



REPUBLIC OF KENYA



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**Mwiti v Republic (Criminal Appeal E169 of 2021)
[2023] KEHC 441 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 441 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E169 OF 2021
EM MURIITHI, J
JANUARY 26, 2023**

BETWEEN

ABEL MWITI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence by Hon. R.
Ongira RM in Tigania Criminal Case No. 36 of 2020 on 15/10/2021)*

JUDGMENT

1. The appellant, Abel Mwiti was charged with the offence of defilement contrary to Section 8 (1) as read with section 8 (4) of the [Sexual Offences Act](#) no 3 of 2006. The particulars of the offence were that on 16/7/2020 at around 10:00 pm in Tigania Sub County within Meru County, he unlawfully and intentionally caused his penis to penetrate the vagina of BK a girl aged 12 years old. He 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 were that on the same date and place, he unlawfully and intentionally touched the vagina of BK a girl aged 16 years old with his penis.
2. He denied the charges but upon full trial, he was convicted on the main charge of defilement and sentenced to 15 years imprisonment.
3. Dissatisfied with the conviction and sentence, the appellant lodged this appeal setting out 5 grounds of appeal as follows:
 - a. The learned trial magistrate erred in law and fact by failing to find that the elements of the offence of defilement were not proved beyond reasonable doubt as required by law (Penetration).



- b. The learned trial magistrate erred in law and fact by failing to find that the clinical report does not support the allegation of defilement.
- c. The learned trial magistrate erred in law and fact by failing to note that the sentence was harsh and excessive in the circumstances in this case.
- d. The learned trial magistrate erred in law and fact by failing to take into the period spent in custody under section 333 (2) of the [Criminal Procedure Code](#).
- e. The learned trial magistrate erred in law and fact by dismissing the appellant defense without giving cogent reasons of dismissing it.

Duty of Court

- 4. This being a first appeal, the court is duty bound to re-appraise and re-analyse the evidence afresh, draw its own conclusions and make its own independent findings, bearing in mind that it did not have the advantage of seeing the witnesses testify. (See *Okeno v R* (1972) EA 32).

The Evidence

- 5. PW1 BK, the complainant herein, testified on oath that she was a form 2 student at [particulars withheld] aged 16 years. “I know Abel Mwit as he is my friend. i.e boyfriend. On 16/7/2020 at 10.00 p.m it was on Thursday, Abel came home and he started talking to my aunt JN. When talking to her I was in my uncles place called EM watching TV. When I left my uncle’s place I found the Abel still talking to my aunt and they continued talking when my aunt saw me, she asked me to go to the house and get maize so that we could get help to put it on the jiko. This was about 3.00 pm. I prepared the maize and the jiko and put the maize on the jiko. My aunt then borrowed miraa from my grandmother, my grandmother allowed my aunt and Abel to go and pluck the miraa. My aunt also stays home. Abel was given the miraa and he left at 5.00 pm. My aunt then told me to take her to [Particulars Withheld] and we went and also my aunt called Abel who came so that we all went to [Particulars Withheld] . We reached [Particulars Withheld] at my aunt’s place. When I was going my mother directed me to return home by 7.00 pm but if I had not returned by that time I should not return home. 7.00 PM reached but I was at my aunts place and my mother started called me on my phone but I was afraid of picking her calls because I feared her response. When I refused to pick her calls, I told my aunt that she had promised me that we would return home by 7.00 pm but that time had passed and my mother had started calling me and I was afraid and that’s when my aunt told me that, it was because of that she had called Abel who would escort me home. My aunt then told me that she did not intend to return home on the said day so I asked her why she did not tell me earlier and she reiterated that Abel would escort me home. At 8.00 pm my mother called me and Abel picked my phone and talked to my mother and told her that he was with me but he was bringing me home. My mother then told him that she had sent people from Nyumba kumi to fetch me because she had instructed me that 7.00 pm should find me home. Abel then refused to take me home claiming that members of nyumba kumi would beat him up. I then told my aunt what would happen as she told me she did not have space in her house. Abel told me he would not take me home unless I slept in his house so I ended up sleeping in Abel’s house. When we reached Abel’s house, I sat at a wooden sat while he was spreading the bed then he started wooing me. I told him I was not going to sleep in the same bed as him when he grabbed my hands and pulled me towards his bed where he pushed me to the bed and he started touching my breasts, my thighs, my waist and he started removing my clothes. On that day I wore panty, tights and a dress. He lifted my dress, removed my tights and pulled down my panty, he then got on top of me and he started having sex with me. He did not use any condom. No I did not want him to have sex with me and I even told him I was not ok with what he did and he told me if meat comes to his house, he cannot refuse



