



REPUBLIC OF KENYA



KENYA LAW
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**Mombo v Republic (Criminal Appeal E050 of 2021)
[2023] KEHC 24084 (KLR) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24084 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E050 OF 2021
GMA DULU, J
OCTOBER 25, 2023**

BETWEEN

JEREMIAH MWADIME MOMBO APPELLANT

AND

REPUBLIC RESPONDENT

(From the conviction and sentence in Sexual Offence Case No. E006 of 2021 at Wundanyi Law Courts delivered on 10th August 2021 by Hon. E. M. Nyakundi (RM))

JUDGMENT

1. The appellant was charged in the Magistrate's court with defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of offence were that on 25th February 2021 at around 0700hours in Taita Taveta County intentionally caused his penis to penetrate the vagina of DM a child aged 12 years.
2. In the alternative, he was charged with committing an indecent act with a child act contrary to Section 11(1) of the *Sexual Offences Act*, the particulars of which being that on the same date and place intentionally touched the vagina of DM a child aged 12 years with his penis against her will.
3. He denied both charges. After a full trial, he was convicted on the main count of defilement and sentenced to twelve (12) years imprisonment.
4. Aggrieved by 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 convicting him in the case while failing to consider that the prosecution evidence was not proved beyond reasonable doubt.



2. The learned Magistrate erred in law and fact thereby breaching the provisions of Article 50(2) (h) of the Constitution.
3. The trial Magistrate erred in law and fact convicting him and failing to put into task the provisions of Section 124 of the Sexual Offences act.
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 am duty bound to re-evaluate and re-examine all the evidence on record and come to my own independent conclusions and inferences – see *Okeno v Republic* [1972] EA 32.
7. At the trial, the prosecution called five (5) witnesses. On his part the appellant tendered sworn defence testimony and did not call any additional witness.
8. PW1 was the complainant who stated that on that morning the appellant gave her Kshs. 450/=, took her up a hill and defiled her and that one Mwacharo the owner of a nearby shop appeared and as a result the appellant hurried away.
9. PW2 OMK was the father of PW1 whose evidence was that classmates of PW1 reported to him that PW1 had been found with Kshs. 450/=.
10. PW3 was Emily Mvoi whose evidence was that on 25th February 2021 at 6p.m. a child called S informed her that he saw PW1 with Kshs. 450/= and that PW1 had been given the money by a person who laid on her.
11. PW4 Dr. Sumeiya Seif testified that she examined the complainant PW1 and noted that the hymen was broken, and filled and produced the medical report form (P3).
12. I note that Joanness Mwacharo who was to be PW5 was stood down, and then PW5 PC Elslah Chelagat testified that a report on the incident was made at Mwatate Police Station on 26th February 2021, and that he conducted investigations and charged the appellant in court.
13. On his part, the appellant tendered sworn defence testimony claiming that the allegations levelled against him were false. He was cross-examined at length.
14. The element of the offence of defilement for which the appellant was convicted have been restated in many court cases. I will only refer to the case of *Charles Wamukoya Karani v Republic* – Criminal Appeal No. 72 of 2013. The elements are three – the age of the victim; sexual penetration; and identity of the perpetrator.
15. From the evidence on record herein, in my view the age of the complainant was proved to be 12 years, as a birth certificate was relied upon in court and produced as an exhibit.
16. On sexual penetration, in my view this element was not proved beyond reasonable doubt. This is because though the hymen of the complainant was broken, there is no evidence of recent penetration. Secondly, the complainant did not attempt to report the incident to anybody, and was only said to have disclosed so when some pupils, who were not called in court to testify, asked her where she got Kshs. 450/=. In my view, the fact of possession of unexplained money and sexual intercourse are two different things, and at least one of those pupils should have been called by the prosecution to testify, or the reason for failure to do so explained to court. Short of that, one cannot say that sexual penetration was connected to the possession of money by PW1.



17. On the culprit also, I find that the prosecution did not prove this element beyond reasonable doubt as the person who was said by PW1 the complainant, to have seen the appellant in the act, or at the scene of the incident did not testify in court. Thus the evidence of PW1 on this element did not satisfy the threshold requirements for believable evidence under the proviso to Section 124 of the Evidence Act (Cap.80).
18. Though the appellant has complained on appeal that his constitutional rights under Article 50 of the Constitution were violated; I see no such violation, and dismiss that ground.
19. Having found that penetration and identity of the perpetrator were not proved, the appeal will succeed.
20. I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

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

GEORGE DULU

JUDGE

In the presence of:-

Alfred – Court Assistant

Appellant

Mr. Sirima for State

