



REPUBLIC OF KENYA



**KENYA LAW**  
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**Chembe v Republic (Criminal Appeal 54 of 2020)  
[2024] KECA 647 (KLR) (7 June 2024) (Judgment)**

Neutral citation: [2024] KECA 647 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CRIMINAL APPEAL 54 OF 2020  
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA  
JUNE 7, 2024**

**BETWEEN**

**NGOME NGOMBO CHEMBE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the judgment of the High Court of Kenya at Malindi  
(Nyakundi, J.) dated 7th October, 2019 in Malindi Cr. Appeal no. 47 of 2018)*

**JUDGMENT**

1. The appellant, Ngome Ngombo Chembe, was charged with 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 6<sup>th</sup> June 2015 at Bofu Area in Samburu Location, Kwale County, he intentionally caused his penis to penetrate the vagina of NN, PW1, a child aged 17 years.
2. In the alternative, he was charged with 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 of which are that on the same day and location, being a male person, he intentionally caused his penis to penetrate the vagina of NN, PW1 a child, who was to his knowledge his aunt's daughter. The appellant pleaded not guilty and the matter proceeded to hearing.
3. NN testified that, on 6<sup>th</sup> June 2015, she met the appellant and they had sex relations in a forest, whereafter she became pregnant. She did not tell anyone about the incident until 5 months later when her uncle, one Ngome, noticed that she was pregnant and took her to hospital. She was later taken to Samburu Police Post where she was issued with a P3 form. She stated that she only had sex with appellant, which resulted in the pregnancy. She added that the appellant is a cousin, (a son to her aunt).



4. PW 2, Mr. Ngome, an uncle to NN, testified that, on 4<sup>th</sup> November 2015, he noticed that NN was not attending school and became suspicious from the behavior she was exhibiting. On 7<sup>th</sup> November 2015, he informed NN's mother that he suspected that NN was pregnant. He then took her to a private clinic where she was found to be 5 months pregnant, and whereupon he informed her mother and grandmother. At first, NN refused to disclose the person responsible for her pregnancy, but later told her grandmother that the perpetrator was a close family member. Soon thereafter, NN escaped from home prompting PW2 to report her absence to the school and the police station. She was found at a neighbor's home, and that was when she confessed that the appellant was the person responsible for the pregnancy. She was taken to Samburu Police Post where they were referred to Samburu Health Centre. He testified that NN was born on 27<sup>th</sup> March 1998 and produced NN's birth certificate. He stated that NN lived with him, and that the appellant is a cousin to NN. He further stated that he was married with 5 children.
5. PW3, Athuman Chiro, a clinical officer at Samburu Health Centre, examined NN on 10<sup>th</sup> November 2015 and concluded that she was about 17 years old. Guided by the history of her having been defiled, he examined her and found that she was 20 weeks into her pregnancy and her hymen missing. He concluded that there was penetration and classified the degree of injury as harm. He produced the P3 form in support of his findings.
6. PW4, PC Joseph Kaloki of Samburu Police Post was the investigating officer having taken over from the previous investigating officer, Sergeant Katembe. He confirmed that, when the matter was reported on 9<sup>th</sup> November 2015, Sergeant Katembe and PC Kaloki arrested the appellant on 15<sup>th</sup> November 2015 after he was positively identified by PW2.
7. When placed on his defence, the appellant narrated the events leading to his arrest, which he stated occurred while preparing to go to church. He denied the allegations made against him. He contended that NN's family actions were in revenge against his family due to a previous grudge between his mother and her brother, PW2.
8. The trial magistrate, upon considering the matter, convicted the appellant of the offence of defilement and sentenced him to serve 15 years imprisonment. Aggrieved by the trial Magistrate's decision, the appellant filed an appeal to the High Court. Upon considering the appeal, the learned Judge upheld both the conviction and sentence.
9. Aggrieved by the judgment, the appellant has now filed an appeal to this Court on the grounds that the learned Judge was in error: in failing to appreciate that no original or certified copies of the clinical card was produced in evidence by PW5 in compliance with section 66 and 64 of the [Evidence Act](#); in failing to appreciate that there were contradictions in the prosecution's evidence, specifically concerning PW1's age as given in her testimony during the trial; in failing to appreciate that no evidence was adduced that connected the appellant to the alleged offence as no DNA test was conducted; and in failing to consider that the legal provision providing for a mandatory minimum sentence under section 8(4) of the [Sexual Offences Act](#) violates sections 216 and 329 of the Criminal Procedure Code, and denies judicial officers the right to exercise their discretion when sentencing.
10. In his written submissions, the appellant submitted that the age of the complainant was not established; that penetration was not proved; and that no DNA test was carried out to establish whether he was the father of the child. The appellant further submitted that PW3 did not prove that he was the maker of the P3 form and yet had produced it in disregard of the requirements of sections 163 and 164 of the [Evidence Act](#). It was his further submission that there were contradictions in the prosecution's case; that he was purely convicted on circumstantial evidence; and that his defence was not considered.



