



REPUBLIC OF KENYA



KENYA LAW
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**Ndirangu v Republic (Criminal Appeal 124 of 2017)
[2023] KECA 1056 (KLR) (24 August 2023) (Judgment)**

Neutral citation: [2023] KECA 1056 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 124 OF 2017
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA
AUGUST 24, 2023**

BETWEEN

JOHN MAINA NDIRANGU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence of the High Court at Nyeri (R. Ngetich, J.) dated 24th July 2017 in Criminal Appeal No. 20 of 2014)

JUDGMENT

1. The appellant, John Maina Ndirangu, was charged before the Chief Magistrate’s Court at Nyeri on June 26, 2013 with defilement contrary to section 8(1)(3) of the *Sexual Offences Act*, No 3 of 2006. The particulars were that on the June 25, 2013 at about 01.00 hours in Kieni West District of the Nyeri County, he intentionally and unlawfully caused his penis to penetrate the vagina of JNW a child aged 12 years. He faced an alternative charge of indecent assault contrary to section 11(1) of the *Sexual Offences Act*. He was convicted on the main charge and sentenced to serve 20 years in prison. He was aggrieved by the conviction and sentence. He appealed to the High Court at Nyeri (R Ngetich, J), who, following hearing, on July 24, 2017 dismissed the appeal, both on conviction and on sentence. The appellant then came before this Court on second appeal to challenge the findings by the learned Judge.
2. The appeal to this Court was based on five (5) grounds as follows:-
 - “1) That, the appellate court judge erred in law and fact while basing my conviction in supporting the prosecution proved their case thus section 124 of the *Evidence Act* cap 180 Laws of Kenya was applicable while the victim’s words in her evidence did not prove penetration took place, thus “his body put inside my body.”



2. That, the high court judge erred in law while upholding that the clinical officer's evidence was sufficient while there was conflict in regard to the dates of when the P3 form was filled.
 3. That, the high court judge erred in law and fact while supporting the trial court properly convicted I the appellate without considering that I am being tried with defective charge sheet thus section 8(1)(3) does not exist in sexual offence act with omission of a phrase" as read with".
 4. That, the high court judge lost direction while supporting the trial properly rejected defence without considering that the same was not displaced by the adduced evidence by the prosecution side as per section 212 of the CPC cap 75 laws of Kenya.
 5. That, since I can't recall all what transpired during the whole hearing of my appeal, I do hereby beg this hon. Court to serve me with my court proceedings which will enable me to prepare more reasonable grounds during the hearing of this appeal and I wish to be present in person."
3. The appellant amended his grounds of appeal to the following:-
- " 1) That, the trial magistrate erred in law and fact while basing my conviction in reliance that section 124 of the Evidence Act was proved by the victim without considering that, the same was riddled in doubts in regard to the words "his body put inside my body" also conflict concerning the P3 Form.....it was filled.
 2. That, the trial magistrate erred in law and fact further in believing the charges were accurately proved under section 8(1)(3) while the same does not exist in sexual offences act with omission of a phrase "as read with" also the age of the complainant was only by a word of mouth with no documents to prove.
 3. That, the trial magistrate erred in law while she became influenced with adduced evidence by the whole set of prosecution witnesses and rejected defence without considering it was not displaced as per section 21 of the CPC cap 15 Laws of Kenya."
4. We appreciate our mandate as the second appellate Court to be limited to matters of law as defined in section 361 of the Criminal Procedure Code, and as was reiterated in David Njoroge Macharia v R [2011]eKLR as follows:-
- "Only matters of law fall for consideration and the Court will not normally interfere with concurrent findings of fact by the two lower courts 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 also Chemagong v Republic [1984] KLR 213)"
5. The evidence on which the magistrate's court convicted the appellant was tendered by the complainant JNW. (PW 1), her mother LWM. (PW 2), a neighbour DNW (PW 3), village elder FKG (PW 4), a doctor VO (PW 5), and police officer (PW 6). PW 1 testified that she was aged 12 and was in class six. At about 1.00 am on June 25, 2013 she was asleep in her mother's house. She was with her sister and brother. Her mother was not at home. She was woken up by the voice of the appellant who asked



