



REPUBLIC OF KENYA



**Mutindi v Republic (Criminal Appeal 74 of 2021)
[2023] KECA 874 (KLR) (7 July 2023) (Judgment)**

Neutral citation: [2023] KECA 874 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 74 OF 2021
AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA
JULY 7, 2023**

BETWEEN

DENNIS NDONYE MUTINDI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal against the judgment of the High Court at Makeni (C. Kariuki, J.) delivered on 2nd July 2018 in HCRA No. 233 of 2017)

JUDGMENT

1. This is a second appeal from a decision of the Magistrates Court at Kilungu where the appellant, Dennis Ndonge Mutindi was charged with the offence of 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 the August 2, 2016 in Malili sub location, Mukaa sub county, the appellant wilfully and intentionally caused his male organ to penetrate the vagina of IMN, PW1 the complainant, a girl child aged 9 years.
2. He also faced an alternative count of committing an indecent assault contrary to section 11(1) of the *Sexual Offences Act*. The particulars of which were that on August 2, 2016 in Malili sub location, Mukaa sub county, he indecently assaulted IMN a girl child aged 9 years by touching her private parts, namely vagina.
3. The appellant pleaded not guilty and during the trial, the prosecution called 4 witnesses. The trial magistrate found the appellant guilty and convicted him for the offence of defilement and sentenced him to life imprisonment.
4. Dissatisfied with the conviction and the sentence, the appellant appealed to the High Court which dismissed the appeal and upheld both the conviction and the sentence.



5. Aggrieved by the decision, the appellant has appealed to this court on grounds that: the High Court failed to find that the contradictions in the prosecution's case impugned the witnesses credibility and went to the root of the case; failed to find that key witnesses were not called to testify; failed to find that the appellant's right to a fair trial was infringed since he was not informed of his right to have an advocate and was not provided with one despite the seriousness of the charge; failed to consider the appellant's cogent defence which reasonably exonerated him from any criminal culpability; and failed to find that the prosecution did not discharge the factum probandum as a legal requirement, thus acting in breach of article 50 2 (a) of the Constitution which provides that an accused person to be presumed innocent until proven otherwise.
6. The appellant filed written submissions, and when the appeal came up for hearing, the appellant who was in person appeared from Kamiti Maximum Prison where he informed us that he would rely on his submissions in their entirety. It was submitted that he was not afforded legal representation given the serious charges that he faced, and for that reason, he was handicapped in prosecuting his case which led to a miscarriage of justice.
7. It was further submitted that the prosecution case comprised of inconsistencies and contradictions that rendered his conviction unsafe; that for instance, Eric Kasiamani, (PW1), the clinical officer stated that he placed IMN on antiretrovirals and other drugs to prevent venereal diseases while IMN stated that, she did not receive medication which statements were contradictory; that additionally, there were also differences in the dates when the witnesses stated that the P3 form was completed.
8. The appellant went on to submit that both the trial and first appellate court failed to discharge their duty to carefully scrutinize the alleged victim's credibility before believing her testimony since she was easy to manipulate by her mother.
9. He maintained that he had a cogent defence and that the prosecution failed to interrogate the evidence, and the trial court wrongly disregarded it.
10. The appellant finally submitted that the prosecution failed to prove its case to the required standards which rendered the conviction unsafe.
11. Learned prosecution counsel for the state, Mr Okachi opposed the appeal and submitted that the prosecution proved its case to the required standard; that the victim of the offence was aged 9 years and was familiar with the appellant; the evidence showed that the complainant's hymen was broken and that she was defiled.
12. This is a second appeal. The mandate of this court is specified under section 361(1) of the Criminal Procedure Code to the effect that in second appeals, this court's jurisdiction is limited to matters of law only. The court ought not to interfere with factual matters save for instances where the findings made are not supported by the evidence on record. See Adan Muraguri Mungara v Republic [2010] eKLR and David Njoroge Macharia v Republic [2011] eKLR.

In view of the above, the issues that fall for determination are;

- i. whether the appellant's right to legal representation were violated;
- ii. whether the prosecution witnesses' testimony was contradictory and whether IMN was a credible witness;
- iii. whether the prosecution ought to have called crucial witnesses to testify;
- iv. whether the respondent discharged its burden of proof; and,



v. whether the appellant's defence was considered.

