



**Ngaruiya v Republic (Criminal Appeal 28 of 2016)  
[2022] KECA 1345 (KLR) (2 December 2022) (Judgment)**

Neutral citation: [2022] KECA 1345 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CRIMINAL APPEAL 28 OF 2016  
MA WARSAME, F SICHALE & J MOHAMMED, JJA  
DECEMBER 2, 2022**

**BETWEEN**

**DANIEL NJOROGE NGARUIYA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against both the judgment of the High Court at Nyeri  
(Riechi, J.) delivered on 31st May, 2016 in H.C.CR.A. No.13 of 2013)*

**JUDGMENT**

1. Daniel Ngaruiya Njoroge, (the appellant) was charged and convicted by the Chief Magistrate’s Court at Nyeri of the offence of defilement of a girl aged 12 years contrary to section 8(1) as read with section 8 (3) of the *Sexual Offences Act*.
2. The particulars of the offence were that on November 8, 2011 at [Particulars Withheld] in Nyeri district of the then Central Province, the appellant unlawfully caused his penis to penetrate the vagina of HNT (name withheld), a girl aged 12 years.
3. The trial court convicted the appellant and sentenced him to 20 years imprisonment. Aggrieved by the said conviction, the appellant preferred an appeal to the High Court. The High Court (Riechi, J) dismissed the appeal and upheld the conviction and sentence imposed by the trial court.
4. Undeterred, the appellant preferred a second appeal to this court. In his supplementary grounds of appeal, the appellant who was unrepresented, impugned the judgment of the first appellate court on the grounds *inter alia*: that the age of the complainant and penetration were not proved; that the evidence adduced by the prosecution was riddled with inconsistencies which rendered the conviction unsafe; that the learned judge failed to consider his defence; that all the material witnesses to the case did not testify; and that section 169(1) of the *Criminal Procedure Code* (CPC) was not complied with.



5. This being a second appeal, the court is restricted to matters of law only.

Section 361 of the [Criminal Procedure Code](#) provides that:

“ 361.

- (1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section –
- a. on a matter of fact, and severity of sentence is a matter of fact; or
  - b. against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.”

6. Further, in [Njoroge v Republic](#) (1982) KLR 388, this court stated as follows: -

“...On this second appeal, we are only concerned with the 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.’ See also [Karingo v Republic](#) [1982] KLR 213

7. Bearing this jurisdictional remit in mind, we shall briefly revisit the record of appeal to determine whether there are any issues of law that warrant our interference with the impugned judgment of the first appellate court.
8. The prosecution called seven (7) witnesses to prove its case including the minor complainant. In brief, the facts of the prosecution case were that HNT (PW1) the complainant testified that she was a pupil at [Particulars Withheld] Academy in standard 6 and the appellant was her teacher. On November 8, 2011 at around 5pm, she was informed by her brother, SK (name withheld), (PW2), who was in standard 2 at the same school that the appellant was waiting for her at [Particulars Withheld] area. She proceeded there and found the appellant who took her to his house and made her sit on the bed. It was her testimony that the appellant told her to remove her pants which she did and he inserted his finger into her vagina and removed it. He then inserted his penis into her vagina and blocked her mouth to prevent her from screaming throughout the ordeal.
9. It was PW1’s further testimony that after the incident, the appellant opened the door and a woman entered the house. PW1 left and the woman who she thought was the appellant’s wife followed her. The matter was reported to the police station and PW1 was taken to Nyeri Provincial General Hospital where she was examined and treated.
10. PW2 testified that he was PW2’s brother; that on November 8, 2011 at 5pm, the appellant requested him to call PW1. He informed PW1 that he was sent by the appellant to call her and she proceeded to see the appellant. It was his further testimony that one Mama C called their mother who took the complainant to the hospital. PW2 confirmed that the appellant was a teacher at their school.
11. TWK, (PW3) who is PW1 and PW2’s mother testified that she knew the appellant who was the complainant’s teacher. She testified that the complainant was born on October 19, 1999 and produced her birth certificate.



