



**Kagere v Republic (Criminal Appeal E031 of 2023)
[2024] KECA 1187 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KECA 1187 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL E031 OF 2023
MSA MAKHANDIA, PO KIAGE & A ALI-ARONI, JJA
SEPTEMBER 20, 2024**

BETWEEN

JORAM MAINA KAGERE APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Nairobi
(Ngenye, J.) delivered on 22nd May 2019 in HCCRA No. 57 of 2017)*

JUDGMENT

1. Joram Maina Kagere, the appellant herein was charged before Kibera Chief Magistrate’s Courts in Nairobi, with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. (“the Act”). The particulars of the offence were that on 14th September 2014 in Kajiado North District within Kajiado County, the appellant intentionally and unlawfully committed an act of defilement by inserting his male genital organ (penis) into the female genital organ (vagina) of DK a girl aged 15 years.
2. The appellant faced an alternative charge of committing an indecent act contrary to Section 11(1) of the *Act*. The particulars of the offence were that on the 28th of September, 2014 in Kajiado North District within Kajiado County, he committed an indecent act by placing his male organ (penis) and fingers on the surface of the female organ (vagina) of DK a child aged 15 years.
3. The appellant pleaded not guilty to the charges and the matter proceeded to trial, where the prosecution called 5 witnesses. The appellant was thereafter placed on his defence, and upon considering the evidence, the trial magistrate found him guilty of the main count, convicted him, and sentenced him to 20 years’ imprisonment.



4. The appellant was aggrieved by the judgment of the trial court and preferred an appeal to the High Court. On considering the appeal, the High Court (Ngenye-Macharia, J.) (as she then was) agreed with the findings of the trial court. She upheld both the conviction and sentence thus dismissing the appeal in its entirety.
5. The appellant was aggrieved by the decision of the first appellate court and filed this appeal. Before we address the grounds of the appeal, we shall summarize the evidence that was adduced in the trial court briefly.

PW2, SWW the complainant's mother testified that on the 27th of September, 2014, while at work, she received a call from her mother informing her that her daughter, PW3, had disappeared from home at around 7:00 pm. At that time, PW3 was 15 years old and was living with her mother and grandmother. Further, she testified that on receipt of the information, she later proceeded to Ngong Police Station and filed a report. The next day, together with her mother (PW4) they began a search for PW3, when they received information that PW3 had been seen at the house of the appellant, their immediate neighbour. Their two residences were only separated by a wall.

6. PW2 further testified that she got in touch with officers from Ngong Police Station and together they went to the appellant's house and on entering the appellant's house they found PW3 inside. PW2 stated further that she could not tell when PW3 went to the house of the appellant; that PW3 told her that they had sex about six times the night she slept with the appellant; that upon being rescued PW3 was then taken to Nairobi Women's Hospital where she was examined and treated, that on examination she was found to have been defiled and was put on treatment; that she also took PW3 to the Nairobi Area, where a P3 form was filled. PW2 presented PW3's birth certificate in court, which showed that she was born on 22nd April 1999, and which was proof that she was 15 years old at the time of the incident. She also testified that the appellant was her neighbor and that she had known the appellant for 20 years, even before PW3 was born.
7. Further, she testified that she learnt from PW3 that the appellant had called on her on the pretext that he wanted to send her to buy sugar for him. She refuted the claim that she had received Kshs.15,000 from the appellant in August 2014 to pay for PW3's school fees. She also rejected the claim that the appellant was her boyfriend, stating that they were just good friends who exchanged greetings when they met on the road. She stated further that when the appellant was arrested, and on the way to the police station, he asked PW2 for forgiveness, but she refused. She denied asking for Kshs.20,000 from the appellant.
8. PW3, DK the complainant, recalled that on 27th September 2014, a Friday, after school, as she stood outside their gate, the appellant called her to his house indicating that he wanted to send her to buy sugar for him; that on entering the appellant's house to get the money for the sugar, the appellant locked the door and threatened to kill her if she screamed or raised an alarm; that the appellant made her sit on the bed and forced her to undress and that out of fear, she obliged, removed her dress and underpants and the appellant defiled her the whole night and the whole of Saturday before she was rescued by her mother and the police, who found her asleep as she was in pain; that it was the first time the appellant defiled her; that upon being rescued she was taken to Nairobi Women's Hospital, examined and it was established that she had been defiled; that she was put on two weeks' treatment and her Post Rape Care

“PRC” form filled; that later she was taken to the Nairobi Area and a P3 form was filled; that the appellant was known to her all her life and she used to refer to him as uncle.



