



REPUBLIC OF KENYA



**Gitonga v Republic (Criminal Appeal E046 of 2021)
[2024] KEHC 530 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 530 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL E046 OF 2021
AK NDUNG’U, J
JANUARY 31, 2024**

BETWEEN

STEPHEN NDIRITU GITONGA APPELLANT

AND

REPUBLIC RESPONDENT

*(From original Conviction and Sentence in Nanyuki
CM Sexual Offences Case No 69 of 2020– L. Mutai, CM)*

JUDGMENT

1. Stephen Ndiritu Gitonga (hereinafter the Appellant) was convicted after trial of Defilement contrary to Section 8(1) as read with Section 8 (4) of the *Sexual Offences Act*, No 3 of 2006. The particulars were that on diverse dates between 24th and 26th day of November, 2020 in Kieni West within Nyeri County, intentionally caused his genital organ namely penis to penetrate the vagina of GMN a child aged 16 years. On 30/06/2021, he was sentenced to ten (10) years imprisonment.
2. Being dissatisfied with the conviction and the sentence, the Appellant appealed to this court challenging the conviction and the sentence *vide* ‘a supplementary amended grounds of appeal’ filed together with his submissions. The challenged is based on the following grounds;
 - i. Learned magistrate erred by not appreciating that identity of the perpetrator was not conclusively proved.
 - ii. That the medical evidence did not prove penetration of minor complainant on the material dates.
 - iii. The learned magistrate failed to note that there was no circumstantial evidence leading to him as the perpetrator.



- iv. The learned magistrate failed to warn herself on danger of relying on single witness evidence which was not corroborated by medical evidence.
 - v. His conviction was based on zero investigations from the investigating officer.
 - vi. The learned magistrate failed to appreciate that the exhibits (clothes) did not create a nexus to link him to the offence.
 - vii. The learned magistrate convicted him without considering his defence and without giving cogent reasons why his defence was rejected.
 - viii. The learned magistrate failed to consider the time he had spent in custody while sentencing him.
 - ix. The case was not proved to the required standard by not calling the call data evidence from his phone on purported call to PW2's father.
 - x. There was no independent witness who saw him and PW2 together on the material dates despite claims of shopping together.
3. The appeal was canvassed by way of written submissions. In his written submissions, the Appellant argued that there was no evidence that the complainant knew him as she testified that she met him on her way from church and he lured her to his house. That at her age it was strange how she would be lured by a total stranger. That the allegation that he called her father was not investigated as the investigating officer was required to produce the call data to substantiate the allegation. Further, the complainant's evidence was not logical as she testified that on the next day, she accompanied the Appellant to the market to buy clothes which beats logic why he would accompany her to the market after the ordeal without fear of being lynched by mob. It also beats logic why the complainant did not run away which shows that the complainant was lying.
 4. As to penetration, he submitted that the doctor testified that the hymen was absent but did not clarify whether it was freshly broken or it was an old scar. She testified that there was no sign of trauma and all was well and her prognosis was that PW2 was not defiled on the material dates and therefore, the medical evidence exonerated him. That PW2 evidence that she bled during the ordeal was not corroborated by medical evidence and if at all penetration was forceful as described by PW2, there would have been presence of lacerations, epithelia and pus cells.
 5. He submitted that evidence of a single witness should be treated with caution and especially in the instant case where the complainant was a person of questionable character due to the fact that she lied to PW3 that she was in Nakuru. That the witness whom the court wishes to rely on her testimony should not give the impression that she is not a straight forward person. Therefore, the mere fact that nobody saw him accompanying the complainant made the entire testimony weak. Further, that the circumstantial evidence was weak to link him to the commission of the crime as there was no evidence that he was seen with the complainant, medical evidence did not support penetration, no investigations was carried out, no indication on who reported that the complainant had disappeared, his mobile phone was not subjected to forensic examination if at all the complainant used his mobile phone and that no neighbour testified to say that the complainant was at his house.
 6. On the clothes that were produced, he submitted that the same did not form a nexus to link him to the offence as no receipt was produced, no trader was called to testify and no clothes were recovered from his house. That the prosecution failed to prove that the complainant was defiled hence his defence was viable against the weak prosecution's case that was founded on suspicion. Further, the court failed to consider the time he spent on remand in line with section 333(2) of the [Criminal Procedure Code](#).



