



**Muthuri v Republic (Criminal Appeal E161 of 2022)
[2024] KEHC 6561 (KLR) (24 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6561 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E161 OF 2022**

LW GITARI, J

MAY 24, 2024

BETWEEN

PHINEOUS MUTHURI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

A. Introduction

- 1 The appeal arises from the proceedings in Sexual Offences Case No. E012 of 2021 in Principal Magistrate’s Court at Nkubu.
 1. The appellant herein was convicted of the offence of defilement contrary to section 8(1)(3) of the *Sexual Offences Act* and acquitted of the alternative count of committing an indecent act with a child contrary to section 11(1) of the said Act. He was sentenced to serve 15 years imprisonment.
 2. Being dissatisfied with the said conviction and sentence, he appealed to this court vide a petition of appeal dated 8.09.2022 which was filed on 10.11.2022 by the appellant.
 3. The grounds of Appeal are:
 - i. That the learned trial magistrate erred in matters of Law and fact by failing to note that the evidence adduced was not sufficient to sustain the conviction.
 - ii. That the learned trial magistrate erred in law and facts by failing to note that the key witnesses were not called.
 - iii. That the learned trial magistrate erred in matters of law and fact by failing to that there was a grudge between the mother of the Appellant and the aunt of the complainant.



- iv. That the learned trial magistrate erred in Law and facts by failing to note that there was need of identification parade for proper identification of the Appellant.
- v. That the learned trial magistrate erred in Law and facts by not observing that the evidence adduced by the prosecution witness were uncollaborating and inconsistency.
- vi. That the learned trial magistrate erred in law and fact by rejecting the appellant defence without giving any cogent reason.

Based on these grounds the appellant prays that the appeal be allowed, sentence be set aside and he be set at liberty.

4. Directions were taken that the appeal be canvassed by way of written submissions and each of the parties submitted in support of their rival positions.

B. Submissions by the parties

5. The appellant submitted on the factual background of the matter and amended his grounds of appeal:
 - i. That the learned trial magistrate misapprehended the law and particularly on identification of the (sic) hence convicting the Appellant.
 - ii. That the learned trial magistrate introduced extraneous matters in arriving at the guilt of the Appellant.
 - iii. That the learned trial magistrate erred in Law and fact in shifting the burden of proof of innocence to the Appellant.
 - iv. That the learned trial magistrate erred in law and fact in convicting the Appellant on evidence far short of the required standard in Law.
 - v. That the learned trial magistrate erred in law and fact by failing to note that the investigation conducted was shoddy.
 - vi. That the learned trial magistrate erred in law and fact.

The appellant prayed that his conviction be quashed, the sentence be set aside and he be set at liberty.

6. The Appellant relied on the case of *Maina vs Republic (1970) EACA 370* to demonstrate that cases of alleged sexual offences it is really dangerous to convict on the evidence of the woman or girl alone.
7. The Appellant submitted that the investigation conducted by PW4 was shoddy and did not meet the required standards in Law. The Appellant further submitted that when PW4 was cross examined by the appellant he told the court that PW5 reported the incident to the area manager who did not take any action.
8. It is the Appellant's submission that PW3 the complainant's relative reported the incident to the area manager who did not take any action. The Appellant questioned whether PW4 investigated why the area manager did not take any action even after PW5 and PW3 reported.
9. The Appellant submitted that PW4 did not inquire why the complainant did not report or even scream to alert her aunt bearing in mind that the incident took place near her aunt's homestead just at the gate.
10. The Appellant further submitted that the evidence of recognition was not inquired into as required in law.



