



**Musembi v Republic (Criminal Appeal E075 of 2023)
[2024] KEHC 16792 (KLR) (28 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 16792 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E075 OF 2023
NIO ADAGI, J
NOVEMBER 28, 2024**

BETWEEN

ISAAC MUTHOKA MUSEMBI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Judgment of Hon. V. Ochanda (SPM) in
Machakos CMC S.O Case. No. E005 of 2023 delivered on 21/11/2022)*

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 diverse dates between January 2021 and 26th January 2023 at [particulars withheld] village, Kitanga Sub-location, Kola Location in Kalama Sub-county within Machakos County, intentionally caused his penis to penetrate the vagina of EKM (name withheld) a child aged 17 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 diverse dates between January 2021 and 26th January 2023 at Kasinga village, Kitanga Sub-location, Kola Location in Kalama Sub-county within Machakos County, intentionally, and unlawfully touched the vagina of EKM (name withheld), a child aged 17 years.
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 Six (6) witnesses to support their case.
4. On 25/4/2023, the minor testified as PW1 and gave sworn evidence. It was her evidence that she lives in Kimoini and goes to school. She lives with her mother Hellen Wambui and father Mutie. That she was 17 years old. She recalls on 25/1/2023, she was at home and then went to Isaac's home. She went to visit and was there for three days. She was staying with him and the mother; she was not related to



- the family. That she was sleeping in the accused's house. He had been charged with sleeping with a school girl.
5. The prosecutor then orally applied under Section 142 of the CPC to refer the minor to Machakos Children Office for 7 days as she had become a hostile witness which orders the court granted and deferred the hearing to 2/5/2023.
 6. On 2/5/2023 the minor again PW1 gave sworn evidence and stated that she lives with her mother H (PW2) and goes to school at [particulars withheld] primary school. She recalled on 25/1/2023, she told her mother that she had gone for KCPE results. She went to the accused's homestead. The accused is Isaac. She went to their homestead to live with Isaac. She went to his house. He was not there and she was received by the mother. He came after a few minutes, greeted her and they went to the house. They had supper and breakfast the next morning. She went with Isaac to the farm and when they came back, she saw her mother who talked to Isaac's father, Isaac said he would accompany her in the evening. On their way home they had a phone call to go back home, they went and found the Sub-chief. They asked Isaac if he got married but he dismissed. She told them she wanted to continue with education. After that they went to the police station and recorded a statement. They took them to Konza police station and in the morning, she was taken to hospital where she was treated. When she slept at Isaac's house, they had sex and used condoms. Sex happened on the bed; sex is the process of putting penis inside a woman's vagina. That's what he did.
 7. On cross-examination, the minor stated that the accused arrived home after she had arrived.
 8. PW2 - HWM testified that her home is Kyuu and she is a housewife. That PW1 was her 4th born who lived with her and goes to school. She recalled that on 24th/25th January 2023, it was on a Tuesday. She took one of her daughters to school after shopping. She came home. PW1 said she was going to get her leaving certificate. This was in the evening. She had said she will go for it herself. She went to her cucu. She slept on that day. She did not see her on Wednesday. She ran her errands. She called cucu who told her PW1 had not arrived. On Thursday she decided to go to look for her. The Village elder told her the general direction PW1 had gone. She did not know the exact place but she passed next to the house of the village elder. She took that route. She asked as she went. She had gone towards Kasinga. She went and found the father to accused. PW1 had been seen with Isaac Mutheki Musembi by the village elder. She found the boy's father taking breakfast. Mother and daughter were in her kitchen. She told the mother and asked the girl to follow her. She did not. She went back home and told her father and cucu. The Father called the village elder but they did not agree. He called the Sub-chief telling him the girl had been discovered at Musembi's. Thereafter, Sub-chief told PW1's father to go to Kalama. He is disabled. He gave her fare to report to police. She told police she found the girl. They told me to take them there. Then the 2 Sub-chiefs went and collected them from the house. The girl and boy had just left. The father to the boy called him to come back. They did. They were then arrested taken to Kativa. The father to the boy and herself eventually came there. She took her girl to hospital. She talked to him when she found her at Katua. She did not even say anything encouraging. She did not even follow her home. She was 17 years old. Born in 2005.
 9. On cross examination, she stated that PW1 disappeared on Tuesday evening. On Thursday she found her in the accused's house. It was on Tuesday not Wednesday. The accused is the one who usually calls her. The accused does not call her phone. She did not know which phone the accused use.
 10. PW3 was JWC. He stated that he lives in Kola Sub- location Katanga Machakos County. He was Assistant Chief of another Sub-location for 6 years now. He knew his constituency.
 11. He recalled on 26/1/2023 at about 3.00pm, he was in the office. A woman H came and said her daughter disappeared on 24th. When she followed up, she had gone to Isaac's house. He knew the



