



REPUBLIC OF KENYA



**Lunda v Republic (Criminal Appeal E088 of 2022)
[2023] KEHC 27089 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27089 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E088 OF 2022**

DK KEMEL, J

DECEMBER 20, 2023

BETWEEN

DAVID MASINDE LUNDA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgement and sentence of Hon Adhiambo in
Kimilili Principal Magistrate's Court Sexual Offence Case No. 117 of 2019)*

JUDGMENT

1. The Appellant, David Masinde Lunda, was charged before the Principal Magistrate's Court at Kimilili in Sexual Offences Case No. E088 of 2022 with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*, No. 3 of 2006. The particulars were that the Appellant, on 6th September 2019 within Bungoma North sub-County intentionally and unlawfully caused his penis to penetrate the vagina of CS a child aged twelve (12) years.
2. The Appellant also faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that the Appellant, on 6th September 2019 within Bungoma North sub-County intentionally and unlawfully caused his penis to come into contact with the vagina of CS a child aged twelve (12) years.
3. After a full trial, the appellant was convicted and sentenced to ten years' imprisonment.
4. The lower Court record reveals that the prosecution called seven (7) witnesses in support of its case.
5. In his judgement, the learned trial magistrate found that the Appellant committed the offence with which he was charged in the main charge, proceeded to convict him under section 215 of the Criminal Procedure Code and sentenced him to serve ten (10) years' imprisonment.



6. Being dissatisfied with the conviction and sentence, the Appellant has lodged the instant appeal based on the following grounds:
 - i. That the learned trial magistrate misdirected herself and erred in law and fact by relying on the evidence of one witness which was not corroborated despite glaring contradiction, inconsistencies and outright unbelievable circumstances.
 - ii. That the learned trial magistrate misdirected herself and erred in law and fact by introducing, considering and relying on extraneous matters which had in fact not been canvassed by the prosecution during the trial.
 - iii. That the learned trial magistrate misdirected herself and erred in law and fact by forming an early opinion of the guilt of the Appellant and then proceeding to craft non-existent evidence in support of her conviction.
 - iv. That the learned trial magistrate misdirected herself and erred in law and fact by totally ignoring the Appellant's submissions and in particular in regard to the time, place and opportunity for the alleged commission of the offence and the particular circumstances of the case.
 - v. That the learned trial magistrate misdirected herself and erred in law and fact by rejecting the Appellant's alibi out of hand, terming the same to be an afterthought when in fact the same had been introduced at the earliest possible opportunity, that is to say, before the Appellant was arraigned in Court, and that the Prosecution had all the time to test the credibility thereof.
 - vi. That the learned trial magistrate misdirected herself and erred in law and fact by not considering the weight of the evidence thereby finding the Appellant guilty according to no known standard of proof.
 - vii. That the learned trial magistrate misdirected herself and erred in law and fact by dismissing the evidence of all the defence witness without giving due consideration to the merits thereof.
 - viii. That the learned trial magistrate exercised her discretion with partiality bordering on malice in imposing the sentence on the Appellant.
7. He prayed that this appeal be allowed; conviction and sentence be set aside and the Appellant be set free.
8. The appeal was canvassed by way of written submissions. The Appellant submitted that the trial Court erred by relying on the evidence of one witness which was not corroborated despite glaring contradiction, inconsistencies and outright unbelievable circumstances. Counsel submitted that PW1 did not understand the oath and was allowed to give unsworn testimony. According to Counsel, the words of PW1 were not what she stated in Kiswahili and that PW1 lacked credibility.
9. Counsel submitted that the evidence as tendered by the Prosecution was marred with contradictions between PW1 and PW4. According to Counsel, PW4 testified that there was no penetration contrary to what PW1 told the Court. Counsel submitted that the Prosecution did not prove their case beyond reasonable doubt and urged this Honourable Court to allow the appeal and set aside the lower Court's conviction and sentence.
10. Learned counsel for the Respondent submitted that the lower Court considered the evidence of all the witnesses and the necessary ingredients of proving the case of defilement against the Appellant.
11. On the ingredient of penetration, the Respondent submitted that after voir dire examination, the court noted that the PW1 did not understand the nature of an oath but understood the importance



of telling the truth. According to Counsel, there was no contradictions in the manner in which PW1 described the events that occurred on that fateful day. Further, PW6, proceeded to testify on the medical examination of PW1 which duly noted that PW1 had normal external genitalia but had lacerations on the labia minora bilateral; that there was discharge and that a high vaginal swab revealed presence of epithelial cells and that the conclusion was that PW1 had been defiled. PW6 further produced a P3 form and treatment notes. Counsel for the Respondent relied on the case of Bassita vs Uganda S.C. Criminal Appeal No. 35 of 1995 Supreme Court and Mohammed vs R, and provisions of section 124 of the *Evidence Act*.

