



**Obuodha v Republic (Criminal Appeal E013 of 2023)
[2024] KEHC 3256 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3256 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E013 OF 2023
SC CHIRCHIR, J
MARCH 20, 2024**

BETWEEN

GODFREY OPEMBE OBUODHA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant, Godfrey Opembe Obuodha was charged with the offence of defilement contrary to section 8(1) as read with section 8(4) of the [sexual offences Act.](#) (The Act). He was convicted of the charge and sentenced to 7 years in prison.
2. The particulars of the offence were that on the 19th day of June 2022 in Kakamega county, intentionally and unlawfully caused his penis to penetrate the vagina of LNN a child aged 17 years.
3. Being aggrieved by the outcome , he filed this petition of Appeal and set out the following grounds:
 - a) That the learned trial magistrate erred in law and in facts by failing to find that the two elements of defilement (penetration and identification) were not conclusively proved to the required standard of proof
 - b. That the learned trial magistrate erred in law and fact by failing to make a finding that the prosecution deliberately avoided to bring or avail some key witnesses and evidence.
 - c. That the learned trial magistrate grossly misdirected himself in law and facts in convicting and sentencing the appellant in light of inconsistency, farfetched flimsy fabricated, disjointed, malice and suspicious evidence of prosecution without noting and considering that the same was not water tight enough to sustain a conviction.



- d. That the trial court failed in its finding by not observing that the mother of PW1 took her to police (coaxed) so that she can fix him after being tortured and conned as a strategy to implicate him in the crime.
 - e. That the learned trial magistrate grossly erred in law and facts by rejecting his plausible defence without proper evaluation instead it shifted the burden of proof.
4. The Appeal was prosecuted by way of written submissions.

Appellant's submissions.

5. On the issue of penetration the Appellant submits that the evidence of PW1, the complainant, was hearsay and as for that of pw3, the clinical officer, he argued that the absence of the hymen is no proof of penetration. He further submits that the complainant was examined 9 days after the alleged defilement and therefore the medical evidence had been rendered useless. He has relied on the case of Ben mwangi vs R (Nairobi HCCRA No. 471 of 2001) in this regard.
6. On identification, he submitted that the complainant's testimony was so full of contradictions, that the court ought not to have relied on it for purposes of identification.
7. It is further submitted that the prosecution failed to call the crucial and critical witnesses to support its case. He cited the teacher to whom PW2 had been told to report to; the village elder who told Pw2 to report to the police, as well as the brother and father to the complainant who took the complainant to the police station and hospital as well as PW1's grandmother whom the complainant . The appellant stated that failure to call the crucial witness weakened the prosecution's case and that his conviction was not sustainable. He relied in the case of Peter Gitao Muchene vs. Rep 364 of 2006 and the case in Bukenya and others vs. Uganda (1972) E.A 549.
8. The Appellant further submits that the prosecution's case was full of contradictions and inconsistencies. For instance , he argued , the complainant told the court that she first met the Appellant on 19.7.2022 then on cross-examination she gave the date of 19.6.2022; that PW2 contradicted herself on the date she recorded her statement; that pw3 alleged that she signed the P3 form on 26.6.2022 but attended to the complainant on 28.6.2022 He averred that the contradictions, inconsistencies and confusion on dates ought to have given the defence the benefit of doubt. He relied in the case of Joseph Onyango Deny vs. Republic Mombasa App. No 177 of 2001 to buttress his submission in this regard.

Evidence in brief.

9. PW1, was the complainant. She told the court that she was 16 years old . she stated that she first met the accused on 19.7.2022 at [Particulars withheld]. She later stated that she got to know the accused on 25.12.2022, when the accused gave her his phone Number. She tsated that it was Christmas day and she was "just roaming in the market" . In the month of July, he called her.
10. She claimed that on 19/06/2022 her mother sent her to the market where she met the accused who took her to his home with his motorcycle. She testified that she stayed until 6.00 p.m. but when she wanted to leave he told her to wait for his brother who was sent to get money from an Mpesa. She stated that the accused then went out and stayed out until late . while waiting for him, she went to the accused mother's house where they cooked and ate.
11. She further told the court that she asked the accused for transport but he told her that he did not have money. The Appellant then called her parents and informed them that she was safe. She testified that she slept at his house and the accused tried having sex with her but she refused . At around midnight, he



