



REPUBLIC OF KENYA



KENYA LAW
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**DWM v Republic (Criminal Appeal E044 of 2021)
[2024] KEHC 3952 (KLR) (23 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3952 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL E044 OF 2021
AK NDUNG’U, J
APRIL 23, 2024**

BETWEEN

DWM APPELLANT

AND

REPUBLIC RESPONDENT

*(From original Conviction and Sentence in Nanyuki
CM Sexual Offences Case No 63 of 2019– L Mutai, CM)*

JUDGMENT

1. The Appellant, DWM was charged with the offence of defilement contrary to section 8(1) as read with section 8 (2) of the *Sexual Offences Act*, No 3 of 2006. He was also charged with an alternative count of sexual assault contrary to section 5(1)(a)(i) as read with section 5(2) and count II of indecent act contrary to section 11(1) of the same Act. The particulars were that on diverse dates between the month of March 2019 to 24th July 2019 in Laikipia county intentionally and unlawfully caused his penis to penetrate the vagina of one BA a girl aged 10 years old.
2. He was tried found guilty and convicted of defilement and on 12/06/2021, was sentenced to thirty (30) years imprisonment.
3. Being dissatisfied with the conviction and the sentence, the Appellant’ counsel appealed to this court challenging the conviction and the sentence vide an amended petition of appeal dated 02/11/2023. The conviction and the sentence are being challenged on the following grounds;
 - i. That the learned trial magistrate erred by failing to note that the prosecution failed in their duty to prove their case beyond reasonable doubt.
 - ii. The learned magistrate erred rejecting the Appellant’s defence without any convincing reason.



- iii. The learned magistrate erred by convicting the Appellant based on prosecution's evidence which was marred with contradictions, inconsistencies and lacked corroboration.
 - iv. The learned magistrate erred convicting the Appellant based on fabricated claims arising from the fact that there was a grudge between the complainant's aunt and the Appellant.
 - v. The learned magistrate erred convicting the Appellant based on evidence which failed to meet the required standard and was insufficient to secure a conviction.
 - vi. The learned magistrate erred by finding that the Appellant had committed the offence yet the ingredients of the offence were not proved.
 - vii. The learned magistrate failed to observe that the case lacked crucial witnesses such as complainant's parents, siblings and the grandmother who was staying with the complainant.
 - viii. The learned magistrate failed to consider that there was no cogent or credible medical evidence to connect the Appellant with the alleged offence.
 - ix. That the learned magistrate shifted the burden of proof to the Appellant by requiring him to prove his innocence.
4. The appeal was canvassed by way of written submissions. The Appellant's counsel argued that complainant's evidence on penetration must be supported by medical evidence as was held in *DS v Republic (2022) eKLR*. That according to the P3 form, everything was normal apart from the broken hymen which was old which denoted that the breaking of hymen happened sometime before examination. The P3 form did not also make an independent finding of defilement rather than stating that the complainant reported to have been defiled. Reliance was placed on *Abdi Roba Jillo v Republic (2020)eKLR*; *MKJ v republic (2021)eKLR* and *PKW v Republic (2012)eKLR* to emphasise that a broken hymen cannot be only as a result of penetration.
5. That there was evidence on record that the complainant had cycled for a distance of 18 kilometres which definitely amounted to vigorous physical activity with potential of inflicting injury to the hymen. That PW5 did not deny that cycling and other activities could have caused the complainant's hymen to break. Further, PW5 attributed the whitish discharge to many things including the continued use of antibiotics and was therefore not strictly tied to penetration. Reliance was placed in the case of *Daniel Mwingirwa vs Republic (2017) eKLR* where the court faulted the Judge for relying on broken hymen as proof of penetration. As such, the trial court erred considering the breaking of hymen as proof of penetration and ultimately, defilement.
6. Further, the PRC form indicated that the complainant reported to have been assaulted 3 months prior to the date of examination which time was approximated to be May. That PW1 confirmed that after being taken to hospital on April 2019, the medical examination showed no indication that the complainant had ever been defiled. That the complainant was living in a different location with the Appellant and the prosecution did not adduce evidence to place the complainant within the same geographical proximity as the Appellant between February 2019 and July 2019 when he was arrested. That the Appellant was only in close proximity to the complainant from 2018 to February 2019 when she was living with Margaret and she thereafter moved to different locations until July 2019. Therefore, if the complainant was defiled by the Appellant, the same could only have been done before February 2019 and ought to have come during the medical evidence test carried out on April and lack thereof vindicates the Appellant. Further, there was no medical evidence that was adduced to connect the Appellant to the offence as he was not subjected to a medical examination.