9. PW4 MW, PW3's grandmother testified that on 27th September 2014, PW3 left the house and did not return and that attempts to locate her that evening were in vain; that she called PW2, and asked her to report to the police; that later she learnt that PW3 was at the neighbour's house; that she went to the appellant's house, knocked on the door, and asked him if PW3 was with him, but he did not cooperate; that she kept watching over the appellant's house until the police arrived; that she did not enter the appellant's house when the police arrived but she saw PW3 and the appellant leave his house; the appellant was an immediate neighbour, and only a wall separated the two homes. She denied having any grudge against the appellant and that the incident strained their relationship with the appellant's parents.
10. PW5, Dr. Joshua Maundu, of Nairobi Surgery, testified on behalf of his colleague Dr. Shako who at the time was on leave. He informed the court that he was familiar with the handwriting and the signature of his colleague. He confirmed that on the 1st of October, 2014 PW3 was referred to the facility from Ngong Police Station on allegations of defilement by a known person; that on being examined she was found with no physical injuries; that the genitalia was normal but had multiple old tears; the hymen was torn, pressed on by penetration; the tears were old and had healed; there was no discharge; that the recovery and PRC forms had been filed at Nairobi Women's Hospital; that samples were collected and sent to the Government Chemist and a P3 form filled.
11. PW6, Joseph Mwanzi, a clinical officer at the Nairobi Women's Hospital produced PW3's PRC form dated 30th September 2014. He informed the court that PW3 had been seen by Dr. Ibune, whom he had worked with, and knew his handwriting and signature; that on examination PW3 gave a history of having been defiled on 30th September 2014 by a neighbour; that upon examination, he found no hymen; that on general examination there were no bruises; high and low vaginal swabs were done; no spermatozoa were found; that pregnancy, HIV and STI tests were all negative; that PW3 was put on STI and Hepatitis B vaccine to cover any impending infection and referred for counseling.
12. PW7, No. 49035 PC Charles Juma Namunyua testified that on 28th September 2014 while on duty, he received a call from PW4 a resident of his area of jurisdiction who informed him that her granddaughter by the name DK had gone missing from 27th September 2014; that the girl was a Form One student at [Particulars Withheld] Secondary School in Ngong Township and aged 15 years; that as they were searching for PW3, a good Samaritan informed her that PW3 was locked inside their neighbour's house; that he rushed to the scene of the crime in the company of Cpl. Ileri and found PW2 and PW4 who confirmed to them that both the minor and the appellant were inside the appellant's house and that they had locked the house from outside to prevent the appellant from leaving; that they opened the house from outside and entered as it had not been locked from the inside; that they found the appellant and the minor seated on the bed; that they asked the appellant what he was doing with a minor but he remained silent; they apprehended both the appellant and the minor and escorted them to Ngong Police Station; subsequently, they interrogated each of them separately, during which the minor disclosed that the appellant had summoned her to purchase cigarettes for him, and upon entering his house, he locked the door and instructed her to remain inside; that she further informed him that the appellant asked her to have sex with him for money and if she refused he would beat or kill her, to which she agreed for fear of being killed or beaten; that on interrogation the appellant regretted having defiled the minor under threats; that the following day the appellant was taken to Nairobi Area Hospital, where he was examined by a police doctor and the P3 form filled; that the minor was taken to Nairobi Women's Hospital and upon examination, a PRC form was filled, which confirmed that the minor had been defiled; the minor was later taken to the Nairobi Area, where she was examined by a police doctor and her P3 form filled; that he visited the scene, carried out further investigations; recorded the witness statements; then charged the appellant for the offences.