11. On their part, the learned prosecution counsel for the State, Mr. Kamanu, submitted that the prosecution proved its case to the required standards; that the clinical card was produced by the Clinical officer in its original state and, therefore, the appellant's argument that section 66 of the *Evidence Act* was contravened was invalid.
12. Counsel further submitted that the High Court found that the trial court did not misdirect itself when it made a finding that the prosecution had established all the ingredients of the offence and that, upon review of the prosecution evidence, the court was satisfied that there was no error on identification; that section 36 of the *Sexual Offences Act* is not indicative of a mandatory requirement to conduct DNA tests; that a trial court is not duty bound to order DNA tests in every case where the complainant of defilement is pregnant; and that, finally, that the sentence was well within the confines of the law, and was not unconstitutional.
13. This is a second appeal. Under section 361(1) of the Criminal Procedure Code, the mandate of this Court on a second appeal is limited to considering matters of law only, unless it is shown that the courts below considered matters it ought not to have considered, or failed to consider matters it should have considered or, looking at the entire decision, it is perverse.
14. In the case of *Kaingo vs. Republic* [1982] KLR 213 at page 219, this Court stated that:

“A second appeal must be confirmed 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. After considering the record, the grounds of appeal, and the rival submissions, pursuant to this Court's mandate, the following issues of law arise for determination: i) whether the prosecution proved its case to the required standards; ii) whether a DNA test ought to have been conducted to connect the appellant with the offence; iii) whether there were substantial contradictions and inconsistencies in the evidence of prosecution witnesses that would render the appellant's conviction unsafe; whether the appellant's defence was considered, and whether the sentence was lawful.
16. With respect to the first issue, the appellant was charged with the offence of defilement of a child aged 17 years under section 8(1) and (4) of the *Sexual Offences Act*. The section provides:

“(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement;...”

and

“(4) A person who commits an offence of development with a child between the age of 16 and 18 is liable upon conviction to imprisonment for a term of not less than 15 years;.”
17. Therefore, for the prosecution to prove the offence of defilement, it was required to establish three elements, namely the age of the complainant, proof of penetration and positive identification of the perpetrator.
18. Beginning with her age, NN testified that she was 17 years old and was born in 1999. PW2 stated that NN was born on 27<sup>th</sup> March 1998 and produced NN's birth certificate. He stated that NN lived with him, and that the appellant is a cousin to NN. The appellant has argued that there were contradictions



in the evidence with regard to NN's age. A consideration of the record shows that both the trial court and the High Court were satisfied that NN was 17 years of age. In this regard, the High Court stated thus:

“...the prosecution placed before court evidence from PWO and P2 that proved the age to be 17 years old as at the time of commission of the offence. There was further the certificate produced as exhibit 2 to show that the complainant was aged 17 years old. What was the actual age of the complainant therefore remains uncontroverted by the appellant, there is therefore sufficient evidence that age was proved by the prosecution beyond reasonable doubt.”

19. The record shows that NN's age was confirmed by the medical evidence. Additionally, the evidence of PW2 and PW3, the clinical officer together with her birth certificate that was adduced in evidence indicated that she was 17 years old. The appellant claims that there were contradictions in the evidence on NN's age, as on one hand, NN stated her year of birth as 1999, whilst her birth certificate was specified as 27<sup>th</sup> March 1998.

20. In this regard, we begin by observing that at no time during the trial did the appellant challenge her age. In the circumstances, age being a matter of fact, it is not a matter eligible for determination by this Court. But having said that, on the question of the alleged contradictions, it was held by Ugandan Court of Appeal in the case of Twehangane Alfred vs. Uganda, Crim. App. No 139 of 2001, [2003] UGCA, 6 that it is not every contradiction that warrants rejection of evidence. The court stated:

“With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.”

21. NN stated that she was born in 1999. The birth certificate indicated that she was born on 27<sup>th</sup> March 1998. We do not find that there was any significant disparity in this evidence. The age specified in both cases was within the age bracket specified by section 8(4) under which the appellant was charged. This complaint is lacking in merit and is accordingly dismissed.

22. Next, we consider whether the appellant was properly identified. A consideration of the record discloses that the appellant was a cousin of NN, having been the son to the sister of NN's mother. This fact was not at any time controverted, with the result that the appellant was properly identified through recognition.

23. On the issue as to whether penetration was proved to the required standard, the trial court had this to say:

thus:

“The Complainant narrated that she had sex with the accused on the material date in a bush. The allegation is corroborated by the finding that she was 20 weeks pregnant as at 10<sup>th</sup> November 2015 which is approximately five months from the time of incident. Her hymen was absent. This proves penetration.