7. That the authenticity of the P3 form was in question as the police stamp was dated 2018 while examination was carried out on 25/07/2019 which shows that the form could have been doctored prior to any examination being carried out on the complainant in efforts to corner the Appellant. Further, PW5 testified that the complainant's vagina was tender and painful which was a pointer of some recent act yet the Appellant was in a different location from the complainant. As to identity, it was submitted that PW1 testified that a person named J who was staying with her grandmother had defiled the complainant whereas there was no evidence that J was the Appellant and no evidence that the Appellant ever lived with the said grandmother. Therefore, the description given to PW1 by the complainant did not match the Appellant.
8. Further, PW4 testified that the Appellant was identified to them by PW1, the complainant's aunt and the trial court failed to consider the Appellant's defence that PW1 had a grudge against him which led to her identifying him as the perpetrator and cajoling the complainant to testify against the Appellant. Therefore, it was a case of malice based on a grudge between PW1 and the Appellant which the trial court fully disregarded. Further, it was impossible for defilement to have happened at her mother's place since she did not live there between February and July 2019 which was corroborated by PW1 and PW2 who stated that she had been living with her grandmother. That although the complainant testified that her twin brother was present during the incidence, the Appellant's evidence which was not rebutted was that the complainant and her twin brother were separated in April 2019. That the trial court erred for treating the complainant as a truthful witness whereas in voir dire examination, she told the court that she did not know the consequences of lying to court.
9. That there were inconsistencies as PW6 testified that the complainant was living with her great grandmother and later stated that she was living with PW1 whereas PW1 stated that the complainant was taken to PW1's grandmother and to PW2. PW2 also contradicted PW1 when she stated that after going to hospital, the complainant went to her sister's place in July and came back complaining that the person who had defiled her was named 'J' and lived with her father and mother and not grandmother as asserted by PW1.
10. That crucial witnesses were not called to testify including M, complainant's grandmother who was said to be living with the complainant at the time of the incident and who could have stated whether the Appellant ever stayed in her house or whether the complainant was defiled. The complainant's father who was said to have taken her to hospital and complainant's mother too. Further, the complainant's twin brother who was said to be present when the offence took place was not called. Therefore, the court erred convicting him despite the fact that crucial witnesses were not called. On the sentence, she submitted that the sentence was harsh and excessive and failed to meet the objective of rehabilitation as outlined in Sentencing Policy Guidelines. She urged the court to reduce the sentence.
11. The Respondent's counsel on the other hand submitted that the age of the complainant was proved. Penetration was proved by medical evidence produced by PW5 whereby in the PRC and P3 forms he concluded that penetration had occurred which evidence remained unchallenged by the Appellant. Penetration was also supported by the victim's testimony. As to identity, the complainant's evidence was that her mother introduced her to her friend by the name J and that he spent the nights with her mother in the same one roomed house. The identification was very clear but was also through recognition as the Appellant defiled her multiple times. The Appellant confirmed that he was in relationship with the complainant's mother and they lived together at the time of the offence.
12. In response to failure to call crucial witnesses, she submitted that the crucial witnesses are those that will sufficiently prove the ingredients of the offence who were the complainant and the medical officer.



As to the sentence, she submitted that the same was justified considering the aggravating circumstances which outweighed the single mitigating factor by the Appellant.

13. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See *Okeno v Republic* [1972] EA 32.
14. In consonance with this legal duty, I have read and considered the evidence as recorded by the trial court. In so doing, I have factored that I neither saw nor heard the witnesses testify and have given due allowance for that fact. In the same breadth, I have had due regard to the submissions by learned counsel and the case law cited.
15. The evidence before the trial court was as follows. PW1 PN testified that she was contacted by her aunt M in April 2019 who informed her that the complainant had approached her and she appeared defiled. When she told her sister, the complainant's mother, she ignored her. She then contacted the complainant's father who took her to hospital. She was returned to the grandmother and to M but again she was spotted walking with difficulties and she was called. She examined her private parts which had some eruptions. The complainant alleged that J who lived with PW1's grandmother had defiled her and J was arrested. Jeff was living with the complainant's mother. The complainant informed her that the Appellant used to insert fingers in her private parts and she was threatened with death if she discloses the ordeal to anyone. She produced the complainant's birth certificate as Pexhibit1.
16. On cross examination, she testified that the complainant was taken to hospital by the father and she was found to have infection and she was given treatment. (according to handwritten record) That there was no indication that the complainant had been defiled.
17. PW2 CM testified that her grandchild, the complainant went to her place of work in April 2019 while walking with her legs apart. She inquired what was the matter and she informed her that she was sick between her legs and she complained of pain. She examined her and noticed whitish discharge. She contacted PW1 and her father took her to hospital. Later the child went to live with Margaret and left to her great-grandmother in July. She later complained to her that a person who lived with the mother had continually defiled her and who she named as J who was her mother's boyfriend. They reported the matter to police station. She did not know the Appellant from before but was identified to her by the complainant.
18. PW3, the complainant testified that in March to April 2019, she lived with her twin brother and her mother. The Appellant used to visit them and could spend the nights with her mom. They lived in one roomed house with 2 beds. She knew the Appellant as J as her mother had told her. That the Appellant would visit at night and would find her and her brother since her mother worked in a bar. The Appellant would then remove her from her bed to her mother's bed, remove her clothes and underwear, then his trousers and boxers and do bad manners to her (pointing to her vagina) using his thing for urinating. she stated that he did bad manners to her many times and during all instances, her mom was away at work. That she could tell him to stop because it was hurting but he told her not to tell anyone otherwise he will kill everyone.
19. She testified that the ordeal was painful and she even got sores that oozed pus around her vagina and could walk with difficulties with legs apart. Her brother did not witness the ordeal. She reported to PW2 and they reported to the police and she was taken to hospital. She had been on medication and the ordeal affected her as she frequented the toilet for short call. She testified that she had known the Appellant for long and when he started going to their home, they chased him away as they did not know him but he however continued going to their home with their mother and thereafter alone when her mother was at work.



20. On cross examination, she testified that she did not inform her mother and her brother and that she never screamed though the ordeal was unpleasant.
21. PW4 PC David Kibet stated that he was the arresting officer. He testified that he was instructed to accompany PW1 to cause the arrest of the Appellant. The Appellant was pointed out to him by PW1.
22. PW5 was the clinical officer. He testified that the complainant reported that fingers were used as well as penis to penetrate her vagina. On Physical examination, her hymen was broken, the vagina was tender and painful on palpation, she had whitish discharge, HVS results were positive and his prognosis was that defilement had occurred. The hymen scar was old. He produced the PRC form as Pexhibit2, P3 form Pexhibit3 and treatment notes as Pexhibit4. He testified on cross examination that cycling and exercise will cause a broken hymen and whitish discharge could be as a result of many factors including continues use of antibiotics. That complainant's vagina was tender thus painful which was a pointer of some recent acts.
23. PW6 was the investigating officer and only testified that a report was made and the Appellant was arrested. On cross examination, she stated that he was identified by the complainant as the defiler and the complainant informed PW2 that he had defiled her. That the stamp on the P3 form was of 2018. On re-examination, she testified that the complainant was taken to hospital on 25/07/2019 and not in 2018 and that she filled the P3 form.
24. The Appellant in his sworn defence testified that he met the complainant's mother in 2018 and they agreed to live together. She later introduced him to her sister PW1 who hated him since day one. That they decided to take the children to their grandmother in February 2019. Complainant's mother secured a job in Timau in March and he would communicate with her and she would tell him that the children were doing well. In April, the complainant was taken away by another lady in Sipiri and later she moved to Naiboi to her grandmother's place. She later cycled to Thigithu and went to PW1. He testified that in July 2019, they went to greet PW1 but she was unhappy when she saw him. He denied committing the offence and stated that the complainant was coached on what to say. That he took care of the complainant as his own child.
25. That was the totality of the evidence before the trial court. It is trite that for the charge of defilement to stand, the Prosecution must prove the age of the victim (must be a minor), that there must be penetration and a clear identification of the perpetrator. This is provided for under Section 8(1) of the [Sexual Offences Act](#) No. 3 2006.
26. Having established the ingredients of the charge, the question that this court should therefore determine is whether those ingredients were proved to the required standard.
27. Proof of age is important in a sexual offense. In *Kaingu Kasomo vs. Republic*, Criminal Appeal No. 504 of 2010 (UR), the Court of Appeal stated that:

“Age of the victim of sexual assault under the [Sexual Offences Act](#) is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.”
28. In the present appeal, the age of the complainant is not disputed. The same was proved by her birth certificate produced as Pexhibit1. It indicated the date of birth as 01/01/2009 hence she was 10 years when the offence was alleged to have been committed in 2019. Therefore, she was a minor at the time the offence was committed.



