



**Ndeere v Republic (Criminal Appeal E003 of 2022)
[2024] KEHC 3803 (KLR) (22 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3803 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E003 OF 2022**

GL NZIOKA, J

APRIL 22, 2024

BETWEEN

PETER MWANGI NDEERE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the decision of; Hon. H. O. Barasa, Senior Principal Magistrate (SPM), delivered on 14th November 2019, vide Sexual Offence No. 700 of 2016, at the Senior Principal Magistrate's Court at Engineer)

JUDGMENT

1. The appellant was arraigned before the Senior Principal Magistrate's Court at Engineer charged vide Criminal Case S/O No. 700 of 2016, with the offence of defilement contrary to section 8(1) as read with section 8(3) of the [Sexual Offences Act](#) No. 3 of 2006 (herein "the Act").
2. That on diverse date between 10th and 11th June 2016 at an unknown time within Nyandarua County, intentionally caused his penis to penetrate the vagina of BMN, a child aged thirteen (13) years.
3. He was also charged in the alternative charge, with the offence of; committing an indecent act with a child contrary to section 11(1) of the Act. That on diverse date between 10th and 11th June 2016 at an unknown time within Nyandarua County, intentionally caused his penis to penetrate the vagina of BMN, a child aged thirteen (13) years.
4. He pleaded not guilty and the case proceeded to full hearing. The prosecution called a total of six (6) witnesses in support of its case. The prosecution case in brief is that, on 10th June 2016, at about 5:00pm BMN (herein "the complainant") left school for home and passed by the shop to buy sweets.



5. That while on the way to the shop she met the appellant who was riding a motorcycle and offered to take her to the shop. She boarded the motor bike and instead of the appellant taking her to the shop, he took her to his house,
6. That the appellant removed her dress and pant and told her to lie on the bed. He then removed his trouser and defiled her. The complainant stated that she was defiled three (3) times by appellant that evening. The complainant stayed in the appellant's house over night
7. The complainant left the appellant's house and he warned her not to inform anyone about the defilement That upon arrival at home, the complainant's mother (PW2) VWN, inquired from her where she had spent the night the complainant told her that she spent the night at her aunt's place. However, her father (PW3) GNN, noticed that the complainant was walking with difficulty and doubted her information as to where she had slept
8. The complainant's mother established that the complainant was lying that she slept at her auntie's place and at the same time information was received from MK, a member of the Community Policing that the complainant was seen leaving the appellant's house in the morning.
9. The complainant's mother inquired from her to tell the truth, whereupon she revealed that she had spent a night at the appellant's house and had been defiled.
10. The complainant was taken to Manunga Health Centre where she was treated and established that she had been defiled and referred to Engineer Hospital for further examination. Thereafter, the matter was reported at Kipipiri Police Station.
11. That, the appellant went into hiding after the incident but was arrested on 22nd July 2016, at Miharati Police Station and informed (PW6) No. 917314 P.C Antonie Adhaimabo who arrested the appellant and charged accordingly.
12. At the conclusion of the prosecution case, the trial court placed the appellant on his defence. He denied committing the offence and stated on 22nd July 2016, he learnt that the complainant's father was accusing him of defiling his daughter. That, he looked for him and they met whereupon he learnt that the allegations came of defilement was made by the complainant's mother but the father told him he would withdraw the report at the police station.
13. However, the complainant's father called a police officer who arrested him and took him to the police station where he was placed in the cells until 25th July 2016 when he was arraigned before court.
14. At the conclusion of the case, the trial court in the judgment delivered on 14th November, 2019 held the prosecution had proved its case beyond reasonable doubt and found him guilty of defilement, him and sentenced to serve a term of twenty (20) years imprisonment.
15. However, the appellant is aggrieved by both conviction and sentence and appeals against based on the grounds as verbatim reproduced: -
 - a. That the learned trial magistrate erred in law and fact by convicting the appellant but failed to note that the ingredients of the offence were not conclusively proved.
 - b. That the learned trial magistrate erred in law and fact by convicting the appellant yet failed to appreciate that there was no proper medical evidence linking the appellant to the commission of the offence
 - c. That the learned trial magistrate erred in law and fact by convicting the appellant yet failed to find that his defence was cogent and believable.



