



ASK v Republic (Criminal Appeal 59 of 2021) [2023] KECA 719 (KLR) (9 June 2023) (Judgment)

Neutral citation: [2023] KECA 719 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 59 OF 2021
AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA
JUNE 9, 2023

BETWEEN

ASK APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (L. Kimaru, J.) dated 22nd February, 2019 in HC. CR. A No. 73 of 2015)

JUDGMENT

1. The appellant, ASK was charged before Kibera Law Courts, Nairobi, on three counts of defilement, contrary to section 8 (1) as read with section 8 (2) of the [Sexual Offences Act](#) No 3 of 2006. On the first count, the particulars were that, on diverse dates between 15th and July 19, 2014 within Nairobi County, the appellant unlawfully and intentionally penetrated his male organ namely penis to penetrate the female genital organ namely vagina of PLW, (PW2) a child aged 3 years. The alternative charge was committing an indecent act with a child contrary to section 11 (1) of the [Sexual Offences Act](#), No 3 of 2006.
2. On the second count, the particulars were that, on diverse dates between 15th and July 19, 2014 within Nairobi County, the appellant unlawfully and intentionally penetrated his male organ namely penis to penetrate the private parts namely anus of AMN (PW3), a child aged 3 and a half years against the order of nature.
3. On the third count, the particulars were that, on diverse dates between 15th and July 19, 2014 within Nairobi County, the appellant unlawfully and intentionally penetrated his male organ namely penis to penetrate the female genital organ namely vagina of RM, (PW4) a child aged 5 years. The alternative charge was committing an indecent act with a child contrary to section 11 (1) of the [Sexual Offences Act](#), No 3 of 2006.



4. Before we consider the appellant's grounds of appeal, we note that by dint of provisions of section 361 of the *Criminal Procedure Code*, the Court must be confined to issues of law only as set out in *Karani vs R [2010] 1 KLR 73*, where the role of the second appellate court was succinctly set out and the 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.'

5. We thus find it imperative in summary form, to restate the prosecution case before the trial court as well as the appellant's defense.
6. The facts giving rise to the instant appeal are that on diverse dates between 15th and July 19, 2014 within Nairobi County, the appellant unlawfully and intentionally penetrated his male organ namely penis to penetrate the female genital organ namely vagina of PLW, a child aged 3 years. The appellant also intentionally and intentionally penetrated his male organ namely penis to penetrate the private parts namely anus of AMN, a child aged 3 and a half years against the order of nature and lastly, intentionally and intentionally penetrated his male organ namely penis to penetrate the female genital organ namely vagina of RM, a child aged 5 years.
7. PW1, A, mother to AMN testified first. She stated that on July 15, 2014 at around 7.00pm she heard RM telling her aunty, that the appellant took her to his house and inserted his penis into her vagina; RM said that PLW had also been defiled; she interrogated L and confirmed that the appellant had inserted his 'dudu' into the anus of her son, AMN; that they reported the matter to the police the following day who referred them to Nairobi Women's Hospital; that M was 3 years and 8 months and complained of pain in his anus when passing stool and was passing stool at short intervals.
8. The court conducted a voir dire examination on PW2, RM and was convinced that the minor was intelligent enough to testify. She proceeded and gave unsworn testimony as she did not understand the meaning of taking an oath. She testified that on July 15, 2014, AMN and PLW were outside the house playing; they then went to the appellant's house who did bad manners to her; that he inserted his 'dudu' into her private part and undressed PLW and inserted his 'dudu' into her genitals; that he also undressed AMN and inserted his 'dudu' into his anus; that she felt pain on her genitals and it was the first time the appellant had done that to her; that the appellant began with her, then PLW and lastly AMN; that the appellant told her not to cry and threatened to beat her if she cried.
9. The court conducted a voir dire examination on PW3, PLW and was convinced that the minor was intelligent enough to testify but did not understand the value of oath, hence proceeded to give unsworn evidence. PW3, PLW, one of the complainants gave unsworn testimony and she identified the appellant in court. She testified that on July 15, 2014 she was playing with RM; that RM, AMN and herself went to the appellant's house and the appellant undressed her and inserted his 'dudu' (penis) to her vagina (which she pointed out); that she cried after; that she felt pain in her vagina; that it was the first incident the appellant had defiled her; that she did not tell her father and she doesn't know who informed her mother.
10. The court conducted a voir dire examination on PW4, AMN and was convinced that the minor was intelligent enough to testify but did not understand the value of oath, hence proceeded to give



unsworn evidence. PW4, AMN, one of the complainants gave unsworn testimony and he identified the appellant in court. He testified that the appellant called him, PLW and RM to his house and inserted his penis into his anus; that the appellant also inserted his 'dudu' to PLW and RM; that was the only incident the appellant had done that to him; that he went home and told his mother who reported the matter to the police; that it was the first time he had gone to the appellant's home.

