



**Guantai v Republic (Criminal Appeal 9 of 2017)
[2022] KECA 1261 (KLR) (18 November 2022) (Judgment)**

Neutral citation: [2022] KECA 1261 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 9 OF 2017
HM OKWENGU, MSA MAKHANDIA & J MOHAMMED, JJA
NOVEMBER 18, 2022**

BETWEEN

MICHAEL KAMORU GUANTAI APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal against the judgment of the High Court of Kenya at Meru (Kiarie Waweru Kiarie, J.) delivered on 20th December, 2016 In HC. CR. A. NO. 114 of 2015)

JUDGMENT

1. The appellant, Michael Kamoru Guantai was charged and convicted of the offence of defilement of a girl aged 7 years contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* by the Principal Magistrate's Court at Tigania, and sentenced to life imprisonment. His first appeal to the High Court was unsuccessful, hence this second appeal.
2. The jurisdiction of this court on a second appeal is well settled. In *Njoroge v Republic* [1982] KLR 388 this court held that:

“On this 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.”
3. It is against that jurisdictional remit that we shall briefly examine the evidence that was tendered before the trial court and re-evaluated by the High Court in reaching the impugned judgment, to place the instant appeal in context.
4. The particulars of the offence were that on September 23, 2006 at [Particulars Withheld] Sub-location in Meru North District within Eastern Province the appellant defiled JG (name withheld), a child aged 7 years.



5. The prosecution called five (5) witnesses to prove its case including the minor complainant. In a nutshell, the complainant testified that on September 23, 2009, she was 7 years old and that at about 6pm she was sent by her mother to the river with her brother AK (PW2) to fetch water. It was her evidence that while there, the appellant held her hand and dragged her to the bush where he defiled her.
6. PW2 testified that on the material date, he accompanied PW1 to fetch water from the river. That they found the appellant at the river and that he pulled PW1 to the bushes. It was PW2's further testimony that he ran to get help and met Joseph Barui (PW3) and Fredrick Gichunge (PW4) on the way. PW2 informed them that the appellant had dragged PW1 to the bushes. That together with PW3 and PW4 they went to the scene and found the appellant lying on PW1 who did not have her clothes on and that the appellant ran away on seeing them. That the appellant was thereafter arrested.
7. PW3 testified that on the material day he was in the company of PW4 when they met PW2 who informed them that the appellant had taken PW1 and wanted to kill her. He testified that they went to the scene and found the appellant lying on PW1. That the appellant had removed his trousers and pants half way to his knees while PW1 did not have her clothes on. That the appellant ran away on seeing PW2, PW3 and PW4. It was his testimony that he recognized the appellant and had known him since childhood. That he and PW4 reported the matter at Mbeu Police Post and the appellant was arrested. In cross examination, PW3 testified that he saw the appellant defiling the complainant and that he had no grudge against the appellant.
8. PW4 testified that on September 23, 2009 he was in the company of his neighbour, PW3. That on their way to check on his cattle they met PW2 who was crying and who informed them that a man had kidnapped PW1. They followed PW2 to the scene where they found the complainant and the appellant on the ground. The appellant was lying on the complainant who did not have her pants on. The appellant ran away when he saw PW2, PW3 and PW4.
9. Martha Njeri (PW5) testified that she was a Clinical Officer at Mbeu District Hospital. That she examined PW1 and noted that she had sustained a human bite on the left cheek; that her hymen was broken; that there was inflammation of the labia; and that there was a whitish discharge on her external genitalia.
10. When placed on his defence, the appellant gave a sworn statement and denied committing the offence. He testified that he had been framed by his stepmother in conspiracy with PW1's father to enable his stepmother disinherit him while he was in custody.
11. The trial court convicted the appellant and sentenced him to life imprisonment. Aggrieved by that decision, the appellant filed a first appeal to the High Court.
12. The High Court (Kiarie Waweru Kiarie, J.) was satisfied that based on the overwhelming evidence on record, the appellant's conviction and sentence were well founded and thereby dismissed the first appeal.
13. Undeterred, the appellant filed an appeal to this Court on the grounds inter alia that the prosecution evidence was riddled with multiple contradictions; that the identification of the appellant by PW1 and PW2 was dock identification and was an afterthought as no report was made with the appellant's names to the police; that the complainant's torn clothes were not exhibited in court; that the identification and recognition of the perpetrator by PW3 and PW4 was from the back and was therefore not reliable; that the appellant's defence was not considered; that there was a grudge between his stepmother and PW1's father; and that vital witnesses such as the investigating officer were not called to testify.



