



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mutua v Republic (Criminal Appeal E037 of 2021)  
[2022] KEHC 11313 (KLR) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11313 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CRIMINAL APPEAL E037 OF 2021**

**GMA DULU, J**

**MAY 31, 2022**

**BETWEEN**

**PATRICK KIANGI MUTUA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original judgment of Hon. C.A Mayamba in Kilungu Principal Magistrate's Court PM (S.O) Case No.53 of 2020 pronounced on 29th March 2021)*

**JUDGMENT**

1. The appellant was charged in the magistrate's court with defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* No. 3 of 2006. The particulars of offence were that on November 24, 2019 in Ngaamba Location of Mukaa Sub-County within Makueni County using his genital organ namely penis penetrated the vagina of FW (name withheld) a girl aged 17 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 day and at the same place committed an indecent act with a child namely FW aged 17 years by touching her vagina, buttocks and breast.
3. He denied both charges. After a full trial, he was convicted on the main count of defilement and sentenced to 6 years imprisonment.
4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal relying on the following grounds-
  - 1) The learned magistrate erred in finding that there was proof of penetration by the accused yet the evidence on record suggested otherwise.



- 2) The learned magistrate erred in law by finding that the identity of the offender was established yet evidence produced proved otherwise.
  - 3) The learned trial magistrate erred in accepting to shift the burden of proof to the accused person instead of requiring the prosecution to prove its case beyond reasonable doubt.
  - 4) The learned magistrate erred in law by hearing and convicting the accused without legal representation.
5. The appeal was canvassed through filing of written submissions. In this regard, I have perused and considered the submissions filed by M.M Mutua & Company advocates for the appellant and those filed by the Director of Public Prosecutions.
  6. This being a first appeal, I have to start by reminding myself that 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] E.A 32.
  7. In proving their case, the prosecution called four (4) witnesses. On his part, the appellant tendered sworn defence testimony and called two defence witnesses.
  8. Pw1 was the alleged victim FW whose evidence was that she was a Form 3 student at [particulars withheld] Secondary School born on July 13, 2003, thus 16 years on November 24, 2019 when the incident occurred. It was her evidence that on that day she went to church at [particulars withheld] Ministry Church and after service the Pastor Patrick Kiangi announced and invited people to come and see spirits being expelled. When the exercise was completed at 9pm the Pastor took her and two girls Z and M on a motor bike, dropped the other two girls at the home of Pastor Agnes, and took the alleged victim towards her home. However, near ABC Church he asked her to remove her clothes and defiled her and then took her home. It was her evidence that after sometime, she discovered that she was pregnant and the incident was thus reported to the police. It was her evidence that though she had other sexual partners, the pregnancy belonged to the appellant. However, she admitted that the DNA report was that appellant was not the biological father of the child.
  9. Pw2 Erick Kasiamani was a Clinical Officer at Kilungu Sub-County hospital who filled the P3 form medical report on the alleged victim in which it was recorded that on examination the alleged victim was 24 months pregnant, and the date of conception was around December.
  10. Pw3 was TMD a retired teacher and a Pastor at [particulars withheld] Church who lived with the alleged victim because her mother was paralyzed since March 2020. It was his evidence that when the alleged victim came to his home in April 2020 and he heard rumors that she was pregnant, he asked his wife to take her to the dispensary and thereafter the alleged victim named the appellant as the father of the expected child. He testified that thereafter, the appellant who was a Pastor, came home with witnesses and tried to exonerate himself. According to him DNA test was conducted to establish the paternity of the child.
  11. Pw4 was P.C Francis Kamau of Kiu Police Post whose evidence was that he received a defilement report on May 19, 2020 from the alleged victim and an aunt. From the report, investigations were conducted, the alleged victim taken to hospital and reports on medical examination filled. DNA test to establish the paternity of the child was also conducted.
  12. When put on his defence, the appellant tendered sworn testimony as Dw1. It was his defence that on November 24, 2019 which was a Sunday, he went to Kiu from Nairobi to attend a church service.



They completed the service at 2pm and thereafter they conducted a second service up to 4pm and then prayers for sick children from 5pm for one hour, and then he left by his car for Nairobi. In May 2020 however, he received a report about a pregnancy from Mr. Daniel and when he tried to

discuss with the parents of the alleged victim to know the details, he was arrested by the police and charged for an offence, he did not commit. He denied being the father of the child of the alleged victim.

13. Dw2 was Teresia Ndunge a farmer at Kiu, who stated that on November 24, 2019 the appellant arrived from Nairobi in his car KCJ 951U and they prayed until 2pm. Then they went into two other sessions of prayers up to 6:30 pm and the appellant took his car and travelled to Nairobi. She insisted that the appellant never rode a motor cycle.
14. Dw3 was Peter Mulei a resident of [particulars withheld] whose evidence was that on November 24, 2019 Bishop Kiangi (the appellant) who lived in Nairobi went to Kiu for church service until 2pm. They then went to another service to 4pm and then prayers for sick children and the Apostle (appellant) returned to Nairobi. He only learnt later that the appellant had been arrested on false allegations.
15. This being a case of defilement the prosecution was required first to prove the age of the victim. Pw1 stated her age and the date of birth. A birth certificate was relied upon and produced in court as an exhibit. It was not contested. I find that the prosecution proved beyond any reasonable doubt that the alleged victim was 17 year old at the time of the alleged incident.
16. Did penetration of a sexual nature occur at the alleged time? Penetration is the second element of defilement. Pw1 the alleged victim said that she was sexually penetrated. The medical evidence was that the hymen was broken. It was not a recent breaking of the hymen though, and the medical examination was done about 6 months after the date of the alleged incident. There was a pregnancy detected however, which was 6 months old which coincided with the date of the alleged incident. In my view the prosecution proved beyond any reasonable doubt that the alleged victim was penetrated sexually on the date alleged.
17. Was the appellant the culprit? This is the third element of the offence of defilement. From the evidence on record, especially the insistence of the alleged victim that the child was a biological child of the appellant, and the DNA tests showing that he was not the biological father, in my view the evidence of the alleged victim creates a reasonable doubt on whether the appellant has the culprit. The benefit of that doubt has to be given to the appellant and I do so. As a consequence, I find that the prosecution did not prove beyond reasonable doubt that the appellant is the culprit. On that ground alone, I will allow the appeal on conviction, and as a consequence the sentence will also be set aside.
18. 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 unless otherwise lawfully held.

**DELIVERED, SIGNED & DATED THIS 31ST DAY OF MAY 2022, IN OPEN COURT AT MAKUENI.**

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**GEORGE DULU**

**JUDGE**

