



**Ndambuki v Republic (Criminal Appeal 51 of 2020)
[2023] KECA 722 (KLR) (9 June 2023) (Judgment)**

Neutral citation: [2023] KECA 722 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 51 OF 2020
MSA MAKHANDIA, AK MURGOR & GWN MACHARIA, JJA
JUNE 9, 2023**

BETWEEN

JAPHET MASILA NDAMBUKI APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from the judgment High Court at Kiambu (M. Ngugi, J.)
delivered on 20th December, 2018 in Criminal Appeal No. 46 of 2018)*

JUDGMENT

1. The appellant, Japhet Masila Ndambuki was charged with the offence of defilement contrary to section 8 (1) as read with 8 (2) of the *Sexual Offences Act*. The particulars were that on November 18, 2015 in Juja Location within Kiambu County, he intentionally caused his penis to penetrate the vagina of the complainant, SA a girl aged 8 years.
2. He also faced an alternative count of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. He pleaded not guilty and during the trial, the prosecution called four witnesses while the appellant gave an unsworn statement of defence and called no witnesses. He was convicted and sentenced to life imprisonment.
3. He was aggrieved by the conviction and sentence, and appealed to the High Court which dismissed the appeal both on conviction and sentence.
4. The appellant was dissatisfied with the decision and appealed to this Court on grounds that the prosecution's case did not meet the threshold to warrant a conviction for the offence; that crucial witnesses were not called; that the trial and the High Court considered the prosecution's evidence and disregarded the appellant's defence; and that the courts below failed to appreciate that the prosecution's case was not proved to the required standard which rendered the conviction unsafe.



5. 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 from Kamiti Maximum Prison informed us that he would rely on his submissions in their entirety. He submitted that the trial court failed to comply with the provisions of section 124 of the *Evidence Act*, in accepting the complainant's evidence to prove that the appellant penetrated her. It was submitted that SA had stated that she did not know the man to whom the girl had taken her by force to his house, and that she had contradicted herself when she stated that she knew the appellant as a soldier, and a driver; and, that she was not a credible witness, and the court should not have relied on her evidence.
6. The appellant also submitted that SA's evidence did not demonstrate that before he defiled her, he had removed his clothes; that it was not possible for him to have sexually assaulted her without undressing or putting his clothes back on; that furthermore, nothing in the evidence linked him to the offence, since he was not identified by any of the prosecution witnesses as the person who defiled SA.
7. The appellant further complained that crucial witnesses were not called to testify; that neither the girl who peeped or mama Cynthia, mama Jackie, nor mama Michael, were called to testify; that without their evidence, SA alone could not link the appellant to the alleged offence.
8. It was also his complaint that his alibi defence was also not considered; that he was not in his house when the alleged offence occurred. The appellant contended that since the prosecution's case, was riddled with contradictions and inconsistencies, it did not in any way, establish beyond reasonable doubt that he committed the offence and finally, that the two courts below did not properly evaluate the evidence, and had they done so, they would have arrived at a different conclusion.
9. Mr. Okachi, learned prosecution counsel for the State submitted that he would also rely on his written submissions in entirety. In the submissions, counsel merely urged us to uphold the decision of both the trial court and the High Court on conviction and sentence.
10. As defined under section 361 of the *Criminal Procedure Code*, the duty of this Court as the second appellate court and its jurisdiction is limited to matters of law only. In the case of *David Njoroge Macharia vs Republic* [2011] eKLR this Court affirmed that;

“That being so only matters of law fall for consideration – see section 361 of the Criminal Procedure Code. 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.”
11. Having regard to the aforestated guidance, the issues that fall for consideration are;
 - i. whether the offence of defilement was proved to the required standard;
 - ii. whether the prosecution failed to call crucial witnesses;
 - iii. whether the courts below properly evaluated the evidence; and
 - iv. whether the trial court and the High Court took into account the appellant's defence.
12. So as to determine the above issues of law, it is necessary to outline the evidence that was adduced before the trial court. SA, a child of 7 years old was visiting her aunt near [Particulars Withheld] Juja.



