



**Gikundi v Director of Public Prosecution (Criminal Appeal  
E176 of 2021) [2024] KEHC 8130 (KLR) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8130 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL E176 OF 2021  
LW GITARI, J  
JUNE 27, 2024**

**BETWEEN**

**TITUS GIKUNDI ..... APPELLANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT**

*(Appeal Against the Judgement of the Chief Magistrate's  
Court at Meru Sexual Offence Case No.92(B) of 2016.)*

**JUDGMENT**

1. This appeal arises from the Judgement of the Chief Magistrate's Court at Meru Sexual Offence Case No.92(B) of 2016. In the case the appellant was charged with defilement Contrary to Section 8(1) (2) of the *Sexual Offences Act*, No.3 of 2006. The particulars are that on 23/11/2016 in Imenti North District within Meru County, intentionally caused his penis to penetrate the genital organ, vagina of BNK a child aged 8 (eight) years.

In the alternative, the appellant was charged with committing an indecent act with a child Contrary to Section 11(1) of the *Sexual Offences Act* in that on the said date and at the same place the appellant intentionally touched the vagina of BNK a child aged eight yeas using his penis.

1. The appellant was arraigned in court on 1/12/2016 and pleaded not guilty to the charges.
2. A full trial was then conducted and the learned trial magistrate found the appellant guilty of the offence of defilement and sentenced him to serve Fifteen Years imprisonment.

2. The appellant was aggrieved by the conviction and sentence and filed this appeal based on the following grounds:

1. That the learned trial magistrate erred in l aw and fact by failing to note that there was no evidence to show that the trial court conducted voire dire to the complainant.



2. That the learned trial magistrate erred in law and fact by failing to note the age of the complainant was not proved.
3. That the learned trial magistrate erred in law and fact by failing to find that the whole case against the appellant was based on suspicion which the same cannot form a basis for a conviction.
4. That the learned trial magistrate erred in law and fact by failing to note that the evidence of penetration is not proved since there was another evidence which shows that the complainant was defiled by another person previously vide Criminal Case No.93 of 2016.
5. That the learned trial magistrate erred in law and fact by failing to find that the key witnesses were not called.
6. That the learned trial magistrate erred in law and fact by convicting the appellant to serve 15 years imprisonment without supportive evidence.

Based on the grounds of the petition his prayer is that the appeal be allowed, the sentence be set aside and he be set at liberty.

The respondent opposed the appeal and prayed that the appeal be dismissed. The appeal was canvassed by way of written submissions.

### **The prosecution's case**

3. The prosecution called five witnesses. BNK (PW1) the complainant testified that on the said date 23/11/2016 she went to pick fodder for the pigs when she met the appellant who led her to his house. The appellant removed all her clothes that is a trouser, pantie and a blouse. He then inserted his urinating thing into hers. The appellant then told her to go. She went and met her grandmother and narrated to her what happened. She intern took her to the police station
4. S.M. (PW2) who is the complainant's grandmother spotted the complainant coming from the house of the appellant and spotted a watery big stain at the back of PW1's clothes. She enquired from her as to the presence of the stain and she narrated that the appellant had removed her clothes and inserted his penis into her vagina.  
  
PW2 went ahead and inspected her genitalia and noted a sticky stuff, which resembles semen. She escorted the complainant to Rwanyange Police Post on the same day and reported the matter. The complainant's clothes were left at the police and she was referred to hospital. A P3 form was filled by Doctor Kisiru and was produced by PW3 Doctor Ibrahim Hassan. He observed that the genitalia was swollen, bruised external genitalia, vagina bruised and hymen perforated. He formed the opinion that the child had developed urine incontinence since the incident. The findings were penetration, sexual assault.
5. PW4 gave evidence on behalf of the investigating officer. He adduced evidence that the appellant was arrested by CPL Mwenda and Mwete after the complainant reported that he had defiled her.
6. PW5 Dickson Mutula a medical officer working at Meru Level hospital produced the Post Rape Care on behalf of the doctor who examined the complainant on allegation of defilement and filled a Post Rape Care Form. The doctor observed multiple bruises on the complainant's face. On the examination of the genitalia, the hymen was perforated. There were bruises, swellings and tenderness around the external genitalia. He produced the Post Rape Care Form on behalf of Doctor Wambugu a clinician whom he had worked with and was conversant with his handwriting and signature.



