



REPUBLIC OF KENYA



**Kimungwa v Republic (Criminal Appeal E066 of 2023)
[2024] KEHC 16421 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16421 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E066 OF 2023
REA OUGO, J
DECEMBER 20, 2024**

BETWEEN

MAURICE KIMUNGWA ALIAS MABANI APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the conviction and sentence by Hon. J.O Manasses, RM, in the Principal Magistrate's Court at Sirisia CR NO E040 of 2021 in the judgment dated 12th September 2023)

JUDGMENT

1. The appellant herein, Maurice Kimungwa alias Mabani, was charged at the subordinate court with the offence of defilement contrary to section 8 (1) (4) of the Sexual Offences Act No 3 of 2006. The particulars of the case were that on the 2nd September 2021, during the night at [Particulars withheld] village, Cheptais sub-county caused his penis to penetrate the anus of D.K. a boy aged 16 years.
2. The appellant was convicted of the offence and sentenced to 15 years imprisonment. The appellant dissatisfied with the conviction and sentence filed an appeal on the following grounds:
 1. That the trial magistrate erred in law and fact to convict the appellant on contradictory, inconsistent and uncorroborated evidence which meant that the witness was not credible.
 2. That the appellant was denied his fundamental right and freedom established in the bill of rights as per article 49 of the Constitution of Kenya. The appellant spends in the police custody more than 24 hours.
 3. That the case against the appellant is a family grudge for the I.O is a relative to the complainant.
 4. That the appellant is the one who was meant to be the complainant because he is the one who went to the police to report of his stock which was stolen.



5. That the appellant after conviction the time spent in custody (20) twenty months was not considered in the sentence as provided in section 333(2).
 6. That the appellant was denied his right enshrined in article 50 (2) (e) that the case took too long.
 7. That I pray the Hon. Court to serve the appellant with a certified copy of the proceedings and more ground will be added during hearing.
3. It is settled law that a first appellate court must evaluate afresh the evidence adduced before the trial court to arrive at its own independent conclusion but bear in mind that it neither saw nor heard the witnesses testify. (See *Selle & Another vs. Associated Motor Boat Co Ltd & Others* [1968] EA 123).
 4. The evidence that emerged at the lower court was as follows:
 5. DK (Pw1) testified that he was 17 years old. On 01/09/2021 at 12:00 night he was at his grandmother's funeral. Several people were in the house and the appellant entered the house drunk and started dancing. The appellant told Allan that he was his uncle and asked Pw1 to go and sleep in his house. Pw1 testified that the appellant was a neighbour. There was no one in his house when they arrived at the appellant's house and the appellant told him that he was going to see his mother but Pw1 should open the door for him when he came back. They went to sleep on the floor and while asleep the appellant told him that he doesn't sleep with women but with men. The appellant told him that they should try and Pw1 told him that he had never done it. The appellant then forced himself on him.
 6. Pw1 testified that the appellant forcefully removed his short and told him "Kumbe nyinyi mliua chief, mimi nimekuja jela na huwa natomba wazee nyuma". Pw1 struggled with the appellant until he got a knife in the room and threatened to stab him. The appellant left him alone and he ran away. He reported the matter to the Kopsiro police station and went to the Kopsiro Health Centre. On cross-examination, he testified that there was light in the house.
 7. Daniel Sichei Cheuno (Pw2) testified that Pw1 was the aunt's son and he requested him to come and assist with the funeral. The following day, his sons told him that Pw1 went to sleep at the appellant's house. Pw1 told him that the appellant threatened to kill him if he did not remove his trousers. Pw1 took him to the appellant's house who is a distant relative and their neighbour. They made a report at Kopsiro police station and took him to Kopsiro Health Centre.
 8. Evans Mudogo Chueno (Pw3) testified that he is the guardian to Pw1 as his father is away. He testified Pw2 called informing him that his son had been raped and that they were at the police station with the complainant. They then took Pw1 to the hospital. He also testified that the victim was 16 years old at the time of the offence.
 9. Kipsang Maasai (Pw3) testified that he is a clinical officer working at Kopsiro Health Centre. Pw1 came with a history of being sodomized by a person known to him. It was confirmed that he had bruises on the anal oritis and pain. He was put on post-exposure prophylaxis and the P3 form was filed 5 days after the incident.
 10. No 255287 PC Daniel Koriang' based at Kopsiro testified that he was in court on behalf of PC Erick Rono who was the first investigating officer but was transferred to Webuye Police Station. Pw1 and Pw2 reported the defilement case and were sent to the hospital. The investigating officer took the statements of the witnesses and the appellant was arrested by members of the public.
 11. The appellant when placed on his defence testified that he lived with his nephew Tito Sindani. On 28/6/2021 his nephew caused a road traffic accident that injured his mother-in-law. His brother-in-law demanded a cow and he refused so they threatened his wife at the funeral. He was later informed



that out of his cows, one was taken away and he went to report the incident at the police station when he was arrested.