12. On the ingredient of age, Counsel for the Respondent submitted that the same is not disputed and that the mother of PW1 established that she was 12 years old and that a birth certificate that indicated her date of birth as 7th July 2009 was produced. Counsel relied on the case of Hadson Ali Mwachongo vs Republic (2016) eKLR.
13. On the ingredient of identification of the appellant, Counsel for the Respondent submitted that the Appellant was positively identified by PW1 as the person who was well known to her and as per the evidence on record the incident occurred on or about 7.00 AM thus there was sufficient light to see the Appellant.
14. On the aspect of contradictions, Counsel for the Respondent submitted that the discrepancies tabled by the Appellant herein does not hold water as they were from witnesses who were not there when the offence took place. Counsel further submitted that the said inconsistencies were so minor that this Court ought to ignore the same as it did not go to the root of the matter. Counsel relied on the case of Philip Nzaka Watu vs Republic (2016) eKLR.
15. On the Appellant's defence of alibi, Counsel for the Respondent submitted that the same was an afterthought which did not affect the testimony of the Prosecution witnesses.
16. Counsel for the Respondent further submitted that the case against the Appellant was proved beyond reasonable doubt and that the ingredients of defilement were established to warrant the Appellant's conviction and subsequent sentence. Counsel relied on the case of George Opondo Olunga vs Republic (2016) eKLR.
17. On the sentence, Counsel submitted that the Appellant has not challenged the same in his grounds of appeal and thus urged this Court to uphold the same. Finally, it was submitted that the conviction was safe as against the Appellant and hence the conviction and sentence ought to be upheld.
18. As a first appellate Court; I am obligated to re-evaluate the evidence afresh and arrive at my own independent conclusion. I am however reminded to bear in mind that I neither saw nor heard the witnesses and must give due allowance for that. See Njoroge v Republic (1987) KLR, 19 & Okeno v Republic (1972) E.A, 32.
19. I have considered the grounds of appeal, evidence adduced in the lower Court and the respective parties' submissions. I find the only issue for determination is whether the Prosecution proved their case against the appellant beyond reasonable doubt.
20. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* which provides:

“ 8

- (1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.



(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

21. The specific elements of the offence of defilement arising from Section 8 (1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are:
 - i. Age of the complainant;
 - ii. Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*; and
 - iii. Positive identification of the assailant.
22. On these elements; “The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.” (Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013).
23. As regards the issue of age of the victim, it is noted that in a charge of defilement, the age of the victim is important for two reasons:
 - i. defilement is a sexual offence against a child; and
 - ii. age of the child has been used as an aggravating factor for purposes of determining the sentence to be imposed; the younger the child the more severe the sentence.
24. A child is defined as a person under the age of eighteen years. Is the victim herein a child?
25. PW1 testified that she was formerly a pupil at [particulars withheld] Primary School and in class six when the incident occurred. PW2- the mother of the victim testified that PW1 was born on 7/7/2007. She produced PW1’s birth certificate as PEXH1.
26. Accordingly, credible evidence was adduced before the lower Court to prove beyond reasonable doubt that the Complainant was a child for purposes of sections 2 of the *Sexual Offences Act*, as read with section 2 of the *Children Act*, No. 8 of 2001. There was thus no doubt that the complainant was a minor and a child at that.
27. As regards the issue of penetration, the same is defined in section 2(1) of the *Sexual Offences Act* defined as the partial or complete insertion of the genital organs of a person into the genital organ of another person.
28. PW1 testified that the Appellant called her while she was inside class six and asked her to go inspect whether the classes had been swept. She proceeded to confirm the same and report to him that only one class had been swept and he proceeded to ask her to sweep his office. As she swept the office, the Appellant instructed her to stand at a corner and he approached her and started to undress her. The Appellant removed her uniform and inserted his penis inside her vagina. As per the words of PW1 “akaniwekelea kitu yake”. She proceeded to testify that she felt pain but did not scream and when he was done, she left his office. According to PW1, the Appellant defiled her while both of them were in a standing position. She proceeded to report the incident to one Madam Consolata Sirudu who did not render her any assistance prompting her to later make her report with the Deputy headteacher who cautioned her against sharing about the incident with anyone.
29. PW6, Dr. Graham Masika Makokha, testified that he works with the County Government of Bungoma as a general practitioner. That he was before the Court to tender evidence on behalf of



a colleague, Jentrix Wafula, who was out of station on leave thus could not attend the hearing and that Counsel for the Appellant tendered no objection towards the same. According to him, PW1 was treated on 9th September 2019 as she was brought in by her father with a history of defilement that took place on 6th September 2019 while at school. On examination, it was observed that the child was not pale or jaundiced and on vaginal examination, it was observed that PW1 had a normal external genitalia but had a laceration on the labia minora bilaterally, there was laceration on perineum and no discharges. The urinalysis test revealed presence of epithelial cells but no spermatozoa. He produced the treatment notes and P3 forms as PEXH2 and PEXH3 respectively. On cross examination, he testified that the noted injuries on PW1's genitalia were not only consistent with defilement but they could also be occasioned by a blunt injury from another cause.