## Defence Case

7. The appellant testified that on that material day he spent the day at the church from 12.45pm to 5.45pm. He stated that he was not at the Ndekero Village which was not near the church and is four hours' drive from the church to the village. It is his testimony that he did not know the complainant before and only saw her for the first time in court. He also stated that he did not know I.N. the complainant's grandmother and only saw her for the first time in this court. He was arrested on 30/11/2016 at 3.00am. he called DW2 and DW3 who testified that they were with him at the said meeting.

## Submissions:

8. The appellant submits that voire dire examination was not conducted before the complainant gave evidence and there was no finding that the complainant understood the importance of giving evidence on oath. He relies on *Macharia vs. Republic* (1976) eKLR 2009.

The appellant submits that there was no prove of the age of the complainant. He placed reliance on the case of *Manpet Loonkomok vs. Republic* (2016) eKLR and faults the trial magistrate for failing to have the age of the complainant ascertained. He contends that he could not be convicted for the offence of defilement when the age of the victim was not proved and the trial magistrate failed to convict him on the lesser charge as provided under Section 179 of the *Criminal Procedure Code*.

9. The appellant further submitted that penetration was not proved and cited the cases of *Charles Wamuboya Karani vs. Republic* and *Sekitoliko vs. Uganda* (1967) E.A. He further contends that the case against him was based on suspicion. The appellant further submits that his defence of alibi was not challenged and therefore the only conclusion was that there was no proof that he defiled the complainant.
10. The appellant submits that time served in custody was not considered. He pray that the appeal be allowed.

## Respondent's Submissions

11. The respondent submits that the sentence imposed was provided for under the statute, was just and fair. He submits that the charge was proved beyond any reasonable doubts and prays that it be dismissed in its entirety, conviction and sentence be upheld.

## Analysis and determination.

12. It is the duty of the first appellate court to carefully examine and evaluate the evidence which was presented before the trial court and come up with its own independent decision. It is now well settled that an appellant on a first appeal is entitled to expect the evidence as a whole to be subject to a fresh and exhaustive examination and consideration, and to the appellate's court own decision on the evidence. The leading authority on this subject is *Okeno-v- Republic* (1972) E.A 32 where this duty was discussed. This was buttressed in the case of *Kiilu & Another-v- Republic* (2005) 1 KLR 174 where the Court of Appeal stated:-

“ An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weight conflicting evidence and draw its own conclusions.



It is not the function of a 1<sup>st</sup> appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion. It must itself make its own finding. 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 advantage of hearing and seeing the witnesses."

I have considered the grounds of appeal, the record of appeal and the submissions. The issues which arise for determination are:-

1. Whether the charge was proved beyond any reasonable doubts.
2. The defence of Alibi
3. Whether court should interfere with the sentence.

Whether the charge was proved beyond any reasonable doubts

13. The appellant was convicted under Section 8(1) (2) of the [Sexual Offences Act](#) which provides as follows:-

- "(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."
- 2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

For the offence of defilement to be established three key ingredients must be proved. These are:-

- a. The age of the victim
- b. Proof of penetration
- c. Identification of the perpetrator

14. The proof of the age of the victim is important, as the sentence upon conviction on a charge of defilement is largely dependent on the age of the victim. In the case of [Edwin Nyambogo Ondongo vs. Republic](#) (2016) eKLR the court of Appeal stated as follows:-

".....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 or guardian or medical evidence among other credible forms of proof. We think that what ought to be stressed is that whatever evidence preferred in proof of the victim's age, it has to be credible and reliable"

The complainant gave evidence and stated that at the time of the incident she was in class two. Part 1 of the P3 form indicated that the complainant was eight years old. The doctor PW3 stated that the complainant was aged three years. But I note from his evidence that he is not the one who saw the complainant and could not therefore tell her age with certainty. On the other hand, PW5 – Doctor Dickson Mutula produced a Post Rape Care Form as exhibit 2 and it indicates that the child was born on 5/2/2008. The Post Rape Care Form was produced by PW5. The age of the complainant was given on the Post Rape Care Form was not challenged when the doctor testified and produced the Post Rape Care Form. In the above decision by the court of Appeal courts are guided that whatever mode of prove of age of the complainant, it must be reliable and credible. In this case the trial magistrate found that



at the time of filling the PCR Form the age of PW1 was conspicuously established with the PCR Form and that she was born on 5/2/2008. As at 23/11/2016 she was eight (8) years, 9(nine) months and three (3) weeks old. There was no evidence that she was born on another date other than the above. See page 69 of the record. A PCR (Post Rape Care Form) is filled by the doctor who physically examines the complainant. It was confirmed in the trial court that the complainant was examined by a doctor. I find that the information on the PCR Form was credible and reliable means of establishing the age of the complainant to the required standard.

