



**Mukurah v Republic (Criminal Appeal E030 of 2022)
[2024] KEHC 9694 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9694 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL APPEAL E030 OF 2022
AM MUTETI, J
JULY 31, 2024**

BETWEEN

STEPHEN NDERITU MUKURAH APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the decision of the learned Honourable
F. Andayi CM delivered on the 16th June 2022 in S.O 40 of 2019)*

JUDGMENT

Introduction

1. The appellant in this appeal challenges both conviction and sentence. The appellant was charged with the offence of defilement contrary to Section 8(1) as read with 8 (3) of the *Sexual Offences* No. 3 of 2006. It was alleged that on the 4th October 2019 at 15.50 hrs in Kieni West Sub-County within Nyeri County he intentionally and unlawfully caused his penis to penetrate the vagina of BG a girl aged 7 years.
2. The prosecution called a total of five witnesses in support of the case leading to the conviction and sentence of the accused, thus prompting this appeal.
3. The duty of this court as a first appellate court is well set out in the case of *Okeno Vs. Republic* 1972 EA 32. The court is expected to
4. re-evaluate the evidence adduced against the appellant in the trial court re-appreciate the same with a view to arriving at its own conclusions remaining mindful of the fact that unlike the trial court, the court did not have the opportunity to see nor hear the witnesses.



5. The appellant contends among other grounds that the evidence tendered against him did not meet the threshold required to establish the offence of defilement thus his conviction and sentence was improper and ought to be quashed.
6. Addressing this ground of appeal the court sets out to inquire whether there was proof of identify of the perpetrator, evidence of penetration and the age of the victim.
7. If the ingredients set out above are established then this court will have no hesitation in arriving at a finding that the offence was established as required by the law.

Analysis

8. The victim of this offence gave evidence as PW2. She informed the court that she was 8 years old and at that time she was in grade 2. The court upon conducting a voire dire examination observed that;

“The minor is speaking fluently but has problems recalling names. She knows where she is. She knows that she needs to tell the truth. She may not understand the meaning of an oath. To give unsworn statement”.
9. The above statement as captured by the learned Honourable magistrate clearly shows that a voire dire examination was conducted though the trial court recorded it as cross-examination by the court. The anomaly in recording is not material and does not in any way affect the trial. The evidence of the victim was therefore safely taken and could be relied on.
10. The victim testified that on 4th October 2021 she went to “susu” (pass urine) in a bush on her way from school. According to the witness the bush was near the road. The witness went on to state that she saw Nderitu lying there and that Nderitu was the accused person. It was then that Nderitu came from behind and pulled her. She raised an alarm but Nderitu covered her mouth. He removed her clothes and made her to lie down. He had by then removed his trouser and underwear down to the knee. The witness further testified that “he did tabia mbaya” to me. You see that place where urine comes, he put his thing for “susu” inside mine..... He put it in me”.
11. The witness further told the court that Nderitu threatened to kill her with a fork jembe even though he did not have it with him. The witness testified that after the encounter Nderitu went to his home and she dressed up and went home.
12. It is important for this court to point out that from the victims evidence she was in Grade 2 at the time. The record shows that she went to one of their neighbours by the name Mama Jane who informed her that her mother had gone to school looking for her.
13. The mother found her at James’ place but the victim did not tell her what had transpired. According to her, she was scared Nderitu would kill her. The witness goes further to state that the mother called mum Murithi with whom they went behind the house and she disclosed to Mum Muriithi what had happened who in turn informed her mother.
14. It was then that the mother took her to the police and later to hospital.
15. The victim did not know Nderitu before but that was the first time she saw him lying in the bush.
16. Upon cross examination the witness stated that she had parted company with other children namely Murithi and Lucy when the appellant pounced on her. However, it was her evidence Murithi is the one who told her the man lying there is called Nderitu.



17. The witness was firm throughout cross examination that it was Murithi who told her the name of Nderitu. At the time Nderitu grabbed her Murithi had already left.
18. The evidence of the victim established that the perpetrator was Nderitu. The witness identified him by name and there was dock identification as well. Her evidence also proved that there was sexual contact between her and Nderitu the appellant whom she said inserted his male organ into hers.
19. LGM PW 1 was the complainant's mother. According to her she knew the appellant with whom they lived at the same area at the time. In her testimony she stated that on the 4th October 2019 when she got home at around 5.00 p.m she found her daughter who told her that on her way from school she was dragged into the bush by a "person" who had offered her a sweet and she declined.
20. PW 1 went on to state that PW 2 told her that the person did bad manners to her. She also informed the court that her daughter told her that the assailant threatened to kill her should she disclose to anyone what had happened.
21. She took the victim to the police and later to the hospital where she says the doctor informed her "the girl had been opened up". Meaning "that she was no longer a virgin" The witness said that the victim said that the man who had defiled her lived at the grandmothers place and upon investigating she found out it was Nderitu. She further testified that the victim's pantie had blood stains.
22. She gave the age of the victim as being 7 years. She however did not have the birth certificate as well as her clinic card. She stated that the same got lost.
She went ahead to produce P3 PMF1-1 and PCR form PMFI -2.
23. On cross –examination she stated that she was not told by the child who the person who defiled her was but according to her when going to buy milk together with the victim, they met Nderitu and the victim identified him to her. That was the next day according to her testimony.
24. During cross examination of the witness it turned out that she recorded her statement 15 days after the incident.
25. PW 1 states further that the girl first told the doctor what had happened then the doctor told her. The witness went further to state that the victim first gave her description of the man who defiled her. She saw the pantie which was blood stained. The child could not walk properly.
26. The witness informed the court that the clothes that the victim was wearing were left at Nyeri PGH for the police to collect. The evidence of this witness was not very consistent as to the sequence of events but I do not find such inconsistencies to be material as to render the evidence worthless or affect the decision of the trial court.
27. PW 3 JM says that they learnt from PW2's mother that from child was defiled even though she had seen the child looking okay on 4th October 2020. She denied knowledge of any discussion between PW 1 and PW 2.
28. The witness denied ever being told who the defiler was by the child and she maintained the she never checked the child.
29. During cross-examination she stated that the child was undressed outside her house. She however confirmed in re-examination that the child told her she was in pain.
30. At this point I am constrained to comment about the evidence of the witness PW 3 vis a vis that of PW 1 and PW 2. It is clear from her testimony (PW 3) that she was economical with the truth. She



