



REPUBLIC OF KENYA



**Wechuli v Republic (Criminal Appeal E016 of 2023)
[2024] KEHC 6403 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6403 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E016 OF 2023
SC CHIRCHIR, J
MAY 30, 2024**

BETWEEN

JOSPHAT KWEYU WECHULI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal against the Judgment of Hon. J.R Ndururi(PM)
delivered on 7th march 2023 in Sexual offences case No. 105 of 2018)*

JUDGMENT

1. The appellant was charged with defilement Contrary to Section 8(1) as read with Section 3(2) of the [Sexual Offences Act](#).(The Act)
2. The particulars are that on the 13th day of February 2015, at Navakholo sub-county within Kakamega county, intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organs of MO a girl aged 9 years.
3. He faced an Alternate charge of committing an indecent act with a child contrary to Section 11(1) of the [Act](#).
4. He was convicted of the main charge and sentenced to 20 years in prison.
5. He was dissatisfied with the outcome and filed the Petition of Appeal setting out the following grounds:
 1. The learned magistrate erred in law and fact in convicting the accused on unreliable evidence of the prosecution witnesses without properly evaluating it and making a finding on it.
 2. The learned magistrate erred in law and fact by not considering the reasonable doubts available in the case against the Appellant and erred in not giving the Appellant the benefit of these doubts.



3. The learned magistrate erred in law and fact by presuming the age of the minor from a baptismal card s opposed to government issued documents like birth certificate or age ascertaining through age assessment by a medical professional
4. The learned magistrate erred in law and fact in convicting the accused without the prosecution having proved all the ingredients of the offence
5. The learned magistrate erred in law and fact by meting out harsh sentence in the circumstances
6. The appeal proceeded by way of written submissions

Appellant's Submissions

7. It is the Appellant's Submission that the testimony of the Complainant(PW1) was marred with glaring contradictions pointing to uncertainty and complete lack of truth
8. It is further submitted that Kevin Masinde and Ruth who the Complainant told the Court they were coming together from school were not called as witnesses. The other contradiction pointed out is whether the complainant was defiled alone or with one Ruth. In this regard the Appellant has drawn the court's attention to the decision of the court in *Shaban Bin Donald v R* (1940) VL-7 EACA 60
9. It is further pointed out that whereas the Complainant claimed that she was escorted home by Kevin, PW2 told the Court she was alone. It is argued that there was contradiction on whether the Complainant had her panties or not when she arrived home.
10. It is the Appellant's final submissions that the Complainant's age, despite being a critical ingredient of the offence of defilement, was not proved. In pointing out the critical nature of this ingredient the Appellant has cited the case of *Eliud waweru wambui v R* (2019) e KLR and in *Hadson Ali Mwachongo v R* (2016) e KLR.
11. Finally, it is submitted that the Trial Court misdirected itself when considering the defence of alibi; that the prosecution did not discharge its duty of disapproving this defence.The Appellant relies on the case of *Wangombe v R* (1980) KLR 149 in this regard.

Respondent submissions.

12. The respondent's concedes that there were material contradictions on the complainant's testimony on whether:- she was defiled alone or with one Ruth; on the whereabouts of the underwear ; where she was defiled ; whether she was escorted home by kevin or not .
13. It is the prosecution's further submission that although the Appellant was represented , at some point in the proceedings his Advocate was absent. The prosecutor states that this was prejudicial to the Appellant's right to fair trial.
14. The prosecution also agrees that that the trial court failed to consider the defence of Alibi.
15. In conclusion the prosecution concedes that the conviction was not safe

Analysis and Determination

16. This is a first appeal and it is the duty of this court to look at the evidence afresh, re-evaluate it and arrive at its own findings.(Ref:*Okeno v Republic* (1972) EA 32)
17. I have considered the trial record, the Memorandum of Appeal and Submissions of the parties as well as the authorities relied on. In my view the following issues arise for determination:



1. Whether the charge of defilement was proved beyond reasonable doubt. (Grounds 1,2, 3 & 4).
2. Whether there were inconsistencies and gaps in the Prosecution's case.
3. Whether the Trial Court misapprehended the facts in respect of the defence of alibi.
4. Whether the sentence was excessive.

Whether the charge of defilement was proved beyond reasonable doubt. (Grounds 1,2, 3 & 4).

18. Section 8(1) of the *Act* provides as follows:

1. "A person who commits an act which causes penetration with a child is guilty of an offence termed defilement".

19. In the case of *John Mutua Munyoki - v- Republic* [2017] eKLR, the Court of Appeal expounded on the offence as follows:

"Under the Sexual Offences Act the main elements of the offence of defilement are as follows:-

- i. The victim must be a minor, and
- ii. There must be penetration of the genital organ and such penetration need not be complete or absolute. Partial penetration will suffice. Therefore, in order for the offence of defiling to be committed, "the prosecution must prove each of the above ingredients beyond reasonable doubt."

