



**AHM v Republic (Criminal Appeal 129 of 2022)
[2023] KECA 1490 (KLR) (8 December 2023) (Judgment)**

Neutral citation: [2023] KECA 1490 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CRIMINAL APPEAL 129 OF 2022
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA
DECEMBER 8, 2023**

BETWEEN

AHM APPELLANT

AND

REPUBLIC RESPONDENT

((Being an Appeal from the judgment of the High Court of Kenya at Voi before Hon. Justice JM Mativo dated 31st August, 2022 in High Court Criminal Appeal No. E043 of 2021))

JUDGMENT

1. The Appellant herein, AH, was charged and convicted before the Wundanyi Magistrate’s Court in Sexual Offence Case No. 10 of 2020 with the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* on 1st October, 2021 and sentenced to 15 years imprisonment. It was alleged that on diverse dates between the 1st day of January 2019 and 30th January 2019 at around 1200pm in Wundanyi sub- county within Taita Taveta County, he intentionally caused his penis to penetrate the vagina of SWL, a child aged 16 years old. There was an alternative count of committing an indecent act with a child contrary to section 11(1) of the Act on which no finding was made..
2. The facts of the case were that the Complainant, aged 17 years used to attend [Particulars Withheld] where the Appellant was teaching. It was her evidence that the Appellant harangued her into having sex with her and at one point picked her from school and took her to a lodging at [Particulars Withheld] where he had sex with her before she went back to school. In order to be permitted to pick the Complainant from school, the Appellant presented himself to the school where he informed a teacher, PW2, that he was the father of the Complainant and persuaded the Complainant to confirm that that was the position.
3. As fate would have it, the Complainant’s father, PW3 went to pay school fees for the Complainant, but the school administration denied him access on the ground that the Appellant had presented himself



as the Complainant's father. When confronted, the Complainant admitted that PW3 was in fact her father and that the Appellant was not. It was at that point that it came to light that there was an ongoing sexual affair between the Appellant and the Complainant though PW1 disclosed that he had earlier on warned the Appellant to desist from such action. It however turned out that PW3, himself had been a culprit of similar unlawful acts against the Complainant and was in fact charged and convicted on incest SO No. 11 of 2020. According to PW3, the Complainant was born on 18th May 2002 and showed her birth certificate.

4. The Complainant was examined at Mwatate Sub-county Hospital where it was found that she had no lacerations or injuries, her hymen was broken, there was a white vaginal discharge usually caused by infection, and Pregnancy, VDRL and HIV tests were all negative but urinalysis had pus cells. PW4 produced the P3 form. The matter was investigated by PW5 who, based on the same decided to charge the Appellant with the offence in question.
5. Upon being placed on his defence, the appellant stated that on 17th February 2020 he was on holiday at Lunga Lunga and returned on 21st February 2020; that on 22nd February 2020 he went to the Police Station together with the committee members of the mosque to resolve issues relating to the closure of the mosque but he was instead placed in the cells until the following Monday when he was arraigned in court; that the charges were actuated by hate and jealousy because he was receiving higher pay than one Mwanamisi with whom he was working as a madrassa teacher before she was fired; that the said Mwanamisi was a daughter to the person who had donated his land where the mosque and the madrassa were situated and as a result of the bad blood instigated the closure of the mosque; and that he never picked the Complainant from School or took her to a lodging to defile her.
6. According to, DW2, ANI, who testified in support of the Appellant's case, the OCS Mwatate asked them to avail the appellant to explain why the mosque was closed. In his view, the Appellant's problems arose from the leadership wrangles in the mosque. DW3, Phibrona Mwachofi, the executive officer, Wundanyi Law Court produced certified copies of proceedings in SO No. 11 of 2020 in which the Complainant's father, PW3, was charged, tried and convicted for offence of incest and sentenced to serve 20 years in prison.
7. In her judgment, the learned Magistrate found that the prosecution proved the age of the Complainant, penetration and identification of the appellant, convicted him and sentenced him to serve 15 years imprisonment.
8. In his appeal to the High Court, the Appellant's case was that the case was not proved beyond reasonable doubt; that his defence was not considered; that the prosecution failed to call crucial witnesses; and that he was not properly identified.
9. Upon hearing the appeal, the learned Judge (Mativo, J as he then was) found that the appellant's attack on the trial court's judgment based on absence of identification had no substance since the evidence was that the Appellant was well known to the Complainant; that based on the evidence of the Complainant, even without medical evidence, there was sufficient evidence of penetration; that the fact that the Complainant was also defiled by her own father who was the accused in SO No 11 of 2019 did not render the charge against the Appellant unsustainable since the appellant and the Complainant's father were charged separately with the offence of defilement and incest respectively; that the existence of two P3 forms one for each case does not mean that the appellant was convicted using a P3 form used in the other case; that even in the absence of medical evidence, the evidence of PW1 was sufficient to establish penetration; that the issue before the court was not who broke the hymen, but whether the appellant committed an act which caused penetration; and that sexual contact was proved to the required standard; that the issues relating to inconsistencies and contradictions raised were trivial and,