29. What is in dispute is proof of penetration and identify of the assailant. As to penetration, the Appellant argument is that complainant's evidence on penetration must be supported by medical evidence; a broken hymen cannot be hinged on penetration only and therefore the trial court erred putting reliance on broken hymen to convict him; there was evidence that the complainant had cycled for 18 kilometres which could have caused the hymen to break; the doctor testified that the whitish discharge can be attributed to other factors; the PRC form indicated that the complainant reported to have been assaulted 3 months prior to the date of examination which time was approximated to be May; PW1 confirmed that after been taken to hospital on April 2019, the medical examination showed no indication that the complainant had ever been defiled.
30. That the prosecution did not adduce evidence to place the complainant within the same geographical proximity as the Appellant between February 2019 and July 2019; there was no medical evidence that was adduced to connect the Appellant to the offence as he was not subjected to a medical examination; the authenticity of the P3 form was in question as the police stamp was dated 2018 while examination was carried out on 25/07/2019 which shows that the form could have been doctored prior to any examination being carried out; PW5 testified that the complainant's vagina was tender and painful which was a pointer of some recent act yet the Appellant was in a different location from the complainant.
31. On the issue that the complainant's evidence must be supported by medical evidence, it has been held in several occasions that a fact of rape or defilement can be proved by oral evidence and circumstantial evidence without necessary calling for medical evidence. This is in line with section 124 of the [Evidence Act](#) which states that corroboration is not necessary in sexual offences. This was further affirmed in the case of *Kassim Ali v Republic Cr. App. No. 84 of 2005 (Mombasa)* where the court stated:
- “ ... [The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.”
32. The Appellant stated that he was not subjected to medical examination to connect him to the alleged offence. It is noteworthy that no law requires that an accused person must be subjected to medical examination to connect him to a case of sexual assault. Section 36 of the [Sexual Offences Act](#) does not make medical examination mandatory, except where the court thinks it is appropriate in the circumstances of the case to subject an accused person to such examination. Further, the law has been settled that, despite Section 36 of the [Sexual Offences Act](#), sexual assault is proved, not by medical examination, but by evidence adduced at the trial. The evidence of the victim and that of corroborative witnesses or circumstantial evidence is usually enough to establish sexual offences.
33. As to the fact that the complainant cycled for 18 kilometers which could have caused her hymen to break, it is noteworthy that this was only raised at defence stage. The same was not put across the complainant when she testified and it was therefore an afterthought. On the fact that the PRC form indicated that the complainant was defiled three months prior to examination, this is a lie not supported by the PRC form. The Appellant only raised the issue of being in different location with the complainant belatedly in his defence, an issue not raised at all in cross examination. The issue of erroneous stamp was addressed by PW6, the investigation officer and she clarified that the matter was reported on 25/07/2019. The discrepancy in the date is one that is attributable to normal and expected human error and is resolved by the other evidence available.
34. The evidence on penetration was, as seen above, from several witnesses. This is the evidence of PW3, the complainant and PW5, the clinical officer. The complainant testified that the Appellant was introduced to her by her mother in April 2019. He would visit at night when her mother was at work



- and he would do bad manners to her. She described to court that the Appellant would remove her from the bed she shared with her brother to her mother's bed. He would then remove her clothes and underwear, then his trouser and boxer before doing bad manners in her vagina with his thing for urinating. She testified that he did it many times. She reported to her grandmother, PW2. She testified that she got sores and her vagina oozed pus and she could walk with difficulties. PW2 testified that when the complainant went to her place of work, she noted that she was walking with her legs apart and upon enquiry, she informed her that she was sick between the legs. When she examined her, she noticed whitish discharge. This was in April but later on, she reported to her that J had defiled her.
35. PW1 also stated that in April, 2019, she was contacted by PW2 who informed her that the complainant appeared defiled and she reported to her father who took her to hospital. She was again later spotted walking with difficulties and she was called. When she examined her private parts, it had some eruptions and the complainant informed her that J had defiled her. The complainant informed her that Appellant inserted fingers in her private parts.
36. PW5 the clinical officer who examined the complainant stated that the complainant reported that fingers and penis were used to penetrate her vagina. On examination, her hymen was broken though the hymen scar was old and the vagina was tender and painful on palpation. She had whitish discharge. His prognosis was that defilement had occurred. He produced the PRC, P3 form and the treatment notes for the complainant.
37. The totality of the above evidence shows that indeed the complainant was defiled. The question therefore is whether the Appellant was the perpetrator.
38. The complainant named her assailant as Jeff. PW1 and PW2 also testified that she named J as the perpetrator. In her testimony, she testified that the Appellant was introduced to her as J by her mother. He would visit them at their one-roomed house accompanied by their mother and thereafter, he would come at night when her mother was away at work and that is when he would defile her.
39. The Appellant in his submissions stated that there was no evidence before the trial court that he was J and the charge sheet did not use J as alias to his names. It is however noteworthy that at no time did the Appellant deny that he was known as J. Even in his defence, he did not deny this name. The complainant was clear during her testimony that the Appellant was introduced to her by her mother as J. Further, the identity of the Appellant by the complainant was that of recognition as he went to their house on several occasions and it is trite, evidence of recognition is more reliable as it is based on knowledge. See *Anjononi & Others -vs- Republic*, (1976-80) 1 KLR 1566, where it was held that;
- “This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or another.”
40. On inconsistencies, it was argued that PW6 testified that the complainant was living with her great grandmother and later stated that she was living with PW1 whereas PW1 stated that the complainant was taken to PW1's grandmother and to PW2. PW2 also contradicted PW1 when she stated that after going to hospital, the complainant went to her sister's place in July and came back complaining that the person who had defiled her was named 'Jeff' and lived with her father and mother and not grandmother as asserted by PW1.



