



REPUBLIC OF KENYA



**KENYA LAW**  
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**Bunyori alias Waingo v Republic (Criminal Appeal E102 of 2022)  
[2024] KEHC 3553 (KLR) (Crim) (19 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3553 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL APPEAL E102 OF 2022  
LN MUTENDE, J  
MARCH 19, 2024**

**BETWEEN**

**HUMPHREY BUNYORI ALIAS WAINGO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal arising from the original conviction and sentence  
in Sexual Offences Case No. 14 of 2020 at the Chief Magistrates'  
Court Kibera, by Hon. R. M. Kitagwa (RM) on 21st March, 2022)*

**JUDGMENT**

1. Humphrey Bunyori alias Waingo, the Appellant, was charged with defilement contrary to section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on 1<sup>st</sup> February, 2020 at 1600 Hours in Dagoretti within Nairobi county, he unlawfully and intentionally caused his penis to penetrate the genital organ ( vagina ) of KW a child aged 11 years.
2. In the alternative, he faced the charge of committing an Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on 1st February, 2020 at 1600 Hours in Dagoretti within Nairobi county, he intentionally touched the vagina of KW a child aged 11 years with his penis.
3. Having denied committing the offences the appellant was taken through full trial, convicted for the main count of defilement and sentenced to serve life imprisonment.
4. The brief facts of the case were that, the victim was a pupil at [Particulars Withheld] Primary school and she lived with her grandmother after her parents separated. On the fateful date the victim went to visit her father and was molested by the assailant inside the house. She identified the assailant as the



- appellant, an individual who used to do casual jobs for her father. That the individual threatened to kill her hence she did not tell her grandmother. She went to school and her teacher noted that she was walking with some difficulty. This prompted the victim to open up. She narrated what transpired to the teacher who in turn informed her grandmother. She was taken to the Nairobi Women's Hospital for examination and treatment. The matter was reported to the police where after the appellant was arrested and charged.
5. Upon being placed on his defence the appellant denied having committed the offence. He stated that he resided in Kawangware and that he did casual jobs. He confirmed working at J's home and further testified on this case that the police went with in a private car on 7<sup>th</sup> February,2020 and arrested him on allegations that he had defiled a girl. That he was arraigned on Monday 10<sup>th</sup> February,2020. He stated in his defence that the charges referred to a different name and had letters KN as the victim. That a substituted charge sheet indicating KNJ was brought and stated that she was 16 years old.
  6. The appellant filed written submissions and contended that the burden of proof was not attained. That age was not proved since the charges indicated that the victim was 11 years old but the evidence adduced was that she was 12 years old .That penetration was also not proved, that the descriptive words "bad manners" used by the child during evidence did not prove penetration. The evidence of laceration at 6 O'clock was incredible.
  7. That the P3 form and records indicate different dates of the offence. The medical records were also filled after a year.
  8. The appellant further disputes proof of identification. That PW5 did not give a description of the perpetrator and her evidence did not indicate it; PW2, the victim did also not describe the perpetrator to the teacher. Further that there was contradiction on the description of the knife used in the offence and this cast doubt on whether the child could identify the assailant.
  9. The appellant also submits that his alibi defence elaborated how he was arrested and arraigned in court. His defence evidence also cast doubt on the details of the complainant's name. There is also a contradiction on the child's name indicated on the invoice.
  10. The State/Respondent referred to Section 382 of the [Criminal Procedure Code](#) in response to the claim that the charges are defective. It is further submitted that the appeal is based on technicalities and that the offence has not been unequivocally denied by the accused.
  11. That the minor's age was proved through the child health card and the P3 form, and that there are various ways of proving age.
  12. The prosecution further urged that the assailant was known to the complainant and the offence occurred during the day since the perpetrator called the victim.
  13. Lastly that penetration was proved through PW2's evidence and the PRC form which indicated that the hymen had a laceration.
  14. This being a first appellate court, it is called upon to reassess and analyze the trial record afresh and to determine whether the impugned decision was well founded, the court has power to come up with its own conclusions but must bear in mind that it did not see or hear the witnesses who testified. (See *Okeno v Republic*(1972) EA 32).