to eat it in response to my protests. When I say he forced me to have sex with me I mean he took his penis and inserted it in my vagina. When he had sex with me it was about 11.00 p.m. I felt so much pain so I told him I could sleep outside and he tried having sex with me again but I refused because I was in immense pain. He then realized that I was serious about leaving so he changed his mind and we were able to sleep without having sex again. On 17/07/2020 at 8.00 a.m the people from nyumba kumi came at Abel's house and woke us up. They asked Abel twice who he had slept with and he said he had slept with no one. He was asked whether he had T's daughter in the house and he accepted and we were asked to go to our home where we met my mother and we were taken to Micimikuru police post and later on to Mikinduri police station. We were then taken to the hospital at Miathene hospital where we were treated and I was given medicine. Yes I saw the doctor writing notes....I had previously had sex while in class 7 that was not the first time I had sex. Yes I recorded my statement at the police. Yes I can see Abel, he is there (pointing) at accused."

6. On cross examination, she stated that, "I had not agreed with you that he would have sex with you in your house. It was not mandatory for us to have sex because you were my boyfriend. I did not want to have sex with you and I did not know that's what you were going to do. I did not go to your house with any intention. We went home to your house because you had told me that you just wanted to go and wear your jacket and then take me home."
7. PW2, TK testified that, "On 16/7/2020 at 5.00 pm, the accused came home where my mother stays and my sister JN and BK who is 16 years old a form 2 in a named school. Accused asked my mother to give him miraa and my mother asked my sister J to take Abel to the farm to harvest the miraa he wanted. Abel did not come through the gate after harvesting the miraa as he went over the fence. I did not see Abel again as he went. At that time B was still home and that's when Abel called B on her mobile phone and I heard Abel telling B they should meet at [Particulars Withheld] primary junction. After I heard the same B left the house and I asked her where she was going and she said she was going to her aunt's house. The aunty is called F. I had followed B for a while and when she told me she was going to the aunt's place and it was late I told her if 7.00 pm reaches she should not return home but spend the night at her aunts place. B did not return home so I called her on phone but she refused to pick. I called a member of Nyumba kumi at 9.00 pm to go and check if because B was at her aunts place and soon thereafter the nyumba kumi members told me B had gone with Abel but I don't know where they went. In the morning Mungathia the member of Nyumba kumi called me and asked whether B had returned home and I said no so he said he will go to check on her and he went to the accused persons home where he found B and accused in the accused person's home. In the night Abel called me using B's number and told me he was with B but I told him that B had informed me that she was going to the aunts place where she was not found thus I had reported the matter to the sub area and Nyumba kumi members and the law would take its course. In the morning when Mungathia went to the accused person's house, he found B and accused and he took both B and Abel to my house. I asked Abel what he was doing and he told me that B was his wife and that's when Mungathia took my phone and called the chief and told him what happened. We went to the chief, went to Micimikuru police post and I made a report and later B was taken to Miathene hospital where she was treated. Both Abel and B were taken to the hospital and those are the treatment notes. B is 16 years old. I did not witness what Abel did to B but later B told me that the accused had sex with her and the doctor also established that B was defiled. I can see the accused before court and I have known him for a while and I know even his parents."
8. On cross examination, she stated that:

"I did not know that you and B were boyfriend and girlfriend despite you coming to our home severally. I knew you jumped over the fence because you were seen by a woman who



was in the farm harvesting bananas. B told me that you are the one who called her on phone. Both Mungathia and Kobia are sub area and I would have called either to assist me but I elected to call Mungathia.”