her to wake up. He asked where her mother was. She responded that she had gone to work at their neighbour's (A.K's) house. The appellant went to the gate and begun calling PW 1 in a low tone. He wanted her to come out. She refused to come out. He knocked the door but it did not open. He used a long knife that he had to open the door. She screamed. He slapped her. She was on the bed. He pulled her out, asking to be shown where her mother was. He used the knife to slap her on the right cheek, asking her if she knew that he was the "government". He moved her to behind the house and removed all her clothes. He put her down, removed his penis and penetrated her vagina using his penis. He bit her right arm. She was screaming. Her grandfather heard her. The appellant went away, taking with him all her clothes (blouse, short, pant, camisole and cardigan). The clothes had become muddy. The clothes were produced in evidence. PW 1 rose and went to the house of A.K. who lit a fire for her to warm herself before she got her to go and sleep. The next morning her mother (PW 2) and brought her clothes and shoes. She called some people and they went to look for the appellant who lived in the neighbourhood. Among the people that PW 2 called were PW 3 and PW 4. The appellant had locked himself in his house. When they knocked the door, he begun to scream saying that he had done nothing. The door was broken open. He wanted to run but was arrested. PW 1's clothes were recovered a short distance from the scene.

6. PW 1 was taken to the police station and then Nyeri Provincial Hospital where she was examined. Part of her right cheek was swollen, and so was her neck. She had bite marks on the right middle aspect of her right arm. Her vagina appeared wet and had lacerations. Her hymen was broken. She had scratch marks on her buttocks. PW 5 produced her P3. The appellant was examined. He had no infection or spermatozoa. He had small scratches on the upper limbs. His P3 was also tendered in evidence.
7. The appellant gave unsworn statement in defence. He denied that he had defiled PW 1, and stated that he did not leave his house that night. He was in the house with his wife and children. He is a boda boda operator. He went to work as usual. When he returned home, PW 3 and PW 4 went to his home in the company of PW 1 and PW 2. He was arrested and taken to police station where he was detained. Police asked him for Ksh.40,000 which he did not have. According to him, PW 2 was, by bringing the charge, doing business with the child (PW 1). He told the court that he knew PW 2, who lived about one and half kilometres from where he lived but that he had never been to her home. He did not know PW 1 previously.
8. PW 1 had testified that on the material night there was moonlight, and that she recognised the appellant's voice. She stated as follows in cross-examination: -

"I have never seen you at our home. There was a time you called me at 5.00 pm when I was from the shop. It was around May. I knew you a long time ago."

9. The appellant called one witness (DW 2 – AK). DW 2 is the A.K. in whose house PW 1 ran to that night. She testified that she does not get along with PW 2 whose home is about 3 km from that of the appellant. She told court as follows:-

"On June 25, 2013 I was sleeping in my house. At midnight I heard some noises then I found 2 of L's kids in my house. They were young daughters and a son. They were crying. I heard N also screaming for my help. She said somebody was strangling her. She came without pants. She said she was defiled. She said she could not know who it was. I gave them tea. I called L's father and informed him and told him to call her. I went to sleep later with the 3 children. At 9.00 am their mother came and left with J. I stayed with the children from there on I do not know what happened."



10. When cross-examined, she stated that PW 1 came with clothes. She had been bitten on the arm. She did not know who had defiled PW1.
11. The learned magistrate considered the prosecution and defence evidence. On the question of age, it was noted that the prosecution had not produced PW 1's birth certificate or baptismal card to show her age; that the only evidence as to her age had been given by PW1 when she said she was 12. She was in class six. The court estimated her age to be between 12 and 15 years. The court accepted PW1's evidence in the following terms:-

“She gave a fairly detailed account of how the accused commenced and executed his act. She was clear, consistent and went into minute detail on what had transpired from the time the accused arrived at their house Her testimony was even substantially supported by the testimony of DW 2 who was called by the accused.....The only variance being that she says the complainant told her she could not know who it was ”

The court did not believe DW 2 when she sought to absolve the appellant. It found the medical evidence as to penetration to be emphatic as the relevant injuries had been documented in the P3. In all, it was found that the guilt of the appellant had been proved beyond doubt.