11. The Appellant submitted that it was at night at around 8.00 pm and it was not inquired what type of lighting was available for recognition of the appellant bearing in mind that there was a banana plantation and in his view the area was bushy. That the voice recognition was also not inquired into to ascertain how the appellant called the complainant or even what were the exact words uttered, and in which language used by the appellant to have positively recognized by the complainant.
12. It is the Appellant's submission that the complainant did not mention anywhere in the proceedings that light enabled her to see the walking style of the Appellant.
13. The Appellant submitted that the magistrate arrived at the decision to convict the accused. The Appellant further submitted that certain conditions must be met for voice identification and that the court must be satisfied that it is the voice of the accused, which is missing in the instant case. The Appellant relied in the case of *Wanjohi and 2 others v Republic* and in *R V Turn Bull (1976) 3 ALLER 549*.
14. It is the Appellant's submission that PW1 alleged that she was familiar with his walking style and further she also alleged that she could recognize his voice.
15. The Appellant submitted that as indicated by the above authorities sometimes mistakes are made as pertaining recognition. The Appellant submitted that PW1 did not tell the court how she recognized the appellant. The Appellant relied in the case of *Lesarau v Republic (1988)KLR 783*.
16. The Appellant submitted on the third issue of the broken hymen. The Appellant further submitted that the trial magistrate erred in matters of law and facts by convicting the appellant on the evidence of PW2.
17. The Appellant submitted that in general both PW2 and the learned magistrate was saying that due to broken hymen there was penetration. The Appellant relied in the case of *P.K.W vs Republic(supra)*,
18. The Appellant submitted that from the above authority there is a high probability that PW1 may have engaged in one of the above-mentioned activities being a 14-year-old girl. The Appellant contends that the evidence of PW2 was erroneous assumption.
19. The Appellant submitted that the learned trial magistrate erred in matters of law and facts by dismissing the appellant's defence without cogent reasons. The Appellant submitted that the instant case was a frame up by PW3 because of a grudge that existed with her mother.
20. It is the Appellant's submission that the learned magistrate dismissed the appellant's defence by stating it to be an afterthought Appellant submitted that he was prejudiced by the learned magistrate which is against article 27 of *the Constitution*.
21. The Appellant submitted that the instant case was not proved beyond reasonable doubt. The Appellant relied in the case of Supreme Court of Canada in *R vs Lifchus (1997) 3 SCR 320*.
22. The Appellant further submitted that the accused mitigation was not considered by the learned magistrate.
23. The Appellant further submitted that the Appellant had no obligation to prove his innocence and the burden of proof was on the prosecution. That his defense was rejected without cogent reasons and therefore casting doubts of the prosecution. The Appellant relied on the case of *Okech Okale vs Rep 1964 EACA NO.179*.
24. On behalf of the respondent, it was submitted on the brief background of the matter



25. The respondent submitted that the conviction and sentence should be upheld and the said petition dismissed for reasons that the appellant alleges that the prosecution witnesses gave inconsistent and uncorroborating testimonies.
26. The respondent submitted that the said allegations made by the Appellant are false and misleading to the court. The respondent further submitted that the prosecution witnesses were consistent in their testimony on the events that lead up to the arrest of the Appellant.
27. It is the respondent's submission that the charges as well as the particulars as laid out in the charge sheet sufficiently as corroborated by the witnesses and exhibits adduced which led to prove the case beyond reasonable doubt.
28. The respondent submitted that the prosecution did prove their case against the Appellant beyond reasonable doubt and to assert contrary is misleading and erroneous. The respondent relied in the case of Charles Wamukoya Karani vs Republic, Criminal Appeal No.72 of 2013.
29. The respondent submitted in regards to age that PW1 gave sworn testimony that at the time of commission of the offence, she was a minor of 14 years which was corroborated by tendering her birth certificate proving the same.
30. The respondent further submitted that the trial court correctly relied on the documentary evidence (PEXH.3) to ascertain the minor's age and therefore there is no error in charging the Appellant under section 8(1) as read with section 8 (3) of the *Sexual Offences Act*.
31. The respondent submitted regarding penetration that the second element was also proven following PW1'S testimony that the accused called her and pulled her into a banana plantation while she was going to her aunt's home. That he undressed her and also removed her trousers' and proceeded to defile her. That evidence was corroborated by the P3 and the treatment card that were produced by the clinical officer, PW2 marked P.Exh 1 and 2.
32. The respondent further submitted on the issue of identification that the court found identification of the Appellant by the complainant to be positive as the complainant gave detailed description of the person who defiled her as she knew his voice and walking style and even described his place of employment.
33. It is the respondent's submission that the trial magistrate's reasoning to find the Appellant guilty for the offence was sound and was rightly informed by evidence tabled by the prosecution who proved their case beyond reasonable doubt.
34. The respondent submitted that the trial Magistrate did put into consideration the Appellant's defense and the claim that there are pre-existing grudge between the complainant's Aunt, PW3 and the Appellant's mother where the later had accused PW3 of having an affair with her husband, the Appellant's father. The court found that the defense was an afterthought as the same was not raised by the Appellant when he was cross examined. That the Appellant was given an opportunity to call witnesses in his defense and he did not call his mother as a defense witness to support his allegations.
35. The Appellant submitted that the trial court's sentence and conviction should be upheld.

