



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Ndiema v Republic (Criminal Appeal 44 of 2019)  
[2024] KECA 1427 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KECA 1427 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 44 OF 2019  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
OCTOBER 11, 2024**

**BETWEEN**

**DANIEL KIPROP NDIEMA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*((Being an appeal from the judgment of the High Court of Kenya at Kakamega  
(R. N. Sitati, J) delivered on 26th February, 2019 in HCCRA No. 51 of 2018))*

**JUDGMENT**

1. The appellant, Daniel Kiprop Ndiema, was tried by the Senior Resident Magistrates Court at Sirisia, convicted, and sentenced to serve 20 years' imprisonment, for the offence of defilement of a girl aged fourteen years, contrary to Section 8(1) and (3) of the *Sexual Offences Act*.
2. During the trial, the prosecution called four witnesses. These were: the victim PWR, (name withheld), who testified that she accompanied the appellant to his home, had sex with him and later went to stay with his mother, and remained there until her father went to collect her whilst in the company of police officers. The victim's father Stanley Rotich, who testified that he reported the disappearance of his daughter at Kipsigon Police Station, and later was accompanied by PC Kamau and other officers to the appellant's home where his daughter was found and arrested. PC Peter Kamau, the investigating officer, who took the victim to hospital for medical examination, and arrested the appellant, also testified. Another crucial witness was Barasa Juma a clinical officer who examined the victim, assessed her age as fourteen years, confirmed that she was twenty-eight weeks pregnant; and that her hymen was missing, vagina perforated, and she also had a foul smell from the vagina.
3. In his defence the appellant gave an unsworn statement and called no witness. He explained that he was a boda-boda rider and also explained how he was arrested on 13<sup>th</sup> September, 2018. He denied any knowledge of the allegations that were made against him.



4. As already stated, the trial court found the appellant guilty of the offence charged, convicted and sentenced him to serve 20 years' imprisonment. Aggrieved, the appellant preferred an appeal to the High Court, faulting the trial magistrate for convicting him yet no DNA test was conducted nor was the age of the complainant established.
5. In dismissing the appeal, the learned Judge of the High Court found that the appellant was well known to the victim; that there was no grudge between the family of the victim and that of the appellant; that the evidence of the victim and her father was credible as the fact that the victim was found at the appellant's home, confirmed the victim's evidence that it is the appellant who defiled her and made her pregnant. The learned Judge was satisfied that penetration was established by the victim's evidence and the medical report, and that the appellant was proved to be the culprit, as he had eloped with the victim and was with the victim at the material time.
6. In regard to the victim's age, the learned Judge found the evidence adduced by the prosecution, which included a notification of birth and an age assessment, proved that the victim was around 13 years old at the time of the commission of the offence; and that her age fell within the age bracket indicated under Section 8(3) of the *Sexual Offences Act*.
7. The appellant is now before us in a second appeal, in which he has raised six grounds. He faults the trial court and the first appellate court for conducting proceedings that were null and void, as his rights under the law were violated; in convicting him on evidence that violated his rights, evidence that was not analyzed, and was full of contradictions; in considering extraneous factors in the decision making; in acting baselessly by adopting the prosecution evidence without appreciating that it lacked the essential elements to warrant a conviction; in failing to appreciate that the prosecution case was not properly investigated; and in failing to find that the sentence imposed was harsh and excessive in light of the contradictions regarding the age of the complainant.
8. In support of the appeal, the appellant filed written submissions, in which he complained that he was not taken to hospital for DNA testing, nor was there any examination done to confirm whether the victim's pregnancy was his. He argued that this was a deliberate omission as the prosecution case would otherwise have been ruined. He took issue with the evidence regarding the victim's age contending that the same was contradictory, the victim having stated that she was 14 years, while her father and PW3 maintained that she was 13 years, and the medical examination report showed that she was 16 years.
9. Another alleged contradiction that the appellant pointed out concerned the date that the victim went missing. The appellant argued that the charge sheet was defective as it lacked the signature and rubberstamp of the police station, while the magistrate only signed it as part of certification of the original proceedings. The appellant stated that the failure to carry out an identification parade was a crucial omission. He pointed out that no malice aforethought was established as the victim stated that she was in the house of the appellant for 3 days during which period, the house was not locked.
10. Finally, the appellant faulted the investigations and the failure to produce a birth certificate arguing that the age was important in the sentencing process. He complained that he was held in the cells for more than 24 hours which was contrary to the law.
11. Ms. Busienei, Senior Principal Prosecution Counsel in the office of the Director of Public Prosecutions (ODPP), filed written submissions on behalf of the respondent, and also argued the appeal on behalf of the respondent during the hearing of the appeal.
12. In the written submissions, Ms. Busienei opposed the appeal, maintaining that all the ingredients of the offence of defilement were proved beyond reasonable doubt. She relied on *Charles Wamukoya Karani vs. Republic Criminal Appeal No. 72 of 2013*; for the proposition that, the critical ingredients forming