30. In the case of John Mutua Munyoki vs. Republic [2017] eKLR, the Court of Appeal in this regard held that:

“Therefore, in order for the offence of defilement to be committed, the prosecution must prove each of the above ingredients beyond reasonable doubt...The clinical officer was categorical that he was not in a position to ascertain the act of defilement after examining the complainant. He testified that he conducted vaginal examination and found no tears, no bruises, no hymen and no discharge. In addition, there were no spermatozoa and yeast cells or fungal cells. The complainant had also confirmed to him that she had previously engaged in sexual intercourse and was therefore not a virgin. Accordingly, the lack of hymen could not be attributed to the alleged incident involving the appellant. In a nutshell, there was no evidence of penetration. Faced with similar situation, this Court in the case of Arthur Mshila Manga (supra) observed while allowing the appeal that:

‘But did the medical evidence on record establish that JM was defiled? We do not think so. It is apposite to produce verbatim the findings of Jenliza after examining JM, as narrated before the trial court by PW3. No blood stain was seen on clothes. On the head, abdomen and thorax nothing was seen. On the genitalia the hymen was absent and the vagina was open. No discharge was seen. No injuries on the legs or hands. Pregnancy and HIV tests were negative. The urine was negative. HIV test was to be done after three months. I wish to produce the PW3 form as PEXI.’

The Court proceeded and stated that:

‘From both the evidence of PW3 as well as the P3 form, which we have carefully perused, other than noting absence of hymen and consequently an open vagina, Jenliza never expressed any opinion that the JM had been defiled, or defiled the previous day. There was nothing on record to suggest that JM had lost her hymen the day before Jenliza examined her. The medical evidence having failed to confirm that JM was defiled, the only other evidence of defilement was that of JM. It is trite that under the proviso to section 124 of the *Evidence Act*, a trial court can convict on the evidence of the victim of a sexual offence alone. (See Mohamed v Republic (2008) KLR G&F, 1175 and Jacob Odhiambo Omuombo v Republic (supra). However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief.’

As we shall endeavour to demonstrate later in this judgment, much as the trial Court believed the testimony of the Complainant, there was no strict compliance with the requirements of the proviso to section 124 of the *Evidence Act* aforesaid. It is quite clear that there was doubt as to whether the Complainant was actually defiled by the Appellant since



there was no credible evidence as to the penetration of the Complainant. It is trite that those doubts should have been resolved in favour of the appellant.”

31. The Supreme Court of Uganda held in the case of *Bassita vs. Uganda S.C. Criminal Appeal Number 35 of 1995*, that: -

“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victim’s own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not a hard and fast rule that the victim’s evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt”.

32. To bolster his defence, the Appellant submitted that as per the evidence of PW6 in cross examination, the general practitioner noted that the injuries observed on PW1 could also have been caused by something other than defilement thus an error of the trial Court to observe the injury noted on PW1’s genital as consistent to injuries as one sustained as a result of defilement.

33. Furthermore, the law does not require the presence of spermatozoa as proof of penetration. The Court of Appeal in the case of *Mark Oiruri v Republic (2013) eKLR*, expressed itself on this matter as follows: -

“..... and the effect that the medical examination was carried out on her on 16th November 2008, five days after the event, and that during that time she must have taken a bath and no spermatozoa could be found. In any event, the offence is against penetration of a minor and penetration does not necessarily end in the release of sperms into the victim. Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and the penetration need not be deep inside the girl’s organ....”

34. From the medical evidence adduced, there was evidence of laceration on the labia minora bilaterally, there was laceration on perineum but no discharge was noted. The urinalysis test noted presence of epithelial cells but no spermatozoa. This serves as proof that an act of sexual assault may have taken place subject to proof by other corroborative evidence. In any event, penetration can be proved circumstantially taking into account circumstances under which the act was committed. In the case of *Kassim Ali v Republic (2021) eKLR* the Court of Appeal stated that;

“So, the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence”

35. As regards the issue of the identity of the perpetrator, it is noted that from the medical evidence as well as witness testimonies, there is proof that there was penetration of the complainant’s sexual organ. But by whom? This is the mega question.