9. PW3 Joseph Mungathia Karanja, the area Manager of Kailoo village testified that:

“I know the accused person he is a neighbour I know PW1 as she is a student at [Particulars Withheld] day secondary and I have a child in the said school too and she comes from my area. On 16/7/2020 at 21.00 hours. I was called PW1’s mother one T who told me that her daughter had taken off from home. I asked her if she could have an idea where the daughter was and she told me that PW1 was together with Abel. I then told her that in the morning I would go and check where PW1 was because it was already at night. The following morning I called another sub area called Mugambi the sub area of [Particulars Withheld] village who came and together we went to the home of the accused person and when we reached there we found Abel’s house had been closed from inside. I then knocked on the door and Abel responded and asked him to open for us the door and when he opened the door I asked him whom he was with and he told me that he was together with PW1. I then asked him whether he knew PW1 was a school student and accused answered me saying that even PW1’s mother was aware that he was with the said PW1. I then told accused and PW1 that they accompany me to PW1’s mother place so that I could establish whether indeed PW1’s mother was aware that her daughter was with the accused person. We then left together with sub area Mugambi, accused person and PW1 and all the way to the home of PW1 and PW1’s mother told me that she was not aware that PW1 had was with the accused and all she knows is that PW1 had taken off from home and later she heard that she was with the accused person. I then called the chief called John Kaberia who advised we escort both the accused and PW1 to Micimikuru police station and I took both the accused and PW1 to the police and booked in the OB and they were both arrested and then arraigned before court and later I was called at Mikinduri police station where I recorded my statement. The incident occurred on 16/7/2020 when the covid pandemic was in the country. Yes PW1 has since returned to school this year. Yes I can see the accused person before court, he is there (pointing at accused).”

10. On cross examination, he stated that:

“I am a sub area of the area where you come from and Anjuki and is a nyumba kumi member of the area where I am a sub area and I am also a chairperson of the Nyumba Kumi where Anyuki is a member. When PW1 ran away from home you were seen with her that evening and even neighbours established that and indeed the following morning I found her in your house. All I know is that I was called at night and I was told that you were seen with the complainant and the following morning the complainant was found in your house.”

11. On re-examination, he stated that:

“Yes I found PW1 in the accused person’s house together with the accused person after the accused person opened the door for me.”

12. PW4 Geoffrey Muthomi, a clinician at Miathene hospital, produced the complainant’s P3 and PRC forms, treatment notes, Lab request forms and age assessment reports for both the complainant and the appellant as exhibits in court. On examination, the labia majora and minora were intact, there were



bruises on the vulva, the hymen was torn but not fresh, the pregnancy and HIV tests were negative and he concluded that the complainant had been defiled.

13. The doctor was not cross examined.
14. PW5 PC Edward Kimata of Mikinduri Police Station and one of the investigating officers herein, stated that on 17/7/2020, the complainant and the appellant were brought to the station by PW2, PW3 and James Mugambi on allegations that the appellant had defiled the complainant. They commenced investigations into the matter, recorded witness statements of the complainant and the witnesses. On 18/7/2020, they visited the scene, which was the appellant's one room timber house located within [Particulars Withheld] village, led by the appellant and the complainant. Inside the house was a wooden chair and a bed on the other side of a curtain that had partitioned the house. The appellant was arraigned before court on 20/7/2020 to face these charges. He identified the appellant, who was unknown to him prior to the incident, in court.
15. On cross examination, he stated that the minor had confirmed that she was defiled by the appellant on 16/7/2020, which was corroborated by the doctor. He could not tell whether the appellant was the first to have sex with the minor and that the age of the minor was determined through age assessment report.
16. In his sworn defence, the appellant, DW1 testified that:

“I am a student at Thika Medical college. On 16/7/2020 at 10.pm. Earlier on 16/7/2020 K was with the aunt and I went to their home to get miraa. Later K and the aunt stated that they would escort me. The two escorted me and I went my way. When the night reached there is a hotel near one home and I went with my friend to the said hotel. My friends name is SK. At 10.00 pm I went home and K has not returned home and I heard that her mother had been called and informed that I was with her. My friend S was shocked to hear that I was accused of being with K. The following morning members of Nyumba kumi came and arrested me. Mungathia is the one that arrested me and I was brought to Mikinduri police station.”

17. On cross examination, he stated that:

“On 16/7/2020 I was at N and I confirm I saw K. Yes we left with K and Nkirote from their home. N went to her home where she lives with my friend. N never left me with B. I went with K to the hotel when N left us. I don't know if K was to return home. Yes I have evidence showing I was with K but I don't have it before court today. K is a neighbour. On 16/7/2020 K went home with the aunt. After staying in a hotel I went back home and I went with K and K and my sister called AK was in the house and she saw K too. K did not sleep in our home on 16/7/2020 as her aunt called when she was in the home. K had come to revise with my sister who was her school mate. We went to my sisters bedroom with K and my sister was present. K used to revise with my sister and when they used to revise and get stuck, they would ask me to help. K and Ag were both in form 2 though not in the same school. Nyumba kumi members came on 17/7/2020 and I was arrested and taken to the hospital and I was tested and treated and given medicine and the evidence was adduced. Yes I am in Thika medical school.”