Thus the Prosecution must prove the age of the victim, the identification of the perpetrator and the penetration

20. On the age of the victim, the investigation's officer produced a Dedication card. It showed that the Complainant was born on 9/2/2006. It is the Appellant's submission that age was not proved; that in the absence of a birth certificate, the Complainant ought to have been subjected to age -assessment by a medical professional. I entirely agree with the Appellant that the age of the victim in Sexual Offences is critical. It needs to be proved as the age of the victim determines the sentence to be meted out in the event of conviction. (See *Hadson Mwachonyo v R* cited by the Appellant (supra))

21. However, it is now settled that birth certificate is not the only way of proving age. As was held in the case of *Edwin Nyambaso Onsongo v Republic* [2002] eKLR, in which the court cited the case of *Mwolongo Chichoro Mwanyembe v Republic*, Mombasa Criminal Appeal No. 24 of 2015 (UR) the Court of Appeal held 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 documents, 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, guardian or medical evidence among other forms of proof...."

22. A dedication Card fall under the genre of a baptismal card. The card shows that the complainant was born on 9.2.2006. The document tallies with the Complainant's testimony when she told the court that she was 13 years old at the time of the hearing . In view of the foregoing, I am satisfied that the age was proved.



Penetration

23. On the aspect of penetration, the Complainant told the Court that she was on her way from school in the company of Kevin and Ruth, when they decided to enter a sugarcane plantation to steal sugarcane. They were caught by the Appellant. Her two companions ran away but she did not manage to. The Appellant pulled her to the middle of the plantation. He forcefully removed her clothes including her panty. He pushed her, removed his trouser and removed his penis. He inserted it in her vagina. She stated that he did bad things to her. She further stated that she screamed but he held her neck.
24. The words used by the victim here, “he inserted his penis in her vagina” then later “he also did bad things to me”. I has been accepted by the courts as euphemisms used by children to refer to sexual assault. In the case of in *Daniel Arasa v. Republic*, HCRA 1035 of 2013 [2014] eKLR the court held: It is common knowledge in this country and the court may thus take judicial notice that the words “ tabia mbaya” i.e bad manners coming from a young girl who has been a victim of sexual violence connotes nothing but sexual intercourse . Children in particular will always refer to sexual intercourse as “ tabia mbaya” perhaps due to shyness or they may not know what description to give such an act . Suffice to hold that “ tabia mbaya “ is an euphemism for sexual offences.”
25. Further, the testimony of the Complainant was corroborated by the clinical officer(pw4). He examined the Complainant the same day. On examination, the found that the hymen was freshly torn, with blood stains. There were blood stains in the urine as well as spermatozoa and blood cells. He formed the opinion that the child had been defiled. There was thus full compliance with Section 19 of the Oaths and Statutory Declaration Act. The Victim’s testimony was fully corroborated. I am therefore satisfied that penetration was proved.

Identification of the Perpetrator

26. It emerged from the evidence of PW1, PW2 and PW3 that the Appellant was not only very well known to the 3 witnesses but were also related. The complainant referred to him as grandfather, PW2 referred to him as his cousin ,that their fathers are brothers; and PW3 referred to him as her brother-in-law. PW2 and PW3 are married couple. This was therefore a case of identification by way of recognition. Identification by recognition ,as often said, is much more reliable than identification by a stranger
27. An issue arose on whether the Accused was Peter or Josephat . PW2 told the court that that is the name they know the accused by, at home. This was repeated by PW3. That there was therefore consistency that at home, the Appellant was referred to as Peter. Moreover ,whether the Appellant was Peter Wechili Kweyu or Josephat Wechili Kweyu is not significant. What is significant is the recognition. It is a matter of common notoriety that people may use different names at different times. Indeed it is instructive that the issue of names has not been taken up as a ground of Appeal.

Were there material Contradictions & Inconsistencies?

28. The inconsistencies pointed out out by the Appellant and which got the support of the Respondent went as follows:- That while the complainant told the police that she was defiled alongside Ruth, she told the court that she was alone. In this regard she stated “I recorded my statement to the police twice. The first one was 13/2/2015. I cannot recall what I wrote in the statement. I told the police earlier that Peter took me and Ruth. He finished up with Ruth and she went home.”
29. This was a 13th year old girl trying to recall events which occurred about 4 years earlier. such mix-ups are not unexpected. Further the reference to Ruth do not suggest on act of defilement. The words used were “he took me and Ruth”. He finished up with Ruth and she went home. The question is “what was



finished?” was it an act of defilement or somebody else e.g. beating. To ascertain the contradiction that the Appellant has referred to he ought to here sought classification at the point of cross-examination. Further the complainant told the court that she recorded two statements. It is not indicated whether the contradictions were reflected in one or both statements. The contradiction in view don’t negate the fact of defilement, neither does it appear like the complainant was deliberately lying.