11. PW5, S, mother to PLW stated that on July 15, 2014, her daughter came complaining and told her that she had something to tell her; that her daughter told her that the appellant had done bad manners to her; that on July 19, 2014 a neighbor came to her at around 7.00pm and told her that the appellant had done bad manners to the three minors; that PLW told her that the appellant had called them to his house and inserted his penis into her (PLW), then to AMN and lastly to RM; the minors confirmed that the appellant had defiled them on a Friday; and she produced the birth certificate of PW2 which confirmed that PLW was born on March 15, 2009.
12. PW6 E, mother to A stated that on July 19, 2014 she was called by A who is RM's aunt and asked her to go over to their place to hear what the children were saying; that she went over and her daughter was asked to narrate what had happened; that PW3 then said that the appellant placed them on the bed and he undressed her pant and inserted his penis to her vagina; that they concluded that the appellant had defiled PLW, ANM and RM; that RM told her that she attempted to cry but the appellant hit her on the head; that since it was at night, the following morning PLW's father and RM's mother took the complainants for medical examination; that PW3 had a foul smell on her genitals, which were swollen and she complained of being in pain; she stated that PW3 was aged 4 years and produced the birth certificate for PW3 which confirmed she was born on September 21, 2010; that after medical examination they found that PW3's virginity had been broken; that they proceeded to Muthangari police station where they reported the matter.
13. PW 7, the doctor testified that on July 22, 2014 he examined PW3 aged 3 and a half years; that he had no physical injuries noted and the genitals were normal; that the anal region was also normal but was painful on touch and no discharge was noted. On the same date he examined PW 2, aged 5 years and noted that there were no physical injuries, external genitals were normal, there were no tears or bruises noted but the hymen was absent, no discharge was noted and he produced the P3 form. On the same date he examined PW 3, aged 3 years and noted that there were no physical injuries, external genitals were normal, there were no tears or ulcerations noted but the hymen was absent, no discharge was noted and he produced the P3 form as PEX9.
14. PW8 PC Veronica Thuo testified that she knew the investigating officer in the case, one CPL Sharon Reget and proceeded to produce the birth certificates of the 3 minors who were the complainants in the case.
15. On his part, the appellant upon being put on the defence, gave sworn evidence and did not call any witnesses. He denied committing the offences and testified that the mothers of the 3 complainants did not get along with him and his wife as PW1, PW5 and PW6 were against his marriage to his wife on tribal grounds; that PW1 wanted to employ his wife in a chang'aa business which PW1 ran, but the appellant discouraged her as his wife risked being arrested; that the mothers of the 3 complainants had an issue with the appellant for marrying from a different community and generally had 'issues' with him and his wife.
16. The trial magistrate found the ingredients of the offence of defilement to have been established and found the complainants to be truthful witnesses while taking into account their tender ages. The appellant was convicted of all the 3 counts of defilement and sentenced to serve life imprisonment on each.



17. Aggrieved by the conviction and sentence, the appellant lodged a first appeal in the High Court, which was heard by L Kimaru, J (as he then was). In the judgment dated February 22, 2019, the learned Judge upheld both the conviction and sentence, thus precipitating this second appeal.
18. The appellant lodged a notice of appeal on April 23, 2019 and has proffered the instant appeal by filing an undated grounds of appeal containing 5 grounds. The grounds are that the learned Judge erred in law in that: The court failed to re – evaluate the entire trial record afresh as required; in failing to find that the evidence adduced was scanty; that there was no medical evidence to support the conviction; that there was unsatisfactory evidence contrary to section 150 of the *Penal Code* and failing to attach weight to his plausible defence.
19. When the matter was called out for hearing, the appellant adopted his written submissions, and Mr George Muriithi, learned counsel appearing for the State, highlighted his written submissions dated. We have considered the submissions and the authorities cited.
20. The appellants submissions can be summarized as follows; charge sheet was defective; that the charge sheet states that he committed the alleged offence on diverse dates between 15th and 19th, yet PW2, Lavender testified that she was defiled on 15th and it was the first incident where the appellant had defiled her; that PW3 testified that she was defiled once but the charge sheet gives information to the contrary; that penetration was not proved; that there were a lot of contradictions in the evidence of the minors and the likelihood that they were coached cannot be ruled out; that there was a delay of 5 days in taking the minors to hospital which was not interrogated by the two courts below; that the medical opinion of PW5 differed with the medical evidence from Nairobi Womens' Hospital; that the courts below simply inferred that since the hymen of the minors was missing, that the penetration had been proved which was erroneous; that without clear evidence from the medical report on penetration and given that the minors contradicted each other on material evidence, then the conviction was unsafe; that age assessment of the complainants was not done; that complainants were not credible witnesses ;and that the alibi defence of the appellant was rejected although the prosecution did not disprove it as required by law.
21. On its part, the respondent submits that the charge sheet was not defective as it disclosed all the particulars of the offence that were proved beyond any reasonable doubt.
22. Having duly considered the record, the judgments of the two lower courts, the appellant's grounds of appeal and submissions of the appellant and counsel for the Republic, we start by reminding ourselves of the approach that this Court takes when it is invited to interfere with the concurrent findings of the trial court and the first appellate court.
23. We have revisited the record on our own and considered it in the light of the rival arguments set out in the submissions by the appellant and the response by the State. In our opinion, three issues arise for our consideration:
 - i. Whether the charge sheet was defective;
 - ii. Whether there were inconsistencies and contradictions in the testimony of the complainants; and
 - iii. Whether the particulars of the offence were proved as required under the law and whether the learned first appellate Judge discharged his mandate properly.