C. Duty of first appellate court

36. The duty of this court while exercising its appellate jurisdiction (1st appellate court) as was set out by the Court of Appeal in *Okeno v. Republic* [1972] E.A. 32 and re-stated in *Kiilu and another vs. R* (2005) 1 KLR 174 is to submit the evidence as a whole to a fresh and exhaustive examination and



weigh conflicting evidence and draw its own conclusions. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. The court should be guided by the principle that a finding of fact made by the trial court shall not be interfered with unless it was based on no evidence or on a misapprehension of the evidence or that the trial court acted on the wrong principles (See *Gunga Baya & another v Republic* [2015] eKLR). However, it must be stated that there is no set format to which a re-evaluation of evidence by the first appellate court should conform but the evaluation should be done depends on the circumstances of each case and the style used by the first Appellate Court and while the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance. (See *Alex Nzalu Ndaka v Republic* [2019] eKLR).

D. Analysis of the evidence before the trial court

37. In a summary, PW1 testified that she is a class 8 pupil at Kithunguri Primary school and she is 15 years old. That she was born on 11th September, 2006 and she had her birth certificate.
38. It was PW1's evidence that on 16th April, 2021 as she was going to her aunt's place about 8.00 pm. At the gate, she heard someone call her and he held her by her hand. That he pulled her into a banana plantation and he then undressed her. That he removed her trousers and he also removed his trousers.
39. PW1 stated that he then defiled her by inserting his penis into her vagina. That he inserted his private parts into hers. PW1 further stated that when the accused was done, the accused left the scene and she went back home.
40. PW1 testified that her grandmother questioned her and she narrated what had transpired and she called the area manager and reported. PW1 further testified that her grandmother told her aunt what had happened and she was later taken to Nkubu Police station where they reported and referred to hospital at Kanyakine where she was examined and treated and thereafter a P3 form was filled. She produced a P3 form dated 19th April 2021 marked P.MF1-1, a treatment card marked P.MF1-2 dated 19th April 2021 and a birth certificate for the complainant marked P.MF1-3 and her date of birth was 11th September 2006.
41. PW1 testified that she knew her assailant and it was the accused in the dock and she knew the accused prior to the date of the incident and he was not a stranger to her. PW1 further testified that her aunt's place was just a few metres away and further the accused used to work at a quarry
42. In cross examination she testified that the incident happened about 8.00 pm as she headed to her aunt's home. That she knew the accused walking style and she heard his voice.
43. PW1 stated that she did not scream and after the incident she just went back home. PW1 testified that the accused used to work in a quarry.
44. PW1 was re examined and she reiterated that the accused defiled her.
45. PW2- Timothy Mberia testified that he is a clinical officer at Kanyakine Sub County Hospital. That he had medical documents for the complainant that is a P3 form and a treatment card. That the patient was treated on 19th April 2021 at Kanyakine OP No 10819.
46. PW2 testified that the P3 form was filled by his colleague S.Kaimantheri and he was conversant with her handwriting and signature.
47. PW2 stated that the patient gave a history of defilement by someone on 16th April, 2021. at about 8.00 p.m.



