



**Julius v Republic (Criminal Appeal E052 of 2022)  
[2023] KEHC 1341 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1341 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL E052 OF 2022  
TW CHERERE, J  
FEBRUARY 23, 2023**

**BETWEEN**

**MUSA KARIUKI JULIUS ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An Appeal from conviction and sentence in Tigania Criminal Case  
1574 of 2012 by Hon. J.W. Gichimu (Ag. PM) on 13th October, 2014)*

**JUDGMENT**

1. Musa Kariuki Julius (Appellant) was charged with defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No 3 of 2006 (the Act). 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 offences were committed between 23<sup>rd</sup> and October 28, 2012 against NG a child aged 9 years.
2. Complainant stated that on October 23, 2012, Appellant found her in the shamba cultivating and asked her to go to his house for prayers. When she got there, Appellant defiled her. She remained in Appellant's house until her mother and members of public went for her. Complainant's mothers stated that she returned home on October 23, 2012 and didn't find complainant. She continued to look for Complainant. On October 28, 2012, one Flora informed her that Complainant was in Appellant's house and true to her word, they found her there and arrested both Complainant and Appellant and escorted them to the police station.
3. Complainant was examined by Alex Mwinza on October 29, 2012 and was found with normal external genitalia, hyper anemic vaginal mucosa with no tear as shown on the P3 form PEXH. 2. Complainant's age was assessed to be 9 years and after investigations Appellant was charged.



4. Appellant chose not to give any defence. At the conclusion of the trial, he was found guilty and sentenced to serve life imprisonment on October 13, 2014.
5. Dissatisfied with both the conviction and sentence, Appellant lodged the instant Appeal and raised 4 grounds which I have summarized into three grounds:
  1. Prosecution case was not proved
  2. Key witnesses were not called
  3. Defence was not considered
6. This being a first appeal, the court is expected to analyze and evaluated afresh all the evidence adduced before the lower court and draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See *Okeno v Republic* [1972] EA 32, *Pandya v Republic* [1957] EA 336 and *Kiilu & another v Republic* [2005]1 KLR 174.
7. In considering whether the Prosecution case was proved beyond any reasonable doubt, I will be guided by the elements constituting the offence of defilement which are proof of penetration, the age of the minor and the identity of the assailant (See *C.W.K v Republic* [2015] eKLR), the evidence on record and the grounds of appeal.
8. It is trite that the age of a minor is a critical component of a defilement charge and that it is an element which must be proved by the prosecution beyond reasonable doubt. (See *Kaingu Kasomo v Republic* Criminal Appeal No 504 of 2010).
9. Proof of the age of a victim of defilement is crucial because the prescribed sentence is dependent on the age of victim. (See *Hadson Ali Mwachongo vs Republic* Criminal Appeal No 65 of 2015 [2016] eKLR & *Alfayo Gombe Okello v Republic* Cr. App. No 203 of 2009[2010] eKLR.
10. Complainant's age was assessed to be 9 years as at the time the offence was committed and Appellant was therefore properly charged under Section (1) as read with Section (2) of the *Act*.
11. Although Complainant's hymen was intact, she was found with hyper anemic vaginal mucosa and the learned trial magistrate's determination that penetration had been proved was therefore well founded.
12. Concerning identification of the perpetrator, it is trite that visual identification in criminal cases can cause miscarriage of justice and should be carefully tested. The court in *Wamunga v. Republic* (1989) KLR 424 at 426 had this to say:

“Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”
13. There is evidence that Appellant was a neighbor of the complainant and was therefore not a stranger. Complainant stayed with Appellant for 5 days and was found there on the 5<sup>th</sup> day by her mother. There is therefore no doubt that Appellant was properly identified as the perpetrator.



14. Concerning the Appellant’s contention that Prosecution failed to call crucial witnesses, he did not identify the witnesses he was referring to and in any case, Section 143 of Evidence Act (Cap 80) Laws of Kenya provides:

“ 143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

15. From the foregoing analysis, I find and hold that the conviction and sentence imposed on Appellant were safe.

16. Concerning the defence, Appellant did not tender any and there was no defence to be considered by the trial magistrate.

17. As regards sentence, the extent that the Sexual Offences Act prescribes minimum mandatory sentences with no discretion to the trial court to determine the appropriate sentence to impose, falls foul of Article 28 of the Constitution which provides that

“Every person has inherent dignity and the right to have that dignity respected and protected”.

18. In the end, the conviction is upheld but the life sentence is substituted with a 15 years’ imprisonment term from the date of arrest on October 28, 2012.

**DELIVERED AT MERU THIS 23<sup>RD</sup> DAY OF FEBRUARY 2023**

**WAMAE.T. W. CHERERE**

**JUDGE**

**Appearances:**

Court Assistant - Kinoti

Appellant - Present

For the State - Ms. Rita (PPC)