the offence of defilement are age of the complainant, proof of penetration and positive identification of the assailant.

13. Ms. Busienei submitted that the victim testified that she was 14 years old, and gave her date of birth as 6<sup>th</sup> January, 2004. This evidence was confirmed by her father and a birth notification which was produced. Counsel also relied on the age assessment report, which showed that the minor's age was 14 years. Ms. Busienei submitted that though the actual age of the victim was 13½ years, under section 8(3) of the Sexual Offence Act, defilement of a girl aged between 12-15 years falls within the same bracket, and therefore there was no much difference whether the victim was 13½ years or 14 years.
14. In regard to penetration, Ms. Busienei submitted that the evidence of the victim that the appellant had sexual intercourse with her, subsequent to which she missed her periods, was corroborated by the evidence of the clinical officer who examined her and confirmed that she was 28 weeks pregnant, and that she had no hymen and her vagina had a foul smell; and this evidence confirmed that there was penetration.
15. According to Ms. Busienei, the victim was able to identify the appellant as they had been friends for a while. In addition, the victim went to the appellant's home, and she was with him for several days, before her father and police officers found her there. Counsel argued that there was no contradiction or inconsistency in the prosecution case, and if there was any, the same did not go to the root of the prosecution case.
16. On sentence, Ms. Busienei, urged the Court to uphold the sentence that was imposed, as the same was in accordance with the law. She argued that the appeal was unmerited and should therefore be dismissed.

[17] This being a second appeal, the court restricts itself to consideration of questions of law only by dint of section 361(1) (a) of the Criminal Procedure Code, that so limits the jurisdiction of this Court. As stated by this Court in *David Njoroge Macharia v Republic* [2011] eKLR; in considering matters of law:

“As this court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings

- see *Chemagong v R* [1984] KLR 611.”

18. Having considered the appeal, the rival submissions, the authorities cited and the law, and in view of the mandate of this Court on a second appeal, the main issues that fall for our determination are: whether the offence of defilement was established beyond reasonable doubt; whether there were substantial contradictions and or inconsistencies in the evidence of the prosecution witnesses such as to render the appellant's conviction unsafe; and whether any legal issues arises with regard to the appellant's sentence, and if so whether this Court should interfere with it.
19. Turning to the first issue regarding whether the offence of defilement was established, the appellant was convicted and sentenced under Section 8 (1) as read with Section 8(3) of the *Sexual Offences Act* which provides as follows:

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

(2) ...



(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years ...”