12. MTK (PW4) who is PW1's father testified that his wife, PW3 informed him that PW1 had been defiled by her teacher. That PW1 informed him that she had been defiled by the appellant in his house. Together with PW3 they reported the matter to the police station. PW1 was issued with a P3 form and the appellant was arrested by members of the public.
13. Loyce Wanjiru Muthoni (PW5) testified she was PW1's neighbour and that on November 8, 2011 at 5.30pm, PW1 was taken to her house by a lady. PW5 enquired from PW1 what had transpired whereupon PW1 started crying and informed her that she had been defiled by her teacher, the appellant. That she called PW3 who arrived with PW4 and PW1 informed them that she had been defiled. PW1 led them to the house where she had been defiled.
14. Dr Waweru James (PW6) from Nyeri Provincial General Hospital testified that he had worked with Dr Wambui Njoroge for 2 years and was familiar with her handwriting and signature. That Dr Njoroge was away on duty. That on November 9, 2011, Dr Njoroge filled a P3 form in respect of the complainant. That the P3 form indicated that the complainant's hymen was broken and she had bruises in the vagina, there were cells and spermatozoa and few red blood cells. It was Dr Njoroge's opinion that the complainant was 12 years old.
15. Sgt Elizabeth Nyaga (PW7) testified that on November 8, 2022, at about 9.14am, the complainant and her parents went to the Police Station and reported that that the appellant had been defiled by her teacher. It was her further testimony that she issued the complainant with a P3 form and that she sought medical attention.
16. In his defence, the appellant gave sworn evidence and did not call any witnesses. It was his testimony that on November 8, 2011, he was at [Particulars Withheld] Academy throughout the day and did not leave the school at all. That he left the school on November 9, 2011 when he received a call from PW3 requesting him to see her in Nyeri. He testified that he went to Nyeri as directed and found a lady in the company of the complainant's parents. That he was wrestled down by people and taken to the police station on allegation that he had defiled the complainant. That the lady who accompanied the complainant's parents was his former girlfriend with whom he had separated three (3) months prior.

### **Submissions**

17. The appeal was heard virtually. The appellant who was unrepresented relied on his written submissions and urged the court to set aside the conviction and sentence.
18. In his written submissions, the appellant submitted that the prosecution evidence was riddled with inconsistencies and contradictions which included whether PW1 was facing the ceiling or sideways during the ordeal and that it was not clear what was inserted in her vagina to prove that there was penetration. The appellant also faulted the first appellate court for failing to sign the judgment thereby failing to comply with section 169(1) of the [Criminal Procedure Code](#).
19. In opposing the appeal, learned counsel for the state, Ms Christine Nanjala had filed written submissions which she briefly highlighted. Counsel submitted that all the ingredients of the offence of defilement were proved. That the age of the complainant was proved by PW3 who testified that the complainant was 12 years and produced a birth certificate. That the medical doctor observed that the complainant was 12 years old and had a broken hymen and bruises in the vagina which was noted in the P3 form.
20. Counsel further submitted that penetration was proved by the evidence of the complainant and the examining doctor. Further that the identity of the perpetrator was proved by the evidence of PW1



and PW2 who knew the appellant as their teacher and it was therefore a case of identification by recognition.

21. Counsel further submitted that all the material witnesses testified in accordance with section 143 of the *Evidence Act*. That the appellant's defence was considered and disregarded in view of the overwhelming evidence adduced by the prosecution.
22. Counsel further submitted that section 169(1) of the *Criminal Procedure Code* was complied with and the contents of the judgment met the requirements of section 169(1) of the *Criminal Procedure Code*. That the points of determination were made as well as the reasons of making such a determination. It was counsel's submission that this made the judgment valid in all aspects of the law.
23. On contradictions and inconsistencies, counsel submitted that there were no contradictions and inconsistencies and if they were, they were minor and do not go to the root of the prosecution case. Those minor inconsistencies (if any), were satisfactorily explained which show that the prosecution witnesses were truthful. Counsel urged us to dismiss the appeal for lack of merit.

