



REPUBLIC OF KENYA



KENYA LAW
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**Lutsili v Republic (Criminal Appeal E020 of 2022)
[2023] KEHC 3487 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3487 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E020 OF 2022**

WM MUSYOKA, J

APRIL 28, 2023

BETWEEN

PAUL OPIAYO LUTSILI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from conviction and sentence by Hon. Dolphina Alego, Senior Principal Magistrate, SPM, in Kakamega CMCSO No. 69 of 2019, of 22nd March 2022)

JUDGMENT

1. The appellant, Paul Opiayo Lutsili, had been charged before the primary court, of the offence of defilement, contrary to section 8(1), as read with section 8(3), of the *Sexual Offences Act*, No 3 of 2006, Laws of Kenya, and an alternative charge of committing an indecent act with a child, contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on diverse dates between the month of December 2018 and January 16, 2019, at Eubayyi Location, Luanda sub-county, within Vihiga county, he intentionally and unlawfully caused his penis to penetrate the vagina of GO, a child aged 16 years. The appellant denied the charges, on July 30, 2019, and a trial ensued, where 7 witnesses testified.
2. PW1, GO, was the complainant. She described how she had been having sexual relations with the appellant. On January 16, 2019, she had a sexual session with him, and upon coming back home, PW2, her father, EOS, told her to go back to where she had come from. She then led PW2 to the appellant. The matter was then reported to the District Commissioner. PW2 described how PW1 led them to the appellant on January 16, 2019. PW1 did not go to school the next day, she disappeared instead. They reported to the District Officer, who took her to hospital, and reported the matter to the District Commissioner. The matter was then reported to the police, and the appellant was arrested. PW3, SA, was a daughter-in-law of PW2. She was among the people that PW1 led to the home of the appellant on January 16, 2016. PW4, LA, was an aunt of PW1. PW1 went to her home on January 17, 2019,



and when PW5 called her brother, RS, she was told that PW1 could have been defiled. When PW4 reported the matter to PW2, he informed the District Officer, and the matter was reported to the police at Luanda. PW5 was milking cows on the evening of January 16, 2019, when the appellant visited their home looking for pliers. He stated that PW1 went to sleep in the evening, and he left for work. In the morning of January 17, 2019, the appellant returned the pliers, while PW1 left for school, but did not come back in the evening. The matter was then reported to the District Officer, and was escalated to the District Commissioner. PW6, Evans Karega, was the clinician who attended to PW1, on January 24, 2019. He later said that he saw her on January 23, 2019, and then again 3 days had lapsed between the date of the alleged defilement and when she visited the health facility. He found her genitals to be normal, though tender on touch, her hymen was torn. PW7, No 8xxx2 Police Corporal Rael Ambasa, was the investigating officer. She said that the matter was reported to her on January 23, 2019, by PW2, PW3 and PW5.

3. The appellant was put on his defence, vide a ruling that was delivered on September 28, 2021. He made a sworn statement. He denied the charges. He said that he was unwell on January 16, 2019. He said that his son, NA, DW2, woke him up, and informed him of visitors who had come looking for their daughter. He went to hospital on January 17, 2019. The matter was thereafter reported to his superiors on January 23, 2019, and he was summoned. He called 2 witnesses, DW2, and DW3, his wife, Viola Kaikali. DW2 said that the appellant was unwell over the period of January 15, 2019 to January 16, 2019, and was at home. He was at home with the appellant in the evening of January 16, 2019. He testified that PW1, PW2 and PW3 came to the home that evening. DW3 also said that she was at home that evening of January 16, 2019, and PW1 did not visit, but said dogs barked, and DW2 went out, and came back saying that PW2 was the one who had visited, seeking to confirm whether PW1 had been there.
4. In its judgment, the trial court found the appellant guilty on the main charge. It found the main charge had been proved beyond reasonable doubt.
5. The appellant was aggrieved, and brought the instant appeal, founded on several grounds. He states that he was not subjected to medical examination, contrary to section 36 of the *Sexual Offences Act*; the age of the complainant was not proved; evidence was contradictory and uncorroborated; he was forced to cross-examine witnesses in the absence of his advocate; article 49 of the *Constitution* was violated; penetration was not proved; his defence was improperly not considered; and the case was mounted to advance a grudge. He later filed supplementary grounds, arguing that the trial was a sham; case was not proved beyond doubt; burden of proof was shifted; among others.
6. The appellant and the respondent filed detailed written submissions. I have gone through the same and noted the arguments made. Significantly, the respondent does not support the conviction. The sticking point raised by the respondent is that, despite PW2, PW3, PW4 and PW5 knowing that a crime had been committed, did not report to the police nor take PW1 to hospital until November 23, 2019, 8 days later. It is also submitted that the trial court only considered the discrepancies in the testimonies of the defence witnesses, but not those of the prosecution witnesses.
7. The charge is based on an alleged act of defilement of January 16, 2019, and the evidence adduced turned on the alleged events of that day, and not earlier, even though PW1 stated that her sexual relationship with PW1 started in 2017. Although PW1 was allegedly defiled in the evening of January 16, 2019, no report was made to the police until January 23, 2019, and PW1 was not taken to hospital until January 23, 2019. Instead of reporting to the police, PW1 and PW2 reported the matter to the appellant's superiors. These acts and omissions raise questions. Why not report to the police immediately, given that it is the duty of the police to detect and investigate crime, and thereafter forward the matter to the prosecutorial authorities. A delayed report to the police could be detrimental to the



case, as evidence could be lost. That happened here. PW1 was not taken to hospital immediately, until after 8 days, when practically any useful evidence would have been lost, and in this case it was lost, as there was little evidence to prove defilement. PW5 found the genitalia of PW1 to be normal. No bruises were found. No significant findings were made, that could found a basis for concluding that sexual intercourse had happened recently. Significantly, rather than report to the police as is the norm, PW2 chose to report the matter to the appellant's superiors. One would wonder why that was necessary. That lend credence to the appellant's defence, that the case was fueled by a grudge of some sort, for a report to the appellant's superiors, rather than to the police, would suggest malice, an intent to get the appellant into trouble with his bosses, perhaps to jeopardise his employment, instead of a genuine desire to have the crime, allegedly committed, properly investigated and prosecuted by the agencies established by the law for that purpose.

8. I agree with the appellant and the respondent, that there was more than meets the eye in the manner PW1 and PW2 handled the matter, from the time the offence was allegedly committed up to when it was reported to the police. The trial court should have been alive to the considerable delay in taking the appropriate action, in the circumstances, which was not explained at all. Benefit of the doubt should have gone to the appellant, and he should have been acquitted. It is not surprising that the respondent does not support the conviction.
9. I find merit in the appeal herein. I accordingly allow it. I hereby quash the conviction, and set aside the sentence imposed. The appellant shall be set free from custody, if he is not on bond, unless he is otherwise lawfully held. Orders accordingly.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS
28TH DAY OF APRIL 2023**

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Ms. Olucheli, instructed by Olucheli & Company, Advocates for the appellant.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the respondent.

