



REPUBLIC OF KENYA



**Momanyi v Republic (Criminal Appeal E039 of 2022)
[2024] KEHC 16791 (KLR) (28 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 16791 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL E039 OF 2022
NIO ADAGI, J
NOVEMBER 28, 2024**

BETWEEN

BONIFACE MOMANYI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Judgment of Hon. G. Omodho (PM) in
Kiambu in CMC S.O Case. No. 27 of 2018 delivered on 07/06/2022)*

JUDGMENT

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8 (2) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on the 14th day of May 2018 at Kiambaa Sub-County, intentionally caused his penis to penetrate the vagina of MNM (name withheld) a child aged 4 years.
2. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006, the particulars being that, on the 14th day of May 2018 at Kiambaa Sub-County, intentionally, and unlawfully touched the vagina of MNM (name withheld), a child aged 4 years 10 months with his penis.
3. He pleaded not guilty to both the main and the alternative charges and the case proceeded on full trial, during which, the prosecution called Five (5) witnesses to support their case. At the close of the prosecution's case, the Appellant was placed on his defence after which the court found that the prosecution had established a prima facie case.
4. The minor testified as PW3 and gave sworn evidence after the court conducted voire dire. It was her evidence that one day after she came from school, she took tea then did her homework. The Appellant then carried her on a wheel barrow to his house undressed her and then slept on top of her on his sofa.



- The Appellant had removed his clothes too and slept on her. The minor knew the Appellant very well and she identified the Appellant who was the accused before the trial court.
5. The Appellant had promised to buy her a cake. The minor felt pain in her private parts. The Appellant's house was dark.
 6. In cross examination, the minor testified that she spoke the truth but her mum told her what to say.
 7. PW1, BM testified that on 14/5/2018 at about 5.30pm he left the Appellant in company of his two young daughters. He testified that the Appellant would do odd jobs at his hotel once in a while. When he returned, he was perturbed to find one of the daughters who is aged 6 years missing as well as the Appellant. When he made inquiries from the sister who was left alone, he was informed that the two had left together. This witness proceeded to the Appellant's house only to find the two in the house with the door locked. He pushed the door open and found the accused lying on the sofa while the minor was standing by the door. He expressed his displeasure of how the Appellant had taken the minor without his authority. So, when the minor was asked, she said that the Appellant had undressed her and slept on her causing her injuries on her private parts. But on assessment she looked okay. The minor was taken to Karuri hospital where results revealed that she had been defiled. The matter was reported to the police for further investigations and a PRC form and P3 form were filled.
 8. In cross examination the witness affirmed that the Appellant was well known to his children as an employee of his hotel establishment. He added that he traced the minor to the Appellant's house. He closed by stating that when he found the Appellant's door closed, he knocked but when there was no response, he opened it.
 9. PW2, RK testified that on 14/5/2018, she had gone to the market before her children returned from school. She explained that from school they would stay at their hotel with the employee. So, on that day when she returned from the market, she found PW1 agitated over the Appellant taking their child into his house. She took it upon herself to establish what had transpired, the minor admitted that the accused had undressed her and laid on her causing her pain in her private parts. She took the victim to Kiambu level 5 hospital. According to her the minor had watery vagina and whitish discharge, she identified the Appellant as a staff at their hotel. In cross examination she reiterated that their children usually go to the hotel after school and that the hotel has other employees too whose wages are settled on daily basis.
 10. PW4, Dr. Richard Munene a Senior Clinician from Karuri level 4 hospital testified that in 2018, he examined the minor aged 4 years and 10 months with a history of defilement and had been seen at St. Peters in Ruaka. She then went to Karuri level 4 hospital. On examination the minor had very tender genitalia hymen was intact. On documents from St. Peters hospital, she had whitish seretims from private parts. Unival swab and forward pus cells 3+++ urine -ve, HIV -ve VBRN-VE. She filled the P3 form, treatment card and PRC form then attached treatment notes from St. Peters Hospital which she produced in evidence.
 11. In cross examination she admitted that she filled out the p3 form, PRC form. The rest of the documents were documents from the facility that saw the minor first. She relied on the documents and attached them to her report. She examined the minor after two days. She confirmed to have sent the minor to the lab and the hymen was intact. She concluded there was penetration because of shed carning genitals p2 spectrum 3 tender genital bruised labia minora. There was also finding of whitish discharge at Kiambu hospital. There were no sperms though.
 12. PW5 No. 77087 PC Cyrus Wahome attached to Kauri Police Station testified on behalf of Stephen Githu who was since deceased. That on 15/5/2018 a case of defilement was reported by the minor's



mother. The incident had happened on 14/5/2018. The minor was sent to hospital with a P3 form. She was first seen at St. Patrick clinic and later referred to Karuri level 4 hospital where the P3 form was filled. According to the I.O, the minor identified the Appellant. The Appellant sold sugar cane but deceived/lured the minor to his house and defiled her. He undressed her and had canal knowledge of her. PW5 produced a birth certificate for the minor having been born on 2/7/2013 and the Statement of the deceased I.O under Section 33 of the Evidence Act.

