



**Kinyanjui v Republic (Criminal Appeal 60 of 2020)  
[2023] KECA 220 (KLR) (3 March 2023) (Judgment)**

Neutral citation: [2023] KECA 220 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPEAL 60 OF 2020  
AK MURGOR, MSA MAKHANDIA & GWN MACHARIA, JJA  
MARCH 3, 2023**

**BETWEEN**

**HARRISON NGUGI KINYANJUI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from a conviction and sentence of the High Court at Kiambu  
(Fred A. Ochieng, J.) dated 5th July, 2012 In HCCRA No. 488 of 2008.)*

**JUDGMENT**

**Brief background**

1. The appellant was charged and convicted of the offence of defilement contrary to section 8 (1) as read with 8(2) of the [Sexual Offences Act](#). The particulars were that; between the month of January 2006 at an unknown date and March 17, 2007 at [particulars withheld] of Kiserian in Kajiado District within Rift Valley Province committed a sexual offence act by inserting his male genital organ (penis) into the female genital organ (vagina) of MN a child aged 8 years which caused penetration.
2. We sat over this matter on second appeal and so our role is circumscribed by the provisions of section 361 (1)(a) of the [Criminal Procedure Code](#). Elaborating on the provisions, this court has in [Karani v R](#) [2010] 1 KLR 73 stated:

“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.”

3. Be that as it may, we shall briefly revisit the facts of the case so that we can satisfy ourselves, on evaluating the evidence, that the two courts below arrived at concurrent findings and so carried out their mandate as required by the law.
4. The prosecution called 4 witnesses to prove their case, which evidence in a nut shell was that the complainant, MN who testified as PW1 used to work at the appellant’s home looking after his baby and it was during this period that the appellant defiled her several times. He allegedly also defiled his daughter, and it was not until his wife found a towel under the bed which he had used to wipe himself with, that the complainant disclosed that the appellant had been doing this to both herself and their daughter, and they were taken to hospital. PW2, Dr. Zephania Kamau testified that upon examination of PW1 there were no spermatozoa, no bleeding or injuries to the vulva or vagina, but numerous pus cells were seen and the hymen was missing. PW3, PC Stanley Kipchumba from Kiserian Police Station, testified that he was on duty, when a woman came to report that a child had been defiled. He accompanied the woman back to [particulars withheld] village where they met with the appellant and he arrested him. PW4, Dr. Ketra Muhombe attached at Nairobi Women Hospital testified that she examined PW1 and found she had extreme redness on the left side inside the genitalia, her hymen was broken at 12 O’clock. There was no discharge, but she formed an impression of defilement.
5. The appellant was placed on his defence and he gave an unsworn testimony. He stated that two weeks prior to his arrest he had differed with his wife as she had been cheating on him and in response to the accusation, she promised to do something bad to him. It was his defence therefore, that his wife had framed him and coached the children on what to say. He stated he used to leave for work at 6.00 O’clock in the morning, and returned home at 6pm in the evening when everybody was at home and so there was no opportunity for him to defile the children. He denied that he committed the alleged offence.
6. The trial court found him guilty, convicted him accordingly and sentenced him to life imprisonment. Aggrieved by the conviction and sentence, the appellant preferred an appeal to the High Court against both the conviction and sentence and by a judgment delivered on July 5, 2012 by Fred A. Ochieng, J. (as he then was), the appeal was dismissed and both the conviction and sentence upheld.
7. The appellant has now preferred this second appeal, raising 10 grounds in his Memorandum of Appeal filed on March 21, 2013 which grounds he reduced to 4 in his home-made written submissions as follows; -
  - a. That the first appellate court judge failed to discharge his legal duties of subjecting the entire trial record to a fresh and exhaustive evaluation before drawing any inference.
  - b. That the first appellate court judge failed to note that the complainants age was not proved.
  - c. That the evidence adduced could not sustain a conviction.
  - d. That his plausible defence was not given adequate consideration.

## **Submissions**

8. When the matter came up for virtual hearing before us on September 27, 2022, both parties, the appellant who represented himself and Ms. Matiru for the State wished to rely solely on their respective written submissions.