Submissions

14. At the hearing of the appeal, the appellant was unrepresented and relied on his written submissions and did not wish to orally highlight the same. In his written submissions, the appellant submitted that the prosecution case was not proved to the required standard; that the evidence of the prosecution witnesses was riddled with inconsistencies; that the evidence of PW3 and PW4 was unreliable as they saw the perpetrator from the back; that there was a grudge between his stepmother and PW1's father and he was framed to enable his stepmother disinherit him; and that the identification by PW1 was not free from error.
15. Mr. E. Masila, learned counsel for the State had not filed written submissions but was allowed to orally submit. Counsel submitted that there were no material contradictions in the prosecution evidence. That all the prosecution witnesses were reliable and corroborated each other in all material aspects. Counsel emphasized that PW2, PW3 and PW4 all saw the appellant lying on the complainant. That they were village mates and they saw him in the act of defiling the complainant. Counsel urged us not to interfere with the concurrent findings of the two lower courts.
16. Counsel submitted that the appellant's defence was considered by the two courts below and that all witnesses testified in accordance with the *Sexual Offences Act*. Counsel submitted that it was not mandatory for the investigating officer to testify in the circumstances of this case. Counsel urged us to dismiss the appeal for lack of merit.

Determination

17. We have carefully considered the appeal, the submissions, the authorities cited and the law. Sections 8(1) and 8(2) of the *Sexual Offences Act* provide that:
 - “ 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.”
18. The appellant was charged with the offence of defilement. It is now settled law that to warrant conviction for an offence of defilement under section 8(1) of the *Sexual Offences Act*, three elements should be satisfied before conviction of an accused person can arise. These are penetration, apparent age of the victim and identity of the perpetrator. In *John Mutua Munyoki v Republic* [2017] eKLR, this court stated that three critical ingredients need to be proved by the prosecution in a charge of defilement:-
 1. The age of the victim;
 2. Proof of penetration;
 3. Proof of the identity of the perpetrator
19. In the circumstances of this case, the prosecution was required to prove that the victim was below the age of 11 years at the time of the commission of the offence; and that the appellant committed an act which caused penetration with a female person who to his knowledge was a minor. As for the complainant's age, it is common ground that the age of the victim is an essential ingredient of the



offence of defilement and forms an important part of the charge as the prescribed sentence is dependent on the age of the victim. In the case of *Hadson Ali Mwachongo v Republic* [2016] eKLR the court stated that:

“The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim.”

20. In our evaluation, the issues arising for determination in this appeal are whether the charge against the appellant was proved to the required standard; whether there were material contradictions in the evidence that ought to have been resolved in favour of the appellant; and whether the essential witnesses were called to testify.

21. On the question of proof of penetration, it is clear from the record that the complainant’s testimony was corroborated by medical evidence. It was confirmed by the Clinical Officer (PW5) that the medical examination on the complainant revealed that her hymen was torn and that there was inflammation of the labia majora and vagina. PW5 was of the opinion that there was penetration and she produced the P3 form.

22. Regarding identification of the appellant, the complainant identified the appellant as the person who defiled her. It was a case of identification by recognition as the appellant and PW1 lived in the same village. PW2 also recognized the appellant and knew him by name. PW3 and PW4 who were both adults identified the appellant and corroborated the evidence of PW1 and PW2, having found him in the act of defiling the complainant. The 1st appellate court accepted the complainant’s identification of the appellant as the perpetrator reliable. The trial court believed and accepted the complainant’s testimony as truthful and stated as follows:

“The complainant gave clear and consistent evidence and having observed her demeanor, I am satisfied that she spoke the truth.”

23. On the question of the age of the complainant, we find that the same was proved by the evidence of PW1. Further, the P3 form produced in court by PW5 indicated the approximate age of the complainant as 7 years. The treatment card which was also produced in court indicated that the complainant was 7½ years.

24. On the question whether the sufficient number of witnesses were called.

Section 143 of the *Evidence Act* provides:

“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

In the circumstances, we are satisfied that the prosecution called the witnesses required to prove its case.

25. On the failure to call the investigating officer, from the record, the investigating officer did not feature anywhere in the proceedings. As held by this court in *Simiyu v Republic* [2021] eKLR:

“We agree that the investigating officer was not called. Neither did he feature anywhere in the proceedings...Calling such an investigating officer as a witness would not have added value to the prosecution case as such witness would simply have narrated to court the events as narrated by PW2 [the complainant’s mother]. We therefore find no miscarriage of



justice was occasioned to the appellant by the failure to call that witness due to the peculiar circumstances surrounding the commission of the offence as aptly narrated by PW2.”

26. By parity of reasoning, the evidence of PW1, PW2, PW3 and PW4 was provided overwhelming evidence against the appellant and was consistent with the evidence of the clinical officer, PW5. PW3 and PW4 who were both adults and who both recognized the appellant, found him in the act of defiling the complainant. An investigating officer’s evidence would therefore not have added much value in the peculiar circumstances of this case. We therefore find that the appellant was not prejudiced at all by the failure to call the investigating officer.
27. We are satisfied that all the ingredients of the offence of defilement were established to the required standard and that the concurrent findings of the two courts below were based on credible evidence.
28. From the foregoing, we are satisfied that in light of the overwhelming evidence adduced against the appellant, his defence denying having committed the offence was properly rejected. His conviction was therefore sound.
29. Having found that the elements for the offence of defilement have been proved beyond reasonable doubt, we find no basis to interfere with the findings of the trial court as upheld by the High Court. The upshot of the foregoing is that the appeal is accordingly dismissed.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF NOVEMBER, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