13. Before we address the grounds raised, it is essential that we outline the facts that were before the trial court.
14. Eric Kasiamani, (PW1), a clinical officer attached to Kilungu sub- county Hospital completed a P3 form for the appellant on August 9, 2016. He had bruises on the forehead. He also examined his genitalia, as it was alleged that he had defiled a girl. Nothing out of the ordinary was observed. PW1 produced the appellant's treatment card in court.
15. The clinical officer also completed a Post Rape Care form for IMN that showed that she had been defiled. He stated that the examination showed that her genitalia were extremely red and there was presence of whitish discharge. She was placed on anti-retroviral and other drugs to prevent venereal diseases. He also produced a dental age assessment report from Kilungu District Hospital that showed IMN was 9 years old. IMN's treatment card from Kilungu District Hospital was dated August 3, 2016 and showed that the child had been defiled on August 2, 2016 at about 8.00 p.m. The examination showed that, the genitalia was swollen and red. A urinalysis test done was found to be positive. He also produced a P3 form for IMN in court.
16. In cross examination, PW1 averred that the complainant's hymen was broken, and it was red, but there was no blood when he examined her.
17. IMN, PW2 gave a sworn testimony following the conduct of a voir dire examination by the trial court. She stated that her mother sent her to the appellant's house to get a matchbox from the appellant that he had borrowed. When she got to his house, he told her to remove her clothes. When she refused, he removed them himself; that she had on a black trouser and a shirt with pink colour and a red sweater; that they went behind the house to an empty plot. He told her if her mother calls, she should tell her that he had gone to buy her chips. IMN stated that he unbuckled his belt and did "tabia mbaya." to her; that when he removed her trouser, he also removed her pant. She stated that he touched her private parts with his hand, and then took his "thing" which she said was the part he uses to urine, and put it in hers.
18. Thereafter, she told her mother about what had happened to her and was taken to the hospital at Mutungu and then to Salama Police Station. She told the trial court that she had not lied. She reiterated that the appellant did wrong to her.
20. In cross examination, the IMN stated that other people live where the appellant lives, but no one saw her with him; that she screamed but he covered her mouth with his hands. She confirmed that her mother beat her for the delay in returning home, but she disclosed to her that she was with the appellant.
21. Catherine, (PW3), IMN's mother was in her house when the appellant came and borrowed a matchbox. She gave it and told him to go with her daughter so she could return with it. Thereafter when she noticed that her daughter had overstayed, she went out to call her, but IMN did not respond. She returned to the house for her shoes to go and look for her. When she went out again, she saw her daughter, and because she was angry, she slapped her for having delayed returning home. Her daughter then told her that the appellant had done "tabia mbaya" to her. She decided to go and buy credit to call her husband but found people gathered outside her house, and her husband had come home. PW3 informed the court that she had resided in the plot for 5 years and the appellant had found her living there; that IMN was presently in class 4 and in 2016 she was in class 3. She was 9 years old at the time. The matter was reported at Salama Police Station and they later went to Mutungu Hospital.