36. The Appellant was known to PW1. When PW1 sought the assistance of PW4 she stated that the Appellant had defiled her. And she reiterated the same to her father-PW3. During trial, the child identified the Appellant in Court. The Appellant was a teacher to the Complainant. PW4 testified that the Appellant was a colleague as he taught the ECD class. This clearly shows that PW1 identified the Appellant vide recognition



37. It bears repeating that the Appellant was a person known to the Complainant. I do not find any element of mistaken identity of the Appellant as the person who penetrated her genitalia. She was categorical it was “mwalimu David” and that the Appellant used to assist Mr. Cerdil Rundi for their math lessons.

38. The above principles were established in *R v Turnbull & Others* (1976) 3 ALL ER 549, where the Court laid down the factors that ought to be considered when the only evidence turns on identification by a single witness, thus:

“... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?...Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

39. It is also accepted in law that evidence of recognition is stronger than that of identification because recognition of someone known to one is more reliable and assuring than the identification of a stranger (see *Anjoni & Others v Republic* [1980] KLR 59).

40. The evidence by the Prosecution leaves no doubt that the Appellant caused penetration of the Complainant’s genital organ.

41. The Appellant’s ground that the trial magistrate considered contradictory evidence must fail as the evidence tendered by the prosecution placed him at the scene of crime. It is important to reiterate that his conviction by the trial Court was based on the medical evidence of PW6 and the evidence of PW1 who saw identified the Appellant. Thus, I have no doubt as to whether the Complainant was truly defiled. Further, the Complainant was able to reiterate the events that occurred on that fateful day and proceeded to even identify the Appellant before the lower Court. Her chronology of events in describing the acts of the Appellant were in tandem and the evidence availed by PW6 did confirm that the Complainant bore injuries that may possibly be as a result of defilement.

42. PW4 and PW5 may have had different accounts as PW1 in regard to the question as to where exactly the incident occurred but that the same did not extinguish the fact that the Complainant was defiled and in exception of the Appellant there were no eye witnesses.

43. In its decision in *Erick Onyango Ondeng’ vs Republic* [2014] eKLR the Court stated as follows with regard to the duty of a Court when considering contradictory evidence.

“The primary duty of the trial court is to carefully analyze that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honoured device for testing the truth or correctness of evidence. Next is the first appellate court which by law, it is its bounden duty to re-consider, re-evaluate and analyze the evidence



that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. (See *Okeno vs Republic* (1972) EA 32).”

44. The way to treat contradictions in a case was stated by the Court of Appeal in *Jackson Mwanzia Musembi v Republic* (2017) eKLR where the court cited with approval the Ugandan case of *Twahangane Alfred –Vs- Uganda CR. Appeal No. 139 of 2002 (2003) UGCA*,⁶ where it was held that:

“with regard to contradictions in the prosecution’s case, the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case”.

45. Upon examination of the evidence, I find that it did not appear that the small contradictions affected the substance of the Prosecution case. According to PW1, the incident occurred at the office of the Appellant. The said contradictions did not cause any prejudice to the appellant in any way as the key evidence was that of the victim who was alone with the appellant in his office and that the incident took place in broad daylight (7.00AM). It is a common fact that such sexual activities are often engaged out of sight of other people and in secrecy. In such circumstances, the evidence of the victim is crucial. It is instructive that the appellant was well known to the complainant and that she alerted the deputy head teacher immediately and another female teacher who offered no assistance forcing her to report to her father. In all these, she mentioned the appellant as the perpetrator. There was thus sufficient evidence to support the conviction of the appellant. I find the conviction arrived at by the trial court was sound and I see no reason to interfere with it. The appeal on conviction therefore lacks merit.

46. Finally, regarding the sentence imposed, the Appellant was sentenced to ten years’ imprisonment. The guiding principles upon which a Court may interfere with a sentence imposed by a lower Court were stated in the case of *Ogalo S/O Owuor Versus Republic 1954 24 EACA* where it was held that:

“an appellate court has the power to interfere with the sentence passed by the trial court if there is evidence that the learned magistrate or Judge acted on wrong principles, overlooked some relevant material or factors or that the sentence passed is illegal or manifestly excessive or punitive or too low as to occasion a miscarriage of justice.”

47. It is noted that during sentencing, the trial Court took cognizance of the Appellant’s mitigation as clearly seen in the trial Court’s records. Sentencing is exercise of discretion by the trial Court which should never be interfered with unless the trial Court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle (See *Shadrack Kipkoech Kogo - Vs - R.*, and *Wilson Waitegei V Republic* [2021] eKLR)

48. In the circumstances, after considering the circumstances of the case including the mitigating and aggravating factors, I find the sentence imposed is proper. I see no need to interfere with it.

49. In the result, the appeal is devoid of any merit. It is dismissed.

DATED AND DELIVERED AT BUNGOMA THIS 20TH DAY OF DECEMBER 2023.

D.Kemei

Judge

IN THE PRESENCE OF:



David Masinde for Appellant

Omukunda for Appellant Mwaniki for Respondent

Kizito Court Assistant