- managed to have sex with her despite her resistance. She narrated how the accused removed her white trouser and penetrated her vagina with his penis without using any form of protection.
12. She testified that the accused left locked up in the house. she stayed with him for one week as the accused had sex with her. The accused's mother did not know since the house was locked up. She managed to escape after a week and her parents took her to Mumias police station to report and later she was taken to Bomani hospital.
 13. During cross examination, she confirmed that she was 16 years old at the time of the incident. She testified that she and the accused had met on 19/6/22 but before then they had interacted on 25/12/21 when the accused asked for her phone number. She recalled that the accused called her on 19th at about 2 pm while she was using her grandmother's phone and when they met at [Particulars withheld], he asked her to board the motorcycle and he took her to his home. There were no other people in the homestead.
 14. PW2, was the complainant mother. She produced the complainant's birth certificate. The certificate indicated that the complainant was born on 30th September 2005. She recalled that at about 3 p.m. on the material day, she had sent the complainant to buy paste and but she did not come back. Later the complainant called informing her that since it was raining, she would spend the night at her teacher's place.
 15. In the morning she went to school, but did not find the complainant she reported to the village elder who informed her to go to the chief and later to the police station.
 16. She claimed that on 26th the complainant came back and informed her that she was going to her grandmother's place. she locked her inside and called her brother and father. They took her to the police station where she confessed that she had been staying with the accused person.
 17. The accused person was arrested and the complainant was later taken to a hospital in Bomani.
 18. During cross examination she stated that she sent the accused on 19th but reported her missing on 20th while her statement was recorded on 28th. she referred to her statement where she had stated that on 19th she had come from church and did not get the complainant since she had sent her to buy toothpaste. She further stated that she got the messages on 19th and 20th informing her not to worry since the complainant would be in school the next day.
 19. She testified that the witness was escorted to Mumias police station on 28th and that the police took her to Bombani hospital for treatment.
 20. The clinical officer testified as PW3. She stated that she examined the complainant on 28/6/2022 who was in the company of her mother. She stated that according to complainant's mother, she had disappeared for 7 days from 19- 26th June 2022. upon examination, the complainant had normal genitalia without discharge, her hymen was missing and she concluded that she had been defiled. She produced the P3 form and treatment notes.
 21. On cross examination, she testified that the minor was in the company of her mother and the police. He examined the complainant 9 days after the incident.
 22. PW4, was the investigating officer. He testified that on 28/6/22 at about 10.30 a.m, he was at the station when the complainant's parents came to report that their child had been defiled. They recorded their statement and took her to the hospital for treatment. They later arrested and charged the accused with defilement.



23. During cross examination, he confirmed that they were informed that the accused and the girl communicated using her grandmother's phone. He testified that according to the investigating diary, the incident happened on 19/6/22 and the complainant went back home on 28/6/22 . He stated that her disappearance had been reported at Itenje police post and when she came home, the matter was reported to Mumias Police station
24. The Accused was put on his defence.
25. Under oath, he told the court that he saw the complainant on 19 /6/2022 , talking to his brother at the gate of " madam". He greeted LN" and just passed . He further stated that on the same day he had had an altercation with a police officer, called Samuel . The police officer threatened him and told him that "he would know who he was" On 10/7/2022 he was arrested in a changaa den with his friends, by the same officer Samuel and charged with the present offence.
26. In cross- examination, he told the court that he did not know the victim; that she went to school with his brother BO.she denied ever seeing her save the day he saw her with her brother.
27. The Appellant called a witness (DW2). He told the court that the accused was his brother and repeated what the appellant told the court on what transpired on that day. At cross- examination he clarified that the Appellant was his cousin , not brother; that they do not stay in the same homestead

Determination

28. This is a first Appeal and the duty of this court is to review the evidence , re- evaluate it and arrive at its own conclusion (Ref; Oneko vs Republic (1972) EA 132)
29. I have considered the evidence on record, the documents produced and the submissions of the Appellant, and the Authorities relied on. I have identified the following issues for determination:
 - a). whether the prosecution's case was proved beyond reasonable doubt.
 - b). whether there were material contradictions and inconsistencies on the evidence presented by the prosecution
 - c). whether the prosecution left out some crucial witnesses

whether the prosecution proved its case

30. The offence of defilement is founded on three main ingredients, being the age of the victim (must be a minor), penetration and the proper identification of the perpetrator.
31. Section 8(1) of the [Sexual Offences Act](#) provides as follows:

“ 8.

- (1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- (2)
- (3)
- (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon



conviction to imprisonment for a term of not less than fifteen years.

32. On the first element of penetration, the appellant avers that PW3 evidence was based on hearsay . However he has not given justification for this assertion. Penetration is defined under Section 2 of the [Sexual Offences Act](#) as follows: as “The partial or complete insertion of the genital organ of a person into the genital organs of another person.”
33. The Appellant contends that the complainant’s evidence was not corroborated by medical evidence. The evidence of the complainant was corroborated by the clinical officer , who told the court that on examination she found the her hymen was broken. I must hasten to add that, as correctly pointed out by the Appellant, a broken hymen or whitish discharge is not necessarily evidence of penetration.
34. PW1 was the complainant . she gave an account of how the sexual act took place. She narrated as follows:” at about mid night he had sex with me ... the accused removed my clothes, I had a white trouser and a pant. He removed this only and he removed his trouser. He had sex with his penis ; he put his penis in my vagina ... he did not use protection . I told him to stop but he refused. I was feeling pain ...”
35. The above portion of her testimony remained largely intact at cross- examination . what is also instructive is a statement made by pw1 at cross- examination. She denied the suggestion that the accused had sex with her immediately he arrived in the house, insisting that it was a midnight. By putting the question to the witness , it was an indirect admission that the sex took place any how. The complainant’s evidence despite what I observed as some minor contradictions , largely remained intact. On this aspect of penetration , I find her evidence convincing.
36. In any event Section 124 of the [Evidence Act](#), provides as follows:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other 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 offense, 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.”
37. In the case of *Bassita vs. Uganda S.C. Criminal Appeal No. 35 of 1995*, the Supreme Court of Uganda had the following to say in respect of proving penetration:-