22. PW3 denied having any grudges against the appellant's mother. She confirmed examining the minor's private parts and found that they were 'red'. She did not hear IMN scream that evening.
23. On the material day between 8.00 pm to 9.00 pm, N PW4, IMN's father returned home from work and found his daughter IMN in the house alone crying. He stated that she told him not to beat her, and then narrated to him that the appellant had taken her behind the plot, removed her pants, and done 'tabia mbaya' to her. They proceeded to Salama Police Station and reported the incident. He denied having a grudge against the appellant or his mother.
24. In his defence the appellant gave an unsworn statement. He stated that on August 2, 2016, he woke up at 6.00 a.m. and went to make ballast. He worked until 5.00 p.m. and returned home to the plot in Malili; that he returned to his house at 6.00 p.m., had a bath, and borrowed a matchbox from his neighbour to heat food as he washed dishes. Shortly thereafter, IMN came to collect the matchbox; he gave it to her and continued with his chores. As he ate, he heard another knock on the door, and PW3 and PW4 entered the house and began to beat him. He began to cry, and blood was dripping from his face; that PW4 slapped him and told him to tell the truth that he had defiled his daughter. The appellant denied having defiled her, so they took him to the police station. At Malili town, they saw a police vehicle which they boarded and were taken to Salama Police Station. He was later charged with the offence.
25. The appellant also asserted that his mother and PW4 had differences because his mother spied for the owner of the plot who had learnt that PW4 who is the caretaker had rented out houses without informing the owner. The appellant stated that PW3 had heard his mother talking to the landlord and had told her husband. As a result, PW4 had threatened the appellant with a panga, because he wanted them to move out of the plot. The appellant's reported the incident to the sub-chief and thereafter, 'nyumba kumi' officials who arrested PW4. The matter was later resolved, but PW4 was still insisting that they move out of the plot.
26. Turning now to the issues raised, the first complaint was that the offence of defilement was not proved to the required standard. To prove the offence of defilement, three main ingredients require to be established. They are; the age of the victim, penetration, and the proper identification of the perpetrator.

In this case, the appellant was charged under section 8(1) as read with section 8 (2) of the [Sexual Offences Act](#) which provide;

“ 8.

- (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”.

In the instant case, IMN's age was not contested. She told the court she was 9 years old when the incident occurred. This was confirmed by her mother, PW3, the treatment notes, the P3 form, and more importantly, the age assessment report produced as evidence, as well as the post rape care form.



27. This court in the case of *Edwin Nyambogo Onsongo v Republic* (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

“... 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.”

Both the trial court and the High Court concurrently found that IMN was 9 years old, and likewise, we are satisfied that her age was established.

28. With respect to whether penetration was proved, under section 2 of the *Sexual Offences Act* “penetration” is defined as, “the partial or complete insertion of the genital organ of a person into the genital organs of another person.”

29. IMN stated that when she went to the appellant’s house to get the matchbox that the appellant borrowed from her mother, the appellant took her into the empty plot at the back of his house, removed her clothes, and defiled her. She provided a clear and consistent account of what had transpired. But the appellant has argued that she was not a truthful witness and both the trial court, and the High Court ought not to have convicted him on the basis of her evidence.

30. Section 124 of the *Evidence Act*, is unequivocal. It states that;

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration 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.”

31. What this means is that this being a sexual offence, as long as the trial court believed her evidence, the court was entitled to convict on the basis of such evidence. But contrary to the appellant’s contentions, a consideration of the evidence does not disclose that the trial court convicted the appellant solely on the basis of IMN’s evidence. Instead, the trial court had this to say;

“It was her testimony that the accused person then put his “thing” on her genitalia. She explained to the court that, by “thing” she meant the part that the accused person uses to urinate (sic). The doctor PW 1 produced the PRC form and treatment notes Kilungu Sub County Hospital. The treatment notes showed that there was redness on the inner aspect of the vagina walls and no hymen was noted. No bleeding was noted but there was presence of a whitish discharge. The urinalysis test that was done was positive. PW1 formed the opinion that the minor had been, defiled.



In light of the foregoing, this court finds that there was evidence adduced to demonstrate that that there was penetration of the complainant's genitalia".

32. To reach a conclusion that there was penetration, the trial court relied on not only IMN's evidence, but also on the medical evidence which was conclusive that penetration had occurred.
33. On its part, the High Court arrived at the same conclusion.
34. Based on IMN's evidence and the corroborative findings of the medical report, both the trial court and the High Court concluded that there was penetration, and likewise, we adopt the finding of the two courts below.
35. On the appellant's identification, IMN stated that the appellant was known to her as he was a neighbour residing in the same plot where she lived with her parents. The appellant was familiar with her family, so much so, that he came over to their house to borrow a box of matches from her mother. IMN identified the appellant through recognition, which is more assuring and reliable than the identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. See *Anjononi & others v Republic*, (1976-80) 1 KLR 1566, 1568. As such the appellant was properly identified.
36. In effect, the ingredients for the offence of defilement having been satisfied, and as were the lower courts; we find that the prosecution proved its case to the required standard, that the appellant defiled IMN.
37. The next issue was that the appellant claimed that the courts below disregarded his defence that he was not present at his house when the offence was alleged to have been committed. But our analysis of the judgments of the trial court and the High Court show that both courts considered his defence and found it to be implausible since, the prosecution evidence placed him at the scene at the material time, having borrowed matches from PW3, and when IMN went to his house to get the matches from him which he has not denied. The assertion that the lower courts did not consider his defence is unjustified and we find this ground to be without basis.
38. In response to the alleged inconsistencies and contradictions, complained of above, we would adopt the observations of this court in the case of *Yusuf Rashid Wanasoro alias Toto v Republic* [2007] eKLR thus;

