



**Wabwire v Republic (Criminal Appeal E032 of 2023)
[2024] KEHC 1989 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1989 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL E032 OF 2023
CW GITHUA, J
FEBRUARY 29, 2024**

BETWEEN

JUSTUS WAYNE WABWIRE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgement of Hon. E. Mutunga, SRM, at the Principal Magistrate's court at Kandara, in Sexual Offences Case No 55 of 2020 delivered on the 29th September, 2022.)

JUDGMENT

1. The appellant, Justus Wayne Wabwire, was convicted of the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the [Sexual Offences Act](#) (hereinafter the SOA).
2. The particulars of the charge were that on diverse dates between 25th December 2019 and 24th May 2020 in different places within the Republic of Kenya, the appellant intentionally and unlawfully caused his penis to penetrate the anus of R.G.K, a child aged 16 years.
3. Following his conviction, the appellant was sentenced to ten years imprisonment.
He was dissatisfied with his conviction and sentence hence this appeal.
4. In his petition of appeal as amended on 8th March 2023, the appellant principally complained that the learned trial magistrate erred in law and fact by; convicting him on a duplex charge sheet which lumped together offences allegedly committed on different dates in one count thus obscuring his defence; convicting him without considering the evidence presented in his defence; allowing cross-examination of his unsworn evidence and relying on that evidence; convicting him on evidence that did not prove the charge of defilement beyond reasonable doubt and failing to give him the benefit of doubt.
5. The appeal was canvassed by way of written submissions. The appellant's submissions were filed on his behalf by his advocates on record Ms. Musyoki Mogaka & Company Advocates while those of



the respondent were filed by senior prosecution counsel, Ms. Caroline Muriu. I will advert to these submissions later when analysing the issues raised in the appeal in order to give them some context.

6. In support of its case, the prosecution called a total of four witnesses. The victim who testified as PW1 stated that he was at the material time 16 years old having been born on 25th December 2003. He narrated how he met the appellant in a football tournament in the year 2017. The appellant introduced himself as Justin and stated that he was working in Somalia with the Kenya Defence Forces (KDF). They subsequently became friends and as they had exchanged their mobile numbers, they continued communicating on text and Whatsapp messages.

7. According to PW1, in December 2019, the appellant contacted him and informed him that he had come back to Kenya from Somalia. On 24th December, 2019 he invited him to lunch on the following day. He honoured the invitation and on 25th December 2019, they met at Thika and the appellant took him to his house at Kasarani. In the house, he was shown four guns and the appellant warned him to co-operate or else he would kill him. The appellant then sodomised him after which he gave him Kshs 200 and escorted him to Thika and before they parted company, the appellant threatened to kill him if he told anyone what had happened.

As he feared the appellant, he went home and decided not to tell his parents what he had experienced in the hands of the appellant.

8. PW1 also testified that he met the appellant again on 17th May 2020 at Kangari. The appellant had a vehicle and he sodomised him in the vehicle twice before dropping him at Kamurugu.

On 24th May 2020, they met again and using a motor cycle, they rode to Delview where the appellant again sodomised him in a bush. He gave him Krest soda after which he became unconscious. When he was taken home, he told his mother what had happened.

9. PW2, his mother testified that PW1 had told her about his friend Justin who had also called her on phone and introduced himself as an officer with the KDF.

She recalled that on 24th May 2020, PW1 was taken home unconscious by a motor cycle rider one Mwai who claimed that he had collected him from a roadside.

After gaining consciousness, PW1 reported that he had been with Justin who had been sodomizing him and that on that day, he had drugged and defiled him. She accompanied PW1 to report the matter at Kandara police station.

10. The record shows that PW1's complaint was received by PW3 Inspector John Kilonzo who was also the investigating officer. According to PW3, PW1 narrated how his friend had severely defiled him and gave him his friend's Safaricom mobile number. Using the number, he traced the appellant at Kanyonyo Training College where he arrested him.

11. On 26th May 2020, PW1 was examined by PW4, Mr. Martin Kariuki Mwangi, a clinical officer at Kandara Hospital. In his evidence, PW4 stated that upon examining the victim, he noted some abrasions on his anal orifice which made him form an opinion that the minor had been sodomised. He filled a P3 form which he produced as P Exhibit 3.

12. When placed on his defence, the appellant gave an unsworn statement and called two witnesses. In his statement, the appellant admitted that PW1 was his friend and that he had met him on three occasions namely; on 24th December 2019, on 17th May 2020 and on 24th May 2020 but he denied having defiled him as alleged.



He presented an alibi defence claiming that on 25th December, 2019 when he first allegedly defiled PW1 in his house at Kasarani, he was not at Kasarani but was with his friends at Joska Malaa where he spent the entire day. He asserted that the charge was based on a lie and that PW1 framed him with the offence after he declined his (victim's) offer to live with him.

13. His witness, John Kyalo Nthenge supported his alibi by testifying that the appellant spent the afternoon of 25th December, 2019 in his house at Malaa; that he had arrived at 2 PM and left at 6 PM .