- people. He did not know the girl. After getting report, he went with his fellow Assistant Chief. They went to Isaac's home, arrested them with complainant and handed them over to the police. They were at Isaac's home.
12. On cross-examination, he stated that they were arrested at the accused's home. He did not call the accused. Maybe it was the accused's parents who called him. The accused's parents are the ones who called him to come. When the accused was called, he came with the girl.
 13. In re-examination, he stated that the accused came with the girl. They did not know where they appeared from.
 14. PW4 was Catherine Musyoki. Sub-chief Iiyuni Sub-location, Kola location, Kalama division Kalama Sub-County for 15 years. She recalled on 26/1/2023, they were in the office. There is Katanga and Iiyuni. they were in her office with PW3. It was 2.08pm. HWM came to the office. She said her daughter disappeared on 24th at 4.00pm. they asked if she was sure she was at Musyoki's house. They took a match to Isaac's home. They found Isaac and PW1 and brought them to the police station accused, his mother, father, Isaac and PW1. They were home. They asked the mother, she said PW1 had been with them since 24th. Accused also confirmed. They took them to their office then to the police station.
 15. On cross-examination, the stated that the mother reported the accused was from a different area not her area. They found the girl in accused father's home Musembi. The accused did not hail from her area. She was helping. The accused was home and was called, the accused just appeared with the girl. The accused came immediately.
 16. PW5 was Dr. Justus Mutunga from Machakos Level 5 hospital, registration No.3932. He had the examination report for PW1 aged 17 years. She was defiled on 25/1/2023 by a person known to her. She was examined. Her hymen was broken but old. She had a dirty discharge. She explained she was on her menses. She was sent to the lab. She had no syphilis, VDRL negative, no HIV, Urine test no spermatozoa. There were pus cells in the vaginal swab 6 -10 microscopy perter. He signed on the P3 form 27/1/2023. He produced P3 form as PExhibit.2. He had the PRC for the complainant. The clothes were not torn considered to the intercourse. She had blood on her clothes. She had menses. She was given medication to swallow. PRC form PExhibit.1.
 17. On cross examination by the accused he stated that PW1 was defiled. It means she did not consent to the defilement.
 18. PW6 was No. 256226 PC Loki Rogoi attached to Konza Police Camp. He recalled on 26/1/2023 in the evening, he received a call from duty officer Sgt Ogechi. He was at the camp. He called his colleague Kipruto. They were ordered to arrest a suspect from Katua police post. They went and upon arrival they were told what transpired. They took him with the victim to Konza station. They booked both suspect and victim, booked an offence of defilement.
 19. On 27th, he escorted the victim and mother and went to Machakos Level 5 hospital for medical examination. Both P3 and PRC were filled. They went back to Konza. They recorded statements. He called the 2 witnesses who also recorded statements. They booked Isaac for the offence of defilement. He was informed of what occurred. Isaac and the complainant were together from 2021 to 2023 January. They had been sleeping together. Isaac and the complainant confirmed. He was told the culprit had been home. She went and reported to Katunga police post. She had reported a missing person. They obtained a birth certificate from mother date of birth is 28/10/2005. Birth certificate P-exhibit 3. He identified the accused as the person who was arrested.
 20. The prosecution's case was then closed.



