



REPUBLIC OF KENYA



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

**Munene v Republic (Criminal Appeal 10 of 2022)
[2023] KECA 812 (KLR) (7 July 2023) (Judgment)**

Neutral citation: [2023] KECA 812 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 10 OF 2022
AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA
JULY 7, 2023**

BETWEEN

JAMES MAINA MUNENE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the judgment of the High Court at Nairobi (G.W. Ngenye-Macharia, J.) delivered on the 26th February, 2019 in Nairobi HCCA No.77 of 2017)

JUDGMENT

1. This is a second appeal from the judgment of the trial magistrates' court delivered on June 28, 2017, where the appellant was charged with defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on June 7, 2010 at Kariobangi North within Nairobi County, the appellant unlawfully and intentionally committed an act that caused penetration of his penis to the vagina of AN (PW1) a child aged 9 years.
2. In the alternative count, he was charged with committing an indecent act with a minor contrary to section 11(1) of the *Sexual Offences Act* in that, he intentionally and unlawfully committed an indecent act with the child by touching her vagina.
3. The appellant pleaded not guilty and during the trial, the prosecution called 5 witnesses. After a full trial, the court found the appellant guilty, convicted him of defilement, and sentenced him to 21 years' imprisonment.
4. Dissatisfied with the conviction and sentence, the appellant appealed to the High Court, and upon considering the appeal, the learned judge upheld both the conviction and sentence.
5. Aggrieved by the decision, the appellant filed an appeal to this Court on grounds that the learned judge failed to find that the elements of the offence of defilement were not proved so as to warrant a



conviction; that the learned judge failed to appreciate that the requirements of section 200(3) of the *Criminal Procedure Code* were not complied with; that the learned judge failed to find that essential witnesses necessary to prove basic facts did not testify and appreciate that crucial exhibits were not supplied to the court; and that the learned judge failed to appreciate that the trial court's decision fell below the required standard in law.

6. Learned State Counsel, Mr Okachi submitted that he would be conceding the appeal on account of a mistrial in the trial court, and also because no proper scrutiny of the evidence was done by the High Court. Counsel further submitted that there were glaring gaps and omissions in the evidence because the age of AN was not proved by any documentary evidence; that the court relied on treatment notes from Nairobi Women's Hospital which were not produced so that the victim's age was not ascertained; and that in addition, the appellant did not have an opportunity to cross examine the maker of the report.
7. Counsel also submitted that penetration was not proved to the required standard, particularly as none of the documents produced demonstrated that there was penetration, and furthermore, following an analysis of the documents, the trial court concluded that the medical evidence adduced did not assist the court. With respect to the High Court's findings, counsel submitted that the court relied on the same documents to find that the assault caused AN to bleed and sustain bruises, which was not supported by the medical evidence.
8. On identification, counsel submitted that the incident took place at about 7.30 pm when the circumstances for identification were inadequate. For instance, there was insufficient lighting to allow for identification of the appellant; further, there was no clear description of the appellant, since he was not caught in the act; when PW3 accompanied by AN went to the house, they found, two gentlemen, and AN had selected the appellant out of the two of them. Counsel urged that the case be remitted back to the magistrate's court for retrial.
9. The mandate of this court as the second appellate court and its jurisdiction is limited to matters of law as defined in section 361 of the *Criminal Procedure Code*.
10. In the case of *David Njoroge Macharia v Republic* [2011] eKLR this Court reiterated 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. While appreciating the scope of this court's mandate as expounded above, this appeal raises the following issues for determination:
 - i. whether the ingredients of the offence of defilement were proved to the required standard;
 - ii. whether the prosecution failed to call crucial witnesses;
 - iii. whether the exhibits were produced in court; and
 - iv. whether section 200(3) of the *Criminal Procedure Code* was complied with.