18. DW2 Agnes Kinya, testified that:

“I cleared high school last year so I am not in any form of employment. On 16/7/2020 K came to our home as she is my friend and she came so that we could revise together. She came to visit me. She came to our home at 5.30 pm. K was in form 2 and I was in form 4 in a different school. I revised with her and there was no one else at home since my mother was away. At night we both went to sleep and in the morning Mungathia knocked our door and he asked for DW1 and I told him that when he left the previous day in the evening he had not returned but he could check DW1’s house. He knocked on DW1’s door and Mungathia started assaulting DW1 so I started screaming and K came and on hearing what happened, he was told that DW1 was with K. Mungathia was an area manager of Thananga and Kailune and the area manager of Kailune was not called. Mungathia had quarreled with my mother earlier on. DW1 after being caused by Mungathia Kirimi said he had stayed with DW1 at the canteen where they were the whole night and did not see him with K. Mungathia arrested DW1 and took him to the police station at Mikinduri. I am a rider of DW1 his follower.”

19. On cross examination, she stated that:

“On 16/7/2020 at 5.30 pm I was with K and DW1 was not with K and her aunt at that time I was revising with K at home alone and K spent the night at our home. K told her mother that she would spend the night in our home and she agreed. She told her on phone. DW2 remains silent on being asked whether she saw DW1 or whether she met DW1 evening. On 17/7/202 Mungathia came and K was in our home.”

20. On re-examination, she said that “the accused person came home on 16/7/2020 at 10.00 p.m and he saw me.”

21. DW3 Samuel Kirimi, a boda boda rider testified that:

“On 16/7/2020 at 10.00 am I heard noises from DW1’s home who is my neighbour and I found DW1 had been arrested by Nyumba kumi members. DW1 was told that he was with K. I know that K used to go and study at DW1’s because of electricity and I used to meet K and DW1 study whenever I went visiting. K was in form 2, DW2 was in form 4. DW1 was arrested and taken to Micimikuru and brought to Mikinduri police station. K’s mother had disagreed with accused mother and she instigated this case against Abel.”

22. On cross examination, he stated that “Mungathia came to DW1’s home on 16/7/2020 and when he came K was at DW1’s home.”

23. On re-examination, he stated that “K came with Mungathia at Abel’s home when Abel was arrested and fabricated a case that Abel stays with K.”

Submissions

24. The appellant urged that there was doubt as to whether the complainant had actually been defiled since there was no credible evidence on penetration, and cited *P.K.W v R* (2012)eKLR, *Charles Wamukoya Karani v R* Criminal Appeal no 72 of 2013 and *Sekitoliko v Uganda* (1967) EA 53. He faulted the trial court for failing to exercise its discretion during sentencing and failing to take into consideration the period spent in custody under section 333 (2) of the *Criminal Procedure Code*, and cited *Kichanjele S/O Ndamungu v R* (1941) 8 EACA 64, *Opoya v Uganda* (1967) EA 752, *DWM v R* (2016) eKLR, *Tito Kariuki Ngugi v R* (2008) eKLR, *Shadrack Kipchoge Kogo v R* Eldoret Criminal Appeal no 253 of



2003, *R v Lifchus* (1997) 3 SCR 320, *State v Coetzee* (1997) 2LRC 593 and *R v Gagnon (L)*. 2006 SCC 17.[2006]1 S.C.R. 621. He urged that the evidence on record fell short of the standard required in a trial of this magnitude, and prayed for the appeal to be allowed, conviction quashed and the sentence be set aside.

25. The respondent urged that it proved all the three elements of defilement as set out in *George Opondo Olunga v Republic* (2016) eKLR beyond reasonable doubt. It concluded that the appeal should be dismissed in its entirety and the conviction and the sentence be upheld, and relied on *Kaingu Elias Kasomo v Republic* (2010) eKLR, *Joseph Kiet Seet v Republic* (2014) eKLR, *Francis Omuroni v Uganda*, Court of Appeal Criminal Appeal no 2 of 2000, *Sabali Omar v R* (2017)eKLR and *Anjononi & others v Republic* (1989) KLR in support of its submissions.

Analysis and Determination

26. The issues for determination from the grounds of appeal are whether the ingredients of the offence of defilement were proved beyond reasonable doubt; whether the appellant's defence was considered and whether the sentence was excessive.