13. Dr. Joseph Maundu of Police Surgery was PW1. He informed the court that he examined the appellant on the 29th of September 2019, who had been referred for examination by officers from Ngong Police Station, on suspicion of having defiled a minor. There were no injuries on the appellant's genitalia. He filled in a P3 form and signed the same.
14. Upon considering the prosecution's evidence set above, the trial magistrate put the appellant on his defence. He gave a sworn statement and denied the offence. He called three witnesses, DW2, Peterson Ngatia, his son, DW3, Nicholas Lemusi Ole Sunkuli, and DW4, Mary Bushisi Wangui, his mother. He informed the court that he was 43 years old and worked as a security agent; that he was married with three children; that he was arrested on 28th September 2014 while in the company of two of his friends; that the police knocked on his door and his friend Henry answered it; they were accompanied by his neighbour (PW2); that the police instructed Henry to wake him up and he was asked to go with them to the police station; at the police station it was alleged that he was with his neighbor's daughter, which he denied; PW2 was his girlfriend but they had broken up; she had asked for Kshs.15,000 from him which he declined to give; that at the police station he was asked to give PW2 Kshs.20,000 which he refused, and he was locked; initially, he was charged with the offence of child abduction which was later changed to defilement; that PW3 was forced to make the false allegations against him.
15. DW2, Peterson Ngatia, was 21 years old and had just completed his secondary school, and was the appellant's son. He testified that on 28th November 2014, he was in his house, which is next to the appellant's when he heard a knock, and on opening the door he met PW6 arresting his father; he later went to see his father at the police station and learnt that he had been charged with the offence of defilement.
16. DW3, Nicholas Lemusi Ole Sunkuli worked at the Ministry of Fisheries as a driver and was a friend of the appellant. He claimed to have been in the appellant's house when the police came. He testified that he heard a knock on the door, he opened the door and met two police officers who asked for the appellant; that the appellant was an old friend whom he knew very well; that together with DW2, they followed the police officers to Ngong Police Station where the appellant was locked up.
17. DW4, Mary Bushisi Wangui, the appellant's mother testified that she saw the appellant being arrested, taken to Ngong Police Station, and later arraigned in court and remanded in custody.
18. The trial court having considered the evidence of both the prosecution and the defence was persuaded that the appellant committed the offence. Accordingly, it convicted the appellant and sentenced him to 20 years' imprisonment. Being aggrieved with the judgment the appellant preferred an appeal to the High Court. In its judgment, the High Court agreed with the findings of the trial court and upheld both the conviction and sentence.
19. The decision of the High Court precipitated the appeal now before us on grounds that the learned judge erred in law:
 - i. By failing to properly evaluate the trial court proceedings and come up with a fair and independent verdict.
 - ii. By failing to consider that the essential elements of the offence of defilement were not proved.
 - iii. By lending credence to a prosecution's case based on evidence that was below the required standard.
20. The appellant filed undated written submissions, where he submitted that the plea was not taken in strict compliance with the law. Further, that the trial court failed to consider the evidence he placed



before the court; that the action of the police was contrary to the Evidence Act, the Kenya National Police Service Act, and the Constitution.

21. On the ingredients of the offence, the appellant submitted that two birth certificates were produced to prove the age of the complainant and which contradicted each other; that the said certificates were not certified as required by Sections 66 and 83 of the Evidence Act. On identification, he submitted that he was a neighbour to the complainant and her mother hence recognition was expected but that the complainant did not describe the appellant within the meaning of Section 9 of the Evidence Act and that dock identification is not sufficient; that further the complainant did not make a formal complaint and the occurrence book record does not show when, and, if the complainant made a complaint.
22. On penetration, the appellant submitted that the medical evidence adduced defied Sections 63 and 147 of the Evidence Act; and that the evidence of the complainant was admitted unsworn contrary to Section 125 of the Evidence Act.
23. The respondent filed written submissions dated 19th February 2024 in opposition. The State submitted that the first ground that the judge did not analyze and evaluate the evidence to arrive at an independent conclusion, must fail, as the judge properly analyzed the evidence, evaluated the same, and made a determination; on the ground that the ingredients of the offence of defilement were not proved, the State submitted that penetration was confirmed by PW5 and PW6 who produced the PRC form and the P3 form which indicate that penetration occurred, further that the investigating officer, his colleague, PW2 and PW4 found the appellant and PW3 seated on the bed and the appellant was not able to explain why he was locked in his house with the PW3.
24. On the age of the PW3, the State submitted that the age was not in dispute as the same had been confirmed by the production of the birth certificate; further, the learned judge found the evidence of the complainant was consistent and believable as she was able to narrate the ordeal that befell her, and thus found no reason to doubt the evidence. As for the appellant's evidence, the learned judge found that it was neither consistent nor corroborated; and that the prosecution's evidence was overwhelming against the appellant's, and the few inconsistencies raised did not shift the fact of his culpability.
25. The State further urged for the dismissal of the appeal as there was no substantial miscarriage of justice that had occurred; that the court complied with Section 362 of the Criminal Procedure Code and Article 50(4) of the Constitution as the police ensured that evidence was legally obtained; they acted professionally and complied with Article 244 of the Constitution; as for the plea, the same was taken in strict compliance with the law. The State further submitted that the case against the appellant was proved beyond reasonable doubt and the sentence was legal and proper. The State relied on the case of *S v Malgas* 2001 (1) SACR 469 (SCA), where the court held that a court exercising appellate jurisdiction cannot in the absence of material misdirection by the trial court, approach the issue of sentence as if it were the trial court. It also relied on *Mokela v The State* (135/11) [2011] ZASCA 166 where the Supreme Court of South Africa held that sentencing remained pre-eminently within the discretion of the sentencing court. Back home the State cited the case of *Ogolla S/O Owuor v Republic* [1954] EACA 270, where the court held that it could not alter a sentence unless the trial judge had acted upon wrong principles or overlooked some material factors. The State added that the Supreme Court in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR set out the guidelines concerning sentencing.
26. This is a second appeal and our mandate is restricted to addressing only matters of law. The court will also not normally interfere with concurrent findings of fact by the two courts below, unless such findings were not based on evidence, or were based on a misapprehension of the evidence, or that the courts below acted on wrong principles in arriving at the findings. In the case of *Karani v. R* [2010]