The complainant was eight years, nine months and three weeks at the time the offence was committed. She was within the range of the offence covered under Section 8(1) (2) of the *Sexual Offences Act*. The age of the complainant was proved to the required standard.

15. The second ingredient of the offence is penetration.

The term penetration is defined under Section 2 of the *Sexual Offences Act* as follows:

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

16. Penetration is proved through the evidence of a person who is the victim of the crime and corroborated by medical evidence. Thus, the testimony of the victim is paramount in proving penetration and confirmed by medical evidence. However, we cannot rule out cases where the evidence of the complainant may not be forthcoming especially where the victim is very young and unable to express herself or is prevented from doing so by reason of some disability. The court in such situations will rely on medical evidence and weigh the evidence depending on the circumstances of the case.

17. In this case, the complainant was a child of tender years. Section 124 of the *Evidence Act* (Cap 80 Laws of Kenya) permits the court to rely on the evidence of the victim if the court is satisfied that the alleged victim is telling the truth.

It provides:

“Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of alleged victim admitted in accordance with that section on behalf of the

prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is

corroborated by other material 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 offence, 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.”

In this case, the complainant testified that the appellant called her to his house and removed all her clothes then inserted his penis in her vagina and defiled her. The medical evidence adduced by PW3 – was that on examination, the complainant had sustained swollen and bruised external genitalia, vagina bruises, hymen perforated as a result she developed urine incontinence since the incident. The doctor who filled the PCR Form concluded there was penetration. The doctor concluded that penetration was positive.



From this evidence, it is clear that penetration was proved to the required standard.

18. The next consideration is the positive identification of the perpetrator. The complainant testified that the appellant called her and she went and entered his house. While inside the house, the appellant defiled her. She told the court that the offence took place at 4.30pm inside the house where he is employed. The appellant admitted that he was indeed employed by Lydia Kithinji who had given him building work and was at her place. This confirms the testimony of the complainant that the appellant was living in her neighborhood and could not have failed to know him.

PW2 – On the other had testified that on the material day when she returned home, she did not find the complainant. She went to the appellant’s compound and called him three times and he answered. Then PW2 told the appellant that she was looking for B. She also met Kinyua who was calling the appellant. She then saw the complainant BN coming out of the house of the appellant which is opposite a fishpond. She saw watery stain on her dress and asked her what happened. She disclosed that the appellant had defiled her. The appellant was well known to the complainant and her mother. The offence was committed in broad day light, which rules out any possibility of mistake. The fact that the appellant was inside his house at that material time was corroborated by PW2. In deed the appellant put it to her that she was calling him because she wanted to have sex with him. This is a confirmation that he was in the room. The prosecution availed sufficient evidence to prove that the appellant was the perpetrator.

### **The Defence Of Appellant**

The appellant in his defence stated that he was not at the scene on that material day as he was attending a meeting at his church. He called two witnesses to support his defence. The Court of Appeal in *Erick Okeno Meda vs. Republic* 2019 eKLR stated that:

“In an alibi defence based on witness testimony, the credibility of the witness can strengthen or weaken the defence dramatically. A successful alibi defence entirely rules out the accused as the perpetrator. There is no burden of proof on the accused to prove an alibi. If there is a reasonable possibility that the accused’s alibi could be true. The prosecution has failed to discharge its burden of proof and the accused must be given the benefit of doubt”.

Where an accused raised specific defence of alibi he does not assume the burden to prove that defence. See *Kiarie vs. Republic* (1984) KLR.

It is trite law that an alibi defence needs to be raised at an early stage so as to allow it to be tested especially during cross-examination and also to give time to the prosecution to investigate the defence. The accused who raises a defence of alibi is not required to give particulars of where he was. The law today is that it is up to the prosecution to dislodge any defence of alibi and show that the accused was present at the place and time the offence was committed by the accused or his accomplices. See *Republic vs. John Kimita Mwaniki* (2011) eKLR

The prosecution must present a case that the accused is guilty beyond any reasonable doubts so as to dislodge the defence.

