



**Ng'etich v Republic (Criminal Appeal 25 of 2015)  
[2023] KECA 1153 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KECA 1153 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CRIMINAL APPEAL 25 OF 2015  
F SICHALE, FA OCHIENG & LA ACHODE, JJA  
SEPTEMBER 22, 2023**

**BETWEEN**

**ZEPHANIA KIPKIRUI NG'ETICH ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the judgment by Ongeru, J delivered  
on the 22nd day of July 2015 in HCCRA 92 of 2014.)*

**JUDGMENT**

1. The appellant, Zephania Kipkirui Ng'etich was first presented before the magistrate's court on a charge 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 night of 17<sup>th</sup> to January 18, 2013 in Kuresoi District within Nakuru County, the appellant intentionally caused his penis to penetrate the anus of JMI a minor aged 5 years.
2. In the alternative, the appellant was also charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that the appellant on the night of 17<sup>th</sup> – January 18, 2013 in Kuresoi District within Nakuru County, intentionally touched the anus of JMI a minor of 5 years.
3. The appellant pleaded not guilty to the main charge and the alternative charge and the case went to full trial. The prosecution presented four witnesses to prove their case while the appellant gave an unsworn statement and called no witnesses.
4. The prosecution's case in a nutshell was that on the material day the complainant, JMI (PW1), a class one pupil at [Particulars Withheld] Primary School, came home from school and found that his mother had been arrested by the police for being in possession of a substance suspected to be narcotic drugs.



As a result of the arrest, the landlord had locked the door to his home. The appellant, who was their neighbour, came to his rescue and offered him shelter for the night.

5. Sometime during the night, the minor was rudely awakened from sleep by the action of the appellant pulling off his trousers. The appellant then smeared saliva on his penis and inserted it into the minor's anus. The ensuing pain caused the minor to cry out for help and as a result the appellant fled. The incident was reported at the police station where he was accommodated for the rest of the night. He was later taken to the hospital. The minor told the court that it was the first time the appellant did "tabia mbaya" (bad manners) to him.
6. DOO (PW2) was at [Particulars Withheld] Town Center, where he learnt that the minor who was known to him had been defiled. The minor was bleeding from the anus, and he told PW2 that he knew the person who had defiled him. He called a relative of the minor and together they took the minor to the police station to report the incident and thereafter to hospital. Subsequently, they mounted a search for the appellant and found him hiding in a napier grass farm. The police arrived just in time to arrest and save him from irate villagers who were about to lynch him.
7. Mr Komen Mulin'gwo (PW3), a clinical officer at [Particulars Withheld] Health Center examined the minor and observed that there were blood stains on the shorts he was wearing and there were tears on the anal wall from which blood was oozing. He prescribed HIV prophylactics, antibiotics and analgesics and referred the minor to Molo Hospital for surgical repair of the anal tears. PW3 produced the P3 form he filled in respect of the minor and the treatment book. His conclusion was that the minor had been subjected to forceful penetration of the anal orifice. He also conducted a medical examination on the appellant and found that he was HIV positive.
8. No 57551 PC Milton Otenyo (PW4), the investigating officer was on duty, at [Particulars Withheld] police station on January 18, 2013 when the minor was brought to the station with a report that he had been sodomised. PW4 issued a P3 form to the minor, re-arrested the appellant who had been arrested by the villagers, and took him to hospital for examination.
9. In his defence, the appellant testified without oath and blamed his predicament on the man who arrested him. He told the court that the man who arrested him was an uncle to the minor and that the man vowed to teach him a lesson after they disagreed at the workplace. He called no witnesses to support his case.
10. Upon consideration of the evidence before him, Hon Nyaga, SPM (as he then was), found the appellant guilty of the main charge. He convicted him accordingly and sentenced him to life imprisonment under section 8(2) of the SOA.
11. The appellant being dissatisfied with the decision of the court, preferred an appeal in the High Court. The learned judge, Ongeri, J, considered the appeal before her and in a judgment delivered on the July 22, 2014, held that the appeal had no merit. She dismissed it and affirmed the conviction and sentence of the lower court.
12. Not one to give up easily, the appellant has approached the Court of appeal in this second appeal, seeking to challenge the decision of the Superior Court. The instant appeal is predicated on the grounds that the learned judge erred in law:
  - a. By not finding that the age of the complainant was not proved conclusively as an element of defilement.
  - b. By failing to find that the medical evidence adduced was not conclusive to prove penetration.



