



**M'Nyeri v Republic (Criminal Appeal E024 of 2022)
[2023] KEHC 20654 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 20654 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CRIMINAL APPEAL E024 OF 2022
MS SHARIFF, J
APRIL 27, 2023**

BETWEEN

MUTEGI IKANA M'NYERI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the original conviction and sentence in Sexual Offences Case No 3 of 2016 in the Senior Principal Magistrate's Court at Chuka delivered on 15th June 2017 by Hon. S. Sudi, SRM)

JUDGMENT

A. Case Background

1. The Appellant was charged of the offence of attempted defilement contrary to Section 9(1) (2) as read with Section 8(4) of the *Sexual Offences Act* No 3 of 2006. He also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the said Act.
2. The particulars of the offence were that on the 14th day of April 2016 in Meru South Sub county within Tharakanithi County the appellant unlawfully attempted to cause penetration of his genital organ namely penis to female genital organ namely vagina of one FM a girl aged 4 years.
3. The particulars of the alternative charge were that on the date and place stated herein above, the appellant committed an act of indecency with FM a child aged 4 years by touching her private parts namely vagina.
4. Upon conviction on the alternative charge the Appellant was sentenced to serve ten (10) years imprisonment.



B. Appeal

5. Being aggrieved by both the conviction and sentence the Appellant filed the appeal herein and premised it on the following grounds:-
- i. That the learned trial magistrate erred in law and fact by failing to note that there was a grudge between the Appellant and the relatives of the complainant.
 - ii. That the learned trial magistrate erred in law and fact by failing to note that the broken (sic) of hymen is not proof of defilement.
 - iii. That the learned trial magistrate erred in law and fact in failing to note that the key witnesses were not called.
 - iv. That the learned trial magistrate erred in law and fact by failing to take into consideration the period spent in custody under Section 333(2) of the *Criminal Procedure Code*
 - v. That the learned trial magistrate erred in both law and fact by relying on uncorroborated and contradicting evidence tendered by the prosecution witnesses.
 - vi. That the learned trial magistrate erred in both law and fact by failing to note that the investigators of this case failed to investigate the case to the required standard by law.
 - vii. That the learned trial magistrate erred in matters of law and fact by failing to consider my defence.

C. Evidence

i. Respondent's evidence

6. The State called six (6) witnesses.
- PW1 FM a girl child then aged 4 years and a nursery student at [Particulars Withheld] Primary school was subjected to a voir dire exercise and upon the trial court having found that she understood the import of speaking the truth, was allowed to give a sworn testimony.
7. It was the evidence of PW 1 that on a day she that could not recall the date, the Appellant, a neighbour went and summoned her from where she had been playing outside her home and she then went to the road whereat the Appellant bought her some sweets and invited her to his house. He then started tickling her vagina using his penis after he had undressed both of them. He then slept on her and inserted his penis inside PW 1's vagina and PW 1 experienced immense pain and cried out loud. PW 1 was made to lay down on a sack at all material times. The Appellant who used to live in a makeshift structure had placed a mattress on its door way as the structure had no permanent door. PW 1 said that her brother D (PW 2) then happened to have been sent by her mother to the Appellant's place to get some medicine for chicken when he stumbled upon the Appellant in the act of defiling PW 1.
8. PW 1 said that the Appellant had applied some oil on her vagina before the act and after the defilement PW 1 saw blood coming out of her vagina.



9. PW 1 stated that when PW 2 arrived, the Appellant dressed her and himself. PW 2 then took her home and one P washed her. This witness said that the Appellant used to fetch water at her home when his well dries up.
10. PW 2 stated that his mother had sent him to go and get some medicine for their chicken from the Appellant when he found him with his pants down and PW 1 skirt up. The Appellant was doing 'bad manners' with his sister PW 1. PW 2 then went and reported to his mother and then later told him to go and get PW 1 back home. When he went to get PW 1, he found that the Appellant and PW 1 had dressed up and the appellant gave him the chicken medicine and he went back home with PW 1 who walk home.
11. PW 3 the victim's mother stated that on the material day she was at her home when the Appellant went and called PW 1 and he went with her son D (PW 2) to go and get some medicine for her chicken from the Appellant only for PW 2 to return back and report that he had found the appellant doing bad manners with PW 1. She then sent PW 2 to get PW 1 back home. Upon their return home, PW 1 looked teary and upon being asked to explain what had happened at the Appellant's house, PW 1 said that the Appellant had tickled her private parts. PW 3 said that she then took PW 1 into bedroom, placed her on bed and examined her. She found some oil on the vagina which was visibly swollen. She then screamed and a crowd gathered. She thereafter ran to farm to call her husband. PW 3 her husband and he crowd went to appellant's house and made a citizen's arrest and took the appellant to the police. In the meantime, PW a sister to PW 1 washed her later before she was taken to hospital.
12. PW 3 stated that the Appellant and her family were good neighbours and he ordinarily fetched water at her place. He would also bring her children guavas. She said it was normal for the children to go with the Appellant wherefore she had no reason to suspect that he would on that day defile PW 1. PWE 3 produced PW 1's copy of certificate of birth as P. exhibit 1.
13. PW 4 the father of the victim stated that on 14th April 2016 he heard screams from the Appellant's house and he rushed to find out what has happened. He was told that the Appellant had defiled a child and upon inquiring from the Appellant whether that was true, the latter said that he was being framed. PW 3 said that they decided take the Appellant to the police and while en route, the appellant pleaded for forgiveness. He even promised to educate PW 1 and to comply with any demands that PW 1's father would have made as a condition for being pardoned. The victim's father declined the appellant's proposal. This witness said that there was no enmity between victim's family and the Appellant.
14. PW 5 the victim's father said on 14th April 2016 he was in his farm when his wife PW 3 called him and told him that the Appellant had taken PW 1 and removed her clothes. He then went to the Appellant's house and inquired from him as to whether what he had heard was true. The Appellant denied the story whereat PW 5 insisted that PW 1 and PW 2 should be called in to narrate their side of the story. At that juncture the Appellant pleaded for forgiveness and requested that the mater be resolved amicably. The Appellant undertook to comply with the wishes of the victim. PW 5 then screamed and a crowd gathered. PW 5 called the sub chief who advised him to take the accused to the police station. PW 5 said that PW 1 had said that the Appellant's penis was huge.
15. PW 6 the Investigating officer stated that on 14th April 2026 a defilement report was made against the appellant. She commenced investigations, took PW 1 to Chuka hospital for a medical examination. A P3 form was filled which revealed that there was no penetration. PW 6 said she visited the scene. She stated that PW 1 gave a consistent version of the events; the victim however looked disturbed.