24. As regards the charge sheet being defective, the appellant submits that the charge sheet read as follows:

' The particulars in count one were that on diverse dates between 15th and July 19, 2014.'

He submits that from this, it is clear that the appellant committed the alleged offence on diverse occasions yet from the evidence of the PW2, he committed the offence once, that was on 15th which is contrary to the charge sheet.

25. The practice of using the term 'on diverse dates' in the charge sheet does indeed connote that the offence was done on either of the dates outlined in the charge sheet or on all the dates outlined therein. In the instant case, the offence was committed on July 15, 2014 but the report was made on July 19, 2014. This did not mean that the appellant defiled the complainants on each day between 15th and July 19, 2014. This seems to be his understanding of the word 'diverse'. Neither did the prosecution advance such an argument.

26. In any event, the question that begs would be, did the charge sheet give information as to the nature of offence charged and whether the appellant was prejudiced or the same occasioned any miscarriage of justice? A cursory reading of the charge sheet reveals that the charges were clearly brought out hence no prejudice could have been suffered by the appellant. Moreover, the appellant properly participated in the trial, was aware of the charges facing him and did not raise any objection regarding the charges that he faced.

27. Cognizant of the above principles and having read the record and in consideration of the rival arguments therein, we reach our own independent conclusion, that the appellant was not prejudiced in any way by the defect. Indeed, he was able to understand the charges he faced as he fully participated in the proceedings.

28. With regard to proof of defilement, the learned Judge concurred with the findings of the learned trial magistrate that the prosecution had indeed established to the required standard of proof beyond any reasonable doubt that the complainants were defiled.

29. The appellant's position is that the prosecution failed to prove the elements of the offence of defilement against the appellant. With regard to the age of the complainant, the learned Judge had this to say:

' With regards to the age of the complainants, Dr Maundu (PW7) stated that he assessed all the Complainants' ages. He indicated their ages in their respective P3 forms. He produced the same in court. According to his assessment PW2 was five (5) years old, PW3 was four (4) years old and PW4 was three and a half (3 ½) years old. The complainants' parents (PW2, PW5 and PW6) confirmed their respective ages as assessed by the doctor. PW8 produced three birth certificates in court belonging to the three complainants. The birth certificates also confirmed their respective ages as assessed by PW7.

The court therefore holds that the prosecution did establish the ages of the complainants and that all the complainants were children within the meaning of Section 2(1) of the *Children Act*.'

30. It is our finding that the evidence of the witnesses and the certificate of birth adduced in court, are the best evidence of the complainant's age. Firstly, PW2, PW5 and PW6 being the complainant's mother



are the witnesses best suited to know when the complainants were born. Secondly, the certificate being a public document its contents are governed by Section 83 of the *Evidence Act* which states: -

- ' 83 The court shall presume to be genuine every document purporting to be a certificate, certified copy or other document which is—
- (1)
 - a. Declared by law to be admissible as evidence of any particular fact; and
 - b. Substantially in the form, and purporting to be executed in the manner, directed by law in that behalf; and
 - c. Purporting to be duly certified by a public officer.
 - (2) The court shall also presume that any officer by whom any such document purports to be signed or certified held, when he signed it, the official character which he claims in such document.'

The certificate itself bears on its face a notice to the effect that:

' This certificate is issued in pursuance of the *Births and Deaths Registration Act* (Cap. 149) which provides that a certified copy of any entry in any register or return purporting to be sealed or stamped with the seal of the Director of Civil Registration shall be received as evidence of the dates and facts therein contained without any or other proof of such entry.'

There is therefore a presumption under the law that the certificate is a valid document and that the dates and facts therein are correct.

