 Form, Ms. Nandwa cited the case of Raphael Kavoi Kiilu vs Republic [2010] eKLR where this Court found that there is no requirement that a P3 Form must only be produced by a medical doctor. With respect to identification, the learned prosecution counsel explained that the incident occurred in broad daylight, and that the appellant was well known to the complainant prior to the sexual assault, hence he was positively identified. Ms. Nandwa urged us to uphold the appellant's conviction and affirm his sentence.
14. This is a second appeal. The mandate of this Court on a second appeal is confined to matters of law only, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or, looking at the entire decision, it is perverse. In the case of *Kaingo v. Republic* [1982] KLR 213 at page 219 this Court stated thus:

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court found as it did (*Reuben Karoti S/O Karanja versus Republic* [1956 17EACA 146].”
15. We have carefully considered the record, judgments of both the trial and first appellate court and the rival submissions set out above, in light of this Court's mandate. In our opinion, the issues that arise for our determination are:



- i. Whether the prosecution established the element of penetration beyond any reasonable doubt;
 - ii. whether the P3 Form was prepared by a competent medical practitioner;
 - iii. whether the appellant's defence that there existed a grudge between him and complainant's father was viable; and,
 - iv. whether the appellant's constitutional right to a fair trial was violated.
16. On the first issue, it was the appellant's submission that the P3 Form indicated that there were no signs of forceful penetration, and that no bruises or discharge was observed, and therefore this evidence failed to corroborate the complainant's assertion that she was defiled.
17. The act of penetration, as was held by this Court in *Kassim Ali v. Republic* [2006] eKLR, can be proved by the oral evidence of a victim of rape or defilement, or by circumstantial evidence. The Supreme Court of Uganda in the case of *Bassita v. Uganda S. C. Criminal Appeal No. 35 of 1995* had this to say with regard to proof of penetration:
- “The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt.”
18. In the instant case, evidence of penetration emanated from the complainant's sworn evidence, and was corroborated by the medical evidence. The complainant narrated to the court how the appellant followed her on her way home, waylaid her near a bush, pushed her to the ground, and had forcefully had sexual intercourse with her. She stated that she did not inform her mother immediately as her mother did not come home that night. She told her mother of the incident, two days later, after the appellant complained to her mother that she did not want to sell milk to him. It was PW2's testimony that when she asked the complainant why she declined to sell milk to the appellant, the complainant informed her that the appellant had defiled her on 23rd December 2011.
19. The complainant was examined two days after the date of the alleged defilement. The P3 Form noted that her hymen was torn, with fresh bleeding. Similar findings were recorded on the complainant's medical record from Miathene District Hospital. The P3 Form also indicated that “There are no signs indicative of forceful penetration. However, changes may have occurred in the last 42 hours”. We agree with the findings of the learned Judge that the clinical officer was mindful that the complainant was examined two days after the alleged incident, hence there was a possibility that any signs of forceful penetration may not have been visible. It is our considered view that the fact that the complainant's hymen was freshly torn with signs of bleeding corroborated her assertion that she was penetrated. The medical evidence, considered together with the evidence of the complainant, established beyond any reasonable doubt that the complainant was defiled.
20. The appellant contended that the clinical officer who filled the P3 Form was unqualified to do so as per the evidence adduced by PW3. It was PW3's testimony that since Alex Mwanza was not qualified in paediatrics, he should not have filled the P3 Form. We disagree with this observation. This Court has



previously held that P3 forms completed by clinical officers are as valid as those completed by medical doctors. In *Raphael Kavoi Kiilu v. Republic* (supra), this Court observed as follows:

“The challenge touching on the clinical officer’s qualification is in our view taken care of by a scrutiny of the Act governing the affairs of clinical officers bearing in mind that the appellant did not lay any factual basis for his allegation in the first place. Under Section 2 of the Clinical Offences Act (Training, Registration and Licensing Act Cap 260 (LoK) a clinical officer means:

“a person who, having successfully undergone a prescribed course of training in an approved training institution, is a holder of a certificate issued by that institution and is registered under the Act.....”

Section 7(4) of the Act states:

“A person who is registered by the council shall be entitled to render medical or dental services in any medical institution in Kenya approved for the purposes of this section by the Minister by Notice in the Gazette.”

The Act goes further to provide that such officers may engage in private practice “in the practice of medicine, dentistry or health work for a fee.” It follows that the clinical officer did testify in this case on his area of competence.

We have examined the provision of *Sexual Offences Act*. There is no such requirement that a P3 form must be produced only by a medical doctor.”

21. The third issue relates to the appellant’s defence. He contended that a grudge existed between him and the complainant’s father due to the fact that he had caused his children to be expelled from Mweramaria Primary School where the complainant’s father was employed. It was the appellant’s evidence that on 24th December 2011, he went to see the complainant’s father at the said school, to ask for water, that is, when the complainant’s father became abusive and physically assaulted him. He stated that the defilement allegations were fabricated in a bid to cover up the assault incident occasioned upon him by the complainant’s father.
22. We note that the defilement occurred on 23rd December 2011, a day before the alleged altercation between the appellant and the complainant’s father. Further, the complainant was examined and the medical evidence corroborated her case. This was independent evidence that pointed to the fact that the defilement occurred. The appellant was properly identified by the complainant as he was well known to her, a fact which was admitted by the appellant. We find it curious that the appellant failed to put this defence to the complainant and her mother during cross-examination, if the alleged events indeed took place. It would have elicited answers from them that would have aided the trial court establish the truth. He only raised it when he was put on his defence. This is a classic case of a defence being put forward as an afterthought. We find that the appellant’s defence was meant to exonerate himself and the same did not dent the otherwise strong culpatory evidence adduced by prosecution witnesses connecting him with the sexual assault occasioned on the complainant. It was properly dismissed by the two courts below as being of no evidential value.
23. The last issue relates to whether the appellant’s constitutional right to fair trial and his right to freedom and security were violated when he was arrested while allegedly reporting a complaint against the complainant’s father, regarding an alleged physical assault. It is our considered view that it was well within the Investigating Officer’s rights to arrest the appellant and conduct investigations into the appellant’s criminal culpability, upon receiving the complaint by the complainant, that the appellant



had defiled her. There is no law that prohibits a police officer from arresting a suspect in respect of a report made earlier of a disclosed offence when the suspect presents himself to the police station to report the commission of another offence.

24. In the circumstances, we are satisfied that the High Court addressed itself correctly on the facts and the law. There are no grounds for interfering with the concurrent findings of facts of the two courts below. The sentence meted on the appellant by the trial court was lawful. We decline to interfere with it.

Accordingly, all the grounds of appeal raised and advanced before us by the appellant must fail. We order the appeal dismissed on both conviction and sentence.

DATED AND DELIVERED AT NYERI THIS 26TH DAY OF APRIL, 2024.

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