in a way, misguided; that the Complainant's testimony on the involvement of the appellant was cogent and essentially un rebutted; that no value would have been added by calling students from the Madrasa or availing CCTV cameras or registers when the Complainant and the appellant knew each other so well and when PW2 vividly recalled the appellant as the person who visited the school claiming to be the Complainant's father such that when the real father turned up, she dismissed him; that in any event, it is established law that a conviction can be based on the testimony of a single-eye witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone; and that the learned Magistrate considered all the material before him and there was no basis for the contention that the lower court did not consider the appellant's evidence and submissions. The learned Judge dismissed the appeal in its entirety.

10. Aggrieved by the said decision the Appellant preferred this appeal which according to the supplementary grounds dated 10th July, 2023 and which formed the basis of his submissions before us was based on the fact that that the learned judge erred in law by failing to note that the charge did not disclose any offence because the word "unlawful", a mandatory ingredient was missing from the particulars of the offence, hence rendered the charge defective; and that the learned judge erred in law by failing to note that the Post Rape Care Form from the Ministry of Health National Management guidelines, should be used as clinical notes to guide filing in of the P3 form was never adduced at the trial; and lastly that the learned judge erred in law by upholding the sentence imposed by the trial court on the appellant without putting into consideration that PW I was an untrustworthy witness.
11. We heard this appeal on the Court's virtual platform on 18th July, 2023. during which the appellant was logged in from Manyani Maximum Prison while learned counsel, Mr. Nyange appeared for the Appellant and Ms Fuchaka, Senior Public Prosecution Counsel, appeared for the Respondent. Both counsel relied on entirely on their written submission.
12. It was submitted on behalf of the Appellant that the charge with which the Appellant was charged was defective as the word "unlawful" was omitted; that the act of penetration itself, if at all it was really committed as alleged, automatically would have been unlawful act bearing in mind the age of the Complainant (16 years). Reliance was placed on the case of *Daniel Nyareru Achoki v Republic* [2000] eKLR where it was noted that the omission of the expression "unlawful" and "without her consent" rendered the charge incurably defective as an offence without those ingredients is unknown to law.
13. It was further submitted that it is a requirement under the MOH 363 that Post Rape Care form (PRC) be used as clinical notes to guide filling in of the P3 form; that in the absence of the said form there would be no basis upon which the medical officer from the Mwatate sub-county hospital filled the P3 form. In the Appellant's submissions, there were contradictions in the Complainant's evidence who stated that the Appellant had been defiling him at one point and at another point that it was the first time for the Appellant to defile her.
14. On behalf of the Respondent, it was submitted that the charge against the appellant was not defective since it contained the offence that the appellant was charged with as well as the particulars specifying the nature of the offence charged as required in Section 134 of the *Criminal Procedure Code*. This submission was based on the case of *Sigilani v Republic* [2004] 2 KLR where it was held that the principle of law governing charge sheets is that an accused person should be charged with an offence known in law. According to the Respondent, lack of the word "unlawful" from the particulars of the charge cannot make the charge to be fatally defective since it is a mere technicality that is curable under Article 159 of *the Constitution*. Reliance was placed on the Supreme Court decision in the case of *Willie (William) Slaney v State of Madhya Pradesh A.I.R 1956 Madras Weekly Notes 391* held that mere irregularity is not to fatal unless there is prejudice. The Respondent further cited the case of *Benard Ombuna v Republic* [2019] eKLR where it was held that the test whether a charge sheet is



fatally defective is substantive rather than formalistic. Since the appellant understood the nature of the charges that that he was facing, we were urged to invoke the curative provisions of Section 382 of the [Criminal Procedure Code](#).