7. In rejoinder, the Respondent's counsel submitted that the prosecution case was proved beyond reasonable doubt as the court considered the Appellant's defence and observed that it was a mere denial which did not dislodge the prosecution's case. The age of the victim was sufficiently proved through her birth certificate. Identification of the Appellant was also sufficiently proved as the complainant testified she met the Appellant who held her in his house for two days and as such, there could be no doubt that the complainant was able to identify the Appellant. As to penetration, she submitted that the evidence of the complainant was corroborated by the medical evidence. As to sentence, counsel submitted that sentencing is at the discretion of the trial court and the Appellant did not demonstrate any reason for this court to interfere with that discretion. Further, the trial court considered the Appellant's mitigation and found that a deterrent sentence was called for. The sentence imposed was not only lenient but lawful.
8. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See *Okeno v Republic* [1972] EA 32.
9. I have read, considered and re-evaluated the evidence as recorded by the trial court. In doing so, I have taken cognizance that I neither saw nor heard the witnesses testify and have given due allowance for that fact. I have taken into account the submissions on record and the authorities cited without necessarily rehashing them here.
10. In summary, evidence before the trial court was as follows. PW1, the clinical officer testified that she examined the complainant and her finding was that he external genitalia was normal, the hymen was absent but the scar was old and her conclusion was that there was no sign of trauma. All was well. She produced the P3 and PRC form as Pexhibit1 and 2 respectively.
11. The complainant testified as PW2. She told the court that on 24/11/2020 on her way from church she met a person unknown to her. He invited her to a hotel where he bought her tea and mandazi and later asked her to accompany him to his house. They went to Kamari to a homestead with some houses. There was nobody else there. He asked her in but she declined, he begged her to get in and he then grabbed her neck and forced her into the house which was a one roomed house. She was thrown on the bed, her trouser and inner wear were removed. He removed his trouser and pushed his penis inside her vagina. She screamed but the more she screamed, the music volume was increased. She started bleeding and she asked him to let her go but he declined.
12. She asked him to allow her to talk to her parents and she gave out her father's number and he contacted her father and he asked her to lie that she was in Nakuru where she had gone to work. Her mother also called her. On the following day, he took her to the market where he bought a jamper, tights and jacket for her. She identified the Appellant as the assailant. The next day, he left to attend to his cattle and she managed to leave his house. She went home and reported to her mother. They reported to the police and she took the police to the Appellant's house where he was found and arrested. On cross examination, she testified that she did not know the Appellant from before and that she identified him to the police. She identified the yellow jumper, black tights and sandals that the Appellant bought for her.
13. PW3 AW, the Complainant's mother testified that the complainant left home for a seminar at the church on Tuesday 24/11/2020 but never returned home. On Wednesday She reported to the area chief and on Thursday, the complainant found her at home and she explained what had happened. She mentioned Stephen Gitonga had defiled her. She was wearing clothes she had not seen. She stated that she had communicated with the complainant who informed her that she was in Nakuru. She did not know the Appellant.



14. PW4 was the arresting officer. He testified that they escorted the complainant to hospital after a report was made. Later the complainant took them to a homestead within Kieni East. The Appellant who was inside the homestead was identified to them. On cross examination he testified that the complainant was the one who identified the Appellant. That the compound had houses but only one was occupied.
15. PW5, the investigating officer stated that a defilement report was made by the complainant and her mother. It had been reported that the complainant had disappeared. He escorted the complainant to hospital who later showed them the scene of crime which was at Kisunjeru, Kieni East. The Appellant was the only person at the scene. He produced the clothes that the Appellant bought the complainant as Pexhibit 3-5. On cross examination, he testified that the Appellant was sleeping at the time of the arrest and that he did not interrogate neighbours on whether the complainant was seen there or not.
16. In his unsworn defence, he testified that on 25/11/2020, he went to work and when he was resting at home over lunch hour, the police arrested him and escorted him to police station where he was informed that he had defiled the complainant, a person he did not know.
17. That was the totality of the evidence before the trial court. It is trite that for the charge of defilement to stand, the Prosecution must prove the age of the victim (must be a minor), that there must be penetration and a clear identification of the perpetrator.
18. Having established the ingredients of the charge, the question that this court should therefore determine is whether those ingredients were proved to the required standard.
19. Proof of age is important in a sexual offense. In *Kaingu Kasomo v Republic*, Criminal Appeal No. 504 of 2010 (UR), the Court of Appeal stated that:

“Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.”
20. In the present appeal, the complainant’s age was not disputed. PW3, the complainant’s mother produced the complainant’s birth certificate as Pexhibit1 which shows that the complainant was born on 27/4/2004. The offence was committed on 24th to 26th November 2020 and therefore the complainant was 16 years at the material time hence, a child.
21. As regards to identity, the Appellant submitted that the evidence on record was that he was a stranger as the complainant testified that she had not seen the Appellant before. That it was therefore strange how a person of her age would have followed a stranger to his house.
22. It is well settled that a conviction resting entirely on identity of an accused person which he disputes invariably causes uneasiness even when the case is that of recognition as opposed to that of identification of a stranger. In the case of *R v Turnbull* [1976] 3 ALL ER 549, it was stated by the Lord Chief Justice of England and Wales as follows:

“First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make sure reference to the possibility that a mistaken witness can be convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge



need not use any particular form of words. Secondly, the judge should direct the jury to examine closely the circumstances in which identification by each witness came to be made. How long did the witness have the accused under observation" At what distance" In what light" Was the observation impeded in any way, as for example by passing traffic or a press of people" Had the witness ever seen the accused before" How often" If only occasionally, had he any special reason for remembering the accused" How long elapsed (sic) between the original observation and the subsequent identification to the police" Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance"

23. Applying the above tests in our instant case, the circumstances surrounding identification were that the Appellant was indeed a stranger to the complainant. However, the incident took place during day time. The complainant testified that she was on her way from church in the afternoon when she met the Appellant. Further, the Appellant took her into his house where she was held for three days. The Appellant also took her to the market to buy clothes. The complainant was the one who took the police to the homestead where the Appellant was at the time of his arrest. Taking all this into consideration, it is apparent that identification was free from any error as the trial court held.
24. Having established that identification was positive, the next step is to determine whether the Appellant defiled the complainant as alleged.
25. The Appellant submitted that penetration was not proved as the medical evidence exonerated him. Further, the complainant's character was questionable as she had lied to her parents that she was in Nakuru.
26. As seen earlier, the complainant testified that when they got to the Appellant's house, he asked her to get in but she declined. He begged her to get in and then he grabbed her by the neck, forced her into his house, threw her on the bed, he forced her trouser and her inner wear out. The Appellant removed his trouser and he pushed his penis inside her vagina. She screamed but the music was played and the more she screamed, the volume was increased. She started bleeding and she asked him to let her go but he declined.
27. PW1, the clinical officer who examined the complainant stated that her external genitalia was normal, the hymen was absent but the scar was old, there was no evidence or sign of trauma as all was well. She produced the P3 form which was filled on 26/11/2020, the day the complainant reported the matter. She also produced the PRC form. A closer look of the P3 form indicated that the external genitalia was normal, hymen was absent, no bruises/trauma in labia majora/minora, no bruises on vagina and cervix. The PRC form did not indicate any abnormalities.
28. The trial court was satisfied that penetration was proved by holding that the medical evidence which was not disputed corroborated the complainant's evidence. That the missing hymen was proof that the complainant had been sexually penetrated and thus defiled at the material time.
29. A critical look at the medical evidence readily shows that it does not corroborate the complainant's evidence. The clinical officer did not find anything unusual to suggest that the complainant was defiled. On the issue of the missing hymen, the clinical officer said that it was an old scar but did not give the age of the scar whether recent or not having examined the complainant like two days after the ordeal. The complainant testified that she bled as a result of the sexual intercourse and if at all she had bled, at least the medical evidence would have noted something unusual.



30. It is trite law that the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence (see Kassim Ali v Republic Cr Appeal No. 84 of 2005 (Mombasa)(unreported)
31. However, where the only available evidence is that of a victim of a sexual offence, section 124 of the Evidence Act provides that a trial court can convict on the evidence of the victim of a sexual offence alone provided that the trial court believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief. The said section provides;
- “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.”
32. To my mind, Section 124 of the Evidence Act can only be complied with if the “reasons” are “recorded in the proceedings” indicating that the “Court is satisfied that the alleged victim is telling the truth”.
33. In its finding, the trial court found the corroboration of the complainant’s evidence by the medical evidence. This conclusion is not supported by the evidence on record. The court was, from the face of the record, oblivious of its obligation under section 124 of the Evidence Act. The trial court erroneously based conviction on the fact that the medical evidence found a missing hymen which was proof that the complainant was sexually penetrated thus defiled at the material time. Yet, if one was to go by the evidence of the complainant that she bled during the act, the examining doctor would surely have observed trauma or injury on the complainant’s genitalia a fact the doctor rules out in the p3 form produced.
34. There was therefore no corroboration of the complainant’s evidence. The correct legal route open to the trial court was the one set in Chila v Republic [1967] E.A 722 where the court addressed uncorroborated evidence of a victim of a sexual offence thus;
- “The Judge should warn ... himself of the danger of acting on uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless court is satisfied that there has been no failure of justice.”
35. Flowing from the above, it therefore follows that penetration was not proved and being a crucial element for the charge of defilement to stand, it therefore means that the Appellant’s conviction was not safe.
36. With the result that the appeal herein succeeds. The conviction against the Appellant is quashed and the sentence set aside. The Appellant is set at liberty forthwith unless otherwise lawfully held under another warrant.

DATED SIGNED AND DELIVERED AT NANYUKI THIS 31ST JANUARY 2024

A.K. NDUNG’U



JUDGE