12. The appellant in his submissions argues that there was a contradiction in Pw1 and Pw2's testimony. Pw1 stated that after the incident he told Allan of what transpired but Pw2 testified that Allan was away. In any event, the offence was fabricated as the alleged victim in his examination in chief did not state how the incident happened but only said that they started struggling and he managed to get a knife and threatened to stab the appellant. This shows that nothing had taken place. It was argued that the incident is said to have happened on 2/9/2021 and reported the following day which would be on 3/9/2021. The appellant also submits that his rights under Article 49 (1) (f) (i) (ii) of the Constitution were violated as he was not arraigned in court within 24 hours but after the lapse of 8 days from the date of his arrest.
13. In his further submissions he argues that Pw1's age was not proved as no birth certificate was produced as evidence. He also argued that there was no evidence of positive identification.
14. The respondent opposed the appeal. They submit that the case was proved beyond reasonable doubt. Firstly, the age of the minor was proved as Pw1 testified that he was 17 years old and was born in 2005. Secondly, the finding on the P3 form was proof of penetration; and thirdly, the appellant was no stranger to the complainant as they were neighbours. On the issue of contradictions, the respondents submit that there were no contradictions. In the event of any, then they were minor and did not go into the root of the prosecution case and should be ignored (see *Erick Onyango Odeng' v Republic* [2014] eKLR).

Analysis And Determination

15. I have considered the appeal before the court and the rival submissions by the parties. The issue raised by the appeal is whether the prosecution proved the offence of defilement to the required standard; whether the sentence was harsh; and whether the trial process observed the tenets of fair trial under Article 49 of the Constitution. The offence of defilement rests upon three things: the age of the victim (must be a child), penetration, and the accurate identification of the perpetrator.
16. In this case, I agree with the submissions of the respondent that there was clear evidence on the age victim and identification of the appellant.
17. On the age of the minor, Pw1 testified that he was born in 2005. In *Francis Omuroni v Uganda*, Court of Appeal Criminal Appeal No. 2 of 200 0 it was held thus:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or *guardian* and by observation and common sense...”
18. Pw3 testified in cross-examination that he was the guardian of Pw1 and he was 16 years old at the time of the offence. The appellant having been born in 2005 and the offence committed in 2021, would have been 16 years old and a minor.
19. On identification, Pw1 testified clearly that the appellant came to the house where there was light and asked him to go and sleep at his house. He knew the appellant as a neighbour. The following day after the incident, he took Pw2 to the appellant's house. This shows that the appellant was known to the complainant.



20. I now turn to consider whether the prosecution proved penetration. Pw1 in his testimony testified that he struggled with the appellant after he removed his shorts until he got a knife. The medical report on the other hand revealed that there was penetration as the P3 form notes that he sustained bruises on the anal walls and the treatment notes reveal that there was discharge (sperm). According to the evidence of Pw1 who was the only direct witness, he did not give any evidence before the trial court on penetration. The medical evidence could not corroborate the evidence of penetration as Pw1's testimony did not give any evidence of penetration.
21. However, the elements of attempted defilement, which is a minor offence were proved by the prosecution. In *Robert Mutungi Mumbi* [2015] eKLR the Court of Appeal made comprehensive remarks on cognate offences:
- “..... As is apparently clear, section 179 of the Criminal Procedure Code empowers a court, in some particular special circumstances, to convict an accused person of an offence, even though he was not charged with that offence. The court contemplated by section 179 can be either the trial court or the appellate court. The real question here is not whether the appellant was charged with indecent assault of NK for which the High Court convicted him. That was not necessary under section 179. The question is whether the special circumstances contemplated by section 179 were in existence to enable the court convict the appellant of an offence with which he was not charged.”
22. Section 179 of the Criminal Procedure Code provides that:
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- (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.
 - (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.
23. Section 9 of the Sexual Offences Act provides as follows:
- “9. Attempted defilement
- (1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.
 - (2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.”
24. Pw1 testified that the appellant told him that he does not have sex with women but men and proceeded to forcefully remove his shorts so that he could have sex with him. The Pw1 struggled with the appellant and the appellant stopped pursuing him after he got a hold of a knife. In the circumstance, I find that the prosecution proved the offence of attempted defilement.
25. The appellant argues that his right under Article 49 of the Constitution was violated. Article 49 of the Constitution provides that an arrested person should be brought before the court as soon as reasonably possible, but not later than twenty-four hours after being arrested, and if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day.



26. Although the appellant was arrested on 7/11/2021 and arraigned on 12/11/2021 outside the constitutionally stipulated period, this would not automatically lead to an acquittal but he has recourse to seek damages for violation of his constitutional right.
27. In the end, I find that the appellant is guilty of attempted defilement contrary to section 9 (1) and (2) of the Sexual Offences Act and is consequently sentenced to ten (10) years imprisonment. Right of Appeal explained.

DATED, SIGNED, AND DELIVERED AT BUNGOMA THIS 20TH DAY OF DECEMBER 2024.

R.E. OUGO

JUDGE

In the presence of:

Maurice Kimungwa alias Mabani / Appellant- Present

Mr. Ayekha For the Respondent

Wilkister -C/A