21. On being put on his defence, the Appellant DW1, gave sworn evidence and called one witness. He testified that he lives in Kola Location, Machakos County. He works in a hotel. On the charges, whatever happened, he was arrested as he came from work. He had not even reached home. His mother called that he was being sought. He reached home, the Chief, Assistant Chief were there. He was arrested and taken to Konza Police Station. He denied knowing anything about the charges.
22. DW2 was Leah Musembi. She testified that she lives in Kola and was a farmer. She knew the accused who was her child. The day he was arrested, it was about 5.00pm. He had come from town the previous day. That morning, she saw Joseph Chungu and Catherine. They asked her where the accused was and she told them he had gone to work. She called him and they took her phone. They waited for him and when he came, they asked him if he knew PW1. He said no. They asked the girl. They arrested him and told her to go and see him the next day, she went to Konza where they had taken him. He was later charged in Machakos. The charges were fabricated.
23. The defence case was closed.
24. At the close of the defence case, the trial court directed parties to file submissions which it considered and found that the prosecution had established a prima facie case and convicted the Appellant who was sentenced to serve Fifteen (15) years imprisonment.
25. Being aggrieved by the said judgment, the Appellant lodged the appeal herein challenging both the conviction and sentence.
26. In this appeal, the court gave directions on filing of written submissions to canvas the appeal. The Appellant's submissions are dated 18/8/2024 whereas the Respondent's submissions are dated 30/9/2024.

Analysis and determination

27. 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”.
28. Having carefully and cautiously considered and analysed the trial court's record, the grounds of appeal and the Parties' rival submissions on the appeal the issue for determination is whether the Appellant has made a case for this court to interfere with the conviction and sentence imposed by the trial court.
29. It must be appreciated that under Section 107(1) of the *Evidence Act*, the burden of proof is on the prosecution to establish every element in a criminal charge beyond reasonable doubt. This was well buttressed in the principle in the cases of *Woolmington v DPP* 1935 AC 462 and *Miller v Minister of Pensions* 2 ALL 372-273.
30. This being a criminal case, the prosecution bore the burden of proving the case beyond any reasonable doubt.



31. 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.”
32. The ingredients of the offence of defilement were reiterated by the High Court in the case of *George Opondo Olunga Vs Republic* [2016] eKLR, which are:
- i. Proof of age of the complainant
 - ii. Proof of penetration
 - iii. Proof that the accused person was the perpetrator (identification).
33. The question which needs to be answered is whether the above ingredients were proved to the required standards?
35. It is not in dispute that the Complainant at the time of the commission of the offence, was 17 years old as the same could be determined from the evidence produced in the trial court (Birth Certificate); and the age of the complainant has not been a subject of the instant appeal. Nevertheless, I will proceed to consider this essential element in a defilement charge in this judgment.
36. On the first ingredient, the Birth Certificate of PW1 was produced as an Exhibit.3. It shows that she was born on 28/10/2005, the incident took place between January 2021 and 26th January 2023 and by the time the incident took place, she was aged about 17 years, she was a minor at the material time.
37. The centrality of the element of the age of the victim, is 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”.
38. 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.”



39. 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.”

40. On this, PW5- Dr. Justus Mutunga testified that he was from Machakos Level 5, hospital and had the examination report for PW1 aged 17 years. She was defiled on 25/1/2023 by a person known to her. He examined that her hymen was broken but old. She had a dirty discharge. She explained she was on her menses. She was sent to the lab. She had no syphilis, VDRL negative, no HIV, Urine test no spermatozoa. There were pus cells in the vaginal swab 6-10 microscopy perfer. He produced the P3 Form which he had signed on 27/1/2023 as PExhibit 2. He had the PRC for the Complainant. She had blood on her clothes. She had menses.

41. The evidence of PW5 on penetration could only be corroborated either by the minor (PW1) or an eye witness. From the record, it is apparent that PW1 testified twice. In the first instance on 25/4/2023, after PW1 had testified briefly, the Prosecutor sought to make an application under Section 142 of CPC for the reason that the witness PW1 had become hostile and applied further that the witness be referred to Machakos Children Office for 7 days which orders the trial court granted as prayed and PW1 was incarcerated for 7 days at the said institution. On 2/5/2023, PW1 was again arraigned in court where she was sworn and proceeded to testify in the normal way.

42. A perusal at the record does not show how this witness had become hostile, further, the provision of the law under which the application was made is not applicable to the prayers that were sought by the prosecution. I have looked at the said Section and confirmed that Section 142 of the CPC provides for “mode of proof of previous conviction”.