9. The appellant submitted that the age of the complainant was not proved in which case the court would not be able to arrive at an appropriate sentence to impose. He submitted that the age of a complainant in a defilement case is an essential ingredient whose proof the court cannot overlook. He submitted that the prosecution witnesses were hostile and unreliable and that PW1 was being used by his wife to instigate the case against him. He illustrated that he was framed and implored this court to make a different finding than that of the two courts below.
10. For the respondent it was submitted that the learned trial magistrate conducted a *voire dire* examination on the minor and was satisfied that the victim was indeed 8 years of age and that she understood the meaning of speaking the truth. As to proof of the offence, it was submitted that all the elements of the offence of defilement, namely the age of the victim, penetration and identity of the appellant were established. Emphasizing on this, respondent submitted that penetration was proved by the evidence of the two doctors and relied on the case of *Jackson Mwanzia Musembi v Republic* [2017] eKLR, to posit that there is no legal mandatory requirement for conducting a DNA test to prove penetration, as it was held that “medical evidence or DNA is not the only way in which a charge of defilement can be proved against an accused.” It was therefore, the submission of the respondent that the case was proved beyond a reasonable doubt and we are urged to dismiss the appeal in its entirety and uphold both the conviction and sentence.

### **Analysis & determination**

11. We have considered the record of appeal, the submissions by both parties and the case law relied on. The issues of law that arise for our determination are whether: the complainant’s age was proved; the appellant had a plausible defence and the prosecution adduced sufficient evidence to prove of its case.
12. On the question of the age of the complainant, the prosecution was required to prove that the victim was below the age of 11 years at the time of the commission of the offence. The age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge as the prescribed sentence is dependent on the age of the victim. Notably, in the case of *Hudson Ali Mwachungo v Republic Mombasa* [2016] eKLR, this court held that proof of age of a victim in defilement cases is critical as the sentence is dependent on the age of such victim. Whereas the contradictions in the age of a victim cannot assist an appellant in escaping liability as was held by Majanja, J. in the case of *Stephen Ouma Ogola v Republic* [2015] eKLR, the court must be convinced by evidence adduced before it, that the victim is a child so as to establish the offence of defilement.
13. In this case, both courts below found that the age of PW1 had been proved. The trial court conducted a *voire dire* examination and found the complainant to be intelligent and understanding the import of telling the truth. After considering the evidence of the child and the medical evidence presented to court, we are satisfied that both courts below arrived at the right conclusion. It is clear that the complainant testified as to her age which was confirmed by PW4, Dr. Mohombe who first examined her. Further, the P3 form produced in court by PW2, Dr. Kamau indicated the approximate age of the complainant as 8 years. We are accordingly satisfied that PW1 was 8 eight years old as at the time of the incident.
14. In the same breath, we are satisfied that other ingredients of the offence of defilement, namely penetration and identity of the perpetrator were established to the required standard and that the concurrent findings of the two courts below were based on credible evidence. As emphasis, Dr. Mohombe concluded that the redness inside the genitalia and the tear of the hymen at 12 O’clock were a testament of defilement. On identification, the record shows that this was by way of recognition since the appellant was well known to the complainant.



15. On whether the appellant's defence was considered by the two courts below, we have gone through the record and are satisfied that his defence was considered but the same did not displace or cast any doubt on the strong and water tight evidence adduced by the prosecution.
16. From the foregoing, we are satisfied that in light of the overwhelming evidence adduced against the appellant, his defence that he did not commit the offence was properly rejected and his conviction was therefore sound. It is also our finding that the first appellate court properly and exhaustively reevaluated the evidence adduced before the trial court and arrived at a proper verdict.
17. We find no basis to interfere with the findings of the trial court and as upheld by the High Court. The upshot of the foregoing is that the appeal is accordingly dismissed in its entirety.

**DATED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF MARCH, 2023.**

**ASIKE-MAKHANDIA**

**JUDGE OF APPEAL**

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**A. K. MURGOR**

**JUDGE OF APPEAL**

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**G. W. NGENYE - MACHARIA**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