- While there, she stated that she was forcefully taken to the appellant's house by a girl, one Jackie Awino. The appellant pulled her into his house, closed the door and removed her pants, trousers and sweater, leaving her with her T-shirt. He then inserted his 'dudu' into her 'dudu', and after he had finished, he opened the door to let her out.
13. At that moment, another girl peeped into the house and saw her. The girl informed some three women who lived nearby, who in turn informed her father, PW2. The appellant then came out of the house and she pointed him out to her father, and he was subsequently arrested and taken away on a motorcycle. SA was taken to the police station and then to the hospital where she was examined. Blood was found on her private parts. She stated she had been sexually assaulted by the appellant, and that one Jackie Awino had forced her to go to his house.
 14. PW2 SM's father had taken SA to his sister's house. His sister was the appellant's neighbour. He was at work on the material day, and when he returned about 5.00 p.m, he found women outside his sister's house discussing his daughter. They told him that his daughter had been sexually assaulted and after he asked them to check, they confirmed this to have been the case. He took her to Thika Police Station and later to Thika Hospital where PW3, Dr. Gichane a medical doctor confirmed to him that the SA had been defiled. She was thereafter treated and discharged.
 15. After examining her, Dr. Gichane completed the P3 form. She confirmed that the SA had blood on her trousers, her hymen was broken and she had blood in her vagina which was evidence that there was penetration of her vagina. She produced a P3 form, and also produced the Post Rape Care form completed by another officer. PW 4, Cpl Leah Wabera was the investigating officer who had recorded the statement from SA and charged the appellant. She produced SA's birth certificate. It was her testimony that the appellant had been brought to the police station by neighbours.
 16. When placed on his defence, the appellant stated that he arrived home from work at around 11.00 am, that he had been brought shoes to mend but did not have the items for the job so he went to Thika town to purchase them. He returned at 5.00 p.m. As he was preparing to go to work, he received a call that something had happened. He was told not to go back home, if he had defiled a child, but he nevertheless returned home and found a large crowd of people. It was alleged that he had committed the offence and he was taken by the crowd to the police station where he was booked and later charged.
 17. In considering the issues raised, we begin by determining whether the prosecution proved its case against the appellant to the required standard. To do so, it is necessary for the key ingredients for the offence of defilement namely; the complainant's age, the appellant's identity and whether there was penetration to be established.
 18. First, the age of the complainant was not contested. However, PW 2, her father, produced her birth certificate showing that she was born on September 27, 2007. The date of the offence was October 18, 2015. Clearly, she was therefore 8 years of age at the material time.
 19. Next, on the question of penetration, SA testified that she was forcefully taken to the house of a man, a neighbour of her aunt. When she entered the house he closed the door. The appellant removed her clothes and inserted his "dudu" into her to "dudu", meaning that he inserted his penis into her vagina. After sexually assaulting her, as he opened the door to let her out, a girl peeped in, saw them and told some women who in turn informed her father.
 20. The medical evidence presented by Dr. Gichane, who examined SA and completed the P3 form confirmed that she had injuries in her vagina caused by a penile object. Her hymen was broken, and there was blood in her vagina. The doctor confirmed that there was penetration.



21. In view of the evidence of SA as corroborated by the medical evidence, the trial court, upheld by the High Court, found that penetration was established to the required standard. Based on the concurrent finding of fact that penetration was proved, we too are satisfied that penetration was established.
22. Central to the appellant's appeal is the issue of identification. It is his case that he was not identified by SA; that further, since crucial witnesses who saw SA at his house were not called, nothing linked him to the offence of defilement.
23. Our re-evaluation of the evidence would point to the contrary. To begin with, SA clearly stated that she was forcefully taken to the appellant's house by one Jackie Awino. According to PW2 and PW4, his house was situated on the same plot where the aunt, who SA was visiting, resided. When the appellant opened the door after sexually assaulting SA, they were seen by a girl who peeped into the house, who then reported to 3 women. The women in turn informed her father PW2, that SA had been defiled by the appellant. SA pointed out the appellant to her father at the scene when he came out of his house. The appellant was subsequently taken to the police station by PW2, and a crowd that had gathered outside his house.
24. On the basis of this evidence, it is clear that the appellant was properly identified as the person who defiled SA. The offence, occurred in broad daylight when she was able to see him and took place in the house, that the appellant occupied. She was able to identify him when he came out of the house, and pointed him out to her father. As such, this was not a case of mistaken identity. SA's evidence and that of PW2, when considered together directly pointed to the appellant as being responsible for the sexual assault on SA.
25. As concerns the appellant's contention that crucial witnesses were not called to link him to the offence, this issue was considered by the High Court which concluded that the witnesses that were called were sufficient to prove the prosecution's case.
26. We agree. The prosecution witnesses' evidence established beyond reasonable doubt that the appellant defiled SA, and therefore, the evidence of the girl who peeped, or that of the 3 women would not have augmented the prosecution's case in any way. In any event, section 143 of the *Evidence Act* is clear that no particular number of witnesses shall be required to prove any fact. In other words, by SA and PW2 having testified on the material facts that proved that the appellant defiled her, the evidence of the girl and the women were rendered superfluous.
27. Finally, on the contention that the trial court and the High Court failed to evaluate the evidence, we consider that the court's below properly analysed the evidence, having taken into account the prosecution's as well as the defence case, and by so doing, they rightly concluded that the appellant defiled SA. We find as a consequence, that the evidence was water tight, and the conviction was safe.
28. As to whether the appellant's alibi defence was disregarded, the High Court stated thus;
 - “...the trial court did consider the defence case, but noted that it was a narration of events and did not water down the prosecution case.

... I agree with the trial's assessment of the appellant's dispense (sic). He made an unsworn statement in which he alleged that he had left work at 11.00 am, and found some shoes had been left for him to repair and gone to Thika to collect the shoes, then had returned home at 5.00 pm. This was after he had been informed by a caller not to do so if he had defiled a child. He stated he had gone to the police station with the child and the father of the child,



and then had been arrested...I am unable to find anything that would have displaced the prosecution case against him”.

29. The foregoing is clear that the appellant’s alibi defence was taken into account. Likewise, our consideration of this evidence leads us to conclude that it did not dislodge the prosecution’s case at all. Consequently, we dismiss both grounds that the courts below did not properly evaluate the evidence and failed to consider the appellant’s alibi evidence.

30. In sum, the appeal is unmerited and is dismissed in its entirety.

It is so ordered.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

G. W. NGENYE–MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