15. Regarding the issue of the failure to produce post rape care form at trial, it was submitted that the said form is not a mandatory document since it is just a medical document that can be used to support an allegation of defilement. In this case the medical document that was produced was a P3 form and it has the same effect as a PRC form since the contents of a P3 form and a PRC form are almost identical and there is not prejudice suffered by appellant by the failure to produce the PRC form.
16. Regarding the allegations of the untrustworthiness of PW1, it was submitted that PW1 was a truthful and honest witness and that her evidence was credible, consistent and was never shaken on cross examination; that her evidence was corroborated with the evidence of PW2; that the trial court had the opportunity of seeing her testify and her demeanour and it gave reasons for believing her.
17. It was therefore submitted that the prosecution proved its case against the appellant to its required threshold which is beyond reasonable doubt and we were urged to find that the High Court properly evaluated the evidence in the exercise of its jurisdiction and arrived at the correct conclusion and to uphold its finding that the conviction was safe.
18. We have considered the material placed before us in this appeal. This being a second appeal, our jurisdiction is restricted by Section 361(1) (a) of the [Criminal Procedure Code](#) to consider issues of law only as opposed to matters of fact that have been tried by the first court and re- evaluated on first appeal. This position was restated in in *Karani vs. R* [2010] 1 KLR 73 that:-

“ This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.”

19. That position was reiterated in *Njoroge v Republic* [1982] KLR 388 where it was held by this Court that:

“ On a second appeal, we are only concerned with points of law and consider ourselves bound by the concurrent findings of fact arrived at in the courts below, unless shown to be based on no evidence.”

20. We are also guided by the decision in [Adan Muraguri Mungara v R](#) CA Cr App No 347 of 2007 where it was held thus:

“ As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by two courts below, unless such findings are based on no evidence at all, or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this court to interfere.”



21. “Matters of law” in relation to this Court’s jurisdiction as the second appellate court, was explained by the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kitbinji and 3 others* [2014] eKLR which characterised the three elements that constitute “matters of law” thus:

- “(a) the technical element: involving the interpretation of a constitutional or statutory provision;
- b. the practical element: involving the application of *the Constitution* and the law to a set of facts or evidence on record; and
- c. the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record.”

22. This Court, in *Jonas Akuno O’kubasu v Republic* [2000] eKLR, however held that:

“It is correct that on first appeal the appellant is entitled to have the appellate court’s own consideration and view of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the material before the judge or magistrate with such other material as it may decide to admit. The appellate court must make up its own mind not disregarding the judgement appealed from but carefully weighing and considering it... On second appeal, it becomes a question of law as to whether the first appellate court on approaching its task, applied or failed to apply such principles.”

23. The determination of this appeal must therefore be based on the above principles.

24. It is clear that the issues being raised before us have mutated from the grounds that the Appellant raised before the High Court on first appeal and even before the trial court. This Court in *Alfayo Gombe Okello v. Republic* [2010] eKLR pointed out that:

“...the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have.”

25. The reason why this Court shies away from interfering with decisions of the trial court or the first appellate court on matters not raised before the said courts is that this Court deals with the Appellant’s grievances based on allegations of errors of omission or commission committed by the said courts. Where the issues being raised are not matters which were placed before the lower courts and therefore the said courts did not address their minds to them, it would be improper to interfere with their decisions when they had no chance of dealing with the same and no finding was made in respect thereof.

26. In deference to the Appellant, we will nevertheless, deal with the issues placed before us particularly those that raise issues of law. It was the Appellant’s case that since the charge sheet in question did not contain the word “unlawful” it was defective since the charge in question alleged that the Complainant was aged 16 years and therefore sexual intercourse with her was unlawful. The charge sheet in question at the particulars section stated that:

“On on diverse dates between the 1st day of January 2019 and 30th January 2019 at around 1200pm in Wundanyi sub-county within Taita Taveta County, he intentionally caused his penis to penetrate the vagina of SWL, a child aged 16 years.”



