



**Kinyesi v Republic (Criminal Appeal E043 of 2023)
[2024] KECA 1732 (KLR) (6 December 2024) (Judgment)**

Neutral citation: [2024] KECA 1732 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CRIMINAL APPEAL E043 OF 2023
MSA MAKHANDIA, AK MURGOR & GV ODUNGA, JJA
DECEMBER 6, 2024**

BETWEEN

KAINGU DECHE KINYESI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Malindi delivered in Garsen (S.M. Gitthinji, J.) delivered on the 8th day of February 2022 in HCCR APP No. E025 of 2020)

JUDGMENT

1. The appellant, Kaingu Deche Kinyesi was charged with the offence of defilement of a child contrary to section 8(1) and (2) of the *Sexual Offences Act*. The particulars of the charge sheet were that the appellant on 2nd May 2018 at Kaloleni Sub County in Kilifi County within Coast Region, intentionally and unlawfully committed an act which caused his male genital organ namely penis to penetrate the female genital organ namely vagina of the complainant PKK, PW1 a child aged 7 years.
2. The appellant also faced an alternative charge of indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. The particulars of which were that on the same date and place he intentionally and unlawfully committed an act which caused his male genital organ namely penis to touch the female genital organ namely vagina of PKK, PW1 a child aged 7 years.
3. The appellant pleaded not guilty to the offence and the matter proceeded to a hearing.
4. PW1 testified that she was 9 years old and was in class 2, and that the appellant was her uncle. She stated that on the material day she left home to go to the river where they had planted vegetables, when the appellant called her out twice, but she ignored him. The appellant then approached her, grabbed her hand and took her into his house and locked the door. He spread a mat on the floor then removed his clothes and her skirt and pants and defiled her; that he inserted his 'mdudu' (penis) into her



- ‘tuputupu’ (vagina). All the while, he held her mouth to prevent her from screaming and threatened to kill her with a panga if she made any noise. Her father PW2 knocked on the appellant’s door, and when he opened it and saw her inside, he was upset and punched the appellant
5. on his face, whereafter he called their Assistant chief.
 6. PW2 who is also the appellant’s older brother told the court that PW1 was born on 7th July 2009. On 2nd May 2018, he was left to take care of PW1 and his other children after his wife went to Mazaras. He attended a funeral and when he got back home, he did not find the children so he went looking for them. He found PW1’s elder brother, one B who told him that PW1 had gone to the appellant’s house. His other 2 children also told him that the appellant had taken PW1 to his house. PW2 went to the appellant’s house, and when he opened the door, he noticed that his trousers was unzipped and one could see his penis. PW2 saw PW1 standing on a mat and on seeing her father, she pulled up her panties which were on the floor. He asked her what she was doing in the appellant’s house and she told him that the appellant had defiled her. PW2 punched the appellant, and when he tried to run away, he raised an alarm and he was caught.
 7. Hamisi Kombo Gogo PW3 was the assistant chief of Jibana location. He was at home at around 5.00 p.m that day when people who were beating the appellant came to his house, as it was alleged that he had defiled PW1. He took the appellant to Kaloleni police station to avoid him being lynched by the mob.
 8. PC Winnie Murei PW4 of Kaloleni police station took over the police file from the investigating officer one, PC Wairoto who was away on maternity leave. After it was reported that the appellant had defiled PW1 who was a child,
 9. PW1’s statement was recorded. PW4 told the court that PW1 produced her Birth Notification and her Child Health Card.
 10. Mwangolo Chigulu PW5, a Senior Clinical Officer at Mariakani Sub County Hospital, testified on behalf of his colleague one, Barrington Charo who was unwell and was pursuing treatment. PW5 stated that he was very familiar with Barrington’s handwriting and signature since he had worked with him for 8 years. He stated that PW1 was examined at their facility on 3rd May 2018 by Clinical Officer Barrington. A vaginal examination revealed a broken hymen and a small vaginal tear at the lower part of the vagina; that Barrington confirmed PW1 was defiled. He produced her P3 Form, treatment notes, and a laboratory request form.
 11. When placed on his defence, the appellant denied committing the offence. He confirmed that PW2 was his brother and PW1, his niece; that on the day in question, he was digging in his farm when people he did not know arrived and beat him up, and thereafter took him to Kaloleni police station. He claimed that the charges were a fabrication brought by PW2 because of a land dispute that existed between them.
 12. The trial Magistrate upon considering the evidence convicted the appellant of the offence of defilement and sentenced him to serve life imprisonment.
 13. Being dissatisfied with the conviction and sentence, the appellant lodged an appeal in the High Court on the grounds that penetration was not proved; that evidence was contradictory and that his defence was unfairly dismissed.
 14. The High Court, upon considering the appeal, held that the prosecution had established its case to the required standards and dismissed the appeal for want of merit.