43. I believe either the Prosecutor meant Section 152 of the CPC and the trial court could have recorded it wrongly. The relevant parts of Section 152 of the Act regarding a refractory witness provides: -

“ 152

(1) Whenever a person, appearing either in obedience to a summons or by virtue of a warrant, or being present in court and being verbally required by the court to give evidence-

- a) refuses to be sworn; or
- b) having been sworn, refuses to answer any question put to him; or
- c) refuses or neglects to produce any document or thing which he is required to produce; or
- d) refuses to sign his deposition,

without offering sufficient excuse for his refusal or neglect, the court may adjourn the case for a period not exceeding eight days, and may in the meantime commit that person to prison, unless he sooner consents to do what is required of him.

(2) If the person, upon being brought before the court at or before the adjourned hearing, again refuses to do what is required of him, the court may again



adjourn the case and commit him for the same period, and so again from time to time until the person consents to do what he is required of him”.

44. From the foregoing, it is clear that a refractory witness is one who, when summoned to appear or while in court and is required to give evidence, refuses to be sworn, or after being sworn refuses to answer questions put to him, or refuses to produce a document or exhibit that is required of him. If such witness offers no sufficient reason, the consequences set out in Section 152 of the Act will attaché.

45. The effect of evidence of a hostile witness is well known. In the case of *Batala v. Republic* (1974) EA. 402 the court held that:-

“The giving of leave to treat a witness as hostile is equivalent to a finding that the witness is unreliable. It enables the party calling the witness to cross-examine him and destroy his evidence. If a witness is unreliable, none of his evidence can be relied on, whether given before or after he was treated as hostile and it can be given little, if any, weight”.

46. The Court of Appeal also summarized the applicable law on a hostile witness in *Abel Monari Nyanamba & 4 others v Republic* [1996] eKLR as follows:

“In *Coles v. Coles*, (1866) L.R. 1P. &D. 70, 71, Sir J.P. Wilde said:-

“A hostile witness is one who from the manner in which he gives evidence shows that he is not desirous of telling the truth to the court.’

In *Alowo v. Republic* [1972] EA at page 324 the predecessor of the Court said:-

“The basis of leave to treat a witness as hostile is that the conflict between the evidence which the witness is giving and some earlier statement shows him or her to be unreliable, and this makes his or her evidence negligible.’

The evidence of a hostile witness is indeed evidence in the case although generally of little value. Obviously, no court could find a conviction solely on the evidence of a hostile witness because his unreliability must itself introduce an element of reasonable doubt.

The inevitable conclusion after PW4 had been declared a hostile witness was that he became an unreliable witness, whose evidence would be rejected as untrustworthy. He was discredited completely. In our view, PW4 was substantially an unreliable witness and all parts of his evidence should have been rejected. It must follow, therefore, that nothing PW4 said in Court could be accepted against any of the appellants.”

47. The Complainant Child, PW1 having been declared a hostile witness by the court, the prosecution ought to have proceeded to cross examine her to destroy her evidence instead of allowing her to be sworn and proceed to testify normally.

48. This court finds that the trial court and prosecution failed to follow the correct procedure in handling a hostile witness particularly a minor. The correct procedure in handling a hostile witness has been enunciated by the Court of Appeal in *Edusei Asili Malema v Republic* [2007] eKLR thus:-

“Regarding the correct procedure for declaring a witness to be hostile at the instance of the party who has called him, Sections 161 and 163 (1) (c) of the *Evidence Act* are relevant. Section 161 gives the court discretion to permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party. Section 163 (1) categorizes the evidence which may be called by an adverse party or, with the consent of



the court, by the party who calls him for impeachment of his credit. Such evidence which may be called to impeach the credibility of the witness includes proof of former statements whether written or oral inconsistent with any part of the evidence which is liable to be contradicted."

49. This court further observes that PW1 being a minor, the trial court acted drastically by allowing the minor to be detained for 7 days and thereafter to testify in court. As submitted by the Appellant, most likely the detention of the minor for that duration of time could have left her with no other option but to agree to dance to the prosecution's music to secure her freedom. Her release and freedom hang on her consenting to do what was required of her by the prosecution as is provided for under section 152 (1) of the CPC.
50. The trial court and the prosecution had an option to have the minor, PW1 cross-examined on her statement or put any questions to her which might have been put in cross-examination by the Appellant instead of having her detained as it happened. In the circumstances, detention of the minor ought to have been used as a measure of last resort for shortest appropriate time. To this court, the 7 days were beyond shortest appropriate time and the detention was not the best option at all. These actions were against the spirit of Article 53 (1)(f) of *the Constitution*, 2010 which provides that:-

"Every child has the right-

- a) ...
- b)
- c)
- d)
- f) not to be detained, except as a measure of last resort, and when detained, to be held –
 - (i) for shortest appropriate time:

51. Article 53 (2) of *the Constitution*, 2010 provides that:-

"A child's best interests are of paramount importance in every matter concerning a child."