Since the complainant is a minor and there was penetration, the offence of defilement has been proved.”



24. In concurring with the conclusions of the trial court, the High Court stated

“The prosecution evidence of PW1 and that of PW2 point out that the sexual act took place and the appellant who was well known to be PW1 committed the offence on diverse dates as framed in the charge sheet. I also accept the medical evidence by PW3 Chris which corroborated PW1 testimony that she had sexual intercourse which gave rise to a pregnancy. The absence of DNA test is not a defence to offence of defilement. I consider the prosecution testimony or PW1 as the trial court did to be both qualitative and quantitative to link the appellant with the offence. The complaint by the appellant on DNA test as a ground to cast doubt on the prosecution evidence remains and unpersuasive to say the very least.”

25. Both the trial court and the High Court reached concurrent findings that penetration was proved. Likewise, and based on the prosecution evidence of NN, the medical report, and the fact of her pregnancy, we too are satisfied that penetration was proved. But having said that, the appellant challenges his conviction on the basis that the learned judge failed to appreciate that no original or certified copies of the clinic card was produced in evidence by PW5, and that no DNA test was conducted to connect the appellant to the offence.

26. On the production of the clinical card, section 64 of the *Evidence Act* provides that the contents of documents may be proved either by primary or by secondary evidence. We have considered the record, and it is apparent that, during the proceedings, the original clinical card was produced by the clinical officer, PW3, who was also the maker. Therefore, the allegation that the original medical documents were not produced does not arise.

27. On DNA testing, section 36(1) of the *Sexual Offences Act*, provides that:

“Notwithstanding the provisions of Section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.”

28. Notably, section 36(1) is couched in discretionary terms, rather than mandatory terms. The above provision was a subject of discussion, this Court in the case of Robert Mutingi Mumbi vs. Republic, Criminal Appeal No. 52 of 2014 (Malindi) where this Court stated:

“Section 36 (1) of the Act empowers the court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly that provision is not couched in mandatory terms.

...DNA evidence is not the only evidence of which commission of a Sexual Offence may be proved.”

29. In the case of David Kahura Wangari vs. Republic [2016] eKLR, this Court held that:

“There is no requirement for the appellant to be taken for treatment to establish an act of defilement. DNA testing or forensic examination of a perpetrator of any offence is done in the course of investigations, but that is purely the choice of the investigating officers, and



failure to do so particularly in this case did not affect the credibility of the evidence that was before the court.”

30. And in the case of *AML vs. Republic* [2012] eKLR, this Court authoritatively stated that, “The fact of rape or defilement is not proved by D.N.A. test, but by way of evidence.”
31. In view of the above cited authorities, the conduct of a DNA test is not mandatory and, in the circumstances of this case where the prosecution had satisfied all the elements of the offence of defilement clearly, a DNA test was unnecessary. See *Evans Wanjala Wanyonyi vs. Republic* [2019] eKLR.
32. Given that the ingredients for the offence of defilement, namely NN’s age, the identity of the appellant, and penetration were all proved, as were the trial court and the High Court, we too are satisfied that the appellant defiled NN, which would therefore render the conviction safe.
33. On sentence, the appellant contended that a mandatory minimum sentence under section 8(4) of the *Sexual Offences Act* violates section 216 and 329 of *the Constitution* and denied judicial officers their legitimate jurisdiction to exercise discretion in sentencing, and that it was therefore unconstitutional.
34. As already observed, the appellant was charged with the offence of defilement under section 8(4), which provides that “... A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than 15 years.”
35. Upon the exercise of discretion, the appellant was sentenced to serve 15 years’ imprisonment, but from the wording of the provision, the trial court was at liberty to impose a term in excess of 15 years’ imprisonment. Evidence was adduced by NN who was 17 years of age than the appellant, her cousin, and a married man with 5 children defiled her in the forest. Having considered the circumstances of the case and the aggravating circumstances of her pregnancy, the trial court imposed a sentence of 15 years, which was upheld by the High Court. Bearing the foregoing at the back of our minds, we find that the sentence was lawful, in excess and lenient and we have no reason to interfere with it.
36. In sum, the appeal against conviction and sentence is without merit and, as such, it is hereby dismissed. It is so ordered.
37. The Judgment is signed under Rule 34(3) of the Court of Appeal Rules (CAR), since Hon. Mr. Justice Odunga, JA refuses to sign the Judgment.

**DATED AND DELIVERED AT THIS 7<sup>TH</sup> DAY OF JUNE, 2024.**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA C.Arb, FCI Arb.**

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**JUDGE OF APPEAL**

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

*Signed*

Deputy Registrar