“...we cannot, with respect, accept that the contradictions or inconsistencies, if they were, not material enough to affect the substance of the prosecution evidence which must be assessed in its totality. Nit-picking isolated contradictory statement by witnesses is not the right approach in assessment of evidence unless the contradictions fundamentally affect the evidence”.
39. Consequently, we find that any contradictions and inconsistencies that existed were minor and incapable of impugning the prosecution's case. This ground also fails.



40. On the complaint that crucial witnesses, in particular the investigating officer was not called to prove his guilt, we begin by observing that, section 143 of the Evidence Act states that no particular number of witnesses are required to prove any particular fact.

In the case of *Kiriungi v Republic* [2009] KLR 638, it was held that;

“...the effect of failure to call police officers involved in a criminal trial, including the investigating officer, is not fatal to the prosecution unless the circumstances of each particular case so demonstrate. We have examined the circumstances of this case and we are satisfied that the evidence of the investigating officer and the arresting officer would not have been prejudicial to the prosecution case as it was established beyond doubt that the appellant was involved in the crime with which he was charged.”

In our view, the failure by the investigating officer to testify did not weaken the prosecution’s case or prejudice the appellant. The prosecution witnesses who testified proved that the appellant defiled IMN to the required standard. The investigating officer’s testimony would therefore not have provided any additional evidence to the case.

41. The High Court having discharged its duty and properly evaluated all the evidence that was before the trial court and reached its own independent conclusion, we uphold the appellant’s conviction.

42. The final issue was that the appellant faulted the trial magistrate for failing to appreciate that he was not represented by an advocate, and nor was he informed of his right to legal representation at the State’s expense pursuant to article 50 (2) (g) and (h) of the Constitution article 50 (2) (g) and (h) specify that;

(2) Every accused person has the right to a fair trial, which includes the right –

g. to choose, and be represented by, an advocate, and to be informed of this right promptly:

h. to have an advocate assigned to the accused person by the State and at State expense if substantial injustice would otherwise result, and to be informed of this right promptly.”

43. Though the appellant was not represented in either the trial court or in the High Court, there is no evidence on record to show that he requested for legal representation, and neither did he raise the issue.

44. In the case of *Mohammed Abudullabi v Republic* [2019] eKLR, this court expressed itself thus;

“Having perused the record, it is clear that from the onset up to the conclusion of the trial the appellant was not represented by counsel. There is no evidence of him requesting the court for legal representation. Maybe he did not feel prejudiced by lack of representation. Article 50(1) of the Constitution does not in our view make appointment of counsel for an accused person at State expense automatic. If that were so, then such advocates would be appointed even before plea to appear for an accused person regardless of whether an accused person was in need of free legal aid or not. It is imperative for an accused person who feels he needs free legal representation to place such an application before the trial court for consideration. When the matter went to the first appellate court the appellant did not seek legal counsel either. The learned judges who heard the first appeal do not appear to have held the view that the appellant needed legal representation. Was the appellant entitled to



legal representation at State expense as of right" was his right to legal representation at the state's expense violated"

See also *Severin v Republic* [2023] KECA 355 (KLR).

45. It is also not lost on us that the appellant was able to conduct his defence and participated fully in the trial. He was even able to cross examine the witnesses. In view of the above, the appellant did not demonstrate that substantial injustice was occasioned to him due to the lack of legal representation. This ground similarly fails.

46. 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

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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

DEPUTY REGISTRAR