“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victim’s own evidence and corroborated by the medical evidence or other evidence. Though desirable, it is not hard and fast rule that the victim’s evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt.”



38. The complainant was a 16 year-old , she gave uncontested account of what transpired. For reasons I have stated herein before , I do believe her testimony. Am satisfied that this element of the offence was proved.
39. The second ingredient of identification. PW1’s testimony shows that she knew the Appellant and had met him at the market on 25/12/2021 where they exchanged mobile phone details.. The complainant told the court that the Appellant contacted her parents on the 19th and assured them she was fine. This was corroborated by pw2 who told the court that someone contacted her , assured her that pw1 will be in school the following day but the person did not identify himself. Further at at cross – examination the Appellant did not question the complainant on the issue of identification. He only waited until it was his time for defence to deny ever knowing her. Even then , in his examination in chief he said he saw “LN” with his brother. How could he have known her name if she was still a stranger to her. The Appellant’s defence in this regard was not plausible at all. Identification therefore was by way of recognition. In case of Anjononi & Others Vs Republic [1989] KLR in which the court held; Recognition is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another.
40. Am satisfied that the Appellant was duly identified.
41. The last ingredient is the age of the complainant . This was not an issue during trial and neither is it in this Appeal. The complainant was 16 years and hence was a child within the context of the children’s Act (ref section2)

Were there material contradictions and inconsistencies in the prosecution’s case

42. The appellant submitted that there were several contradictions in the evidence of the complainant. He stated that there was a lot of contradictions from the complainants such as when she stated that they first met on 19/7/2022 and later got to know him on 25/12/2021 and during cross examination stated that they met on 19th June 2022. He stated that PW2 stated that they recorded the statement on 19th while PW1 disappeared on 20th ; that she recorded her statement on 29th and later changed to 28th. He further stated that according to PW1 she received the message about the complainant’s whereabouts on 20/6/2022 at but there was no messages such message received.
43. The way to treat contradictions in a case was addressed by the Court of Appeal in Jackson Mwanzia Musembi v Republic (2017) eKLR where the court cited with approval the Ugandan case of Twahangane Alfred –Vs- Uganda CR. Appeal No. 139 of 2002 (2003) UGCA,6 where it was held that “with regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case”.
44. In this case, the contradictions stated by the appellant do not go to the core of the matter. It does not deal with the three elements that the prosecution ought to prove for defilement such as the age, penetration or identification.
45. It was more on the date they met and the date that the report was made at the police station. The contradictions regarding the messages received by PW 2 was not admitted in evidence. This court is not in a position to confirm if such a contradiction existed.
46. In the case of Alex Kapunga & 3 others v R CR Appeal No. 252 of 2005 the Court of Appeal Tanzania revisited the issue and stated that: “The fact that there are discrepancies in a witness



testimony does not straight away make him or her unreliable witness and make the whole of his or her evidence unacceptable.”

47. The contradictions were minor, did not affect the substance of the prosecution case

Were crucial witnesses left out?

48. The other issue that was raised by the appellant was failure by the prosecution to call crucial witnesses. These include the teacher whom Pw2 had gone to report to at the school, when the complainant went missing, the village elder who advised PW2 to go and report to the chief as well as the complainant’s brother and father who escorted the complainant to the hospital, and PW1’s grandmother with whom the complainant was using her phone, so as to shed light on the existence of the phone.

49. Section 143 of *Evidence Act* (Cap 80) Laws of Kenya provides as follows: -

143. Number of Witnesses

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.

50. In the Court of Appeal case of Keter v Republic [2007] 1 EA 135, Bosire, Githinji and Onyango-Otieno JJA held as follows: - “The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.”

51. In the instant case, having found that the evidence of PW1, the complainant proved penetration and identification, and there having been no dispute on the age of the complainant, the calling of these other witnesses would not have added any value to the prosecution’s case.

52. Am satisfied that the prosecution proved the offence of defilement beyond reasonable doubt. The Appeal is without merit . It is hereby dismissed.

DATED , SIGNED AND DELIVERED AT KAKAMEGA THIS 20TH DAY OF MARCH 2024

S.CHIRCHIR

JUDGE.

In the presence of :

Godwin- court Assistant.

No appearance by the parties