52. Clearly, the incarceration of the minor to get her to testify in the matter amounted to obtaining evidence through coercion which was not in her best interest at all but in the interest of the prosecution.

53. Article 50 (4) of *the Constitution*, 2010 provides that:-

"Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.

54. On the foregoing provision of *the Constitution*, this court finds that the manner in which the evidence of PW1 was obtained, violated her right to freedom and human dignity hence her evidence ought to have been excluded since it rendered the trial unfair and otherwise was detrimental to the administration of justice.

55. This court's understanding would then be that once a witness is declared hostile, their evidence becomes almost worthless and is of no value to either the prosecution or the defence and for that reason



this court holds that the prosecution failed to prove the ingredient of penetration by the Appellant in the circumstances of this case.

56. Before I pen off on the issue of handling of a hostile witness, my above finding has triggered me to opine that its a high time the Drafters of the Law or rather the Legislature be invited to relook at the provisions of Section 152 of the *Criminal Procedure Code* in conjunction with the provisions of Article 50(4) of *the Constitution*, 2010, in the dispensation of justice.
57. Lastly on the ingredient of identification of the perpetrator, the Appellant was known to all the witnesses, except to PW5, the Doctor and PW6, the Investigating Officer. This was a case of recognition as opposed to identification.
58. 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.
59. From the evidence of PW5, he is categorical that the defilement was on 25/1/2023 whereas the Charge Sheet indicates that the incident occurred between January 2021 and 26th January 2023. The P3 Form produced as PExhibit.2 shows the date and time of the alleged offence as 26/1/2023 and the date sent to hospital as 27/1/2023, just the following day. This court observes that if in deed the defilement took place on 26/1/2023 then on 27/1/2023 when the Doctor examined the Complainant, the hymen wouldn't have been old just a day after the incident. Likely, the Complainant's hymen might have been broken much earlier than on the specific dates of January 2021 and 26th January 2023 as per the Charge Sheet, or on 25/1/2023 as per the Doctor or on 26/1/2024 as per the P3 and this could have been by a person other than Appellant.
60. The Appellant could have properly been recognized as the perpetrator in the circumstances of this case but then it has not been proved by the prosecution beyond reasonable doubt that he committed the offence of defilement herein.
61. This court also observes that, even if the trial court were to rely on the evidence of the Complainant, PW1, she testified that she went to the accused's homestead. The accused is Isaac. She went to their homestead to live with Isaac. She went to his house. He was not there and she was received by the mother. He came after a few minutes, greeted her and they went to the house. When she slept at Isaac's house, they had sex and used condoms. Sex happened on the bed; sex is the process of putting penis inside a woman's vagina. She took herself to the Appellant's parent's home after lying to her mother that she was going to collect her KCPE results. It took an arrest to make her leave that home. These shows that the Complainant knew much about sex and conducted herself as an adult before the Appellant who should not be held liable in the circumstances. In quashing the conviction and setting aside sentence, Justice C.K. Kariuki, J in a very recent case of *Kaige v Republic (Criminal Appeal 121 of 2023)* [2024] KEHC 2718 (KLR) (Crim) (19 March 2024) (Judgment) held that:-
“no man should be held culpable for consensual sex to a 17 year who manifests herself as an adult and ends up being married while still underage on her own free will”.
62. The court finds that the circumstances in the Kaige case (supra) are similar and apply to the instant case, the prosecution never proved its case beyond reasonable doubt and thus the appeal succeeds in its entirety. Thus the court makes the orders;
- i. The appeal is allowed, the conviction is quashed and sentence set aside.



ii. The Appellant shall be set at liberty forthwith unless otherwise lawfully held.

JUDGMENT WRITTEN, DATED & SIGNED AT MACHAKOS THIS 28TH NOVEMBER 2024

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 28TH NOVEMBER 2024

In the presence of:

In person..... for Appellant

Ms Agatha..... for Respondent

Milly Grace..... Court Assistant

9