48. PW2 further stated that the patient was treated and appropriate drugs prescribed including P.E.P and emergency pregnancy pills.
49. It was PW2'S evidence that on examination of the complainant she had a bruise on the left side of labia minora and her hymen was broken and she did not have any discharge.
50. PW2 avers that the additional remarks are that the injury on the vagina and broken hymen showed that the complainant had been involved in penetrative sexual activity.PW2 produced P. Exhibit 1 a P3 form and P. exhibit 2 a treatment card.
51. PW2 was cross examined by the accused and he confirmed the accused was not availed for any examination and further there was evidence that the complainant had been involved in penetrative sexual intercourse.
52. PW3- DN testified that on 16th April 2021 she was called at about 8.00 pm and told that the complainant had disappeared from home.PW3 further testified that the complainant is her niece. That they searched for the complainant to no avail and she came back to his grandfather's house at about 9.00 pm. That she told them that she had met the accused while on her way to her aunt Kawira.
53. PW3 testified that she met the accused who held her and took her to a banana plantation where he defiled her.PW3 further states that she reported the case at the area manager and then went to Nkubu police station where she reported and further took the complainant to hospital at Kanyakine where she was treated.
54. PW3 states that the P3 form was filled up and returned to the police.PW3 further states that she knew the accused since he used to pass by and the aunt's home is across the road.
55. PW3 was cross examined wherein she stated that on 17th she reported to the area manager and then on the 19th on a Monday she reported to the police station.
56. PW3 testified that she did not know why the area manager did not act but he had the tendency of covering him up.PW3 further testified that his parents came to their home and that is the 1st time she saw them. That the case is not a frame up.
57. PW4- IP (W) Jacinta Mwabili testified basically as having investigated the matter. That on 19th April,2021 she was at the station when the complainant a 14-year-old was escorted by her aunt Doris Ngugi and reported that on 16th April 2021 at about 8.00 p.m she had left to go to her aunt's place. That before she could get to the aunt's gate she was called and on turning it was the accused Phineas Muthuri.
58. PW4 narrated that the accused pulled her into a banana plantation where he threw her to the ground undressed her and defiled her. That he did not use any protection and he then left and ran away.
59. PW4 states that the complainant then dressed up and went back to her grandmother's hose and narrated to her what had transpired and the grandmother called the area manager. That on the next Monday, the grandmother called the aunt D since the area manager did not take any action.
60. PW4 testified that she referred the complainant to Kanyakine Sub County Hospital where she was treated and the P3 form was filled up.PW4 further stated that she recorded the witness statements and visited the scene and later on the accused was arrested by the Assistant chief who handed him to the police station.
61. PW4 states that the victim was 14 years and she had obtained her birth certificate from the mother and she was born on 11th September 2006.



62. In cross examination, she testified that she conducted the investigations and she referred the victim to hospital. That further she interrogated the complainant and visited the scene.
63. PW5 testified as JN. She stated that on 16th April 2021 her grandchild the complainant went to her aunt's home around 8.30 pm. She testified that she could not find her phone and she went looking for her at her aunt's house but she was not there. That she went to search for her and she went back home when she could not find her.
64. PW5 states that her grandchild came back and narrated that the accused dragged her into the banana plantation where he undressed her and defiled her. That she called the area manager and reported but the next day the area manager did not come and eventually after 3 days he did nothing. That she called Alice Ngugi who escorted the complainant to Nkubu Police Station and was treated at Kanyakine Sub Count Hospital.
65. PW5 testified that she did not know the accused prior to the incident.
66. PW5 was cross examined and she reiterated that she reported the incident to the area manager the same night and he did not take any action. That she called D the following Monday at 9.00 a.m.
67. The appellant was placed to his defense and his evidence was basically that he never committed the offence and that he was being framed by PW3 because she had a grudge with her mother because her mother had accused PW3 of having an affair with his father.
68. The Appellant further testified that he has never worked at the quarry as alleged by the complainant.
69. The Appellant was cross examined and he reiterated that PW3 had a grudge with her mother.
70. It was this evidence which the court analysed and, in its judgement, found the same sufficient to warrant a conviction for the main count of defilement.

E. Issues for determination

71. I have considered the and analyzed the evidence which was tendered in the trial court by both the appellant and the prosecution (in compliance with the duty of this court as was laid down in *Okeno -vs- Republic* (supra) and re-stated in *Kiilu* and another *-vs- R* (supra)), the grounds of appeal as raised on the petition of appeal and the rival written submissions, it is my view that the issues this court ought to determine are whether the prosecution tendered sufficient evidence to prove its case to the required standards and whether the sentence meted on the appellant was excessive.

F. Determination

72. As I have already stated, the appellant was charged with the of defilement contrary to section 8(1)(2) of the *Sexual Offences Act* No. 3 of 2006 in the main count and the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006.
73. Section 8(1) provides that “a person who commits an act which causes penetration with a child is guilty of an offence termed defilement”. Section 8(3) on the other hand provides that “a person who commits an offence of defilement with a child aged between twelve (12) and fourteen (14) years shall upon conviction be sentenced to imprisonment not less than twenty (20) years.
74. It is therefore clear from these provisions and its indeed 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. The standard of proof is settled and its beyond any reasonable doubts.



