



**P (Not His Real Name) v Republic (Criminal Appeal 106 of 2019)
[2021] KECA 357 (KLR) (17 December 2021) (Judgment)**

Neutral citation: [2021] KECA 357 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CRIMINAL APPEAL 106 OF 2019
HM OKWENGU, MSA MAKHANDIA & F SICHALE, JJA
DECEMBER 17, 2021**

BETWEEN

P (NOT HIS REAL NAME) APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the decision of the High Court of Kenya at Eldoret
(Sewe, J.) delivered on 22nd November, 2018 in HC.CR.C NO. 46 OF 2011)*

JUDGMENT

- [1] The appellant before us, whose real name we have withheld and whom for the purpose of this appeal we shall refer to as P, is husband to a woman whose real name we have also withheld, but for the purpose of this appeal refer to as J. Together they have several children, including a girl, who was at the material time aged 6 years and whom for the purpose of this appeal, we shall refer to as L.
- [2] On 25th July, 2010, J left her house to go to the market to buy clothes for her children. She left the children, including L with their father P. J came back home at around 1.00 p.m. Her daughter L was not at home and J learnt that L was at the house of her uncle, one I. When L came back, J noticed that her daughter was gloomy and did not appear excited by the clothing that she had bought her. The next day L went to school and came back. It was then that J received information from her brother in law I, implicating P of sexually assaulting L.
- [3] J took L to one Margaret, who deals with issues of children, who interviewed L and then escorted her together with J to Lumani dispensary. L was then taken to Lumakanda police station where, upon interrogation she implicated P as having sexually assaulted her. L was issued with a P3 form and referred to Lugari District Hospital where she was examined by Dr. Ambundo who found that her hymen was torn. PC Kevina later recorded statements of the witnesses including L who explained that her father had taken her into a maize plantation where he removed her skirt and underpants, pushed her to the



ground and put his 'thing' inside hers, after which her father told her to go and take a bath. On the material day, L did not inform her mother what happened but informed her the next day after she questioned her.

- [4] L gave unsworn evidence during the trial after a voire dire examination from which the trial magistrate formed the impression that although L was intelligent and understood the importance of speaking the truth, she did not understand the nature of an oath.
- [5] In his defence, P denied having sexually violated his daughter. He blamed J for falsely accusing him. He called two witnesses who were his mother and sister, both of whom maintained that J had fabricated the story.
- [6] In his judgment the trial magistrate found that L was 6 years old, and that the evidence adduced established that there was penetration of her genital organ because her hymen was torn. The trial magistrate accepted L as a truthful witness and believed her evidence that it was P who violated her. He therefore convicted P of the offence of defilement and sentenced him to serve life imprisonment.
- [7] appealed to the High Court against his conviction and sentence. The High Court (Sewe, J) upheld the finding of the trial magistrate and dismissed P's appeal against both conviction and sentence. P is now before us in this second appeal in which he has raised 6 grounds.
- [8] In a nutshell, P faults the learned Judge for: dismissing his appeal without finding that section 150 of the *Criminal Procedure Code* was not fully complied with; failing to note that the trial court conducted irregular proceedings that were unfair and contrary to Article 25(c) of the *Constitution*; relying on circumstantial evidence to dismiss his appeal when the elements of circumstantial evidence were not fulfilled; upholding his conviction and sentence when the ingredients of the offence of defilement were not proved; dismissing his appeal and relying on the evidence of L without giving proper reason as to why he believed her evidence; and in dismissing his appeal without finding that proper consideration was not given to the plausible defence of alibi that he had raised.
- [9] In support of his appeal, P filed written submissions in which he contended that the evidence that was adduced against him did not support the charge of defilement that was laid against him. He took issue with the charge being brought under section 8(1)(2) of the *Sexual Offences Act* (SOA), while in reality, L is his blood daughter and he should have been charged under section 20(1) of the SOA for incest, under which the punishment is 10 years' imprisonment, as opposed to the punishment under section 8(1) & (2) of the SOA, which is life imprisonment. P also argued that the prosecution did not prove the case against him to the required standard as no tangible evidence was adduced to prove penetration, and the broken hymen did not constitute a sufficient basis for the conclusion that there was penetration. He maintained that any attempt to penetrate the private parts of L, would have resulted in excruciating pain.
- [10] In addition, P submitted that I who is alleged to have found him committing the offence was an important eye witness who should have been bonded to testify. Relying on the case of *Bukenya & Others vs Uganda [1972] EA 549*, and *Keter vs Republic [2007] 1EA 135*, P maintained that the prosecution had the duty to call all witnesses whose evidence was necessary to establish the charge that was preferred against him. He submitted that he was denied his right to a fair trial under Article 50 of the Constitution as he was not supplied with the prosecution documentary evidence.
- [11] Finally, P maintained that the sentence imposed upon him was harsh, excessive and mandatory in nature contrary to the Supreme Court decision in *Francis Kariako Muruatetu & Anor v Republic & Others [2017] eKLR* as applied in *Dismus Wafula Kilwake vs Republic [2018] eKLR*, where this Court