41. It is well settled that where there are contradictions and inconsistencies in the evidence of witnesses, it is the duty of the court to weight the contradictions and consider whether they have any effect on the overall evidence in the case. The court in *Njuki & Other Vs Republic* (2002) 1 KLR 771 held that:

“Where such allegations are raised, the obligation of the court is to determine as to whether the said discrepancies, contradictions and indiscrepancies are of such a nature as would create doubt as to the guilt of the accused. Where they do not they are curable under section 382 of the Criminal Procedure Code”.

42. The court in *Erick Onyango Ondeng’ v Republic* [2014] eKLR, the Court of Appeal cited *Twehangane Alfred v Uganda*, (Crim. App. No 139 of 2001, [2003] UGCA, 6, in which the Court of Appeal of Uganda stated:

“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.”

43. The Court of Appeal in the case of *Richard Munene –v- R Cr. Appeal No. 74/2016 (2018) eKLR* while addressing the issue of contradictions held;

“It is a settled principle of law however that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessary creates doubts in the mind of the trial court that an accused person will be entitled to benefit from it.”

44. It was further submitted that crucial witnesses were not called to testify including Margaret, complainant’s grandmother who was said to be living with the complainant at the time of the incident and who could have stated whether the Appellant ever stayed in her house or whether the complainant was defiled. The complainant’s father who was said to have taken her to hospital and complainant’s mother were also not called. Further, the complainant’s twin brother who was said to be present when the offence took place was not called.

45. It is trite law that the prosecution is not bound to call numerous witnesses to prove a fact. This is in line with Section 143 of the *Evidence Act* which provides that;

“In the absence of a provision of the law, no particular number of witnesses is required to prove a fact.”

46. In *BUKENYA AND OTHERS V. UGANDA* [1972] EA 349 it was held that;

“While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case.”



47. There is no requirement that the prosecution has to call a number of witnesses to prove a fact. But, if he fails to call crucial witnesses, an inference can be made that their evidence would have been adverse to their case. However, as per the above case, the inference can only be made where the evidence is barely adequate
48. As regards the assertion that the Appellant's defence was not considered and that there was a grudge between the Appellant PW1, my analysis shows that the trial court considered the defence evidence and the issue of a grudge was raised too late in the day giving the prosecution witnesses no room to rebutt it.
49. On the sentence, the Appellant was sentenced to thirty (30) years imprisonment. The law under section 8(2) provides for life imprisonment. The trial court while sentencing the Appellant considered his mitigating factor and the aggravating circumstances. As submitted by the Respondent's counsel, sentencing is at the discretion of the trial court and an appellate court will not easily interfere with the discretion of the trial court on sentence unless it is shown that in exercising its discretion, the court acted on a wrong principle; failed to take into account relevant matters; took into account irrelevant considerations; imposed an illegal sentence; acted capriciously or that the sentence imposed was harsh and excessive. (Ogolla S/o Owuor v R {1954} EACA 270).
50. I find no indiscretions on the part of the trial court that would open a door for this court to interfere with the sentence meted out.
51. With the result that the appeal herein fails in its entirety and is dismissed.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 23RD DAY OF APRIL 2024.

A.K. NDUNG'U

JUDGE