75. As to proof of age, the importance of proving the same was emphasized by the Court of Appeal in *Kaingu Kasomo -vs- Republic*, Criminal Appeal No. 504 of 2010 (UR) where the court 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.”
76. In the case before the trial court, PW1 produced a copy of the birth certificate (P.MF1) which indicates that she was born on 12.09.2016. The incident allegedly took place on 11.09. 2006. It is clear that at the time of the offence, the victim was 14 years as at the time of the offence and thus a child within the meaning of the law. I thus agree with the trial court’s finding as to the prove of the age of the minor. I find that indeed the same was proved.
77. The next ingredient I will consider is identification of the appellant as the person who committed the offence. PW1 testified that she recognized the accused by his voice and his walking style since she already knew him and he worked in the quarry.
78. Basically, in any criminal offence, the positive identification of a person is what connects them to that offence. It is therefore extremely important that any evidence on identification must be thoroughly and carefully scrutinized to avoid any miscarriage of justice. (See *Mercy Chelangat -vs- Republic* [2022] eKLR and which statement I find persuasive). I find therefore that it was highly likely that the victim herein knew the appellant as at the time of the offence.
79. I note that in her evidence, she testified that she knew his walking style and she heard his voice. Further it was the evidence of PW1 that the accused used to work at a quarry and the quarry was near their home.
80. In my view, the minor was categorical that she was taken to the banana plantation where she was defiled.
81. Having determined the issue as to identification, the other issue for determination is whether penetration was proved. In this respect, the evidence by PW1 was to the effect:
82. “He held me by the hand. He pulled me into a bana plantation and he then undresses me. He removed my trousers. He also removed his trousers. He then did ‘tabia mbaya ‘ to me. He inserted his penis into my vagina. He insered his private part into my private part.”
83. The question whether this evidence was sufficient to prove penetration?
84. Penetration is defined under section 2 of the *Sexual Offences Act* as the partial or complete insertion of the genital organ of a person into the genital organs of another person. As an important ingredient of the offence, it must be proven beyond reasonable doubt and it can be proved either through the evidence of the child corroborated by medical evidence or in other circumstances, through the sole evidence of a child and this is governed by section 124 of the *Evidence Act* Cap 80.
85. The said section 124 of the Act provides as thus;-
- “Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him.



Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

86. The effect of the above provision is that the trial court can convict on uncorroborated evidence of a child in sexual offences without corroboration provided that the court, for the reasons to be recorded in the proceedings, is satisfied that the alleged victim is telling the truth. This position of law was reiterated by the Court of Appeal in the case of *George Kioji -vs- Republic (UR)* where the Court of Appeal expressed itself as:

“Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”

87. The question therefore is whether the trial court complied with this section?

88. PW2 testified that”

“On examination the complainant had a bruise on left side of labia minora, the hymen was broken, she did not have any discharge.”

89. The evidence of PW1 was corroborated by the clinical officer. I am persuaded that penetration was proved. The trial magistrate stated that he had no doubt that the victim know the appellant very well. PW2 testified that the complaint alleged that the perpetrator was her boyfriend, a fact which the appellant did not deny. The complainant could not mistake the identity of the appellant who was her boyfriend.

90. I find therefore that the evidence tendered by the prosecution was sufficient to prove the elements of the offence the appellant was facing. Further the trial court was right in its determination and I have no reason to disturb it.

91. On whether the trial magistrate shifted the burden of proof to the Appellant. It is common ground that the burden of proof rests on the prosecution and its illogical for the appellant to entertain the thought that the burden was shifted. It is neither here or there. The learned trial magistrate properly analysed the defence and gave reasons for rejecting. The learned magistrate considered the ingredients of the charge and supported his finding with the evidence. I find nothing of what the appellant calls extraneous. The evidence on record proved the charge to the required standards. In case of defilement investigations include having the victim examined by a medical practioner, securing evidence to prove the age of the victim and adducing this evidence in court. This was done in this matter and I fail to see how the appellant can fault the investigations.

The finding by the learned magistrate that the broken hymen was evidence of penetration was based on the evidence of the clinical officer (PW2). The finding was based on cogent and credible evidence. The considered the defence and gave reasons for rejecting. The record shows that the mitigation was considered and the court gave reasons for imposing the sentence.

92. It is my view therefore that grounds 1 to 6 of the record of appeal fails. The conviction by the trial court was thus lawful and proper.

93. Taking into consideration all the above, I find that the appeal herein lacks merits and the same is hereby dismissed.



DATED, SIGNED AND DELIVERED AT CHUKA AT MERU THIS 24TH DAY OF MAY 2024.

L.W. GITARI

JUDGE