The evidence of his other witness Dr Kizii Shako did not have much bearing on the facts in issue as it only challenged the insufficiency of evidence presented in the P3 form, treatment notes and the PRC form produced in evidence by PW4.

14. This is a first appeal to the High court and as such, it is an appeal on both facts and the law. I am well aware of my duty as the first appellate court which is to exhaustively re-consider and analyse the evidence presented before the trial court to reach my own independent conclusion whether the appellant was properly convicted and sentenced. In doing so, I must bear in mind that unlike the trial court, I did not have the advantage of observing the witnesses as they testified in order to assess their demeanour and give due allowance for that disadvantage.

See: Mwangi V Republic [2014] KLR28; Okeno V Republic [1972] EA 32.

15. Guided by the principles behind the aforesaid duty, I have carefully considered the grounds of appeal, the rival written and oral submissions made on behalf of both parties as well as the authorities cited. Needless to state, I have also read and understood the evidence on record and the impugned Judgement.

Having done so, I find that the key issue arising for my determination is whether the evidence adduced by the prosecution proved the charge of defilement against the appellant beyond any reasonable doubt.

But before considering this issue, let me briefly address the appellant's complaint that he was wrongly convicted on a charge that was bad in law for duplicity although he apparently abandoned the complaint when prosecuting the appeal as no reference was expressly made to it in his submissions.

16. Duplicity, simply put refers to the charging of multiple offences in a single charge in a way that makes it impossible for an accused person to tell which particular offence he was charged with.

Nyamweya J (as she then was) discussed the rationale for the rule against duplicity in Hassan Jillo Bwanameka & Another V Republic [2018] eKLR, when she stated as follows:

“.....the rule against duplicity provides that the prosecution must not allege the commission of two or more offences in a single charge in a charge sheet.....The rule stems from two important principles; firstly, as a matter of fairness, a person charged with a criminal offence is entitled to know the crime that they are alleged to have committed, so they can either prepare and or present the appropriate defence.

Secondly, the court hearing the charge must also know what is alleged so that it can determine the relevant evidence considering any possible defences and determine appropriate punishment in the event of a conviction....”

I fully associate myself with the above observation by the learned Judge.

17. In this case, a perusal of the charge sheet does not support the appellants claim that it was defective for duplicity. The charge sheet shows that in the main count, the appellant was only charged with the offence of defilement while in the alternative count, he was charged with the offence of committing an



indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#). In each of the counts, the appellant was charged with only one offence not multiple offences.

18. The fact that the particulars supporting the charge in the main count referred to diverse dates does not by itself make the charge duplex given that the particulars were clear that the appellant allegedly committed the offence of defilement on the dates stated therein. No other offence was expressly or impliedly stated in the main count. The court record also reveals that the appellant clearly understood the charge levelled against him and strenuously defended himself accordingly.

Nothing therefore turns on that ground of appeal.

19. Turning to the key issue earlier isolated for my determination, the appellant submitted that the prosecution failed to prove the three ingredients of the offence of defilement beyond any reasonable doubt in that the victim did not describe the acts the appellant committed that amounted to sodomy; that the medical evidence relied on by the prosecution did not prove that the abrasions or lacerations found in the victims anal orifix were caused by penile penetration and that this coupled with failure to call crucial witnesses created a doubt in the prosecution case which ought to have been resolved in favour of the appellant.
20. The respondent on the other hand supported the appellants conviction contending that all the three ingredients of the offence were proved beyond any reasonable doubt and that the appellant was properly convicted; that failure of PW1 to describe details of the act he described as sodomy did not negate the appellant's guilt.
21. Further, it was submitted on behalf of the respondent that failure to call some witnesses in support of its case was not fatal since under Section 143 of the [Evidence Act](#), the prosecution had discretion to call any number of witnesses it felt were sufficient to prove its case.
22. As correctly submitted by both parties and properly noted by the trial court, it is trite that for the prosecution to sustain a conviction for the offence of defilement, it must prove beyond any doubt the three essential elements of the offence which are;-
- i. Age of the victim - that the victim was a minor.
 - ii. Penetration.
 - iii. Positive identification of the accused person as the culprit.
23. In this case, after my independent appraisal of the evidence on record and the submissions made by the parties, I find that the age of the victim as stated in the charge sheet was not disputed and did not therefore require proof but the prosecution nonetheless proceeded to prove it through production of a copy of the victim's birth certificate.
24. It was also not disputed that the victim and the appellant were friends and that subsequent to their initial meeting, they had met on three other occasions including on 24th May 2020 which was the last date in a series of other dates on which the appellant allegedly defiled the victim.
25. Though the exact nature of their friendship was rather mysterious and was not clearly disclosed, the truth of the matter as can be ascertained from the evidence on record was that the victim and the appellant were friends to the extent that they took photographs together. In the premises, the victim's identification of the appellant as his alleged assailant cannot be open to question.
26. However, that said, the question that remains to be answered is whether the prosecution proved beyond doubt that the victim was in fact defiled by the appellant as alleged.