1 KLR 73, the role of the second appellate court was succinctly set out, wherein 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.”

In Kaingo v R [1982] KLR 213 where the court affirmed the above position by restating that; -

“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 the second appeal is whether there was evidence on which the trial court could find as it did (Reuben Karari C/o Karanja v R (1956) 17 EACA 146).”

27. Cognizant of the limitations of our mandate, and having considered the grounds of appeal, submissions by both parties, and case law cited, we are of the view that the issues turning in this appeal for consideration are; -

- i. Whether the trial court properly analyzed the evidence before arriving at its determination.
- ii. Whether the ingredients of the offence of defilement were proven; and
- iii. Whether the sentence meted out to the appellant is lawful.

28. As stated in the case of Okeno v R [1972] E.A. 32 and David Njuguna Wairimu v Republic [2010] eKLR, it is trite that the first appellate court is charged with the duty of considering, evaluating, and analyzing the evidence taken by the trial court afresh to arrive at an independent opinion. A close look at the judgment of the High Court is evident that the judge reconsidered the evidence of each of the prosecution’s witnesses, and re-evaluated and analyzed the same in her judgment. As it is there is no formulae of how a judge analyzes and evaluates evidence, it is usually a matter of style. The appellant apart from making a mere claim failed to substantiate his claim as stated by this Court in the case of Alexander Ongasia & 8 Others v Republic [1993] eKLR:

“...it is not enough; indeed there is no need, to loudly announce in the judgment that the evidence has been re-evaluated. Such re- evaluation must be apparent on the face of the record and if that is done, then there is no occasion to announce it.....but it is clear to us that he broadly agreed with the conclusions reached by the trial magistrate and he also found as a fact that the evidence against the appellants was overwhelming. We think he was right in his general conclusions and in the circumstances of this case, his failure to analyze in detail the evidence before the trial court did not occasion any failure of justice to any of the appellants.”

29. On the complaint that the ingredients of the offence of defilement were not proved; on age, the two courts below considered the birth certificate produced in evidence and were satisfied that the age of



PW3 was proved. This Court in the case of *Mwolongu Chichoro Mwanyembe v Republic*, Mombasa Criminal Appeal No. 24 of 2015 (UR) held that:

“...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, guardian or medical evidence among other forms of proof....”

30. The same with the question of penetration. The two courts below believed the evidence of PW3, which was aptly corroborated by the evidence of the doctor and the clinical officer, who produced the PRC and the P3 forms and testified in court.

31. As to the question of the identity of the perpetrator, both courts concurred that there could be no mistake in the identity as the appellant was a long-time neighbour of PW3 and her family, and further the two were found in the appellant’s house where they had been holed up during PW3’s disappearance. We therefore find no reason for this Court to interfere with concurrent findings of fact by the two courts. In the case of *Dzombo Mataza v R* [2014] eKLR this Court stated:

“As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court – see *Okeno v Republic* (1972) E.A. 32. By dint of the provisions of section 361(1)(a) of the *Criminal Procedure Code* our jurisdiction does not allow us to consider matters of fact unless it is shown that the two courts below-considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong.” See the cases of *Karani v R & Kaingo v R* (*supra*).

32. Last for our consideration is the complaint of the sentence meted out by the trial court and affirmed by the High Court. Section 361 of the *Criminal Procedure Code* provides as follows:

“A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section—

- a. On a matter of fact, and severity of sentence is a matter of fact; or
- b. Against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.”

33. Under the Act a person found guilty of the offence of defilement of a girl aged between 12 and 15 years is liable to imprisonment for a term of 20 years. The punishment meted out upon the appellant is therefore lawful, and if the appellant’s complaint is on the severity of the sentence by dint of Section 361(1) of the *Criminal Procedure Code*, our mandate is limited as the severity of the sentence is a matter of fact.

34. In the end we find the appeal to be devoid of merit and the same is hereby dismissed in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL ALI-ARONI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