19. The learned trial magistrate considered the defence at length found that DW2 & 3 were not credible as they contradicted themselves on the name of the wife of appellant who they had said they knew very well. She further stated that it was not improbable for the appellant to be at Ndekero as she stated that he left Ndekero at 12.00pm to 5.45pm on the said date and she concluded that he was living at the homestead with neighbors that of the victim and her grandmother. In the end, she held that the



defence was an afterthought having been raised for the first time at the hearing of the defence case and that the witnesses were coached and weakened the corroborative effect on the evidence of DW1. In the end, she concluded that the appellant was at Ndekero when PW1 was defiled.

20. In this case, the defence of the appellant was an afterthought as it was raised at the time he was put on his defence. This is a fact that shows that he was not a truthful defence as it could have been put to witnesses when they testified. It is also in his defence that he said they approached the pastor demanding Kshs.500,000/-. The DW2 – gave self-contradictory evidence as stated in her evidence in chief that after the meeting she drove away with Titus in the same motor vehicle. In cross-examination, she said “After the meeting I do not know where Titus went to.” This is a clear indication that she was not truthful and was not a credible witness.

21. DW3 on the other hand told lies in his testimony. He introduced himself as a pastor of the church only to change that and state that he is a deacon not a pastor since he is not qualified as a pastor but performs duties of a pastor. In cross-examination, though he stated that he had a diploma in theology. He said that he was not issued with a diploma. He further said he is the one who called for the meeting and telephoned the members that same morning. This was not in the testimony of DW1 & DW2.

There were also contradictions as to what the meeting was all about. It is clear from the testimony of DW3 that he was not truthful and told lies on the face of the court. He was not a credible witness. DW3 admitted that he became aware that the appellant had been given construction work at Ndekero.

From the above analysis, it is clear that the defence witnesses were not credible. It is trite law that the credibility of witnesses can strengthen or weaken the defence dramatically. In this case, the alibi defence fell short of this one requirement, which is the credibility of witnesses. The defence in my view was not a plausible defence. The prosecution discharged the burden of proof that the appellant was in the house where he was living in the compound of his employer where he defiled the complainant at the material time and place.

PW – 5 testimony and that of PW2 who talked to the appellant, a fact he did not deny only saying DW2 wanted sex, placed the appellant at the scene, dislodged the alibi defence. The defence was an afterthought and was properly rejected by the learned trial magistrate.

## Sentence

22. The issue raised on the sentence is that the trial magistrate did not consider the time he spent in custody as required under Section 333(2) of the Criminal Procedure Code (Cap 75 Laws of Kenya). The appellant relies on the court of Appeal decision in *Abamad abolfathi Mohamed & Another vs. Republic* (2018) eKLR and Bethwel Wilson Kibor vs. Republic (2009) eKLR Section 333(2) of the *Criminal Procedure Code* provides as follows:

“333(2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this *Code*.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

The provision mandatory requires that time spent in custody be taken into account at the time of sentencing. The Court of Appeal in *Abamad Abolfathi Mohamed & Another vs. Republic* (2018) eKLR held that taking into account of the period an accused person spent in custody as provided under Section 333(2) supra must mean that the time spent in custody awaiting trial must be taking that period to proportionately reduce the sentence passed on the accused.



It is clear from the record that the learned trial magistrate did not take into account the time the appellant spent in prison awaiting trial. This court has a duty to correct that error. The record shows that the appellant was arrested on 30/11/2016. He was released on bond on 25/5/2017. This accounts for a period of five months and five days. On 12/7/2017 bond was cancelled. It was reinstated on 2/8/2017 and the appellant was out on bond up to the date the judgment was delivered, a period of twenty days. After judgment was delivered, his bond was cancelled up to 13/10/2021 when the sentence was passed, a total of twenty-three days. In total, the appellant spent six months and 23 days in custody while awaiting trial. This period should be taken into account to reduce the sentence.

### **Conclusion**

23. Having analyzed the evidence, for the reason stated, I find that the prosecution proved the charge against the appellant beyond any reasonable doubts. The appeal is without merits. I order that:
1. The appeal is dismissed.
  2. The sentence imposed on the appellant be reduced by six (6) months and twenty-three (23) days.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 27<sup>TH</sup> DAY OF JUNE 2024.**

**L.W. GITARI**

**JUDGE**