27. When convicting the appellant, the learned trial magistrate after addressing his mind to the three ingredients constituting the offence of defilement expressed himself as follows;
- “.....I have considered the demeanour of the prosecution witnesses and found that they had no reason to frame up the accused with the offence. Their evidence was water tight, credible and left no room for doubt that the accused person defiled the minor as charged. The evidence by the defence didn’t shake the overwhelming evidence as adduced by the prosecution.
- In the upshot, I find the accused guilty and convict him accordingly.”
28. After my independent analysis of the evidence on record, although I did not have the advantage of seeing the witnesses as they testified, i am unable to agree with the learned trial Magistrate’s finding that the prosecution witnesses were credible and reliable and that their evidence was water tight.
- I say so because the prosecution’s key witnesses materially contradicted themselves in their evidence and the contradictions remained unresolved throughout the prosecution case. Just to give an example of these contradictions, PW1 in his evidence claimed that he feared the appellant after he took him to his house on 25th December 2019, sodomized him after which he threatened to kill him after showing him four guns. It is this fear that allegedly prevented him from reporting to his parents what the appellant had done to him on that date.
29. However, despite his alleged fear, PW1 did not cut ties with the appellant. Instead, he continued communicating with him and voluntarily met him alone at different places on two subsequent dates, that is, on 17th May 2020 when he was again sodomized and on 24th May 2020. In my view, this is not conduct that would reasonably be expected of a young adolescent boy aged 16 years who had previously been defiled and threatened with guns by the same man he so willingly agreed to meet on subsequent dates. There is something about this evidence that does not add up and gives an impression that PW1 was not candid in his evidence.
30. Secondly, though PW1 claimed that he started communicating with the appellant on text and WhatsApp messages in the year 2017 after they met in a football tournament, PW2, his mother testified that she bought a mobile phone for him in the year 2019, about two years later. So, if this was the case, what phone was PW1 using to communicate with the appellant from 2017 to 2019? This question went unanswered throughout the prosecution case.
31. Further, PW2 testified that she knew Justin as her son’s friend since he used to call her and the victim would also inform her when he was going to visit the appellant. But as would naturally be expected of a mother, PW2 did not apparently seek to find out what kind of relationship her son had with the appellant. In my view, the victims conduct and that of his mother coupled with the contradictions in their evidence casted serious doubts on their credibility.
32. The medical evidence did not also help since according to PW4, there was a possibility that the abrasions and lacerations noted on PW1’s anal orifix could have been inflicted through other means other than penile penetration.
33. In addition, whereas it is settled law as stipulated in Section 143 of the *Evidence Act* that the prosecution has wide discretion in choosing the witnesses to call to prove its case, where the prosecution fails to call a crucial witness whose evidence was necessary to establish the truth of the allegations made against an accused person, the court, in appropriate cases is entitled to infer that had that witness been called, his or her evidence would have been adverse to the prosecution case.



See: Donald Majiwa Achilwa & 2 others V Republic. [2009] eKLR ; Bukenya & others V Uganda [1972] E. A. 549.

34. In this case, the motor cycle rider who allegedly picked PW1 while unconscious from the roadside near Delview and took him home while in the same state was not called as a witness by the prosecution though he was known to PW2 even by name. His evidence was crucial to confirm that indeed he picked PW1 when he was unconscious at a road side in Delview. His evidence would also have shed light on how he was able to know or locate PW1's home if it was indeed true that PW1 remained in his unconscious state till the time he dropped him at his home.
35. It is important to note that the appellant denied the charges and therefore, the prosecution had the legal and evidential burden of proving his guilt beyond any reasonable doubt. The law is that the prosecution's burden of proof remains with it throughout the trial and it does not shift to an accused person even if the accused presented an alibi defence as happened in this case.

See: Erick Otieno Meda V Republic [2019] eKLR

36. Having found as I have above and even without considering the alibi defence presented by the appellant, i find that the prosecution's case considered as a whole had yawning gaps which created doubts regarding whether or not the appellant committed the offence as alleged. The learned trial magistrate failed to thoroughly interrogate the evidence presented before him in its entirety and erroneously found that the prosecution had proved its case against the appellant beyond reasonable doubt which was not the case. He ought to have given the appellant the benefit of doubt as required by the law.
37. For all the above reasons, I am not satisfied that the appellant was properly convicted. It is my finding that his conviction was unsafe and cannot be sustained. The appellant's appeal therefore succeeds. His conviction is consequently quashed and the resultant sentence set aside. He shall be set free forthwith unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 29TH DAY OF FEBRUARY, 2024.

C.W GITHUA

JUDGE

In the presence of:

The Appellant

Ms. Muriu for the Respondent

Ms. Susan Waiganjo Court Assistant.

N/A for Mr. Shadrack Wambui for the Appellant.