ii. Appellant's evidence

16. The Appellant gave unsworn testimony. He stated that on the material day he had earlier on went to buy cigarettes at PW3's shop. He also wanted to collect some beans that he sent PW3 to purchase for him and he had found PW 1 naked as she was smearing herself with oil. It was the appellant's evidence that PW 1 and PW 2 later went to his house and found him eating sweat potatoes. He said that PW 1 and PW 2 then went away but PW 2 later returned and told him that his mother had sent him to request for some medicine for chicken, which he did. The appellant stated that five minutes after PW 2 had left, PW 3, PW 5 and three other persons went to his house and confronted him about an alleged defilement. He was then beaten, tied up with a rope and was taken to the police station and was subsequently charged. He maintained that the victim's family had framed him because he had been asking PW 3 to supply him with the beans that he had ordered from her and had even paid her Kshs 5,000.

D. Submissions

17. The appeal was canvassed by way of written submissions.

Appellant's submissions

18. The Appellant has sought leave under Section 350(v) of the Criminal Procedure Code to amend his grounds of appeal and wishes to rely on the following supplementary grounds of appeal:-

- i. That the learned trial magistrate erred in both law and fact by relying on uncorroborated and contradicting evidence tendered by the prosecution witnesses.
- ii. That the learned trial magistrate erred in both law and fact by failing to consider my defence.
- iii. That the learned trial magistrate erred in both law and fact of failing to note that key witness were not called.
- iv. That the trial magistrate erred in both matters of law and fact in not considering this case was fabrication.

19. The Appellant has chosen to amalgamate all his grounds in his submissions. The appellant maintains that there were contradictions in the evidence of PW1, PW 3 and PW 2 as to whether he was known to the said witnesses and whether he had removed all his clothes at the time of commission of the offence. The Appellant further states that the state witnesses contradicted themselves on the distance from his house to the victim's home.

20. It is the Appellant's case that his defence was disregarded by the trial court and he maintains that PW 3, who was a business woman owed him Kshs 5,000 on account of some beans which he had sent her to purchase for him but was yet to do so, instead PW 3 opted to frame him with defilement charges so as to retain his said money; there was a grudge between them and the charges were a fabrication.

21. The Appellant's faults the State's case on grounds that a key witness was never availed. He posits that PW1's evidence needed corroboration and he has placed reliance on Section 124 of the [Evidence Act](#).



Respondent's Submissions

22. The Respondent supports both the conviction and sentence and maintains that it had proved its case beyond any reasonable doubt and that the Appellant's defence of existence of bad blood between him and PW 3 is but a sham as the Appellant used to patronize PW 3's shop and whenever his well dried up, he would fetch water at PW 3's house. The prosecution maintains that all the ingredients of indecent act with a child had been proved by the testimonies of PW 1, PW 2. Identification was through recognition as the Appellant was PW 1's neighbour and the age of PW 1 was proved by production of PW 1 certificate of birth which revealed that the victim was four (4) years old at the material time.
23. That State submits that the sentence meted was the statutory minimum hence lawful and in compliance with Section 11(1) of the Sexual Offences Act No. 3 of 2006.

E. Analysis And Determination

24. As a first appellate court, I am enjoined to re-evaluate, analyze and scrutinize the evidence afresh and make my own conclusion while taking into account that unlike the trial court, I do have the advantage of seeing and hearing the witnesses first hand. (See *Okeno v Republic* [1972] EA 32, *Pandya v Republic* [1975] EA 336 and *Shantial M. Ruwal v Republic* [1957] EA 570.
25. I have considered the Appellant's appeal and the submissions of parties and I have re-evaluated, re-analyzed and scrutinized the evidence as a whole and I do find that indeed the State did prove the charge of indecent act against the Appellant beyond any reasonable doubt.
26. The evidence of the State witnesses was consistent, corroborative and unshaken by the defence, which defence I find to be a sham given the cordial relationship that existed between the Appellant and the victim's family as already re-analyzed hereinabove in the evidence of both the State and the Appellant.
27. Under Section 124 of the Evidence Act, upon reasons to be recorded, a conviction can be based on the testimony of one witness in Sexual Offences. In any event the State is availed the discretion of deciding on the number of witnesses to call pursuant to the provisions of Section 143 of the Evidence Act which provides that:-

“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.” (see *Abdullah bin Wendo & Another v Republic* [1953] 20 EACA.

28. The Appellant was arraigned before court on 14th April 2016 and was granted bail wherefore he did not spend his pre conviction period in custody.
29. The trial court duly considered his mitigation and the aggravating circumstances when it passed sentence.
30. On the balance, I find that this appeal is devoid of merit and the same is dismissed. The conviction upheld and the sentence confirmed.
31. It is hereby so ordered.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 27TH DAY OF APRIL 2023

MWANAISHA S. SHARIFF

JUDGE