Proof of the offence

27. The key ingredients of the offence of defilement are proof of the age of the complainant, proof of penetration and proof that the person before court was the perpetrator of the offence.
28. On age, PW4 produced the complainant's age assessment report dated 20/7/2020 which showed that she was aged 16 years. The complainant herself testified that she was aged 16 years at the time of the incident, and her testimony was corroborated by PW2, her mother.
29. The next element is penetration which is defined under Section 2 of the Act to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person."
30. It is clear there was penetration on the evidence of the complainant PW1 who testified that:
- “...When we reached Abel's house, I sat at a wooden sat while he was spreading the bed then he started wooing me....He grabbed my hands and pulled me towards his bed where he pushed me to the bed and he started touching my breasts, my thighs, my waist and he started removing my clothes. On that day I wore panty, tights and a dress. He lifted my dress, removed my tights and pulled down my panty, he then got on top of me and he started having sex with me. He did not use any condom. No I did not want him to have sex with me and I even told him I was not ok with what he did and he told me if meat comes to his house, he cannot refuse to eat it in response to my protests. When I say he forced me to have sex with me I mean he took his penis and inserted it in my vagina. When he had sex with me it was about 11.00 p.m. I felt so much pain so I told him I could sleep outside and he tried having sex with me again but I refused because I was in immense pain. He then realized that I was serious about leaving so he changed his mind and we were able to sleep without having sex again.”
31. PW1's evidence on penetration was corroborated by medical evidence of PW4 that on examining the complainant, he noted that although the labia minora and majora were intact, she had bruises in the vulva and her hymen was torn. This court finds that the element of penetration was proved beyond reasonable doubt.



Appellant's defence

32. Apart from its inconsistencies in the evidence of DW1, DW2 and DW3, the appellant's defence did not raise a reasonable doubt. The appellant at first insisted that the complainant had gone home with her aunt. He then admitted on cross examination that although the complainant had come to their home to revise with DW2, she did not sleep there. DW2 admitted that she slept with the complainant but the appellant was not at home. She further alluded to a grudge between her mother and PW3. According to DW3, the disagreement between the complainant's mother, PW2 and the appellant's mother was the root cause of this case.
33. It is clear that the trial court considered the accused's defence. The trial court duly internalized the appellant's defence when it stated that, "The accused had in his evidence refuted claims that PW1 spent the night in their home on the date of the offence alleging that PW1 went with her aunt. DW2 on the other hand stated that PW1 spent in their home and both DW1, DW2 and DW3 agreed that PW3 arrested the accused person on 17/7/2020. DW2 insinuated that PW3 had a grudge with her mother but she failed to substantiate the said claim. DW3 on the other hand had stated that PW2 had a grudge with the accused person mother thus she fabricated the case herein but he too failed to substantiate the said claim and therefore I reject their evidence as untruthful. This court has had the privilege of listening and seeing all witnesses presented before it and I have no doubt to disbelieve the evidence of PW1 and I am satisfied that the evidence of PW1 and the entire prosecution case remained unshaken when placed alongside the defence or accused persons feeble denials."

Identity of the Appellant

34. The identity of the appellant is not in doubt, as he was well known to PW1, PW2 and PW3 prior to the incident. Whereas PW1 testified that, "I know Abel Mwiti as he is my friend i.e boyfriend" PW2 stated that, "I can see the accused before court and I have known him for a while and I know even his parents" and PW3 stated that, "I know the accused person he is my neighbour." The appellant was found with the complainant in his house by PW3. DW2 also confirmed that the complainant had slept in their home on the material day. This court is thus satisfied that the appellant was the perpetrator of the offence.

Excessive Sentence

35. Section 8 (1) (4) of the *Sexual Offences Act* provides that:
- "A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."
36. The trial court, after due evaluation of the mitigating factors and the fact that the appellant had taken advantage of the complainant's desperation, properly exercised its sentencing discretion when it handed him a sentence of 15 years.

ORDERS

37. Accordingly, for the reasons set out above, the appellant's appeal is without merit and it is dismissed.
38. The appellant was arrested on 17/7/2020 and released on bail on 7/8/2020. That pre-trial detention period of approximately 3 weeks shall be deducted from the appellant's 15 year imprisonment term.
- Order accordingly.



DATED AND DELIVERED THIS 26TH DAY OF JANUARY 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in Person.

Mr. Masila Principal Prosecution Counsel for DPP.