strikes me as a witness who testified not because she wanted to but simply because she had recorded a statement and therefore had to testify. In my own analysis her evidence was not very useful to the prosecution save for the part that she confirmed that when the child came to her house she informed her she was in pain.

31. The conduct of the witness was very suspect from the evidence recorded and she appears to have been deliberately trying to conceal the truth.
32. PW 4 Mary Njoki Thige also gave evidence and just like PW 3 did not add any value to the prosecution's case.
33. PC Ann Gathoni Wangechi gave evidence as PW 5 and she stated that the child did not name the assailant at first when she met her but she later learnt that she had disclosed to the doctor that it was Nderitu. She issued the P3 form which was brought back to her duly filled indicating that the child's hymen was freshly broken.
34. According to the witness the incident took place at around 2.00 – 3.00 p.m. The child as per the P3 was assessed at 7 years of age. She produced the P3 form and the soiled clothes of the child. The witness produced the birth certificate as PEXH 3 which gave the child's date of birth. The witness went further to state that when she was given the name Nderitu by the victims mother she put it in the occurrence book.
35. The P3 and PRC forms in this matter were produced by consent by counsel for the prosecution since the doctor who was meant to produce the two was away in Kisumu.
36. The analysis above sums up the case of the prosecution against the appellant who upon being put to his defence the appellant denied committing the offence and insisted that the mother of the child as well as the child were not known to him.
37. He insisted that on 4th October 2019 when he is alleged to have defiled the complainant he was at his aunt's home looking after cattle and doing cultivation.
38. He went further to suggest that he was a simply framed up. it is however not clear how why a child of tender years would set out to frame him up given that they were not known to each other before.
39. The evidence on record established the key ingredients of the offence of defilement.
40. The victim was categorical that the Appellant pounced on her while she was reliving herself in the bush. I do not believe that it is possible that a child of tender years such as the victim in this matter would frame up the accused. The evidence on record does not show any instance of disagreement between PW 1, PW 2 and the Appellant.
41. I find it absolutely difficult to accept that persons with whom one has never interacted would frame up the appellant and give graphic details as narrated by the victim. That is not the conduct of rational child of tender years who has absolutely no axe to grind with anyone in society.
42. The victim was clear as to why she was hesitant to name the Appellant when she got home after the incident. The threat of being killed is not a light matter to a child. Children by their very nature believe what adults tell them more so when at the age that this victim was.
43. It is therefore not in doubt from the evidence on record that the victim knew the person who defiled her very well and indeed gave his name to the doctor when she was being examined. The mother corroborates the evidence of the victim being one of the first persons that the victim disclosed to what had happened to her.



44. The medical evidence tendered through the P3 form confirmed that the victim was defiled by a person well known to her as per part I of the form filled by the police officer who sent the victim to hospital for examination. Section C of the P3 form which describes the physical state of the genitalia reveals that there was penetration. The hymen was indicated as having been freshly broken and the external genital had blood stains.
45. The evidence taken together with the victims testimony that the Appellant inserted his male organ into hers conclusively proves penetration and thus defilement was properly established.
46. The issue of Age was also adequately covered by the evidence of the mother PW 1 and the Birth Certificate No. A. 000xxxxx which indicates her date of birth as 16th April 2012.
47. In the case of George Opondo Olonga Vs Republic [2016] eKLR the court summoned up the key ingredients of the offence of defilement as being:-

Proof of the age, proof of penetration and the identity of the perpetrator.
48. In the instant case I have no doubt in my mind that the prosecution proved the three elements of the offence.
49. The appellant urged in his submission that the court ought to exercise caution when dealing with the evidence of a minor. This court has considered that aspect and come to the conclusions that given the totality of the evidence tendered in this matter it was proper for the trial court to rely and act on the evidence of the minor for it was not the only evidence. The offence having occurred during the day, the circumstances prevailing favoured positive identification and there is no conceivable possibility that the victim may have been mistaken as to the appellant's identity.
50. It is this courts finding therefore the conviction of the appellant was safe and the same is hereby confirmed. The appeal on conviction fails.

Sentence

51. In regard to sentence, taking into account the age of the victim, I allow the appeal on sentence in line with the Supreme court decision in Petition Number E018 of 2023 Republic vs Joshua Gichuki Mwangi. The proper sentence that the court should have imposed is life imprisonment as opposed to 30 years imprisonment.
52. The appellant lay in wait like a carnivore in the grassland waiting for its prey. The act was most inhuman and by the Appellant's action the victim shall forever live with the trauma of defilement.
53. The framers of the *Sexual Offences Act* must have had men like the present Appellant in mind. Some of these crimes shock the conscience of fellow humankind. It is not discernible what an adult sees in a 7 year old to entertain the thought of engaging in sexual intercourse. I shall say no more.
54. I therefore substitute the sentence of 30 years imprisonment for life.

The appeal therefore is hereby dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF JULY 2024.

A. M. MUTETI

JUDGE

In the presence of:



Court Assistant: Kiptoo

Mwangi SPPC for the Appellant

Present in person virtually for the Appellant from Prison

N/A for the Respondent