held, inter alia, that the provisions of section 8 of the SOA must be interpreted in a way that does not take away the discretion of the court in sentencing.

- [12] Ms. C. Muhonja a prosecuting counsel who appeared for the Director of Public Prosecutions (respondent), filed written submissions opposing the appeal. Briefly she submitted that Section 150 of the Criminal Procedure Code, is a discretionary provision that the court may use to summon any person as a witness, and that the trial magistrate was clear on why I did not testify. Moreover, notwithstanding the absence of I's evidence, the court was satisfied with the testimony of L and believed her evidence that it was P who had defiled her. Ms. Muhonja submitted that all the ingredients of the offence of defilement, that is, the identity of the perpetrator, penetration of L's genitalia, and proof of L's age, were established.
- [13] Counsel argued that in accordance with section 124 of the *Evidence Act*, the trial magistrate in his judgment stated that L was a truthful witness who had given a vivid account of how her father defiled her. Counsel urged the Court to dismiss the appeal in its entirety as it lacked merit.
- [14] We have considered this appeal, and the contending submissions. This being a second appeal, our jurisdiction is limited by section 361 of the Criminal Procedure Code, to considering matters of law only. We reiterate what this Court has stated before, that, the Court will only interfere with the concurrent findings of facts made by the two lower courts, if it is established that the findings were not based on evidence or were based on a misapprehension of the evidence or that it is apparent that no reasonable tribunal could have reached that conclusion. (*M'Riungu vs Republic [1983] KLR 455*).
- [15] was charged under section 8(1) of the SOA, which provides for the offence of defilement where the victim is a child as defined under the *Children Act* (that is under 18 years). In his submissions, P has argued that L, the child who was allegedly defiled, being his own daughter, he ought to have been charged under section 20(1) of SOA. That section deals with incest by male persons and states as follows:

“Any male person who commits an indecent act or an act which causes penetration with a female person, who to his knowledge is his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than 10 years:

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of 18 years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with a consent of the female person.”

- [16] P's argument appears to be that he was prejudiced by being charged under section 8(1) & (2) of the SOA which, in his view, provided for a much higher sentence than section 20(1) of the same Act. P's argument is unfortunately misconceived as it does not take into account the proviso to section 20(1) which makes it clear that if the minor is under 18 years, then the offender is liable to life imprisonment, and this is the same sentence provided for under section 8(2) of the SOA where the offence of defilement is committed with a child aged 11 years or less, and in this case L was said to be 6 years old. That being the position, nothing turns on that argument as P did not suffer any prejudice.
- [17] Section 8(1) of SOA provides that any person who commits an act which causes penetration with a child, is guilty of an offence termed defilement. The main ingredients of the offence of defilement that



require proof are therefore, the act causing penetration, and the victim being a child. Penetration is defined in section 2(1) of the SOA as:

“The partial or complete insertion of the genital organs of a person into the genital organ of another person”