- c. By not finding that the trial was irregular and went against the [Criminal Procedure code](#).
  - d. By failing to analyse the prosecution and defence cases as required by law.
  - e. By failing to find that the trial went against article 50(2), 25(c) of the [Constitution](#) and section 198(1) of the [Criminal Procedure code](#).
13. Both parties filed written submissions that were orally highlighted at the plenary during the virtual hearing.
14. The appellant was in person. In his undated submissions, he contends first, that the age of the minor was not proved and there was no evidence that the minor's age was assessed. Also, that the author of the treatment notes was not called to testify on how he arrived at the age of the minor and there was no document tendered in court to prove the actual age of the complainant. To fortify his argument, he relies on this Court's decision in Criminal Appeal No 504 of 2010, Kaingu Elias Kasomo versus Republic, where it was held that age is a critical component and forms part of the charge in sexual offences. Therefore, it must be proved by credible evidence, in the same way as penetration in cases of defilement and rape.
15. The appellant argues secondly on penetration, that the mere finding of a tear on the complainant's anus was not sufficient proof of penetration. He contends that the P.3 form did not indicate; the age of the injuries, the probable type of weapon that caused the injury and the treatment received by the complainant.
16. The appellant submits thirdly, that the trial was irregular and it contravened the [Criminal Procedure code](#) for the reason that PW3 was not the author of the exhibits that he produced and the appellant's consent was not sought before the documents were produced in court. To support his submission, he relies on this Court's decision in [Juma Kalio v Republic](#) [2001] eKLR which quoted the case of [Boniface Karere Ndei vs R](#) Criminal Appeal No 39 of 1990 and [Njoroge Ndungu vs R](#) Criminal Appeal No 31 of 2000 (un reported).
17. Fourthly, the appellant submits in conclusion that he did not receive fair trial as provided for under Article 50(2) of the [Constitution](#) for the reason that the trial was conducted in a language not known to him, causing him prejudice. He also submits that the prosecution did not supply all the documents that they relied on as they ought to have done. He referred to the case of [R v Ward](#) (1993) 2 All ER 557, Where it was held that the duty of the prosecution is to disclose all the relevant material they intend to rely on to the defence, unless there is a good reason for not doing so.
18. The state was represented by Senior Principal Prosecution Counsel Ms. Christine Kathambi. She filed submissions dated July 21, 2022 and urges in response, that the issues of the minor's age and penetration were conclusively settled in the trial and the first appellate court. That the trial court noted that the complainant was a boy aged between "5 to 6" years and sentenced the appellant under Section 8(2) of the [Sexual Offences Act](#) and the appellate court concurred.
19. On the irregularity of the proceedings, Ms. Kathambi argues that the appellant was present during the trial and he followed the proceedings without raising any objections. She points out that the first



appellate court was correct in relying on this Court's case in *Julius Kamau Mbugua versus Republic* [2010] eKLR where it was stated that:

“As Hardie Boys J. said in *Martin versus Tauraga* (page 805- paragraph (b)) there is no reason to vindicate the right of one who allows the gradual trial process to run its course without objection or complaint and then asserts the right at its culmination”.

It was urged that for the foregoing reason this ground should not stand.

20. In rebuttal to the submission on identification, counsel contends that the appellant was well known to the minor, as was held by the first appellate court.
21. Counsel asserts that the appellant has not highlighted how his right to fair hearing was infringed under Article 25(c) and 50(2) of the *Constitution* and he did not raise such a ground in his first appeal. Concerning section 198 (1) of the *Criminal Procedure code*, counsel submits that the trial court conducted the hearing in a language that the appellant knew and understood.
22. This being the second appeal we appreciate that our jurisdiction is limited to matters of law as defined under Section 361 of the *Criminal Procedure code*. This was restated by this Court in the case of *David Njoroge Macharia vs. Republic* [2011] eKLR as follows;

“That being so only matters of law for consideration - see section 361 of *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.”

