



REPUBLIC OF KENYA



KENYA LAW
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**Kitolo v Republic (Criminal Appeal E008 of 2023)
[2023] KEHC 24081 (KLR) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24081 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E008 OF 2023
GMA DULU, J
OCTOBER 25, 2023**

BETWEEN

MUNUVE KITOLO APPELLANT

AND

REPUBLIC RESPONDENT

(From the conviction and sentence in Sexual Offence Case No. E026 of 2021 at Voi Law Courts delivered on 26th April 2022 by Hon. A. M. Obura (Mrs.) (CM)

JUDGMENT

1. The appellant was charged in the Magistrate's court 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 the offence were that on diverse dates between July 2021 and 17th October 2021 in Voi Sub County intentionally caused his penis to penetrate the vagina of Y.M 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 between the same dates and at the same place intentionally touched the vagina of Y.M a child aged 12 years with his penis.
3. He was charged with a second count of assault causing actual bodily harm contrary to Section 251 of the *Penal Code*, the particulars of which being that on 17th October 2021 at around 11:00a.m in Voi Sub County within Taita Taveta County unlawfully assaulted SM thereby occasioning her actual bodily harm.
4. He denied all the charges. After a full trial, he was convicted of defilement and assault causing actual bodily harm and sentenced to nineteen (19) years and six (6) months imprisonment for defilement, and three (3) years imprisonment for assault causing actual bodily harm; sentences to run concurrently.



5. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal and relied on the following amended grounds:-
1. That the charge sheet is defective in format and draft no OB extract in record and no date of alleged defilement in July only written on diverse dates between July 2021 and October 17th, day of October and no time of alleged defilement.
 2. That the learned trial Magistrate erred both in law and facts by convicting him by present case of defilement and indecent act with a child and assault case which had no report, the initial report.
 3. That the learned Magistrate erred both in law and fact by failing to see that he was not being served with the OB extract, initial report of assault and defilement and indecent act with a child and also all investigation diaries as she ordered on 19.10.2021 in page 3.
 4. That the learned trial Magistrate erred both in law and fact by failing to find that the evidence of 5 witnesses are inconsistent and had contradictions and discrepancies.
 5. That the learned trial Magistrate erred both in law and fact by failing to find that the case was not proved to the required standard or beyond reasonable doubt.
 6. That the learned trial Magistrate erred both in law and fact by failing to find this case was poorly investigated and cannot base a conviction and sentence.
 7. That the learned trial Magistrate erred both in law by failing to evaluate the evidence of all 5 witnesses and find that the evidence does not corroborate at all and are immaterial to base a conviction.
 8. That his rights were being violated under Article 48, the State shall ensure access to justice for all persons and if any fee is required shall be reasonable and shall not impede access to justice, Article 49(i) the reason for the arrest (f) (i) (iii) (g) (h) Fair Hearing (g) (h) (j) (6) (7).
 9. That the learned trial Magistrate erred in law and fact by failing to evaluate and find that PW2 she was not a reportee in this case at Kasighau Police Post at Kasighau.
 10. That the learned trial Magistrate erred both in law and fact by failing to find that the evidence of PW1 the medical officer is of truth that the hymen of PW2 it was broken long ago not on 17.10.2021.
 11. That the learned trial Magistrate erred both in law and fact by expecting the wrong exhibit panty and shirt to be produced before court which were erroneous not the same seen by the medical officer which were normal clothes not torn.
 12. That the learned trial Magistrate erred both in law and fact by convicting him by relying on the report of the medical officer having no harm, no injury, no spermatozoa seen or found in the vagina of the complainant PW2, vagina having no lacerations noted, no blood stains, no pus or cells seen and accused person was not examined to prove the alleged defilement on 17.10.2021.
 13. That the learned trial Magistrate erred both in law and fact by convicting him with a defective charge sheet in drafting and format.
6. 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.



7. This being a first appeal, I am duty bound to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences see *Okeno v Republic* [1972] EA 32.
8. In proving their case, the prosecution called five (5) witnesses. On his part, the appellant tendered sworn defence testimony and did not call any additional witness.
9. The appellant was convicted of two offences. I will thus deal with each of the two offences in turn starting with defilement and then going to assault.
10. The elements of defilement are the age of the complainant, the act of sexual penetration and the identity of the perpetrator.
11. With regard to the age of the complainant PW2, she said that she was 12 years old, but did not give her date of birth. She was in Class 7 at [Particulars Withheld] Primary School. She did not rely on any document.
12. PW3 AMN her grandmother gave the names of three grandchildren she lived with including the complainant. She gave the name of one of the grandchildren S to be 3 years. She did not testify to the age of the complainant.
13. The investigating officer PW5 Cpl. Emma Mutwana produced a birth certificate for Y who was said to be 12 years. There was however, no evidence that the said document was identified by PW2 or PW3, nor did this witness state how she got possession of this birth certificate.
14. I find that the age of the complainant PW2 was not proved beyond reasonable doubt.
15. With regard to the element of sexual penetration, the evidence of PW2 is clear and believable that on 17th October 2021 the appellant visited their home and had sexual intercourse with her during morning hours in broad daylight. Also the medical evidence of PW1 Dr. Joto Nyawa was clear that the vagina opening of the complainant was wide, evidencing a habit of repeated sexual intercourse.
16. I thus find that the evidence of PW2 was believable. As such the prosecution proved sexual penetration beyond reasonable doubt.
17. As for the culprit, I am also of the view that as both PW2 and the appellant knew each other well as neighbours, and the incident occurred in broad daylight, there was no possibility of mistaken identity. The prosecution thus proved beyond any reasonable doubt that the appellant was the culprit.
18. Having said so, the appeal on the defilement count will however be allowed because the age of the complainant was not proved beyond reasonable doubt.
19. With regard to the offence of assault causing actual bodily harm, the evidence of PW2, and PW3 was clear. The medical evidence of PW1 also confirmed the injury suffered by the victim, a young girl aged 3 years.
20. On my part, even after considering the appellant's sworn defence I am of the view that the prosecution proved beyond reasonable doubt that the complainant was physically assaulted, and suffered actual bodily harm. That act was done by the appellant. I will thus uphold both the conviction and the sentence on this count of assault causing actual bodily harm.
21. For the above reasons, I quash the conviction for the offence of defilement and set aside the sentence of nineteen (19) years six (6) months imprisonment.
22. I however uphold the conviction for assault causing actual bodily harm and uphold the sentence of three (3) years imprisonment imposed by the trial court. It is so ordered.



DATED, SIGNED AND DELIVERED THIS 25TH DAY OF OCTOBER 2023 AT VOI.

GEORGE DULU

JUDGE

In the presence of:-

Alfred – Court Assistant

Appellant

Mr. Sirima for State