12. We begin with whether the offence of defilement was proved to the required standard so as to warrant a conviction. In order to determine this issue, we consider it necessary to briefly outline the evidence that was before the trial court.
13. After a voir dire examination was conducted, AN (PW1), aged 9 years gave an unsworn statement, where she narrated that on June 7, 2010 at Kariobangi within Nairobi County, her mother sent her to the shop to buy sugar. After purchasing the sugar, a man called her and told her he wanted to send her to buy cooking oil. He then took her hand and led her to his house where he “did bad manners to her”. He removed her dress, tore her underwear with a blade, removed his trouser and shirt, and locked the door. He then laid her on the lower bunk of a double decker bed and placed their clothes on the top bed; the man, the appellant then defiled her, and she felt pain. She wanted to scream but he threatened her with death. After he let her go, she took the sugar and went home; that there were no houses around the one where the perpetrator had taken her.
14. She did not tell her mother what had happened to her, but as she went to bed, her vagina began to bleed. At school the following day she told her teacher about the incident.
15. During cross examination, she confirmed that she did not know the appellant before the incident, but he was the person who defiled her.
16. PW2, was AN’s mother. At about 7.00 pm, she sent her daughter to the shop. After realizing that her daughter had not returned, she went to look for her and met her at the gate of their building. On enquiring why, she was late, AN told her that the shop was full of people; that AN thereafter went to sleep without eating and left for school the next day. Later in the day, she returned home complaining of a stomach ache. AN told her father that she was bleeding from her genitalia. PW2 then checked the biker shorts that AN had worn the previous day and saw they were blood stained. She also examined AN, she saw that she was bleeding. The following day, she went with AN to school, and it was only after she was interrogated by her teacher and PW2 that AN disclosed that the perpetrator who lived on the floor above the shop where she had bought sugar had defiled her. She identified the appellant as her assailant. PW2 took AN to the hospital on 9th June 2010. She identified the medical report from Nairobi Women’s Hospital, and a P3 form which was adduced in evidence. The appellant was later arrested.
17. PW3, was AN’s father. He confirmed that AN was sent home from school on June 7, 2010, as she was bleeding from her genitalia; that AN had taken him to the house where she had been defiled which was on the 2nd floor of the building where the shop was. He stated that there were two men in the house and that AN had identified the appellant as her assailant. PW3 apprehended him and took him to the police station.
18. Dr. Zephaniah Kamau (PW4), examined AN on June 24, 2010. He stated that AN did not have any physical injuries, her external genitalia was normal, no injuries were noted on the vulva, vagina and perineum. He observed that the hymen was intact and there was no pathological discharge noted from the genitalia. He prepared the P3 form from the treatment notes of Nairobi Womens’ Hospital where AN was treated on June 9, 2010 with a history of sexual assault; that the notes indicated that the external genitalia was normal, the vaginal opening was hyperemic and that there was purulent vaginal discharge, likely caused by an infection of the genitalia. The report also indicated that the hymen was intact. He observed that the treatment notes specified that AN was born in 2002. He explained that a purulent discharge is an abnormal discharge mainly caused by an infection of the genital.
19. PC Merceline Ngonje, (PW5), was the Investigating officer. She stated that AN reported to her that she was defiled by the appellant whom she physically identified, and she produced the Medical Report



from Nairobi Women's Hospital. When she visited the appellant's house with AN, she noted that it was on the 1st floor of the building where AN's father was a carpenter on the ground floor.

20. The appellant gave a sworn defence. He stated that he was arrested on suspicion of defilement; that he was living with his sister and that AN, PW2, and PW3 came to their house and claimed that he had defiled AN, which he denied.
21. DW2 stated that the appellant was her brother and she called him to come and join a college. She further stated that a dispute between herself and AN's father instigated the arrest of the appellant.
22. To reach a finding of defilement, the prosecution must establish three main ingredients. They are; the age of the victim (must be a minor), penetration, and the proper identification of the perpetrator. These ingredients are provided for under section 8(1) and (2) of the [Sexual Offences Act](#) which stipulates;

“(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”.

23. Regarding the first element of age, this Court in the case of [Edwin Nyambogo Onsongo v Republic](#) [2016] eKLR stated;

“... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.”

24. In the instant case, (PW2) AN's mother gave her age as 9 ½ years at the time of the incident. This was corroborated by the P3 form produced by PW4, the doctor, which also indicated her age as 9 ½ years old. In effect, as were the courts below, we too are satisfied that AN's age was sufficiently proved.
25. The second element is penetration. Both the courts below were satisfied that the totality of the circumstances pointed to the penetration of AN. The trial court on its part believed AN as a truthful witness because she “...was unhappy and did not eat that night. She had no reason to lie.” In so concluding, the court relied on the proviso to section 124 of the [Evidence Act](#) to convict the appellant.