13. In cross examination he confirmed that he did not do the investigations and did not know the investigations the investigating officer faced at investigations. He did not visit the scene and did not establish the relationship between the Appellant and the minor's parents. She didn't know how the minor identified the Appellant. He didn't know where the crime took place. He only knew the Appellant in court.

The prosecution's case was then closed.

14. On being put on his defence, the Appellant gave sworn evidence but did not call any witnesses. He testified that on 15/5/2018 he was selling sugar cane. He went home and left the cane. He went to see a friend so between 5-6pm he was at work in a hotel where he did odd jobs. The hotel was a friend's business and PW1 was the proprietor. He sought to be paid his cash of Ksh.2,000/- which was due. On 14/5/2018 after work he went to the hotel to get his cash but he was told that a report had been received from the chief. So, they proceeded to the Chief and that is when he learnt that he was accused of defiling a child and was taken to Karuri police station. He would help at the hotel in the evening after selling his wares. He new PW1, PW2 and their two daughters although he did not know their names.
15. In cross examination he admitted to knowing PW3, the minor. That on 14/5/2018 he went to the hotel but didn't see the minor or her sister. He does not live near the hotel. PW1 was his employer. He denied having been in the house and that he was at work and had returned to the house to drop the sugar cane and proceeded to the hotel to see PW1. I brought no evidence or witness. I brought no evidence of debt but I had gone for my cash. I had worked and he had delayed with my payment. He denied carrying the minor on a wheelbarrow and that the wheelbarrow had sugar cane and had no space for a person. He believed that it was the issue of the debt that he was maliciously charged and that the charges were trumped up.
16. Upon considering the evidence that was adduced by both prosecution and the defence, the learned magistrate found that the prosecution had proved its case beyond reasonable doubt. It convicted the Appellant and sentenced him to serve a life sentence.
17. The Appellant was dissatisfied with the decision of the trial court and he filed the Petition of appeal on the 14/6/2022 wherein he listed the sixteen (16) grounds of appeal basically challenging the conviction and sentence.
18. In this appeal, the court gave directions on filing of submissions and only the Appellant's submissions dated 02/6/2024 are available on court record. There are no submissions filed by the Respondent.
19. The court has considered the Appellant's submissions, the grounds of appeal and the evidence that was adduced before the trial court.
20. In determining this appeal, this court is fully aware of its duty as the first appellate court as espoused in the case of Okeno Vs R (1972) EA 32 where the court 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 the appellate court's own decision on the



evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion”.

21. This being a criminal case, the prosecution bore the burden of proving the case beyond any reasonable doubt.
22. The Appellant herein was charged with the offence of defilement contrary to Section 8 (1) as read with 8 (2) of the *Sexual Offences Act* number 3 of 2006. Section 8 (1) 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.”
23. The ingredients of the offence of defilement were reinstated by the High Court in the case of *George Opondo Olunga Vs Republic* which are:
 - i. Proof of age of the complainant
 - ii. Proof of penetration
 - iii. Proof that the accused person was the perpetrator (identification).
24. On the first ingredient, the birth certificate of PW3 was produced as an exhibit. It shows that she was born on 02/7/2013 and by the time the incident took place, she was not yet eleven (11) years, she was a minor at the material time.
25. The centrality of the element of the age of the victim, one of the essential ingredients of the offence of defilement has also been restated in a number of decisions of the superior court. See the case of *Kaingu Elias Kasomo Vs Republic* which was cited with approval by the High court of Kenya at Kericho in *Bernard Kiptoo Vs Republic* where the court stated:

“Age of the victim in 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 evidence to the imposed will be dependent on the age of the victim.
26. See also the case of *Hadson Ali Mwachongo Vs Republic* by the court of Appeal in Mombasa, where the court stated:

“The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim.”
27. On the ingredient for proof of penetration, penetration is defined under Section 2 of the *Sexual Offences Act* as follows:

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



28. On this, PW4 stated that on examining PW3, she had bruised labia minora on left side. Very tender genitalia hymen was intact. On documents from St. Peters hospital, she had whitish seretims from private parts. Unival swab and forward pus cells 3+++ urine -ve, HIV -ve VBRN-VE. She filled the p3 form, treatment card and PRC form then attached treatment notes from St. Peters Hospital which she produced in evidence. In cross examination she admitted that she filled out the p3 form, PRC form. The rest of the documents were documents from the facility that saw the minor first. She relied on the documents and attached them to her report. She examined the minor after two days. She confirmed to have sent the minor to the lab and the hymen was intact. This to this court confirms that there was no penetration. Penetration could only have caused the brakeage of the hymen.
29. The clinician concluded that there was penetration because of shed carning genitals p2 spectrum 3 tender genital bruised labia minora. This contradicts his testimony that there was no penetration and that the hymen was intact. He stated that there was also finding of whitish discharge at Kiambu hospital. There were no sperms though. There was no evidence of what the whitish discharge was.
30. On identification of the perpetrator, it is on record that the appellant was known to both PW1, PW2 and PW3. The Appellant himself admitted that he knew all of them. PW1 in his evidence vividly testified how on 14/5/2018 at about 5.30pm he left the Appellant in company of his two young daughters. He testified that the Appellant would do odd jobs at his hotel once in a while. When he returned, he was perturbed to find one of the daughters who is aged 6 years missing as well as the Appellant. When he made inquiries from the sister who was left alone, he was informed that the two had left together. This witness proceeded to the Appellant's house only to find the two in the house with the door locked. He pushed the door open and found the accused lying on the sofa while the minor was standing by the door. He expressed his displeasure of how the Appellant had taken the minor without his authority.
31. This was a case of recognition as opposed to identification. In the case of Reuben Taabu Anjononi & 2 Others Vs Republic the Court of Appeal in Nairobi held:

“.....recognition not identification of assailants is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.
32. See also the case of Julius Waititu Muthutite Vs Republic. On the issue of recognition, I find that the victim positively identified the Appellant as the perpetrator.”
33. The Appellant could have been recognized as the perpetrator but then it has not been proved by the prosecution beyond reasonable doubt that he committed the offence of defilement herein.
34. The Appellant challenged the prosecutions case as being malicious prosecution. He denied in totality even being at the scene, thereby raised the defence of alibi. The trial court found that the Appellant's defence of malicious prosecution was left without any proof. It merely mentioned that there was a debt of Ksh.2,000/- which led to the charges. No debt is proved nor is there indication of demand leading to deterioration of relations between the Appellant and his employers. On alibi, the trial court found that it had considered it, however the Appellant simply mentioned that he was not at the scene. No further evidence was adduced and she proceeded to dismiss the defence as unsubstantiated.
35. I do not agree with the trial court on the foregoing, the Appellant testified that he went to see a friend so between 5-6pm he was at work at a hotel where he did odd jobs to get his cash but PW1 told him that he had received a report from the chief so they proceeded to the chief and that is when he learnt that he was accused of defiling a child. According to PW1 the incident occurred at around 5.30pm



and the Appellant tried to run, they chased him and caught him. It is not clear from the record how and where the Appellant was arrested. Whereas PW1 testified that he pushed the door and found the Appellant on the sofa, the Appellant testified that PW1 told him that he had received a report from the chief so they proceeded to the chief's office and that is when he learnt that he was accused of defiling a child and was arrested.

36. What this court cannot figure out is what action PW1 took the moment he saw the Appellant lying on the sofa while the minor was standing by the door in the house the minor had allegedly been defiled. Would he just let him go, only for the Appellant to be summoned before the chief's office later? This testimony by PW1 leaves a lot to be desired.
37. Of great concern is the issue of penetration, PW4, the clinician confirmed to have sent the minor to the lab and the hymen was intact. This to this court confirms that there was no penetration of the minor's vagina. Penetration could only have caused the brakeage of the hymen.
38. With regard to the Appellant's defence of alibi, the Appellant's evidence could only be taken on its face value and based thereon, fault if any could only be found based on that evidence taken as the truth. As was held in *Sekitoliko vs. Uganda* (1967) EA 53:

“The prosecution has a duty to prove all the elements of the offence beyond reasonable doubt and that the conviction of the accused is depended upon the strength of the prosecution case and not the weakness of the defence case.”

39. In taking the approach she did, the learned trial magistrate seems to have shifted the burden of proof to the Appellant. It is trite that even where the accused decides not to adduce any evidence, the burden is not lessened by that mere fact. This was the position of the Court of Appeal in the case of *Dorcas Jemutai Sang vs. Republic* [2018] eKLR where was faced with a similar case where the complaint by the Appellant was that the trial court and first appellate court had placed the burden of proof upon her to prove her innocence, the court stated as follows:

In the present case we are satisfied that both the courts below appeared to or shifted the burden of proving innocence on the appellant. This we say in the light of the quotations we have reproduced above where the learned trial magistrate stated that the appellant:

“...did not call witness to support her defence,”

and the learned Judge remarked that:

...it was a significant fact that the appellant did not call ...any witness at the trial.”

By these sentiments, both the courts below appeared to say that the appellant was obliged to call witnesses to prove her innocence. As stated above, that was a wrong approach regarding the burden of proof in a criminal prosecution and therefore we allow the appeal on this ground.”

Thus, the prosecution did not prove beyond reasonable doubt that the Appellant committed the offence of defilement for which he was convicted of in the circumstances of this case. It follows therefore that both the conviction and sentence herein cannot be sustained.

Consequently, and for the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I order that the Appellant be set at liberty unless otherwise lawfully held.

DATED, SIGNED & DELIVERED VIRTUALLY AT MACHAKOS THIS 28TH NOVEMBER 2024

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NOEL I. ADAGI



JUDGE