15. Aggrieved, the appellant has filed the appeal in this Court on the grounds that the trial Magistrate was in error in convicting him in the absence of cogent evidence; that the Judge failed to take into account the time he spent during trial during sentencing; that the Court failed to consider his defence; that the 1st appellate court was in error in law by failing to consider that the trial was conducted in breach Articles 43 (1)(a) and (2) and 51(1) of *the Constitution* and in failing to see that the prosecution evidence was riddled with contradictions and discrepancies and finally, that the court failed to appreciate that his mitigation was not taken into account.
16. Both the appellant and the respondent filed written submissions. When the appeal came up for hearing on a virtual platform, the appellant who appeared in person submitted that he was ill during the trial and that the court ignored his ill health, which was in breach of his right to fair trial for persons detained, or held in custody or imprisoned under Article 51(1) of the Constitution;

that a person who is detained, or held in custody or imprisoned under the law, retains all the rights and fundamental freedoms in the bill of rights, except to the extent that any particular right or fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned.
17. The appellant further submitted that the case was fabricated against him, and that the prosecution did not adduce evidence to prove that there was penetration; that crucial witnesses were not called as none of the members of the public who arrested him were called to testify and that the sentence of life imprisonment was unconstitutional.
18. On her part, learned prosecution counsel Ms. V. Ongeti submitted that the appellant was properly identified as PW1's assailant as being her uncle and her father's brother, he was well known to her. Counsel further submitted that the PW1 was aged 9 years old, and though the Birth notification indicated that she was 8 years old and that the charge sheet indicated that she was 7 years, the age discrepancies did not go to the root of the case as the prosecution was able to establish that she was a minor and that the appellant took advantage of her.
19. On penetration, counsel submitted that this was established by the evidence of the PW1 which was corroborated by PW2 who walked into the appellant's house and found PW1 on the mat and the appellant standing over her with an unzipped trouser. Counsel further submitted that the evidence was corroborated by PW3, the clinical officer who stated that PW1 had a broken hymen and that there was a small vaginal tear.
20. Counsel submitted that the prosecution proved its case to the required standard, that the conviction was sound and though the appellant has not demonstrated that the sentence was harsh and excessive, counsel suggested that the sentence can be reduced to 40 years imprisonment.
21. This being a second appeal, the Court is restricted under section 361 of the Criminal Procedure Code to considering matters of law only. The confines of the Court's jurisdiction were expressed by this Court in *Karingo vs R* [1982] KLR 213 as follows:

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 could find as it did (*Reuben Karari CO Karanja - vs- R* (1956) 17 EACA 146)"



22. See also *Karani vs. R* [2010] 1 KLR 73 wherein this Court reiterated:

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.”

23. Having considered the record, the grounds of appeal and the submissions of both parties, in our view, the issues that arise for determination are:

- i) whether the elements of defilement were proved beyond reasonable doubt;
- ii) whether the trial was conducted in breach of Article 43 (1)(a) and (2) and 51(1) of the Constitution;
- iii) whether or not the contradictions and inconsistencies in the evidence were material;
- iv) whether the prosecution failed to call crucial witnesses; and
- v) whether the sentence was excessive in the circumstances.

24. With respect to whether the elements of defilement were proved beyond reasonable doubt, the appellant was convicted under section 8(1) as read with section 8(2) of the *Sexual Offences Act* which states:

- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
2. A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life”.

25. Penetration is defined under section 2 of the *Sexual Offences Act* as “the partial or complete insertion of the genital organs of a person, into the genital organs of another person.” Therefore, the ingredients of the offence that require to be proved by the prosecution so as to establish the offence of defilement are; that there was an act of penetration that is, the partial or complete insertion of male genital organs, into that of the minor complainant; that the minor complainant was a child under 11 years of age; and that the appellant was positively identified as the person who committed the act of penetration.

26. Penetration in this case was established through the evidence of PW1 who recounted how the appellant took her to his house, closed the door, lay a mat on the floor, removed her clothes and defiled her. Her evidence was corroborated by PW2, her father, who upon entering the house saw the appellant with unzipped trousers, while the complainant’s pants were still on the floor. PW5 the clinical officer testified that PW1 had a tear on the vagina which was consistent with penetration. As were the two courts below, we too are satisfied that penetration was proved.

27. With regard to the complainant’s age, it is true that the Charge Sheet indicated that PW1 was 7 years old, yet when she testified, PW1 stated that she was 9 years old. PW2 also stated that she was 7 years old, while PW5 stated that she was 8 years old.



28. In the case of Criminal Appeal No. 504 of 2010, Kaingu Elias Kasomo vs Republic this Court stated:

Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.”