15. It is contended that the charges were defective. Section 134 of the [Criminal Procedure Code](#) provides that:

Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence.

16. A charge sheet is defective where the charges preferred are not founded in law or where the evidence contradicts the particulars.

17. In the case of [Peter Ngure Mwangi v Republic](#) [2014] eKLR, it was stated that:

“A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold, Criminal Pleading, Evidence and Practice (40th Edn), page 52 paragraph 53, this Court stated in *Yongo v R*, [198] eKLR that:

- i. In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:
- ii. when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,
- iii. when for such reason it does not accord with the evidence given at the trial.”

18. The appellant’s contest is that the charges indicated the minor as K.N, he referred to a substituted charge indicating the victim as KNJ aged 16 years.

19. From the record, the charge sheet presented during his arraignment referred to the minor as KW The charge sheet was not substituted at the close of the defence case, the alternative charge of indecent act also preferred in the charge sheet referred to the victim as KN aged 11 years. The medical records adduced referred to K. Nj aged 11 years.

20. PW5 stated during cross examination that the errors were typographic mistakes. Typographical errors are technicalities and not substantial enough to affect the conviction. (See Section 382 of the [Criminal Procedure Code](#)) As to the alternative charge, the medical records, evidence adduced by PW1 and PW3 proved that the victim in the case was K.Nj. Medical documents and the testimony of the victim also confirmed the date and year of the offence, the details corresponded with the particulars of the charge sheet.

21. Regarding whether the prosecution proved the ingredients of the offence beyond reasonable doubt; The offence of defilement is established under Section 8(1) of the [Sexual Offences Act](#). By that provision of law, the elements of the offence are: age of the victim, the act of penetration and positive identification of the assailant by the victim.

22. In the case of *Charles Busutu Kavulavu v Republic* [2015] eKLR the court held that :-

“There were three ingredients that the prosecution was required to establish for the Appellant to be convicted of the charge. The first one is the indecent act. The second is the age of the victim and the third is the identity of the perpetrator.”



23. The victim's age has been contested, the appellant position is that it was not proved with certainty. In *Mwalango Chichoro Mwanjembe v Republic* (2016) eKLR, the Court of Appeal stated that:

“...the question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See *Denis Kinywa v Republic*, Criminal Appeal No.19 of 2014 and *Omar Uche v Republic*, Criminal Appeal No.11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in *Francis Omuroni v Uganda*, Criminal Appeal No. 2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable...”

24. The victim herein was a pupil in class six who lived with her grandmother and guardian who testified. She told the court that the complainant was born on 1<sup>st</sup> April,2006. The evidence was confirmed by evidence recorded on the Child Health Card which is a recognized public document issued during immunization of an infant. This was proof that at the time the victim was shy of her 12<sup>th</sup> birthday. The trial court also had an opportunity of observing the victim. The definition of a child is within the meaning of the *Children Act* which provides that a child is any human being under the age of eighteen years. See the case of *Moses Nato Raphael v Republic* [2015] eKLR where the Court of Appeal held that:

“...On the challenge posed by the uncertainty in the complainant's age, this Court had occasion to deal with a similar issue in *Tumaini Maasai Mwanja v R*, Mombasa CR.A. No. 364 of 2010, where we held that proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. As long as there is evidence that the victim is below 18 years, the offence of defilement will be established. The age, which is actually the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child's age cannot therefore assist the appellant to avoid criminal culpability.”

25. The appellant in his contestation does not allege that the victim was above 18 years at the time of the offence. From the evidence, the victim was a pupil at Uthiru Primary school. The court also carried out *voire dire* examination meaning that per the observation, the victim was a child of tender years.

26. The appellant has disputed both medical documents and testamentary evidence. However, this case does not lie on borderline age gaps and any disparity noted in the trial should not affect the conviction but must be resolved in the sentencing proceedings. See the case of *Daniel Mugambi v Republic* Criminal Appeal No. 37 of 2014, where the Court of Appeal held that the disparity in the age of the complainant should have been considered for purposes of sentencing.



27. On penetration, the evidence must prove that the assailant inserted his genital organ into the victim's genitalia. Section 2 of the [Sexual Offences Act](#), defines penetration to mean:

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

28. The complainant testified that the assailant did bad manners to her and the appellant contends that the words did not prove the offence. In the case of [Kedireng Lokilepuang alias Geoffrey v Republic](#) [2019] eKLR, Sitati J. held that:

“In the Kenyan context, “doing bad manners” to a woman or girl or even a boy has the connotation of sexual intercourse. The reason for this is, in my humble view, the societal embargo on referring to sex and matters related thereto in explicit language. This court therefore understands that when a man is alleged to have done bad manners to a woman or girl it simply means having had sexual intercourse with the woman or girl in case of rape or defilement, or touching the private parts of a woman in the case of committing an indecent act.”

29. This is a case where the minor went ahead to describe what the assailant actually did to her. The victim's description proved that the assailant inserted his penis into her genital organ. Proof of penetration into her vagina was further corroborated by the PRC form filled on 4<sup>th</sup> February, 2020 which was not too far from the date of the offence. PW4 testified that the child's hymen was lacerated at 6'0clock.

30. The appellant's contention on the degree of laceration vis a vis the age of the child is neither here nor there and is not supported.

31. Further, the P3 form and the PRC form were filled on different dates and in different circumstances. The child was first seen at Nairobi Women's Hospital where she was examined and observations made filled on the PRC form. The P3 form was issued by the Police and filled and it corroborated the details on the PRC form.

32. PW3, the teacher of the victim who interrogated her at the outset testified that the child had difficulty in walking.

33. It has been severally held hat the victim's evidence can be sufficient to prove a sexual offence without need for corroboration. In the case of [George Kioji v Republic](#), Nyeri Criminal Appeal No. 270 of 2012 (unreported) the Court of Appeal held that:

“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 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.” Also see Section 124 of the [Evidence Act](#).

34. In this case, the trial court stated in the judgment that it believed the minor's evidence. That evidence was also corroborated by the PRC form which was filled on 4<sup>th</sup> February, 2020 and which also placed



the time and date of the offence as 1<sup>st</sup> of February, 2020 at 1600 hours. Therefore, the second ingredient was proved beyond doubt.

35. On identification, the law is that the identification evidence must be tested and found to be free from error. In *Kariuki Njiru & 7 others v Republic*, Criminal Appeal No. 6 of 2001 (Unreported) the court held as follows:

“Law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.”

36. The appellant was described by the minor as a person who worked at their home. The appellant admitted that he did casual jobs and had worked at Joseph house, Joseph being the victim’s father.

37. The complainant testified that she had gone to visit her father and that the appellant took advantage of her father’s absence and pulled her inside the house where he sexually assaulted her then returned to his casual job while she walked back to her grandmother’s home.

38. There is no doubt that the minor knew who her the assailant was, and, she also identified him in court.

39. On sentence, Section 8(2) of the *Sexual Offence Act* provides that:

“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

40. The child health card indicates that the child was born on 1<sup>st</sup> April, 2008, this was corroborated by the child’s grandmother as afore stated. The appellant did not dispute the details in the health card.

41. The court was justified in meting out the sentence. However, today courts are not hamstrung by the issue of meting out minimum mandatory sentences. Each case’s peculiarity is taken into consideration as restorative justice is emphasized.

42. Further, indefinite sentences fail to capture the objectives of sentence. There is need to give offenders hope to rejoin the family and society so as to benefit from social reintegration after an offender has been rehabilitated.

43. Looking at comparative decisions, in *Stephen Kimari Gathano v Republic*, [2022] eKLR, the accused was convicted for defiling a minor aged 9 years and sentenced to 15 years imprisonment, the prosecution sought for enhancement of the sentence to life imprisonment. The court opted to sentence him to 30 years imprisonment.

44. In *Kedireng Lokilepuang alias Geoffrey v Republic* [2019] eKLR (*supra*), the accused was convicted for defiling an 8 year old girl the court set aside the life sentence and sentenced him to 40 years jail term.

45. The upshot of the above is that the conviction is affirmed, but, the life sentence imposed be and is hereby set aside and substituted with twenty-five (25) years imprisonment to be effective from the date of arrest.

46. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 19<sup>TH</sup> DAY OF MARCH 2024**

**L. N. MUTENDE**



**JUDGE**