23. Having set that out, we have considered the grounds and record of appeal, the submissions of the parties and the law and the three issues that fall for our consideration are:
  - a. Whether Article 25 (c) and 50 (2) of the *Constitution* were contravened,
  - b. Whether the proceedings in the trial court were irregular, and
  - c. Whether the Superior Court erred in holding that the prosecution proved its case beyond reasonable doubt.
24. On the first issue the appellant faults the trial court for contravening Article 25 (c) and 50 (2) of the *Constitution*. In response the respondent contends that the appellant has not stated clearly in what manner his right to fair trial was violated, and that he did not raise this issue in the trial court or on 1<sup>st</sup> appeal. Counsel asserts that the appellant's right to fair trial was not violated.
25. When a party alleges a breach of fundamental rights and freedoms, he or she must state and identify the rights or freedoms that have been breached with precision and specify the manner in which the said rights or freedoms have been or will be infringed in respect to him. See- *Anarita Karimi Njeru vs Republic* (1976-1980) KLR 1272.
26. Also, in *Matiba vs AG* (1990) KLR 666 the position was re- stated as follows:

“An applicant in an application under section 84(1) of the *Constitution* is obliged to state his complaint, the provisions of the *Constitution* he considers has been infringed in relation to him and the manner in which he believes they have been infringed. Those allegations are the ones which if pleaded with particularity invoke the jurisdiction of the court under



the section. It is not enough to allege infringement without particularizing the details and manner of infringement”

27. In the instant case the appellant submits that his rights under Article 25 (c) and 50 (2) of the Constitution were violated. He does not particularize the rights adverted to and neither does he specify how the said rights were violated. As such, the appeal under this ground fails.
28. The appellant also alleges that the trial court proceedings were conducted in an irregular manner. This he states is because PW3 who produced the treatment notes was not the author thereof and also that the trial was conducted in a language that he did not understand contrary to section 198 of the Criminal Procedure code. In rebuttal, the State submits that the appellant was present at the trial and he followed the proceedings without raising any objections. The State agrees with the judgment of the trial court as, upheld by the superior court.
29. The first appellate court considered this issue and had this to say:

“In the current case, the appellant never raised the issue of violation of his rights during trial of his case. Moreover, there is no evidence that the appellant’s rights were violated.”
30. We have perused the record and find nothing in the evidence of PW3 to indicate that he was not the author of the treatment notes. The treatment notes emanated from [Particulars Withheld] Health Centre where the minor was attended to and where PW3 was a clinical officer. In his testimony PW3 stated that: “After he was treated, I filled the P3 form which I produce as Exhibit -1. The boy was called J.M. I also produce the treatment book/card for the patient as Exhibit 2.”
31. On whether the trial was conducted in a language that the appellant did not understand, Section 198 of the Criminal Procedure code provides as follows
  - “(1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands.
  2. If he appears by advocate and the evidence is given in a language other than English and not understood by the advocate, it shall be interpreted to the advocate in English.
  3. When documents are put in for the purpose of formal proof, it shall be in the discretion of the court to interpret as much thereof as appears necessary.
  4. The language of the High Court shall be English, and the language of a subordinate court shall be English or Swahili.”
32. The record indicates that, PW1 testified in Swahili and the appellant cross examined him in Kiswahili. PW2 testified in Kiswahili and the appellant cross examined him in Kalenjin. Interpretation was provided for both languages. PW3 testified in English and the appellant cross examined him in Kiswahili. Again, interpretation was provided for both languages. PW4 testified in Kiswahili and the appellant cross examined him in Kiswahili. Finally, the appellant gave his unsworn testimony in Kalenjin.
33. It is clear from the record as set out above, that the appellant participated actively in the proceedings and at no time did he complain that he had any difficulty following the proceedings. We are therefore, satisfied that the trial court’s proceedings were conducted in a language that the appellant understood and that section 198 of the Criminal Procedure code was not contravened.



