



**Mang'ula v Republic (Criminal Appeal 20 of 2020)
[2024] KEHC 4481 (KLR) (26 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4481 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL 20 OF 2020
WM MUSYOKA, J
APRIL 26, 2024**

BETWEEN

SILAS TAABU MANG'ULA APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from the conviction and sentence by Hon. SO Temu, Principal
Magistrate, PM, in Busia CMCSO No. 43 of 2019, of 30th September 2019)*

JUDGMENT

1. The appellant was convicted in Busia CMC SOA Case No 43 of 2019, of defilement contrary to section 8(1)(3) of the [Sexual Offences Act](#), Cap 63A, Laws of Kenya. He was sentenced to serve 15 years' imprisonment. He was aggrieved, hence this appeal.
2. In his petition of appeal, dated 7th July 2020, he argues that the charge was defective and the particulars irregular, the court relied on hearsay and contradictory evidence, the evidence lacked probative value and his constitutional rights to fair trial were violated.
3. He filed supplementary grounds, together with his written submissions, where he argues that penetration was not proved, the identity of the perpetrator was not proved, the exact age of the complainant was not established, the charge in section 8(1)(3) of the [Sexual Offences Act](#) does not exist, the appellant and the complainant were not found together during arrest, the date time and place of the alleged incident was unknown, the medical evidence exonerated the appellant, the evidence was insufficient to support a conviction, the mandatory sentence imposed lacked discretion, the evidence was contradictory and was laden with discrepancies and gaps, and the appellant was not accorded a fair trial contrary to Article 50(2) of the [Constitution](#).
4. The evidence adduced was that the complainant disappeared from home or got lost, and her parents initiated a search. A report was made to the police that the complainant was missing. She was later



- traced at Matayos, where she was staying with the appellant, they were arrested, taken to the police, and then to hospital. The complainant alleged that she had been defiled by the appellant, hence the charges.
5. In his written submissions, the appellant argues that the medical evidence falls short, as no sufficient findings were made. On age of the complainant, it is submitted that no certificate of birth was presented. It is also submitted that the identity of the perpetrator was not established. It is also submitted that the charge was defective as it should have read: "Section 8(1) as read with Section 8(3)." The other submission is that the complainant was not a credible witness, as her testimony, of being defiled, was not supported by PW4.
 6. The respondent submits that the age of the complainant was proved through PW1 and PW5, and cites *Francis Omuroni v Uganda* CA No 2 of 2020 and *Fappton Mutuku Ngu v Republic* [2012] eKLR for the proposition that proof of age does not necessarily require a certificate of birth. On penetration, it is submitted that the complainant said she was penetrated and PW2 inspected her and established so. On the charge being defective, it is submitted that the same was sufficiently clear on the charge that the appellant faced, and *Benard Ombuna v Republic* [2019] eKLR is cited.
 7. Let me start with what the appellant has submitted on. The first argument is on penetration. The complainant narrated about how she had sexual intercourse with the deceased during the time she was at his house. PW2, her mother, testified that she examined her genitals, and confirmed that the complainant had sexual contact. However, PW4, the clinician, who examined the complainant, at about the same time with PW2, did not note anything abnormal or unusual. According to him, the genitals of PW1, the complainant, were normal. No note was made that there was evidence of any recent sexual activity. The only thing of note was absence of the hymen. The testimonies of PW1 and PW2, on one hand, and PW4, on the other, were not consistent, to the extent that the one side alleged sexual intercourse while the other stated that it found no evidence of it. PW4 examined PW1, in order to establish whether or not what she was alleging could be confirmed. His findings were negative. He was the medical person on that score. I would be hesitant to believe PW1 and PW2, where their allegations are discounted or not supported by medical or scientific examination or evidence.
 8. I note that the trial court relied on only one aspect of the medical evidence, the absence of the hymen, as proof of penetration. There was no proof that the hymen had been recently lost. Indeed, other than the testimony by PW1, that she had had no previous sexual exposure prior to the alleged encounter with the appellant, there was nothing to show that she was a virgin before then. It is common knowledge that a hymen can be lost through many other ways, apart from sexual encounter.
 9. There is evidence that the appellant and the complainant were found together, arrested and PW1 taken to hospital straightaway for examination, on the alleged defilement. As indicated above, the examination by PW4 yielded no positive results, save for the one on the hymen, which is, of itself, was no proof that penetration had recently occurred. The fact that the forensic or medical evidence did not establish penetration, would mean that the alleged defilement was not supported or confirmed by the science, and the appellant should have been given the benefit of the doubt.
 10. On the age of the appellant not being established, I note that PW2 was the mother of PW1. She stated that PW1 was born on 5th November 2003. The court has repeatedly said that there can be no better evidence, on the age of a person, apart from that given by that person's own mother. Proof of the age of a child, by production of a certificate of birth, cannot be superior to testimony given by the person who birthed the child. The issue was settled in *Fappton Mutuku Ngu v Republic* [2012] eKLR, where it was stated that proof of age does not necessarily require a certificate of birth. Where the mother of the child is available, the certificate is not necessary. Indeed, there would be no need to produce any documentation on the date of birth. Other modes of proof of age are permissible.



11. On the charge being defective, for charging under section 8(1)(3) of the *Sexual Offences Act*, instead of section 8(1) as read with section 8(3), the view by the respondent appears to be that the latter is the proper way to frame the charge. I do not agree. According to me, it does not matter, so long as the provision cited covers both the definition or creation of the offence, and the sentence prescribed. Section 8(1) defines or creates the offence, while section 8(3) prescribes the penalty. So, whether the charge talks of section 8(1)(3) or section 8(1) as read with section 8(3), is neither here nor there. It does not prejudice the accused person in any way, for either way the accused is informed of the provision creating the offence and that prescribing the penalty. The issue raised boils down to a matter of style in the framing of the charge, and either approach should be good enough. See *Bernard Ombuna v Republic* [2019] eKLR.
12. In view of what I have stated, with respect to the testimony of PW4, the trial court should have expressed doubt as to whether the defilement was proved beyond reasonable doubt. That doubt ought to have been resolved in favour of the appellant.
13. There is, of course, the issue of Article 50(2) of the *Constitution*. The appellant has not submitted on it, and so I cannot tell in what respects he argues that his fair trial rights have been contravened. From the record, I note that the language he used, on 26th March 2019, when he took plea, is not indicated. The trial court did not inform him of his right to instruct an Advocate of his own choice to defend him, and, if he could not afford to instruct one, of his right to be entitled to an Advocate instructed by the State, at State expense. I note that he was admitted to bond, directions were given that he be furnished with witness statements ahead of the trial. There was partial compliance, and partial non-compliance. It is often said that trial would be vitiated only where the accused is prejudiced by such contraventions. I disagree. The *Constitution* makes fair trial rights prerequisites, and non-compliance should vitiate a trial, regardless of whether prejudice was suffered. To look at it otherwise would be to undermine the *Constitution*, by encouraging the overlooking of such infractions of the *Constitution*. There is a risk of such infractions being normalized, by the repeated acts of overlooking them. The trial court has a duty to institutionalise constitutionalism, by a strict observance of all what the *Constitution* commands.
14. In view of what I have stated, in paragraph 12 herein, it is my finding and holding that the conviction of the appellant was not safe. I shall, as I hereby do, accordingly quash his conviction, and set aside the sentence imposed upon him. He shall be set free from prison custody, unless he is otherwise lawfully held. It is so ordered.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 26TH DAY OF APRIL 2024

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Silas Taabu, the appellant, in person.

Advocates

Ms. Chepkonga, instructed by the Director of Public Prosecutions, for the respondent.