29. And in the case of Criminal Appeal No. 486 of 2010 Robert Kabwere Kiti vs Republic [2012] eKLR this Court when addressing a situation where different ages were attributed to the complainant stated thus:

“With regard to the alleged defects in the charge sheet the learned trial Magistrate found no defects in the charge itself. If the defect in the charge is attributable to the discrepancy in the age of the victim as stated in the charge sheet 8 years and PW1’s evidence of 7 years, and the P3 from reading 8 years, the said discrepancies are in our view minor and are curable under Section 382 of the Criminal Procedure Code. They have not caused any miscarriage of justice because whether 7 years or 8 years, “H’s” age fell in the age bracket for the offence of defilement of a girl below the age of 11 years and the penalty has been clearly allocated in terms of the complainant’s age”.

30. Similarly, despite the fact that PW1’s age was indicated as 7, 8 and 9 years, the ages adduced clearly fell within the age bracket specific to a child under the age of 11 years which accorded with the charges that were preferred against the appellant. As such, we find that, the charge preferred and the sentence imposed were safe, and no prejudice was occasioned to the appellant. This notwithstanding, we consider that the age discrepancies were curable under section 382 of the Criminal Procedure Code. For these reasons, this ground fails.

31. With regard to identification, the appellant was the complainant’s uncle and he was not only identified by the PW1 but also by PW2, her father who is the appellant’s brother. In our view, this was a case of identification through recognition, rather than identification of a stranger. The recognition of an assailant is satisfactory, more assuring, and more reliable than the identification of a stranger because it depends upon personal knowledge of the assailant in some form or another. See *Anjononi & Others vs Republic* (1976-1980) KLR 1566.

32. Based on the facts we are satisfied that the appellant was properly identified.

33. As to whether the appellant’s trial was conducted in breach of Article 43 (1)(a) and (2) and 51(1) of the Constitution, this issue has been raised for the first time in this second appeal. In his appeal to the High Court, the appellant did not raise this ground. As a consequence, there has been no determination by the court below on the alleged violation. This Court faced with a similar situation in the case of *Alfayo Gombe Okello vs Republic* [2010] eKLR held that:

...the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have.”



34. In the case of *Katana & another vs Republic* (Criminal Appeal 8 of 2019) [2022] KECA 1160 (KLR) this Court having found itself in a similar position held that:

The issue of a violation of the right to a fair trial was not raised by the appellants in their appeal before the High Court, and therefore could not be the basis for vitiating the High Court's decision."

35. The above cited authorities are emphatic that issues not raised during trial or on first appeal cannot be raised on a second appeal.

36. As concerns the allegations that the contradictions and inconsistencies in the evidence were material, save for stating that there were inconsistencies, the appellant did not identify the contradictions alleged, or outline the impact of such contradictions. Without demonstrating that there were contradictions in the evidence, this ground is also without merit, and therefore fails.

37. Turning to the complaint that the prosecution failed to call crucial witnesses, this Court in the case of *Michael Ang'ara Paul vs Republic* [2021] eKLR held that:

But it is also true that it is not necessary to call a multitude of witnesses; the prosecution need only call those witnesses that it considers will prove its case. The proviso to Section 143 of the *Evidence Act* provides that no particular number of witnesses is required to prove a fact. The prosecution is at liberty to call the number of witnesses it considers necessary to prove the case it presents against an accused person."

38. The appellant contends that the prosecution did not call any of the members of the public who arrested him to testify. The record shows that the prosecution produced the relevant witnesses to prove the charges against the appellant. Though the members of public were not called to testify, there was no prejudice to the appellant, since in the first place, none of the members of the public were identified, and further their evidence would have been of no probative value, as they were not eye witnesses to the commission of the offence. This ground therefore fails.

39. As regards the sentence imposed on the appellant, section 8(2) of the *Sexual Offences Act* provides that:

A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

40. The Supreme Court in the case of *R vs. Joshua Gichuki Maingi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae)* [2024] KESC 34 (KLR) (12 July 2024), on its part in addressing this issue stated:

48. Before further delving into the question of the constitutionality or otherwise of the sentence, we must take cognizance of provisions of Section 361(1) of the Criminal Procedure Code which, in cases of appeals from subordinate courts, explicitly bars the Court of Appeal from hearing issues relating to matters of fact. This section also elaborates that the severity of sentence is a matter of fact and not of law and the Court of Appeal is barred from determining questions relating to sentences meted out, except where such sentence has been enhanced by the High Court.

41. The Supreme Court in the above cited case also cautioned that as long as section 8 of the *Sexual Offences Act* remains valid, life imprisonment is not unconstitutional.



- 42. The trial court sentenced the appellant to life imprisonment, which sentence was upheld by the High Court. The appellant has not placed any cogent reason before this Court to warrant its interference with the sentence imposed. This ground is therefore without merit and so fails.
- 43. In sum, the prosecution having proved its case to the required standards, we uphold the conviction and sentence of the trial court as confirmed by the High Court. The appeal is without merit and is accordingly dismissed in its entirety.
- 44. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER, 2024.

ASIKE- MAKHANDIA

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JUDGE OF APPEAL
A. K. MURGOR

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JUDGE OF APPEAL
G.V. ODUNGA

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original
Signed
DEPUTY REGISTRAR