34. Turning to the last issue, we assessed the record to establish whether the superior court erred in holding that the prosecution proved its case beyond reasonable doubt. This is a second appeal and the jurisdiction of this court is limited to consideration of matters of law only. Accordingly, we are generally, bound by the concurrent findings of fact by the trial court and the superior court. This Court may however, depart from the findings on matters of fact if the Court finds that they are not based on any evidence, or that the said findings were derived from a misapprehension of the evidence, or are plainly untenable as was stated in the case of *Karungo v Republic* [1982] KLR 219.

35. The appellant was charged with defilement contrary to Section 8(1) of the *SOA* which provides that:  
“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement”

This Court in *John Mutua Munyoki v Republic* (2017) eKLR also laid down the elements of defilement as thus:

“For an offence of defilement to be committed, the prosecution must prove each of the following ingredients:

- i. The victim must be a minor
- ii. There must be penetration of the genital organ by the accused and such penetration need not be complete or absolute. The partial penetration will suffice.” (Emphasis added)

36. The appellant contends that the age of the complainant was not proved. While the State argues that the minor’s age was conclusively settled during the trial and the first appellate court concurred. The learned judge observed as follows: “there is evidence that at the time of the offence, the complainant was 5-6 years.”

37. The question of how to assess age in sexual offences is now settled in our courts. In this Court’s decision in *Edwin Nyambogo Onsongo v Republic* (2016) eKLR it was held that:

“...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 guardians 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”

38. In the instant case the charge sheet, treatment notes and medical report indicate that the minor was 5-6 years old. Further, the minor himself testified that he was a class 1 pupil at Estate Primary School. In any case the age of the minor was not disputed during the trial. We thus find that the two courts below were correct in their finding that the age of the complainant was proved beyond reasonable doubt.

39. The appellant also contends that penetration was not proved and that the minor’s evidence was not corroborated by the medical evidence. In opposition, the State asserts that the issue of penetration was conclusively settled in the trial and the first appellate court. The first appellate court held as follows:

“I find that the evidence of the complainant was corroborated by that of the doctor who said there was penetration.”



40. We have looked at the evidence of the complainant on penetration. We find that he was vivid on the encounter of the material day. He told the court that the perpetrator smeared saliva on his penis before inserting it in to his anus. That he felt pain and cried for help. He understood what was done to him as “*tabia mbaya*” (bad manners). PW3 the clinical officer, testified that when he examined the minor, blood was oozing out of his anus and he had a tear on the wall of his anus. His professional opinion was that the minor had been sodomised.

41. On corroboration Section 124 of the *Evidence Act* stipulates thus:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is 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”

42. In *Bassita v Uganda* S.C Criminal Appeal No 35 of 1995, quoted with approval in *MK V Republic* (2017) eKLR, the Supreme Court of Uganda held as follows:

“Usually, the sexual intercourse is proved by the victim’s own evidence and corroborated by medical evidence or other evidence. Though desirable it is not hard and fast rule that the victim’s evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt”

43. The trial court observed that the complainant described the events of the material day with such clarity that the court had no doubt of what he experienced. His evidence was corroborated by the evidence of PW3. We therefore, find no fault with the findings of the two courts below on this issue. This ground of appeal cannot therefore stand.

44. In regard to the identity of the perpetrator, the complainant testified that the appellant was their neighbour. He knew his brother, and he knew that he was in the business of selling potatoes and also washing motorcycles. Clearly, this was a case of recognition as opposed to identification. This Court addressed the question of identification by recognition in its decision in the case of *Reuben Taabu Anjononi & 2 others v Republic* 1980 eKLR thus:

“...recognition of assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of an assailant in one form or another.....”

We are satisfied that the appellant was known to the minor prior to the attack. The minor revealed his identity to PW2 who helped in the search and arrest of the appellant in a napier grass farm. We therefore agree that there was no error in the identification of the perpetrator as was held in the two courts below.

45. For the foregoing reasons, we find that the appeal lacks merit and is consequently dismissed in its entirety. The conviction and sentence are affirmed.



DATED AND DELIVERED AT NAKURU THIS 22<sup>ND</sup> DAY OF SEPTEMBER 2023.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

*I certify that this is*

*a true copy of the original*

*Signed*

**DEPUTY REGISTRAR**

