



**Sekel v Republic (Criminal Appeal 27 of 2016)
[2021] KECA 313 (KLR) (17 December 2021) (Judgment)**

Neutral citation: [2021] KECA 313 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 27 OF 2016
DK MUSINGA, MA WARSAME & F SICHALE, JJA
DECEMBER 17, 2021**

BETWEEN

JOSEPH LESINIK SEKEL APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Nyeri
(S. N. Riechi, J.) dated 21st April 2016 in HC.CR. A No. 100 of 2014)*

JUDGMENT

1. Joseph Lesinik Sekel, the appellant, was convicted by the Chief Magistrates' Court at Nanyuki of defilement contrary to section 8(1) (2) of the *Sexual Offences Act* and sentenced to serve life imprisonment.
2. Dissatisfied with both the conviction and sentence, the appellant preferred an appeal to the High Court raising five (5) grounds of appeal in his amended petition of appeal. The appellant faulted the trial magistrate for convicting him when the offence had not been proved beyond reasonable doubt, adding that the magistrate relied on contradictory and inconsistent evidence adduced by the respondent; that his defence was disregarded without proper reason; that the matter had been poorly investigated; and finally, that the complainant's mother instituted the case against him for the reason that the appellant had failed to pay her the money she had demanded for.
3. The first appellate court (Riechi, J.) found that the appellant was properly convicted and dismissed the appeal and upheld both the conviction and sentence by the trial court.
4. Aggrieved by the said decision, the appellant proffered a second appeal to this Court challenging both the conviction and sentence as upheld by the High Court. The appellant raised five (5) grounds of appeal in his petition of appeal and later filed amended grounds of appeal raising four (4) grounds, arguing that the learned judge erred in law in failing to consider that the key elements to sustain a



conviction for defilement were not proved; that the judge failed to appreciate that there were material contradictions and discrepancies in the prosecution case; that the learned judge failed to appreciate that there existed a grudge between the complainant's mother and the appellant; and lastly, that the prosecution's case was entirely based on suspicion and fell below the required standard of proof as required by the law in criminal cases.

5. Our role being that of a second appellate court, we are required to consider only matters of law. This Court cannot interfere with the decision of the two courts below on facts unless it is revealed that the two courts considered matters that they ought not to have considered or, that they failed to consider matters they should have taken into account, or that looking at the entire evidence on record as adduced they were plainly wrong in their decision. See *Karani v Republic* [2010]1 KLR 73.
6. Before we delve into this appeal, it is proper to lay down a brief background of the case. The prosecution's case was that on 23rd June 2014 the appellant defiled R.A, aged 3 years old. R.L. (PW1), the mother of the complainant, testified that she had asked for permission from her place of work to go and take tea to her children, R.A (the complainant) and W.E., who were 3½ and 7 years respectively. When she reached her home she found the complainant who told her that the appellant had bought her some cake and that he had also removed her pant and told her to sit on him and he did bad things to her. PW1 escorted the complainant to St. Joseph Dispensary and later reported the matter to Ngobit Police Station and the accused was arrested. The same was confirmed by PW6; No. 43832 P.C Elias Ladubai, who booked in the report. It was PW1's evidence that they had lived with the appellant for three years and her children referred to the appellant as "Kuka" meaning, grandfather. PW1 further testified that the complainant was examined at Nanyuki District Hospital and was put on treatment and that they were issued with a P3 form. She was also issued with treatment notes from St. Joseph Dispensary. In conclusion, PW1 stated that she had no grudge with the appellant. On cross examination, PW1 denied ever being the wife to the appellant and also denied having asked the appellant for money.
7. Monica Wairimu Kanyungu (PW2) and Elizabeth Wangechi Muriuki (PW3) testified of being told by PW1 that the complainant had been defiled by the appellant.
8. A voir dire examination was conducted on the minor complainant, PW4, and thereafter she gave unsworn testimony for reason that due to her age it was unlikely that she knew the significance of an oath. PW4 said that she was 3 years old and that she lived with her mother (PW1), father and brother. PW4 testified that the appellant is known to her and that they refer to him as Kuka. She proceeded to state that while she was looking at camels that had come near their home, the appellant told her to take him to their house. This was also stated by PW3 when she testified of having seen PW4 in the company of the appellant walking towards the home of PW1 and they entered PW1's house. PW4 further testified that while in the house the appellant "brushed the thing he uses to urinate with on her thing that she uses to urinate with." It was her testimony that she felt pain and the appellant gave her five shillings (Kshs. 5/=) and told her to buy sweets then he went away. Her mother was not at home when the incident occurred and when she returned home PW4 told her what the appellant had done to her. PW1 took her to the hospital where she was given some medicine and later they went to the police station.
9. Dr. Isaac Naliura, (PW5), testified on behalf of Dr. Omeida and produced a P3 form filed and signed by Dr. Omeida. PW5 noted that PW4 had already received treatment for post-rape care. He stated that PW4 had injuries to her outer part of the vagina; that there was neither evidence of penetration nor evidence of any infection or spermatozoa in her vagina.
10. The instant appeal was canvassed by way of written submissions with minimal oral highlighting made during the hearing. Relying on the case of *Fappyton Mutuku Ngui v. Republic, High Court Criminal*