20. The main ingredients of the offence of defilement are, proof that the victim is a minor; that there was penetration of the victim’s genital organs with the genital organs of another person; and that the accused person was the person who penetrated the victim’s genital organs. For the purpose of the penal section under Section 8(3) of the *Sexual Offences Act*, there must be proof that the age of the victim fell between twelve and fifteen years.
21. Regarding the victim’s status as a minor, this was established through proof of the evidence of the complainant, her father and production of the notification of birth document. We shall shortly revert to the issue of age. On the question of proof of penetration, it is clear from the record that the complainant’s testimony was corroborated by medical evidence as confirmed by the evidence of Barasa Juma a clinical officer who upon examining the complainant on 15<sup>th</sup> September 2017, observed that her hymen was missing, her vagina was perforated, had a foul smell, and that she was 28 weeks pregnant. This means that she conceived about 4 months before, which would mean sometime around April 2017.
22. The date of the complainant’s conception, is not very clear, as the offence was alleged to have taken place between April 2016 and 15<sup>th</sup> September 2017. However, there is sufficient evidence that the appellant took the complainant to his house in April 2017 and not 2016, and that he had sex with her from the time he took her to his house. This is consistent with the evidence of the clinical officer who confirmed that the complainant was 4 months pregnant as at 15<sup>th</sup> September 2017. The learned Judge of the High Court, properly considered the evidence and came to the correct conclusion, in our view, that there was penetration resulting in a pregnancy.
23. This is how the learned Judge rendered himself:
- “PW 1 testified that when they went to bed with the appellant on the unidentified date in August 2016, the appellant forced his penis into her vagina and they had sex three times during the night. When the complainant was eventually found at the appellant’s home, she was five months pregnant. When the appellant was given time to cross-examine the complainant, he asked no questions leading to the presumption that he was in agreement with the complainant’s evidence in chief.”
24. Regarding the question of the identity of the perpetrator, the complainant identified the appellant as the person who defiled her. It was a case of identification by recognition. The appellant was a person who was well known to the complainant as she stated that he had been her boyfriend since April 2016. In her testimony, the complainant narrated that in August 2016, the appellant came to their home and she went to the appellant’s place and slept there; that they had sexual intercourse three times on the first night, and she stayed at the appellant’s place until the appellant left and told her to go to his mother’s home. The complainant moved to the appellant’s mother’s home where she stayed until 15<sup>th</sup> September, 2017 from where she was rescued. Except for the year in which the complainant went with the appellant, the complainant’s evidence was confirmed by that of her father. The appellant’s identification was one of recognition as opposed to the identification of a stranger. Identification by recognition is more satisfactory, reassuring, and more reliable because it depends upon personal knowledge of the assailant in some form or another (See *Anjoni & Others vs. Republic* [1980] KLR 59).



25. The following extract of the judgment of the High Court, reveals that the learned Judge considered the issue of identification as follows:

“From the record, the appellant was well known to the complainant. It is clear from the evidence on record that there was no grudge between the two families because if there could have been such a grudge, one could have concluded that it was the motivation for both PW1 and PW2 to testify against the appellant. In fact, after PW2 gave his evidence-in-chief, the appellant did not ask him questions. I have no reason to doubt the testimony of both PW1 and PW2 as well as the testimonies of PW3 and PW4. PW3 in particular confirmed that he accompanied PW2 to the appellant’s home where they found the complainant. What was the complainant doing at the appellant’s home except for the reason that he had forced himself into her life and defiled her? There is therefore no doubt in this case that it was the appellant who defiled the complainant, ruptured her hymen, and made her pregnant.”

26. In light of the clear evidence of identification, there was no need to conduct an identification parade. We find that the concurrent findings of the two courts below that the appellant was positively identified as the person who defiled the complainant, was supported by the evidence that was on record.

27. Coming back to the question of the complainant’s age, in *Richard Wabome Chege Vs. Republic (Criminal Appeal No. 61 of 2014)* [2014] eKLR; this Court held as follows:

“On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate, PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 (the Doctor) who examined the complainant, and the complainant herself.”

28. From the evidence on record, the complainant stated that her age was 14 years old. She gave her date of birth as 6<sup>th</sup> January, 2004. Her father who supported his evidence with the production of a birth notification, indicating that the complainant was born on 6<sup>th</sup> January, 2004 stated that she was 13 years old. Using her date of birth, the complainant was slightly over 13 years old at the time the offence was committed and not 14 years old as indicated on the charge sheet. Be that as it may, we find this to be a minor inconsistency that has not prejudiced the appellant.

29. The question that we must determine is whether there were contradictions in the evidence tendered by the prosecution, and if so, whether the contradictions (if any), were so material that the trial Magistrate ought to have rejected the evidence. We are so persuaded by the Ugandan Court of Appeal decision in *Twehangane Alfred v Uganda (Crim. App. No 139 of 2001)*, [2003] UGCA, 6, wherein the court stated that it is not every contradiction that warrants the rejection of evidence. This is how the court put it:

“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.”