- d. That the learned trial magistrate erred in law and fact when he convicted the appellant yet failed to find that prosecution did not discharge the burden of proof.
 - e. That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant without putting into consideration the appellant's mitigation, the fact that he was a first offender.
 - f. That I pray to be supplied with a copy of the original trial court's proceedings and its judgment.
 - g. That further grounds shall be adduced at the hearing of this appeal.
 - h. That I wish to be present during the hearing and determination of this appeal.
16. However, the respondent filed grounds of opposition dated; 2nd November, 2022, which states that: -
- a. That the age of the complainant was sufficiently proved to be 13 years as provided for under section 8(1) and section 8(3) of the [Sexual Offences Act](#). and birth certificate produced as an exhibit.
 - b. That the penetration was proved under section 8(3) of the [Sexual Offences Act](#) through the evidence of PW1, PW2, PW5 and PW6 who examined the complainant and PW5 the medical doctor produced P3 form and PRC form.
 - c. That the trial court considered the appellant defence and subsequently dismissed it.
 - d. That in the judgment the trial court noted that the complainant evidence was cogent and the court noted that she was a truthful witness whose evidence was unshakable despite the defence adduced by the appellant;
 - e. That the trial court found that the prosecution case was proved beyond reasonable doubt and subsequently convicted him in line with section 215 of the Criminal Procedure Code;
 - f. That the sentence imposed by the trial court was proper and in line with the [Sexual Offences Act](#). Further, that the court considered mitigation and circumstances of the offence and used discretion in sentencing the appellant to twenty (20) years imprisonment;
 - g. That I pray that the honourable court be pleased to dismiss the appeal and uphold both the conviction and the sentence.
17. The appeal was disposed of vide written submissions. The appellant in undated submissions argued that, the trial was unfair as he was not provided with the statement of (PW1) the complainant before the trial and was not given an opportunity to go through the same and prepare his defence in contravention of Article 50 (2) (j) of [the Constitution](#) of Kenya.
18. Further, his advocate was denied an opportunity to represent him on the day of hearing. In addition, he was not present when the first three witnesses gave their evidence in chamber and was only allowed to cross-examine them, thus the entire trial was unfair and prejudicial to him.
19. He submitted that, the prosecution did not prove the ingredients of the offence to the required standard. That, the prosecution had the onus of proving the age of the complainant beyond reasonable doubt as stated in the case of; Hillary Nyongesa vs Republic Eldoret Criminal Appeal No. 123 of 2000.
20. That, the authenticity of the clinical card produced as proof of the complainant's age was in question as it could not be verified it belonged to the complainant. Further, prosecution did not produce the complainant's birth certificate nor did it conduct an age assessment for the complainant.



21. He relied on the case of; Francis Omuroni vs Uganda Criminal Case No. 2 of 2000, where the Court of Appeal in Uganda held that apart from medical evidence, age may be proved through the evidence of the parents or the guardian, or observation and common sense, but argued that, in the present case, none of the witnesses knew the exact date the complaint was born.
22. The appellant further submitted that, penetration was not proved beyond reasonable doubt. That, the medical evidence produced by (PW5) Doctor Julius Murimi Ntwiga was based on the history given by the complainant. Further, the treatment notes from Manunga Health Centre and J. M. Kariuki Hospital were never produced as evidence in court. Furthermore, PW5 was not the maker of the P3 form and therefore his evidence amounted to an opinion.
23. The appellant argued that, a tear of the hymen is not proof of penile penetration and cannot be conclusive proof of defilement and relied on the case of; Michael Odhiambo vs Rep (2005) eKLR where Dr. Kogutu stated that the rupture of the hymen was not per se conclusive evidence of defilement. He also faulted the prosecution for failing to conduct a DNA test where the medical test was not able to prove that he defiled the complainant.
24. The appellant submitted that, the complainant was not a truthful witness, therefore the trial Magistrate erred in relying on her testimony. That, the complainant voluntarily refused to divulge to her parents where she spent the night until her father threatened to beat despite the fact that she had not been threatened by the perpetrator.
25. That, evidence procured through coercion is not credible and cited the case of Kanini Muli vs Republic (2014) eKLR where the court stated that magistrates and judges have a duty to ensure confessions are voluntary, and that confessions made under torture, threats, promise or inducement are not reliable as they are made with no regard to the truth so as to avoid harmful consequence.
26. Further, the complainant testified that she could not remember the date the offence occurred and could therefore not corroborate the medical evidence on penetration. Furthermore, the words “on diverse dates” as used in the charge sheet have been held to mean no date at all in the case of; Alfonse Odhaimbo Olwa vs Republic (2017) eKLR.
27. The appellant submitted that the prosecution failed to call the complainant’s aunt who was a crucial witness to shed light on whether indeed the complainant slept at her house on the material date and relied on the case of; Bukenya & others vs Uganda (19472) E.A where it was held that the prosecution must make available all witnesses available to establish the truth and where the evidence is barely adequate the court may infer the evidence of the uncalled witness would have been adverse to the prosecution’s case.
28. That the mandatory minimum sentence is harsh as courts have frowned on the same as they place a limitation on judicial discretion and cited the decision of the Court of Appeal of South Africa in case of; S vs Toms 1990 SA 802 (A) at 806(h) – 807 (b).
29. The appellant stated that, the trial court did not consider that; he was a first offender, did not commit the offence, and has a wife and a child and sole bread winner of his family and his incarceration has turned them into beggars. Finally, the trial court failed to take into consideration that the elements of the offence were not conclusively proved and imposed the mandatory sentence.
30. However, the respondent in submissions dated; 21st November 2022, opposed the appeal and argued that the elements of the offence being; age, penetration, and identification of the perpetrator, were proved beyond reasonable doubt.