### **Determination**

24. We have carefully considered the record of appeal, the submissions, the authorities cited and the law. 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.

25. In the circumstances of this case, the prosecution was required to prove that the victim was between the age of 12 and 15 years of age 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.”

26. Sections 8(1) and 8(3) of the *Sexual Offences Act* provide that:

- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement...
- (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”



27. In our evaluation, the issues for determination in this appeal are whether the prosecution proved the case to the required standard; whether the appellant's conviction was vitiated by failure to call necessary witnesses; and whether the impugned judgment complied with section 169 of the *Criminal Procedure Code*.
28. In the circumstances of this case, to prove the charge of defilement, the prosecution was required to establish that there was penetration; that the appellant was positively identified as the perpetrator; and that the complainant was a child between the age of 12 and 15 years.
29. Section 124 of the *Evidence Act* provides as follows:
- “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.”
30. We are satisfied with the findings of the two courts below regarding proof of penetration. The two courts below were both satisfied that the complainant was telling the truth about the fact of penetration. Further, there was corroboration of the complainant's evidence through the medical evidence produced by PW6, the medical doctor, which confirmed that the complainant's hymen was broken and that the vagina had bruises and that she had been defiled.
31. In the instant appeal, the appellant was identified by the complainant and PW2 through recognition. Both courts below were satisfied that the complainant was telling the truth and relied on the complainant's evidence of identification. We find that there was sufficient evidence tendered by the prosecution to prove this fact. PW3, the complainant's mother testified that the complainant was 12 years at the material time and produced a birth certificate indicating that the complainant was born on October 19, 1999. Further, PW6 the medical doctor produced a P3 form which indicated that the complainant was 12 years old.
32. We are therefore satisfied with the findings of the two courts below on the complainant's age. We find that all the ingredients of the offence of defilement were present and proved by the prosecution to the required standard.
33. On the appellant's complaint that there were inconsistencies in the prosecution evidence in that the complainant's evidence was inconstant on whether a finger or penis was used to penetrate her vagina or whether she was facing the ceiling.
34. In *Joseph Maina Mwangi v R*, criminal appeal No 73 of 1999 held inter alia that in any trial, there is bound to be discrepancies and that an appellate court in considering those discrepancies must be guided by the wording of section 382 of the *Criminal Procedure Code* to determine whether such discrepancies or contradictions are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence. The role of an appellate court when an issue of alleged existence of discrepancies, contradictions and inconsistencies is alleged to exist in the prosecution case is to reconcile and determine their impact on the prosecution case. See *Vincent Kasyula Kangoo v Republic* - Nairobi CR A No 98 of 2014.



- 35. The contradictions and discrepancies complained of by the appellant related to whether the appellant used his finger or penis to defile the complainant. Further, whether the complainant lay on her side or faced the ceiling during the ordeal. We find that the discrepancies were not material and that all the ingredients of the offence of defilement were proved.
- 36. On the question whether the material 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.”
- 37. In the circumstances, we are satisfied that the prosecution called the essential and sufficient number of witnesses required to prove its case.
- 38. On the issue whether the judgment delivered by the 1<sup>st</sup> appellate court complied with the provisions of section 169 (1) of the *Criminal Procedure Code* we find that the judgment contained points of determination which were reasoned out, a finding and determination were made and the reasons for making such determination.
- 39. On the contention that the impugned judgment was invalid for lack of signature, we have perused the original High Court file and confirm that the judgment by the 1<sup>st</sup> appellate court was signed and dated. In the circumstances, we find that the impugned judgment complied with the provisions of section 169 (1) of the *Criminal Procedure Code*.
- 40. 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.
- 41. Having found that the elements for the offence of defilement were 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 2<sup>ND</sup> DAY OF DECEMBER, 2022.**

**M. WARSAME**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

*I certify that this is a True copy of the original*

*Signed*

**DEPUTY REGISTRAR**