31. On the identity of the appellant, the learned Judge concurred with the learned trial magistrate's rejection of the appellant's assertions that he had not been properly identified. The trial magistrate had no doubt that the appellant was well known to PW1, PW2 (complainant's mother) and PW3 (complainant's class teacher). The learned Judge also found that from the evidence adduced, it was clear that the complainants had interacted with the appellant and he was well known to them. The appellant himself also confirmed that he knew the complainants and their families as he was their neighbor. The court found no reason why the complainants would implicate the appellant in the crime if he was not the one who perpetrated it and we would also agree.
32. As regards penetration, the appellant avers that penetration as an ingredient of the offence of defilement was not established as required by law. He submitted that without clear evidence from the doctor that the minors were defiled and based on the fact that they contradicted each other on material evidence, his conviction was not safe.
33. As regards penetration, we note that the trial court found as follows:

' Even without medical evidence, what the court requires is proof of facts that penetration occurred. PW2, PW3 and PW4 narrated to the court how the Appellant sexually assaulted them. PW2 said that she was playing outside with PW3 and PW4. The Appellant called them to go to his house. PW2 stated the Appellant did bad manners to her. He undressed her. He inserted his dudu (penis) into her vagina. He also inserted it into Lavenders' vagina and Mwaura's anus. She stated that she felt pain on her vagina when the Appellant inserted his penis. She cried. The Appellant threatened to beat her if she cried. PW3 stated that the Appellant undressed her. He inserted his dudu into her vagina (pointing at her vagina). She cried. She stated that she felt pain on her vagina (pointing). PW4 reiterated how the



Appellant invited them to his house. He was playing outside with PW2 and PW3. He stated that the Appellant undressed him. The Appellant inserted his dudus' (penis) into his anus (pointing). He stated that he did not cry but PW2 and PW3 cried. When PW1, PW5 and PW6 became aware of the incident, they interrogated the complainants who confirmed that they had been sexually assaulted. This court is convinced that penetration was established by the prosecution.'

34. The first appellate court after re-analyzing the evidence adduced before the trial court made similar findings as the trial court and pronounced itself as follows:

' PW2, PW3 and PW4 were defiled in a series and in the presence of each other, according to PW2, PW3 and PW4 the appellant locked the three of them in his house then defiled the three complainants gave corroborated evidence that the appellant took them to his house and locked them in; he undressed them and defiled each of them.

Although the tears were noticed in the genitalia of the complainants, it is noted by this honourable court that the complainants did not reveal the incident immediately they were examined after a period of time here all the medical examination revealed is the missing hymen on the girls and it was difficult to note the interference to PW4s' anal area.'

35. We are satisfied that the question of penetration was addressed properly by the trial court and the first appellate court and the submissions by the appellant on this issue have no merit. We thus find that this element of the offence was proved as held by the trial magistrate and upheld by the learned Judge.

36. The appellant has made heavy weather of the prosecution's evidence being riddled with inconsistencies and being contradictory. He specifically flags the evidence of PW4 and submits that at one point he said that after the ordeal, he felt pain and later said, he did not feel pain. He also attacks PW1's testimony, that at one point she said that they were seated on the appellant's seat and later said the appellant had placed them on the bed. He further submits that PW1 had at one point said that they were given fruits and sweets and later said the appellant did not give them anything to eat.

37. Whereas we do appreciate that there were minor discrepancies in the evidence of the witnesses, it is our view that such minor discrepancies are common. Whether or not discrepancies in the evidence of witnesses have the effect of discrediting that evidence would depend upon the nature of the discrepancies, that is to say, whether or not the discrepancies are significant as to affect the culpability of the appellant. It is also natural, that in cases that involve many witnesses such as the instant case whose witnesses were mostly children of tender years, discrepancies are bound to exist. The court should only consider the discrepancies, if they are of such a nature that would create a doubt as to the guilt of the appellant.

38. 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 of the appellant 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 recognised 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.'

39. This was the position was upheld in *Willis Ochieng Odero vs Republic [2006] eKLR*, where the Court of Appeal held:

'As for the contradictions in the prosecution evidence it may be true that such contradictions, particularly with regard to the date indicated on the P3 form as the date of the offence, is different. But that per se is not a ground for quashing the conviction in view of the provisions of section 382 of the Criminal Procedure Code.'

40. We note that the learned Judge considered in great detail each and every complaint raised by the appellant on appeal before him. He gave sound reasoning of his holding and the reasoning was well balanced and we find no fault in the approach taken by the learned Judge. We are in agreement that both courts below arrived at the correct conclusion as to the culpability of the appellant.

41. Having dealt with the above issues, the upshot of the foregoing is that the appeal fails on each and every ground and is dismissed.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JUNE, 2023.

A. K. MURGOR

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JUDGE OF APPEAL

S. OLE KANTAI

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

