



**Sausi v Republic (Criminal Appeal E047 of 2021)  
[2023] KEHC 19401 (KLR) (30 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19401 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CRIMINAL APPEAL E047 OF 2021  
GMA DULU, J  
JUNE 30, 2023**

**BETWEEN**

**DONALD SAUSI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the conviction and sentence in Voi Magistrate's Sexual Offence Case No. 14 of 2020 delivered on 8th July 2021 by Hon. D. Wangeci (PM) in Voi Law Courts)*

**JUDGMENT**

1. The appellant was charged in the Magistrate's Court at Voi with defilement of a girl contrary to Section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of offence being that on 26<sup>th</sup> July, 2020 at morning hours within Taita Taveta County intentionally caused his penis to penetrate the female genital organ (vagina) of SW a child aged 12 years.
2. In the alternative, he was charged with committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#), the particulars of which being that on the same date, time and place intentionally and unlawfully touched the vagina of SW a child aged 12 years.
3. He denied both charges. After a full trial, he was convicted on the main count of defilement and sentenced to twenty (20) years imprisonment.
4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal and relied on the following grounds:-
  1. The learned trial Magistrate erred in law and fact by failing to consider the documentary and expert evidence by the doctor.



2. The learned Magistrate erred in law and fact by failing to note that the witnesses were not truthful hence incredible.
3. The learned trial Magistrate erred in law and fact by acquitting the accused on the alternative charge yet convicting him on the main charge.
4. The learned trial Magistrate erred in not adequately considering the appellants defence.
5. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions.
6. This being a first appeal, I have to start by reminding myself that as a first appellate court, I am duty bound to reconsider all the evidence on record and come to my own independent conclusions and inferences – see *Okeno Versus Republic* (1972) EA 32.
7. I also have to bear in mind that Section 107 of the *Evidence Act* (Cap.80) puts the burden on the prosecution to prove each of the element of the offence. The standard of proof in a criminal case is beyond reasonable doubt, and mere suspicion however strong, cannot be a basis for founding a conviction in a criminal case – see *Sawe =Versus= Republic* (2003) eKLR.
8. As has been stated by courts of law consistently in several cases, the important ingredients of the offence of defilement for which the appellant was convicted are three. In this regard, I will cite only the case of *Charles Wamukoya Karani =Versus= Republic* – Criminal Appeal No. 72 of 2013 wherein the court stated as follows:
 

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration, and positive identification of the assailant.”
9. In proving their case, the prosecution called six (6) witnesses. The appellant on his part tendered sworn defence testimony and did not call any additional witnesses.
10. Starting with the age of the complainant, she testified as PW1 and said that she was SW aged 12 years. She did not rely on any document. PW2 CM her brother did not testify to the age of PW1. PW3 RM the father of PW2 the brother of PW1, produced a birth certificate in the name of SW issued on 29<sup>th</sup> October 2010 with the date of birth being 15<sup>th</sup> January 2008. PW6 TMM the mother of the complainant, did not testify to the age of the complainant.
11. In my view, the age of the complainant was not proved beyond reasonable doubt for the following reasons. First, though the complainant (PW1) stated that she was 12 years old she did not either state her year of birth nor indicate that she had a birth certificate.
12. Secondly, RM PW3 does not say where he got the birth certificate which he produced as exhibit as he is not the father of the child recorded in the birth certificate, who was LMM. In my view therefore RM PW3 should have said where he got the birth certificate as he was not the father of the child named in the birth certificate.
13. Thirdly, PW6 TMM the mother of the complainant PW1, did not testify to the age of the complainant, and in reference to Exhibit 1 the birth certificate, she was consistently recorded as stating in evidence that it referred to SK and not SW.
14. In my view therefore, the above evidential gaps and inconsistencies in the prosecution evidence, it created a reasonable doubt on the age of the complainant and the benefit of that doubt should have



been given by the trial court to the appellant, as the complainant who was said to be a child, was not even taken through voire dire examination.

15. I thus find that the prosecution did not prove the age of the complainant PW1 beyond reasonable doubt.
16. I now turn to sexual penetration, which in terms of Section 2 of the *Sexual Offences Act* can either be complete or partial penetration.
17. In my view, the prosecution did not prove penetration beyond reasonable doubt for the following reasons. First, it was clear from the evidence of PW2 and PW6 on record, that when initially confronted the complainant PW1, denied sexual intercourse. It was only after beatings by PW2, and threats by PW6 that she talked of sexual penetration. Thus her allegation of sexual intercourse appears to have arisen out of physical coercion rather than an attempt to say the truth.
18. Secondly, the Clinical Officer PW4 Joto Nyawa, was categorical in his evidence that he found no evidence of recent sexual penetration on the complainant though her hymen was missing. According to him “There was no evidence of defilement. The hymen was broken but not fresh. This would have been caused by other reasons, sports for example.”
19. With the above evidence on record, the evidence by PW1 the complainant regarding sexual penetration stands hollow and empty, and cannot be saved by the proviso to Section 124 of the *Evidence Act* (Cap.80), as it was not believable evidence and should not have been believed by the trial Magistrate.
20. I thus find that the prosecution did not prove penetration of a sexual nature on the complainant beyond any reasonable doubt.
21. With regard to positive identification of the culprit, indeed there is evidence from PW2, that he saw the appellant and the complainant twice talking outside some buildings during the day. That is not in dispute. However, in my view, there was no evidence connecting the appellant to a sexual act with the complainant. The fact that two people are seen standing out talking per se, is not proof that there was sexual intercourse between them. I thus find that the prosecution did not prove beyond reasonable doubt that the appellant was the culprit.
22. With the above findings, the conviction and sentence of the trial court herein cannot stand. I will thus allow the appeal.
23. Consequently and for the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED THIS 30<sup>TH</sup> DAY OF JUNE, 2023 IN OPEN COURT AT VOI.**

**GEORGE DULU**

**JUDGE**

**In the presence of:-**

The appellant

Mr. Sirima for State

Mr. Otolo court assistant