31. That, the complainant was able to identify the appellant as she knew him as a neighbour and she spent the whole night at his house. Further, the complainant's parents and PW4 confirmed they knew the appellant well as a boda boda rider, which, was confirmed by the appellant in his defence.
32. The respondent submitted that, the complainant gave evidence on how the appellant detained her, removed her clothes and defiled her. That her evidence remained unshaken during cross-examination despite intimidation by the appellant. Furthermore, the complainant's evidence was corroborated by the medical evidence that confirmed she was defiled.
33. Furthermore, the trial court took cognisance of section 124 of the *Evidence Act* (Cap 80) Laws of Kenya and was satisfied that the complainant was telling the truth. Reliance was placed on the case of; Erick Onyango Ondeng vs Republic (2014) eKLR where the Court of Appeal held that section 124 of the *Evidence Act* allows the trial court to convict on the sole evidence of the victim of a sexual offence if for reasons recorded it is satisfied she was telling the truth.
34. The respondent submitted that the complainant's immunization card was produced in court in proof of her age. Further, the trial court recorded the complainant evidence and established was thirteen (13) years old and truthful.
35. The respondent urged that, the evidence of the witnesses was cogent, detailed, and corroborated facts on the complainant's defilement thus in the circumstances the appeal should be dismissed and conviction and sentence upheld.
36. At the conclusion of the hearing of the appeal and in considering the appeal, I note that, the role of the first appellate court is to re-evaluate the evidence afresh and arrive at its own conclusion, bearing in mind that the court did not have the benefit of the demeanour of the witnesses.
37. In that regard, the Court of Appeal in the case of; Okeno vs. Republic (1972) EA 32 stated that: -

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that, the trial court has had the advantage of hearing and seeing the witnesses”
38. Be that as it were, the offence the appellant was charged with is provided for under section 8(1) of the Act, that states: -

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement”
39. The law is thus settled that, the ingredients of defilement as discussed in the case of; Agaya Roberts vs. Uganda, Criminal No. 18 of 2002, where the Court of Appeal stated that, in order to constitute the offence of defilement the following must be proved: (i) sexual intercourse (ii) victims age is below 18 years (iii) the accused is the culprit.
40. Similarly, in Bassita Hussein vs. Uganda Criminal Appeal No. 35 of 1995, the Supreme Court of Uganda laid down the ingredients of the offence of defilement, which the prosecution must prove



beyond reasonable doubt as; (i) the facts of the sexual intercourse (ii) the age of the victim being under 18 years (iii) participation by the accused in the alleged sexual intercourse.