27. It is clear that the word unlawful was not part of the charge. Section 8(1) of the [Sexual Offences Act](#) under which the charge was brought states that:

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

28. It is clear that the burden on the prosecution is to simply prove that the victim was a child; that there was an act of penetration; and that the person who caused that act of penetration was the accused. After that the only defence that the accused may raise is found at Section 8(5) and (6) of the [Sexual Offences Act](#) which states that:

5. It is a defence to a charge under this section if -

a. it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

b. the accused reasonably believed that the child was over the age of eighteen years.

6. The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the Complainant.

29. It is therefore clear that the word “unlawful” though is usually used in framing of the charges, a practice which we encourage, is not an ingredient of the offence since the act becomes unlawful once the ingredients mentioned above are proved. In contradistinction, Section 3(1) of the [Sexual Offences Act](#) which deals with the offence of rape is in these terms:

1. A person commits the offence termed rape if -

a. he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;

b. the other person does not consent to the penetration; or

c. the consent is obtained by force or by means of threats or intimidation of any kind.

30. That Section clearly imports the words “unlawful” and “consent”. In defilement, consent of the victim is immaterial since the [Sexual Offences Act](#) is meant to protect the vulnerable children from sexual exploitation by adults. The case of [Daniel Nyareru Achoki v Republic](#) (*supra*) which was based on the offence of rape is therefore distinguishable from the instant case. In that case this Court noted that:

“Section 139 of the [Penal Code](#) defines what constitutes a charge of rape. That section is in these terms:-

“Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent if the consent is obtained by force or by any means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representation as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of the felony termed rape.”

This definition makes it clear beyond a peradventure that it is lack of consent on the part of a woman or girl that is at the core of the crime of rape. Indeed, lack of consent is so vital that even if there be an apparent consent obtained by force, personation etc., a charge of rape



would still lie against the ravisher. A fortiori, if there is consent, there cannot be rape. So a charge of rape must allege in its particulars:-

- i. that the act of sexual intercourse was unlawful;
- ii. that the act of sexual intercourse was without the consent of the woman or girl.

We suppose it is the lack of consent which makes the act of carnal knowledge unlawful, but the section uses both expressions, that is, "unlawful" and "without consent" and the prosecution would be well advised to use both. Whether the charge be one of rape under Section 140 or attempted rape under Section 141 of the Penal Code, the particulars must nevertheless state that the attempted unlawful carnal knowledge was without consent of the woman or girl.'

31. It is clear that in that section the words "unlawful" and "consent" were express ingredient of the offence. Accordingly, we dismiss that ground of appeal.
32. The next issue taken by the Appellant was the failure by the prosecution to produce Post Rape Care form (PRC). According to Mr Nyange, without the said form which ought to be used as clinical notes to guide filling in of the P3 form, no basis was laid upon which the P3 form was filled. With due respect, apart from the P3 form, PW4, the Clinical Officer from Wundanyi sub-county hospital produced the treatment notes. We are not aware of any authority, and none was placed before us, for the submission that P3 form can only be based on the material gathered from the PRC. There are many cases where P3 form is relied upon particularly in accident cases where PRC Form is irrelevant. We agree with Ms Fuchaka that PRC is just a medical document that can be used to support an allegation of defilement either solely or with other documents. We reject this ground of appeal as well.
33. The last issue was that in light of the contradictions and inconsistencies in the evidence of the Complainant, her evidence was untrustworthy. Suffice it to say that the Complainant's evidence was considered by the trial court and was found believable. That court had the benefit of seeing the Complainant testify and was satisfied that she was telling the truth. The first appellate court also dismissed the allegations of the inconsistencies which it found inconsequential. We find no reason to disturb the concurrent findings of the two courts below.
34. In the result, we find no merit in this appeal which we hereby dismiss.
35. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF DECEMBER, 2023.

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL



I certify that this is the true copy of the original

DEPUTY REGISTRAR

