



REPUBLIC OF KENYA



**KENYA LAW**  
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**MKB v Republic (Criminal Appeal E151 of 2021)  
[2022] KEHC 11443 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11443 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL E151 OF 2021  
TW CHERERE, J  
MAY 26, 2022**

**BETWEEN**

**MKB ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against judgment, conviction and sentence in Meru Chief Magistrate's Court Criminal SO No. E017 of 2021 by Hon. S.N.Abuya (CM) on 31st August, 2021)*

**JUDGMENT**

**Background**

1. MKB (Appellant) was charged defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006 (the Act). The offence was allegedly committed on December 8, 2020 against PG a child aged 8 years.
2. The prosecution called four (4) witnesses in support of the charges. PW1 the complainant stated that she was 9 years old and in Grade 1. She stated that Appellant used to cohabit with her mother and that they used to sleep on the same bed. It was her evidence that on the material date, she mother went to work in the morning and left her and Appellant in bed and it was then that Appellant defiled her. She reported the matter to Mama K who in turn informed her mother. PW2 found, Complainant's mother stated that Complainant was born on February 20, 2013 as shown on her certificate of birth PEXH. 1. She confirmed that she used to cohabit with the Appellant. She stated she left Appellant and complainant at home every day and the incident was reported to her by Mama K on December 9, 2020 and she called Appellant and together they escorted Complainant to hospital. Complainant was examined on December 11, 2020 by PW4 Huey Atemi a clinical officer who found that the vulva was bruised and labia minora and labia majora were reddish from which he opined that there was evidence of vaginal penetration. He stated that he filled and signed complainant's P3 form,



Gender Violence Recovery Centre Form and PRC Form which he tendered as PEXH.1, PEXH. 2 and PEXH.3 respectively. In cross-examination by Appellant, he confirmed that although the PRC Form has Complainant's name on it, it relates to a baby born on December 12, 2020. Complainant's report to the police was investigated by PW4 CPL BAO and Appellant was subsequently charged.

3. Appellant in his sworn defence denied the offence. He stated that PW2 was his wife and Complainant his step daughter. He stated that he travelled to Nanyuki on December 8, 2020 to collect his certificates from one W with whom he used to work with in Marsabit before he lost his job and settled in Meru. He tendered a ticket dated December 7, 2021 by Menany Sevice Sacco Matatau as DEXH.1 in support thereof. He stated W did not arrive in good time and thus he spent the night of 7<sup>th</sup> and 8<sup>th</sup> December, 2020 in a lodging namely [Particulars Withheld] and he tendered a receipt DEXH. 2 in support thereof. It was his evidence that W bypassed him and travelled to Nairobi and he followed him there on 08.12.2020 by matatu as shown on a ticket by Nyakati Sacco DEXH. 3. He stated he arrived in Meru on the evening of 08.12.2020. He stated he was on duty on December 9, 2020 when PW2 informed him that Complainant was unwell as a result of which he rushed home and together they escorted Complainant to hospital. He stated that he was subsequently arrested on December 11, 2020. He suspected that his wife framed him after he got wind that she had procured an abortion with the assistance of Mama K.
4. The trial court after hearing the witnesses for the prosecution and defence found Appellant guilty and sentenced him to 20 years' imprisonment.

### **Appeal**

5. Aggrieved by the conviction and sentence, Appellant lodged the instant appeal and filed submissions on six grounds mainly that the prosecution case was not proved as required by law and his defence was not given due consideration.

### **Analysis and determination**

6. This being a first Appeal, this Court has a duty to evaluate the evidence, analyze it afresh and draw its own conclusion, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify as did the trial Court, and give due allowance for that (See *Okeno vs. Republic* [1972] E.A.32).
7. The elements constituting the offence of defilement are proof of penetration, the age of the minor and the identity of the assailant. (See *C.W.K v Republic* [2015] eKLR).

### **Age of complainant**

8. It is trite that the age of a minor is a critical component of a defilement charge and that it is an element which must be proved by the prosecution beyond reasonable doubt. In *Kaingu Kasomo vs. Republic* Criminal Appeal No. 504 of 2010 the Court of Appeal stated as follows:

“Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim”.

9. Complainant's mother PW2 stated that Complainant was born on 20.02.2013 as shown on her certificate of birth PEXH. 1 and was therefore 7 years when she the offence was allegedly committed.



I therefore find that the trial magistrate correctly found that Complainant was a minor and that Appellant was correctly charged under Section 8(1) as read with Section 8(2) of the Act.

### **Penetration**

10. Section 2 of the Act defines penetration to entail: -

“partial or complete insertion of a genital organ of a person into the genital organ of another person.”

11. The P3 form PEXH. 2 reveals that complainant had vulva was bruised and labia minora and labia majora were reddish from which the clinical officer formed an opinion that there was evidence of vaginal penetration. I therefore find that the trial magistrate correctly found that penetration was proved.

### **Appellant’s culpability**

12. Appellant was married to Complainant’s mother and was therefore no stranger. As is normal in sexual offence., Complainant was the sole to the commission of the offence.

13. As a general rule of evidence embodied in Section 124 of the *Evidence Act*, an accused person shall not be liable to be convicted on the basis of the evidence of the victim unless such evidence is corroborated. The proviso to that section makes an exception in sexual offences and provides as follows:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

14. The trial court rejected the Appellant’s defence of alibi on the ground that he failed to call anyone from [Particulars Withheld] where he allegedly spent the night of 07<sup>th</sup> and December 8, 2020 to corroborate his evidence that he was not at the scene of crime on 08.12.2020.

15. Concerning the defence of alibi, the Court of Appeal in the case of *Kiarie v Republic* [1984] KLR held:

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.” (Emphasis added).

16. In the case of *Victor Mwendwa Mulinge vs Republic* [2014] eKLR the Court of Appeal held: -

“Even if the appellant raised the defence of alibi for the first time during the trial, the prosecution ought to have applied to adduce further evidence in accordance with Section 309 of the Criminal Procedure Code to rebut the appellant’s defence.” (Emphasis added).

17. Section 309 of the *Criminal Procedure Code* provides that: -

“If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.”



18. Accused raised the defence of alibi and even tendered receipts in support of his case that he was in Nanyuki on the date the offence was allegedly committed. That far, his duty was discharged and it was upon the Prosecution to apply to the court to obtain evidence for the purpose of rebutting the alibi which they failed to do.
19. I have considered the judgment of the trial court and I find that the Appellant's defence of alibi was not appropriately considered. I am of the considered opinion that the alibi cast a reasonable doubt on the prosecution case and the learned trial magistrate ought to have given the Appellant the benefit of the doubt in view of the fact that the prosecution case against the Appellant cannot be said to have been overwhelming.
20. In the end, I find that the prosecution case was not proved beyond any reasonable doubt and Appellant ought not to have been convicted.
21. Accordingly, I find that the learned trial magistrate erred in failing to find that the Prosecution did not rebut the alibi defence and hence find that this appeal succeeds has merit. Unless otherwise lawfully held, it is ordered that the Appellant shall be set at liberty. It is so ordered.

**DELIVERED AT MERU THIS 26<sup>TH</sup> DAY OF MAY, 2022**

**WAMAE. T. W. CHERERE**

**JUDGE**

Appearances

Court Assistant - Kinoti

Appellant - Present in person

For the State - Ms. Nandwa (PC 1)