41. I have considered the evidence adduced in total, and as regards age the charge sheet states that, the complainant was 13 years old. The evidence of the complainant was that she was 13 years. PW2 VWN her mother testified that she was 13 years old having been born on 6th September, 2002 as evidenced by her birth immunization card produced by the investigation officer as prosecution exhibit 3.
42. It is trite law that proof of age of a minor can be by other means beyond a birth certificate therefore, the age of the complainant herein was well proved. A child is defined under the *children Act* as; “an individual who has not attained the age of eighteen years”. As such the complainant was a child.
43. As regard penetration, it is defined under section 2 of the Act as “the partial or complete insertion of the genital organs of a person into the genital organs of another person”.
44. In the instant matter, it is the evidence of the complainant that, the appellant took her to his house and removed her clothes and told her to lie on the bed while naked and then undressed and did bad manners to her by inserting his genital organs into her private parts.
45. The other evidence on penetration was led by PW3 Dr Julius Murimi Ntwiga who produced the P3 and Post Rape Care forms which indicates that when the complainant was examined on 13th June 2016, by Dr Maingi she was found to have inflammation at infroitus of the genital and the hymen was freshly torn. According to the doctor, based on the history, the probable weapon was penal vagina. It is the considered opinion of the court that, the element of penetration was proved by the evidence of the complainant as corroborated by the medical reports produced.
46. Finally, as regards identification, the charge sheet names the appellant as the perpetrator of the crime. PW1 the complainant testified that, it is the appellant who offered to carry her on his motor bike to the shop and ended up taking her to his house. She told the court that she met the appellant when coming from school and buying sweets from a shop. This indicates that she met the appellant in broad daylight. PW4 John Kanyiri Kariuki confirmed that he saw the complainant at 5.00pm on the material date in school uniform when she went to buy a sweet from his shop.
47. The complainant further stated that she knew the appellant earlier than the material day as a Boda Boda rider and would see him at least three times a week as she walked to and from school. The complainant’s parents also testified that he was a Boda Boda rider and. In any event the appellant admitted in his evidence in chief that he was a Boda Boda rider.
48. Furthermore, PW2 VWN testified that she knew the appellant as he used to carry her on his motor vehicle. That she had known him for about three months prior to the date of the incident and would see him at least once in a week. PW3 Goefrey Njuguna Ngugi testified that he knew the appellant as his grandfather was his neighbour.
49. It suffices to note that the appellant did not cross examine the complainant and the parents who testified as PW1, 2 and 3. Furthermore, all of these witnesses testified that, they did not have a grudge with the appellant a fact not rebutted by the appellant.
50. The appellant in his defence testified to the events of 22nd July, 2016 when he was arrested and not the 10th to 11th June 2016, when the offence herein is alleged to have taken place. As such all the evidence adduced by the prosecution witness on what he did on those days and in particular luring the complainant to his house and defiling her is not rebutted.



51. It is also noteworthy that he does not allude to any bad blood or grudge between him and the complainant and/or her parents.
52. I find that it was critical for the prosecution to have called the evidence of the person who allegedly saw the complainant leave the appellant's house, however I find that the evidence of that witness would have been corroborative of the other evidence and its absence does not render all the other evidence inadmissible or insufficient, the subject evidence would not confirm the act of defilement but complainant's presence per se in the appellant's house.
53. Be that as it may, I find that the law is settled that in cases of sexual assault the evidence of the complaint is adequate, so long as the court finds the evidence is credible as discussed in the case of; Arthur Mshila Manga vs. Republic [2016] eKLR where the Court of Appeal stated that:
- “It is trite that under the proviso to section 124 of the *Evidence Act*, a trial court can convict on the evidence of the victim of a sexual offence alone. (See Mohamed vs. Republic [2008] KLR (G&F), 1175 and Jacob Odhiambo Odhiambo vs. Republic [supra]. However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief.”
54. In the instant matter the trial court observed that, the complainant narrated how on the material day she went to the shop, met the appellant who carried her to his house where she spent the night. That she was categorical that the appellant defiled her three (3) time on the night. Further, the trial court found that the complainant's evidence in chief was consistent detailed and the same was not shaken at all.
55. The appellant has raised a defence of inadequate preparation for trial due to lack of witness statements but that issue has been adequately addressed by the trial court. That he had an opportunity to seek for recall of witnesses and did not.
56. In conclusion, I find that the prosecution adduced adequate evidence to warrant a conviction and the appellant was properly found guilty and convicted and I confirm the conviction.
57. As regards sentence I find that the complainant was over 12 years, the Act states that anyone who defiles a child of the age of 12 to 15 years is liable to imprisonment term of not less than 20 years. The appellant was sentenced to 20 years' imprisonment. Therefore, the sentence meted out is legal and/or lawful. However, the calculation of the sentence should consider the period the appellant was in custody, if any.
58. In all I find no merit in the appeal and dismiss it in its entirety. Right of appeal 14 days explained.

DATED, DELIVERED AND SIGNED ON THIS ON 22ND DAY OF APRIL 2024.

GRACE L. NZIOKA

JUDGE

In the presence of:

Appellant presently virtually

Mr Abwajo for the Respondent

Ms Ogutu: Court Assistant