30. The evidence of the complainant and her father on her age was not contradictory as such. There was only a minor inconsistency arising from their calculation of the age, but they were agreed that her



date of birth was 6<sup>th</sup> January 2004. This Court in *John Nyaga Njuki & Others vs. Republic* (Nakuru Criminal Appeal No. 160 of 2000) [2002] 1 KLR 77; [2002] eKLR stated as follows on the issue of discrepancies and contradictions:

“In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused. The discrepancies in the evidence in the matter before us are in our view, of a minor nature considering the facts and circumstances of the case.”

31. Similarly, in *Philip Nzaka Watu vs. Republic* [2016] eKLR, this Court held that:

“The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied with the accused person’s guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise, must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”

32. In the instant case, though there were minor discrepancies in the evidence of the witnesses in regard to age, the inconsistency was minor and did not go to the root of the prosecution case. The age of the Complainant was confirmed by the medical evidence, and the birth notification that was produced in evidence. As regards the inconsistency relating to the date the appellant disappeared and the date of conception, this has already been addressed. We add that nothing turns on it as there was clear evidence that the appellant took the complainant to his house and that he has sexual relations with her from which a pregnancy resulted. This ground of appeal relating to the evidence being inconsistency and contradictory therefore fails.

33. We find that all the ingredients of the offence of defilement were established to the required standard, and the concurrent findings of the two courts below were based on credible and cogent evidence. In light of the overwhelming evidence that was adduced against the appellant, his denial of having been involved in the commission of the offence was properly rejected. His conviction was therefore sound.

34. As regards severity of sentence, as already observed, this being a second appeal the Court’s jurisdiction is circumscribed by Section 361 of the Criminal Procedure Code, under which jurisdiction is confined to matters of law only, with severity of sentence statutorily stated to be a question of fact. (see also P



(not his real name) v Republic (Criminal Appeal 106 of 2019) [2021] KECA 357 (KLR) (17 December 2021) (judgment).

35. The Appellant was charged with defilement contrary to sections 8(1) and 8(3) of the *sexual offences Act* No 3 of 2006, which we have quoted above. Section 8(3) of the said *sexual offences Act* expressly provides a mandatory sentence, that a person found guilty of defilement of a child aged between twelve and fifteen shall upon conviction be sentenced to a term of not less than twenty years imprisonment. The appellant upon conviction did not provide any mitigating circumstances. Nevertheless, he was treated as a first offender and the trial magistrate sentenced him to serve 20 years imprisonment which is the mandatory sentence provided under Section 8(3) of the *Sexual Offences Act*. The 1<sup>st</sup> appellate court upheld the sentence noting that the trial magistrate was guided by the provisions of Section 8(1) and 8(3) of the *Sexual Offences Act*.

36. Sentencing is an exercise of discretion by the trial court. This was aptly stated by this Court in Benard Kimani Gacheru Vs Republic (2002) eKLR as follows:

“It is now settled law, following several authorities by this court and by the High Court that sentence is a matter which rests in the discretion of the trial court. Similarly, sentencing depends on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless the sentence is manifestly high/excessive in the circumstances of the case or that the trial court overlooked some mutual factors or took into account some wrong material or cited upon a wrong principle. Even if the Appellate court feels that the sentence is heavy and the Appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the decision of the trial court on sentence unless anyone of the matter stated i.e. shown to exist.”

37. In the instant appeal, the sentence imposed upon the appellant is the mandatory sentence provided under the law. In Republic -vs- Gichuki Mwangi: Initiative for Strategic Litigation in African (ISLA) and 3 others (amicus curie) 2024, 34 KLR, the Supreme Court asserted that:

“Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction the singular sentence is already prescribed by law.”

38. Needless to state that in passing the said sentence of 20 years imprisonment on the appellant, the trial Magistrate had no room to exercise her discretion in determining an appropriate sentence to be imposed on the appellant, owing to the mandatory nature of the penalty provided under the law. Likewise, there is no room for our intervention.

39. The upshot of the above is that we come to the conclusion that this appeal fails in its entirety. It is accordingly dismissed.

**DATED AND DELIVERED AT KISUMU THIS 11<sup>TH</sup> DAY OF OCTOBER, 2024.**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**H. A. OMONDI**

.....

**JUDGE OF APPEAL**



**JOEL NGUGI**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**