30. The other contradiction was the question of whether Kevin escorted the complainant home or not, whereas the complainant told the court that Kevin escorted her home; her grandparents told the court that she arrived home alone. However the grandfather PW2 told the court “I found M crying in the compound” - meaning M had arrived first. He could not therefore have seen whether she arrived alone or not. The grandmother however said M came alone. This contradiction in my view does not go into the core of the case i.e. the fact of defilement and the perpetration.
31. The other contradiction pointed out by the Appellant was the fate of the complainant’s underwear. The complainant stated:- “I carried my inner clothes as I was feeling pain in my vagina. I also used it to wipe the blood off. I took my panty home.” Her grandfather PW2 stated “she did not have her underpants. The panties were not recovered.” Her grandmother PW3 testified “I examined her private parts, she did not have underpants. On cross-examination she stated “M came without her underpants. I don’t know where the underpants went. It was never found.” On the other hand PW4, the clinical officer stated during his examination-in-chief: “Her pants had blood stains. It was not torn.” At cross-examination he stated “The panties were brought, no, she was not wearing it.”
32. There is consistency on the evidence of the complainant, PW2 and PW3, to the effect that the complainant arrived home without any underpants on her body. Indeed the complainant said she was carrying them. My view is that even if the complainant came home carrying her panties, it may not have been obvious to a male member of the family (PW2) or even grandmother (PW3). This was a 9-year old who had just been defiled, she had been bleeding and could not walk properly. Such a child was not expected to be carrying the panty in her hands for all to see. She had probably suffered enough shame (He did bad things to me, is a telling phrase). It should not be surprising that her grandmother (PW3) did not see it at that point. The grandfather as earlier stated came after the child had arrived home.
33. There is the evidence of PW4 who told the court that the blood-stained panty was taken to hospital. It is true that it contradicts PW3 evidence to the effect that the panties were never found. I consider this however a minor contradiction. It does not negate any of the ingredients of the offence of defilement.
34. The trite law on contradictions and inconsistencies is as was set out in the case of *Twebengane v Uganda* (2003) UGCA6 cited by the court of Appeal in *Eric Onyango v Republic* (2014) e KLR in which the court stated “with regard to contradictions in the prosecution’s case the law as set out in a number of authorities is that grave contradictions, unless satisfactorily explained will usually but not necessarily lead to the evidence of the witness being rejected. The court will ignore minor contradictions unless the court think that they point to a deliberate untruthfulness or if they don’t affect the main substance of the prosecution’s case”
35. The Appellant has further argued that neither Kevin who allegedly took the complainant home one Ruth were called as witnesses. The prosecution is only required to call such number of witnesses as are required to prove their case. Even one witness, depending on the circumstances of a case suffices. Section 143 of the *Evidence Act* states:- “No particular number of witnesses, shall, in the absence of provision of law to the contrary, be required for the proof of any fact”
36. In this case, the testimony of the complainant were corroborated by PW4, on the element of penetration. Identification was by way of recognition and this was established through the evidence of



the complainant, PW2 and Pw3. The age was proved by way of documentary evidence. Therefore the testimony of Ruth and/ or Kevin would not have added any value to these testimonies.

Whether the defence of Alibi was considered.

37. On the issue of Alibi I have taken note of the court's error on the placement of the Appellant at the material time and I agree with both counsels' submission that the trial court misapprehended the dates
38. On the defence of Alibi it is trite law that this defence should be brought to the attention of the prosecution at the earliest to enable the prosecution to investigate. The question of Alibi was never raised during the cross-examination of the first or subsequent prosecution witnesses. The appellant only brought it up in his defence. He did not give the prosecution time to investigate this alibi. Consequently I dismiss this defence. Further even though the Appellant told the court that he was staying with his sister, he never called the sister as his witness.

Whether the sentence was excessive

39. Sentencing is an act of discretion and an Appellate court can only interfere with the trial court if the trial court took into account irrelevant facts or failed to consider the relevant ones. Section 8(2) of the Act provides as follows: A person who commits an offence of defilement with a child of 11 years or less shall upon conviction be sentenced for imprisonment for life". In this case however the Appellant was sentenced to 20 years. Considered against the prescribed sentence of 20 years, it cannot be said to be excessive.
40. I have no reason to fault the findings of the trial court. Both the conviction and sentence was safe. I hereby uphold both.
41. In the end the entire appeal fails and it is hereby dismissed.

DATED, SIGNED AND DELIVERED AT NAIROBI, VIA MICROSOFT TEAMS, THIS 30TH DAY OF MAY 2024.

S.CHIRCHIR

JUDGE.

In the presence of:

Godwin – court Assistant

Mr. Okinyo for the Appellant.