- [18] claimed that the proceedings against him were irregular, unfair and contrary to Article 25(c) and 50 of the Constitution, as he was not given statements of prosecution witnesses before the trial, and the court also failed to call a crucial witness who was said to be an eye witness. We have perused the proceedings of the trial court, and nowhere do we find any request by P for witness statements to be availed to him.
- [19] During the trial, P apparently understood the evidence that was adduced against him and was able to cross-examine each of witnesses including L. The prosecution chose not to call P’s brother who was alleged to have witnessed the commission of the offence. The trial magistrate appreciated and recorded why it was difficult for this witness to testify. Moreover, it was open to P to call the witness as a defence witness, which P did not do. On our examination of the record of both the trial court and the first appellate court, we find no evidence in support of P’s allegation that he was denied his right to a fair trial.
- [20] The next issues that we wish to address are: whether in upholding P’s conviction, the learned Judge of the High Court properly reconsidered and re-evaluated the evidence; whether the learned Judge was right in finding that the ingredients of the offence of defilement, that is, penetration and the victim being a child, were established; and whether P was properly identified as the person who committed the act causing penetration.
- [21] In this case, the two lower courts made concurrent findings that L a six-year-old was sexually violated and that she identified P as the person who violated her. We note that in re-evaluating the evidence, the learned Judge relied entirely on L’s evidence with regard to the identification of her assailant and the trial court’s impression on her credibility.
- [22] In her judgment, the learned Judge referred to section 124 of the SOA that allows a court in a criminal case involving a sexual offence, to convict an accused person on the evidence of the victim if satisfied that the victim is telling the truth, stating as follows:

“...the question is what probative value was given by the trial court to the evidence of the complainant and what impression did she create on the mind of the court in terms of her credibility as a witness? In his judgement, the learned trial magistrate had the following to say in this regard:

‘the complainant minor appeared to be a truthful witness and she narrated a vivid account of how her father had defiled her and threatened her...The complainant appeared to me to be an intelligent girl and she was not even shaken on cross-examination....I am satisfied with the complainant’s testimony that the accused herein who is her father, had defiled her. I herein warn myself, of the danger of convicting the accused on the evidence of the complainant in the absence of an eye witness. Indeed, the complainant’s testimony was confirmed by that of her mother and a medical doctor that indeed she had been defiled...’

It is manifest from the foregoing that the learned magistrate properly directed and cautioned himself as appropriate, and was of the view that the complainant was trustworthy and that her evidence was credible.”



- [23] We are satisfied from the above quote, that the learned Judge properly addressed the evidence and came to the conclusion that L’s evidence was credible and sufficient to sustain the conviction of P. We have no reason to differ with the concurrent findings of the two lower courts in regard to L’s credibility. There was ample evidence from her mother J, Margaret and the clinical officer that she was defiled. As stated, penetration includes partial insertion of the perpetrators genital organs. In this case, although there was no bruise on L’s genital organ, the doctor confirmed that her hymen was torn, and that was sufficient evidence of penetration of her vagina.
- [24] Regarding identification, it is trite law that where the evidence rests on one single witness, the court must cautiously test and weigh the evidence before accepting it. This was reiterated in *Roria v Republic* [1967] EA 583, where the former Court of Appeal for East Africa noted that a conviction resting entirely on identification by one witness, requires the court to satisfy itself that it is safe to act on such identification. The Court followed *Abdalla bin Wendo & Anor vs Republic* [1953] 20 EACA 166 where it was stated:
- “Subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness, but this rule does not lessen the need for testing with the greatest care, the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”
- [25] In this case, L identified P her own father who was well known to her as her assailant. The offence took place in broad daylight, so the issue of a mistaken identification does not arise. Like the two lower courts, we believe that L spoke the truth, that it was her father who defiled her. Needless to state that P’s defence was properly rejected.
- [26] L stated her age as six years and this was confirmed by her mother who gave her date of birth as 12th November, 2003 and produced a clinic card which also gave L’s date of birth as 12th November, 2003. We are therefore satisfied that L was a child under the age of 11 years.
- [27] In light of the above, we have no hesitation in coming to the conclusion that P was properly convicted for the offence of defilement, as there was overwhelming evidence against him. The learned Judge was therefore right in dismissing his appeal.
- [28] As regards the appeal against sentence, under section 361(1) of the Criminal Procedure Code, this Court’s jurisdiction is limited to considering an appeal on matters of law only, and severity of sentence is a matter of fact, not law. The learned Judge observed that P’s sentence was not only lawful, but deserved. Given the circumstances in which P violated his own six-year-old daughter, we cannot fault the learned Judge.
- [29] For all the aforesaid reasons, we come to the conclusion that this appeal is for dismissal. Accordingly, it is dismissed in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021.

HANNAH OKWENGU

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JUDGE OF APPEAL



ASIKE MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