12. The appellant's complaint in the High Court was that the charge was defective as no offence was created by section 8(1) (3) of the Act; penetration had not been established; the age of PW 1 had not been established; and that he had been convicted on insufficient evidence. The learned Judge reviewed and reconsidered the evidence and the submissions by either side and returned the verdict that the learned Magistrate had correctly found that the prosecution evidence had established the guilt of the appellant beyond doubt. Relying on decided cases, the learned Judge found that the evidence of PW 1 that she was 12 years old and the P3's indication that she was 13 years, were enough to place her age between 12 and 15 as required by section 8(3) of the *Sexual Offences Act*. On the alleged defective charge sheet, the learned Judge found that that was curable under section 382 of the *Criminal Procedure Code*. On the question of penetration, it was found that when PW 1 said that the appellant: -

“laid me down and entered me,”

it was sufficiently shown that he had penetrated her genital organ using his genital organ. Lastly, the learned Judge observed that although the incident was at night, PW 1 knew the appellant whose voice she had recognised.

13. We have anxiously considered the judgment by the learned Judge, the grounds of appeal raised by the appellant and the rival submissions. The appellant was not represented while the learned counsel, Mr Naulikha represented the State.
14. We consider that the learned Judge was conscious of her duty to independently reconsider and re-evaluate all the evidence before the trial court to be able to make an independent decision thereon, while aware that she had not had the benefit of seeing or hearing the witnesses as they testified. She correctly cited the decision in *Okeno v Republic* [1972] EA 32.
15. On ground one of the appeal before this court, the appellant raised the issue of corroboration under section 124 of the *Evidence Act* (cap. 80). Section 124 states as follows:-

“Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be



liable to be convicted on such evidence unless it is corroborated by other material 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 offence, 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.”

16. It was clear that PW 1 was the only witness to the defilement. Both the trial court and the first appellate court accepted her evidence to be truthful, and therefore there was no need for corroboration in this sexual attack. Both courts went to great lengths to show that although the incident was at night, PW1 had sufficiently recognised the appellant as her attacker. The two were clearly known to each other, and PW 1 had heard the voice of the appellant before.
17. On the question of penetration, we agree with the learned judge that when PW 1 testified that the appellant had removed her clothes, put her on the ground, removed male organ and entered her female organ, this was sufficient evidence that he had penetrated her. These acts had been confirmed by the medical evidence contained in the P3. We find no merit in the complaint by the appellant that penetration was not proved.
18. On the question of a defective charge sheet, it was noted that the charge sheet ought to have read –
“Defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*, No 3 of 2006.”
and not defilement contrary to section 8(1) (3) as was framed. We, however, agree with the learned Judge that the defect was curable under section 382 of the *Criminal Procedure Code*. We do not find that the defect occasioned a miscarriage of justice. The particulars of the charge were plain and clear. The record shows that the appellant fully understood the complaint, which was that he had, using his penis, penetrated the vagina of a girl aged 12 years. He heard the evidence of the witnesses, cross examined them, testified in defence and called a witness. No prejudice was occasioned by the defective charge sheet. In *Amendi Omurunga v Republic*, CR App No 178 of 2012, in the charge of defilement, reference was made only to the punishment section. This Court held that the default was curable.
19. On the claim that the appellant’s defence had been improperly rejected, we are of the view that the two lower courts both considered the prosecution evidence together with the defence evidence. The evidence was considered as a whole in reaching the conclusion that the guilt of the appellant had been proved beyond doubt. Nothing turned on the alleged conflict of dates in the P3, as the fact that PW 1 had been examined by the Doctor and P3 Form completed was not challenged.
20. On the question of the age of PW 1, the trial court and the appellate court found that the girl was between 12 and 15. We have no reason to depart from that finding.
21. In all, therefore, we find no merit in the appeal. We are satisfied that the appellant was convicted on compelling evidence which, in our view, proved his guilt beyond all reasonable doubt. He was properly convicted and his sentence was merited. We dismiss the appeal.

DATED AND DELIVERED AT NYERI THIS 24TH DAY OF AUGUST 2023.

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRA

