



REPUBLIC OF KENYA



**KENYA LAW**  
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**Sokoni v Republic (Criminal Appeal 99 of 2017)  
[2024] KEHC 4556 (KLR) (26 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4556 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL APPEAL 99 OF 2017**

**REA OUGO, J**

**APRIL 26, 2024**

**BETWEEN**

**JOHN ODEKE SOKONI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the judgement of Hon. E.N Mwenda, Senior Resident Magistrate at Bungoma Delivered On 25th August 2017, Criminal Case No. 1753 of 2012 on the Conviction and Sentence)*

**JUDGMENT**

1. The appellant, John Odeke Sokoni, was charged with the offence of defilement contrary to section 8 (1) as read with sub-section 3 of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence were that on 14<sup>th</sup> August 2012, in Teso North within Busia County, unlawfully and intentionally caused his penis to penetrate the vagina of MA, aged 13 years. The appellant also faced an alternative charge of indecent act contrary to section 11 (1) of the *Sexual Offences Act* No 3 of 2006.
2. The trial magistrate found that the prosecution had proved its case beyond reasonable doubt, convicted the appellant of the main charge and sentenced him to 20 years in prison.
3. The appellant aggrieved by the trial court's finding filed his appeal petition on 21/9/2017 and contends that the proceedings leading to his conviction violated his rights, that his defence was not considered and that the sentence imposed was harsh. He later filed supplementary grounds of appeal on 3/11/2023 raising further grounds of appeal:
  1. That the trial court erred in law and in fact in convicting the appellant relying on inconclusive and uncorroborated evidence of identification of a single eye witness.



2. That the trial court erred in law and in fact in breaching the appellant's absolute rights to a fair trial pursuant to Article 50 (2) (j) and section 200 (3) of the CPC.
  3. That the trial court erred in law and in fact in not weighing the conflicting evidence that were inconsequential to conviction.
  4. That the trial court erred in law and in fact in not making a finding that the mandatory nature of minimum mandatory sentence under section 8(1) as read with section 8(3) is unconstitutional and not warranted on plea.
  5. That the trial court erred in law and in fact in not ordering that the appellant's sentence to run from the date of arrest.
4. As a first appellate court, this court is obligated to evaluate the evidence afresh and make its own conclusions, except, bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See *Okeno v Republic* [1972] EA 32. The evidence before the subordinate court was as follows:
    5. MAJ (Pw1) testified that she is 15 years old and that she is in class 7. She recalled that on 14/8/2012 she was with her brother Brian and the accused sent him to buy a candle. She was in the house and explained that the house is one-roomed. The appellant was inside the house and he asked her to bring him water so that he could wash his hands. As Pw1 walked, the appellant came from behind, covered her mouth and pulled her to the bathroom. He forced her to have sex with him. Pw1 testified that he inserted his penis into her vagina and that she was leaning on the wall. She had worn a skirt and a blouse and he pulled her skirt. It took about 2 minutes and she felt pain. He gave her Kshs 200/- but she refused to take the money and ran away. Pw1 recalled that the incident took place at night. She told her mother that the appellant had defiled her. On cross-examination, Pw1 testified that he had known the appellant for one week and she used to see him talking to her sister. The incident took place at 9:00 p.m. and there was nobody nearby to witness the event.
    6. FA (Pw2) testified that on the material day, she was at her place of business and at about 1:00 p.m. she sent Pw1 to go cook for the children. After a while, she came back crying and told her that the appellant had defiled her. She testified that Pw1 was 13 years old in 2012. The appellant defiled her after he sent Brian and Rachel to buy candles. She reported the incident at the police station, issued a P3 form and took the child to the hospital where she was treated. She testified that the appellant used to stay in the same plot. On cross-examination, she testified that she had known him for about 3 months and had no grudge with him.
    7. Samuel Kibet (Pw4) testified that he is a senior clinical officer, in Teso District, Busia County. He testified that he has the P3 form of Pw1 after she alleged that she was assaulted by a person known to her on 14/8/2012 by a person known to her. He examined her clothing and Pw1 had a blood-stained inner pant. There was slight tenderness in the pelvic region. The vaginal hymen was torn and there was a small tear in the vaginal entrance. She had jelly-like fluid on her thighs. After conducting laboratory tests and a high vaginal swab, Pw1 was HIV negative, live spermatozoa were seen and she had trichomonas vaginalis. He also examined the appellant and his penis was normal without bruises. Pw4 testified that Pw1 was treated with antibiotics, analgesics and HIV prophylaxis. According to the age assessment form, Pw1 was 13 years old. On cross-examination, he testified that he saw the patient on 14/8/2012 but filed the Pw3 form the following day.
    8. No.92756 PC Julie Ruto (Pw3) testified that she was at Malaba police station and received a complaint about defilement from Pw2. She told her that the appellant had defiled Pw2 and she booked the report.



She took Pw1 to Teso district hospital and she was treated. The appellant was arrested and brought to the station and she issued a P3 Form to the complainant.

9. The appellant gave sworn testimony and testified as Dw1. He recalled that in 2012 he was working in Malaba when she met Pw2 who was his “mpango was kando”. On 10/8/2012 he gave her Kshs 10,000/- to boost her business. On 12/8/2012 when he went home, he found her with another man and he told her to return his money. They had a bit of a struggle and she threatened to do something horrible to him. He was later arrested on 15/8/2012 and charged. On cross-examination, he testified that he knew her family and that she had 3 children. He testified that Pw1 was not Pw2’s daughter.

### **Submissions**

10. The appellant argues that the incident took place at 9:00 p.m. and the court did not consider that there was no sufficient lighting for identification. He submits that Pw1 did not spend much time with the assailant and neither did she testify that she saw his face.
11. He also contends that the appellant was not given statements of Pw1 and Pw2. He also cited section 200 of the *Criminal Procedure Code* and submitted that a magistrate who did not observe the evidence is not in a position to assess the position, credibility and personal demeanour of all the witnesses. He also observed that the presence of trichomonas vaginalis observed in Pw1 was not linked to him. He argues that the presence of spermatozoa is not conclusive evidence of penetration. In *Mwangi v Republic* (1984) KLR the court held that the presence of spermatozoa alone in a woman’s vagina is not conclusive proof that she had sexual intercourse. He also contends that Pw4’s testimony that there was a small tear in the vaginal entrance was a fact not captured in the treatment notes. He also submits that the blood in the complainant’s pants was not tested to prove that it belonged to the appellant.
12. On the issue that the mandatory sentence is unconstitutional, the appellant cited the case of Maingi & 5 others Pet No. 017 of 2022. The appellant also argues that the trial court ought to have directed that the appellant’s sentence should run from the date of his first arrest.
13. The prosecution opposed the appeal. They submit that the age assessment report reveals that the complainant was 13 years old at the time the offence was committed. The complainant was a minor and therefore incapable of consenting to a sexual act.
14. The appellant was well known to Pw1 and Pw2 and the appellant in his defence confirmed that Pw2 was his girlfriend. The prosecution submitted that this was a case of recognition and relied on the decision of *Anjoni & Others v Republic* (1980) KLR. They submit that the appellant was properly identified and there was no danger of mistaken identity.
15. The medical officer who examined the complainant concluded that she had been defiled because the hymen was torn and a high vaginal swab disclosed live mobile spermatozoa. The trial court properly found that penetration had been proved.
16. On sentence, it was submitted that the issue of sentence was entirely at the discretion of the trial court and it was exercised properly based on the facts before it. The respondent urges the court not to interfere with the trial magistrate’s finding on sentence.

### **Analysis and Determination**

17. I have considered the grounds of appeal raised by the appellant, submissions by the parties and the main issues raised by the appellant are whether the prosecution proved its case to the required standard and whether the trial magistrate meted the appropriate sentence.



18. The appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* which provides:

“ 8.

- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

19. The prosecution was therefore required to prove that the complainant was a child, below the age of 18; that there was penetration; and that the appellant was identified as the perpetrator of the offence.

20. Pw4 produced the complainant’s age assessment report filed on 15/8/2012 as Pexh 3. The report indicated the child’s estimated age to be 13 years. Pw4 employed the dental method to determine this opinion and observed that the child had 24 teeth. The prosecution availed sufficient evidence to prove the age of the complainant.

21. On penetration, section 2(1) of the *Sexual Offences Act* defines penetration as:

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

22. The evidence of Pw1 is also clear and unshaken. She testified that the appellant had sex with her. She described the ordeal as follows:

“He pulled me to (sic) bathroom. He forced me to have sex with him. He inserted his penis into my vagina. He did it outside the bathroom as I was leaning on the wall. I had worn a skirt and blouse – I had pants on. He pulled up my skirt. He took about two minutes. I felt pain in my vagina. He ran away.”

23. Following the incident, Pw1 reported the matter to her mother Pw2. The incident took place at 9:00 p.m. and immediately they made a report at the police station at around 10:00 p.m. on the same day.

24. The testimony of Pw1 is further corroborated by the medical evidence. Pw4 testified that there was evidence of penetration when he examined Pw1. He testified that there was a tear in the vaginal entrance and the hymen was not intact. According to the P3 Form, Pw1’s inner pants were blood-stained. Semen fluid was also seen on the thighs. A high vaginal swab revealed that there were live mobile spermatozoa in the vaginal canal.

25. The only question is whether the prosecution proved that the appellant was the perpetrator of the offence. The appellant argued that the incident took place at 9:00 p.m. and the court did not consider that there was no sufficient lighting for identification. He also contends that the presence of trichomonas vaginalis observed in Pw1 was not linked to him.

26. In this case, the incident took place at 9:00 p.m. and Pw1 did not give any testimony as to the source of light. Her only testimony concerning the lighting is that the appellant sent her brother and sister for candles which indicates that the house did not have any source of light. Identification of the appellant



was therefore by recognition. In *Wamunga v Republic* (1989) KLR 424 where, in the latter case, this Court held that:

“...it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility or effort before it can safely make it the basis of a conviction.”

27. Pw1 testified that he had known the appellant for one week during which he used to talk to her sister. On the material day, the appellant was in their one-roomed home and he sent Pw1’s siblings for candles. The appellant and Pw1 were the only ones who remained in the house. The appellant also spoke to the complainant during the incident. He first asked her to bring him water for washing his hands. When he was done defiling her, Pw1 recalled that the appellant offered to give her Kshs 200/-. As she went to Pw2, the appellant followed her beckoning her. In my view, the complainant spent sufficient time with the appellant who was well known to her and therefore she was able to recognize his voice. The Court of Appeal in *Vura Mwachi Rumbi v Republic* [2016] eKLR held that:

“In the case of *Choge v R* [1985] KLR 1, this Court held that evidence of voice identification is receivable and admissible and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, however, care and caution should be exercised to ensure that the witness was familiar with the appellant’s voice and recognized it and that the conditions obtaining at the time the recognition made were such that there was no mistake in testifying to that which was said and who had said it...”

28. The Court of Appeal in *Karani v Republic* [1985] KLR 290 observed that:

“Identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognized it and that there were conditions in existence favouring safe identification.”

29. In this case, I find that Pw1 was familiar with the appellant’s voice and he was able to recognize him.

30. However, the appellant in his appeal has argued that the trial magistrate failed to comply with section 200 of the Criminal Procedure Code. The testimony of the Pw1, Pw2 and Pw3 were taken by Hon. I.T Maisiba (SRM) thereafter Hon. P.N Areri took over the matter and complied with section 200 of the Criminal Procedure Code and in his ruling found that the appellant did not give good grounds why the matter should start de novo. However, before the hearing could proceed, Hon. K.T. Kimutai took over the matter, complied with section 200 of the Criminal Procedure Code and directed that the hearing continue.

31. On 5/9/2016, Hon. E.N Mwenda took over the hearing of the case and later took the evidence of Pw4. Section 200 (3) of the *Criminal Procedure Code* (CPC) provides thus:

Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right.

32. From the record, Hon. E.N Mwenda did not inform the appellant that he had the right to demand that any witness be re-summoned and reheard. Hon. E.N Mwenda, therefore failed to comply with the



provisions of section 200(3) of the Criminal Procedure Code. In *Anthony Musee Matinge v Republic* [2012] eKLR the court explained the ramifications of failing to comply with section 200(3) of the *Criminal Procedure Code* as follows:

“The above provisions of law are couched in mandatory terms. It is the accused person, and not the advocate who must be informed by the court of the right to re-summon witnesses. He is also the person to state whether or not the case should proceed without recalling witnesses. It is not his advocate to do so on his behalf. In our present case, there is no record that the appellant was informed of his right to recall witnesses. Nor is there a record that he elected not to recall witnesses. His advocate could not respond for him. The response has to be that of the accused. The omission by the trial court was fatal to the proceedings. Therefore, the appeal has to succeed on this technicality.”

33. Similarly, the court in *Joseph Ndungu Kagiri v Republic* [2016] eKLR stated:

“In the present case the appellant and his co-accused was not informed of his rights under Section 200 cited above including the right to recall witnesses; this is a serious point of law which cuts deep into the rights of an accused person and the administration of justice and the need for courts to adhere to the rules of procedure governing criminal trials. I reiterate that this is a crucial point of law and in my view it prejudiced the rights of the accused persons as guaranteed under the law and it indeed it infringed on their rights to a fair trial. The upshot is that the proceedings were fatally defective, hence cannot be allowed to stand.”

34. The respondent failed to address the issue of section 200 of the *CPC*. In conclusion, I find that the appeal succeeds on this technicality. The appellant has served about 8 years and the incident happened in 2012 which is about 12 years ago. A retrial would not suffice in the circumstances. The appeal is accordingly allowed, the conviction is quashed and the sentence is set aside. The appellant shall be set free forthwith unless lawfully held.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 26<sup>TH</sup> DAY OF APRIL 2024.**

**R.E. OUGO**

**JUDGE**

In the presence of:

Appellant in person

Miss Matere -For the Respondent

Wilkister -C/A