- Appeal No. 296 of 2010, the appellant submitted that the offence of defilement was not proved as required by law; that the respondent failed to prove penile penetration; that the evidence adduced by Dr. Isaac (PW5) on behalf of Dr. Omeida who had examined the complainant exonerated the appellant; and that the issue of inflammation of the vagina (labia minora) was not properly ventilated as the same could have been caused by an infection or injury and not necessarily penile penetration.
11. The appellant further submitted that there was contradiction on both the date and time of occurrence of the alleged defilement. Whereas the charge sheet indicated that the incident occurred on 23rd June 2014 at 9.30 a.m., PW1 testified that it occurred on 23rd March 2014 at 9.00 a.m. In addition, PW1 testified that their neighbours witnessed the appellant defile the complainant but that was contradicted by PW3, who testified that she did not see the appellant defile PW4. He further submitted that the testimony of PW1 that they had lived with the appellant for three years negates any ill motive for the appellant to enter PW1's house with PW4 as misperceived by PW3 when she testified that she saw the appellant and PW4 enter PW1's house. The appellant submitted that there was ill motive on the part of PW1 who did not check on PW4 to ascertain that she had been defiled but only rushed her to the hospital and later reported to the police three days thereafter. He further submitted that he was married to PW1, and they lived together.
 12. Relying on the case of John Mutua Musyoki v. R [2017] eKLR, Josiah Afuna Angulu v. Republic, Criminal Appeal No. 277 of 2006 and John Nyaga Njuki & 4 Others v. Republic [2002] eKLR the appellant argued that the occasioned contradiction and discrepancies are of such a nature as would create doubt as to the guilt of the appellant and urged the Court to find the same and to hold that the inconsistencies, discrepancies and contradictions were capable of unsettling the judgment by the trial court.
 13. On grounds that there existed bad blood between himself and PW1, the appellant argued that they were cohabiting with PW1 and as usual, when people are living together disagreements are inevitable. He argued that the trial court and the first appellate court's assumption that the alleged defilement must have occurred was misplaced. Relying on the case of J.O.O v. R [2015] eKLR, the appellant submitted that the court should be slow in making assumptions not supported by facts adduced in court.
 14. Ms. Christine Nanjala, Senior Prosecution Counsel, relied on her written submissions and reiterated that the appellant's conviction and sentence that were affirmed by the first appellate court were proper in law. In the written submissions, the respondent stated that the trial court relied on the following indicators in making its finding in respect to penetration: the definition of penetration as defined under section 2 of the Sexual Offences Act; the testimony of PW4; and the treatment notes which indicated that PW4 had injuries on the outer part of her vagina. Relying on the case of Mark Oiruri Mose v. Republic [2013] eKLR, the Senior Prosecution Counsel argued that the first appellate court held that the trial court rightly found that there was penetration and that the evidence produced during the trial clearly proved the element of penetration to the required standard.
 15. We have carefully considered the entire record of appeal as well as the written and oral submissions by the parties and the cited authorities. It is well established that for a conviction of defilement to be sustained, the prosecution must establish the age of the complainant; penetration of the complainant's genital organ; and the assailant must be positively identified.
 16. In this appeal what has been greatly contested is the element of penetration. Whereas the appellant argued that penetration was not proved, the prosecution on the other hand maintained that



penetration was proved beyond reasonable doubt. Penetration under section 2(1) of the [Sexual Offences Act](#) is defined as follows:

“Penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;”

17. Going by the evidence of PW4 who was the complainant, she expressly detailed what transpired. It was her evidence that the appellant requested her to take him to her parent’ house; that they entered the house and while inside the house, the appellant “brushed the thing he uses to urinate on the thing I use to urinate.” She further explained that she felt pain. Later the appellant gave her five shillings and told her to go buy sweets. PW4 also stated that when her mother arrived and inquired where she had obtained money from, she told her that the appellant had given her and added that “Joseph had done bad things to me.” This narrative was not rebutted by the appellant.
18. PW5 in his testimony stated that PW4 had injuries to the outer part of the vagina. On the P3 form produced by PW5 it showed no physical injuries or abnormality in the outer genitalia and anus, and noted that the hymen was intact. However, it was also noted that PW4 had inflammation of labia minora- “pair of thin cutaneous folds that form part of the vulva, external female genitalia- with whitish discharge.” It was PW4’s evidence that she felt pain after the act of the appellant that of rubbing his genital in hers.
19. In the case of [Erick Onyango Ondeng’ v. Republic \[2014\] eKLR](#), this Court held that it is not necessary that the hymen be broken; even partial penetration of the female genital by male genital will suffice to constitute the offence of defilement. The Court further quoted the Uganda Court of Appeal case of [Twehangane Alfred v. Uganda, Crim. App. No. 139 of 2001, \[2003\] UGCA, 6](#) where the court shared the same sentiments as follows;

“In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.”
20. In [George Owiti Raya v. Republic \[2013\] eKLR](#) it was held that there can be penetration without going past the hymen.
21. On the appellant’s argument that there were no spermatozoa found on PW4’s vagina, we agree with the finding of this Court in the case of [Mark Oiruri Mose v. Republic \(supra\)](#) that all that the prosecution needs to establish for a conviction of defilement is not the presence of spermatozoa, but penetration of the complainant’s genitalia with the appellant’s penis and nothing more.
22. In [Patrick Gituma v. Republic \[2016\] eKLR](#), this Court held as follows:

“...We reiterate here that the absence of spermatozoa in the genitalia, per se, does not negate the act of defilement, particularly if there is other credible medical evidence to show that there was actually intrusion in the complainant’s genitalia. In this case, there was more than enough evidence to show that the child has been defiled. She has laceration in her vagina and she was also bleeding. There is no requirement in law that blood stains or even spermatozoa are necessary ingredients to prove defilement.” See also [Boaz Kipleting Kemboi Vs. Republic \(2016\) eKLR](#).
23. Regarding the appellant’s argument that he was not taken for any medical examination, on the basis of this Court’s holding in [Patrick Gituma case \(supra\)](#), we reiterate there is also no legal requirement that an accused person in a case of this nature ought to be subjected to a medical examination or tests. That



may be desirable in certain instances, but its absence cannot vitiate an otherwise sound conviction. In *Geoffrey Kionji v. Republic, Criminal Appeal No. 270 of 2010*, this Court held:

“Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80, Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”

24. From the evidence of PW4 which the trial court believed and which was corroborated by the evidence of PW5, we find that penetration was proved beyond reasonable any doubt.
25. We shall not entertain the other three (3) grounds of appeal because they raise issues of facts which were properly handled by the two courts below. Consequently, we find this appeal lacking in merit and dismiss it in its entirety.

Dated and delivered at Nairobi this 17th day of December, 2021.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

M. WARSAME

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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

DEPUTY REGISTRAR