Section 124 of the [Evidence Act](#), stipulates that;

“Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if for



reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

26. In other words, it is plain from the proviso that, the trial magistrate is entitled to reach a finding that there was penetration and convict an accused, where the court finds the victim to be an honest and truthful witness. A re-examination of AN’s evidence shows that AN cogently described how the appellant led her to the house located above the shop, how he removed her clothes, laid her on the double decker bed, and defiled her. She felt pain. This evidence was not in any way controverted by the appellant. The trial magistrate who saw and heard AN was satisfied that she was a truthful and convincing witness. On this basis, we who did not see or hear the witness have no reason to fault the trial magistrate for believing AN and for reliance on section 124 of the *Evidence Act*.
27. Having so found, was penetration proved? “Penetration” is defined under section 2 of the *Sexual Offences Act* as;

“The partial or complete insertion of the genital organ of a person into the genital organs of another person.”
28. Addressing the question of penetration, partial or complete, in the case of *George Owiti Raya v Republic* [2013] eKLR this Court observed;

“There was superficial penetration because there was injury on the vaginal opening as the medical evidence has indicated and further there was a whitish-yellow foul smelling discharge seen on the genitalia...it remains therefore that there can be penetration without going past the hymen membrane...It matters not whether the complainant’s hymen was found to be intact, suffice it that there was evidence of partial penetration.”
29. AN’s evidence was that the appellant took her to his house on June 7, 2010 where he defiled her and thereafter, she bled. When they examined her, both PW2 and PW3 saw that AN was bleeding. They took AN to hospital on June 9, 2010.
30. PW4 produced a medical report from the Nairobi Women’s Hospital that indicated that, though the hymen was intact and her external genitalia was normal, it was hyperemic with purulent vaginal discharge, which PW4, the doctor explained was due to an infection. More importantly, the diagnosis specified that her injuries were a result of a “sexual assault”. On the other hand, the P3 form prepared by PW4, the doctor, that was completed two weeks after the alleged incident showed that the hymen was intact and there were no injuries on the vagina.
31. Our reanalysis of the medical evidence is that her vagina having been hyperemic, with purulent vaginal discharge, pointed to the fact of penetration, albeit partial, because the hymen was not reached. The findings of the medical report that indicated that AN was sexually assaulted, together with AN’s evidence, that showed how the assault occurred, and which the trial magistrate found to be believable, clearly pointed to penetration, which we find was properly established.
32. On the question of identification of the appellant, AN stated that her mother had sent her to Mama Joyce’s shop to buy sugar. As she was returning, the appellant approached her and led her to his house. According to PW3, AN took him to the house where she was defiled. It was located on the 2nd floor, above the shop where she went to buy sugar. The shop belonged to a lady who was living with her brother. PW3 stated that when they went to the house, AN pointed out the appellant as her assailant.
33. AN also took PW2 to the house where she was defiled. There were two people in the house, and once again, she pointed out the appellant as her assailant. PW5 the Investigating officer stated that AN



physically identified the appellant to her. He was their neighbour. She also stated that she went to the scene and established that the appellant lived on the first floor of a building where AN's father worked as a carpenter on the ground floor.

34. Recently in the case of *Stephen Kidamba v Republic* Criminal Appeal No 110 of 2021 where the facts were in many respects similar to those in the instant case, this Court succinctly observed;

“The other evidence that existed was that the victim was able to lead, first her mother, then the police on 2 different occasions to the exact house where she had been defiled. That house belonged to the appellant who resided there alone. The house, made of iron sheets, was in a location where there were many other similar houses and at no time did the girl lead her mother or the police to any other house”.

35. We adopt the observations in the instant case. The incident took place at 7.30 pm, in the appellant's house which was situated above the shop where AN had gone to buy sugar. The appellant intercepted her as she was returning home from the shop and led her to his house situated above the shop, and that was where he defiled her. DW2, confirmed that the appellant was her brother, and she had called him to join a college. The inference being that she lived with him.

36. AN took her father, her mother and the investigating officer to the same house where the appellant lived with his sister above the shop on three different occasions, and on all three occasions, she identified the appellant who lived in the house above the shop, as the person who had defiled her. In view of this evidence, both the trial court and the High court reached the concurrent conclusion that the appellant was identified as the perpetrator. On the basis of those findings, we too are satisfied that this was not a case of mistaken identity, and also find that the appellant was properly identified as the person who defiled AN.

37. In view of the foregoing, as did the trial court and the High Court, we too have reached the conclusion that the offence of defilement was proved beyond doubt and that the appellant defiled AN. Consequently, we uphold the conviction which we have found was safe, as well as the sentence.

38. Finally, since the complaints that the requirements of section 200(3) of the *Criminal Procedure Code* were not complied with, that crucial witnesses were not called, and that exhibits were not produced and were not substantiated, we accordingly dismiss them.

39. In sum, the appeal fails in its entirety and is accordingly dismissed.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY, 2023.

A.K. MURGOR

.....

JUDGE OF APPEAL

S. OLE KANTAI

.....

JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

.....



JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

