



REPUBLIC OF KENYA



KENYA LAW
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**Muthee v Republic (Criminal Appeal E115 of 2021)
[2022] KEHC 11457 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11457 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E115 OF 2021
TW CHERERE, J
MAY 26, 2022**

BETWEEN

KEN MUTHEE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against judgment, conviction and sentence in Meru Chief Magistrate's Court Criminal SO No E008 of 2020 by Hon S N Abuya (CM) on June 29, 2021)

JUDGMENT

Background

- 1) Ken Muthee (appellant) was charged defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No 3 of 2006 (the Act). The offence was allegedly committed on October 23, 2020 against PG a child aged 13 years.
- 2) The prosecution called six (6) witnesses in support of the charges. PW1 the complainant stated that she was born on April 05, 2007 as shown on her certificate of birth PEXH. 1. She recalled that on October 23, 2020 on her way to school at about 07.00 am, she met appellant who he had previously seen in the bush on her way to school and he lied to her that there were elephants nearby. That as she ran for her life, Appellant grabbed her and defiled her after which she went home and reported the matter to her sister and mother. In court, the witness stated he identified appellant by a red trouser he was wearing in court and a mark on his forehead. Complainant was on the material date escorted to hospital by her mother PW2 CM. Complainant was examined on March 08, 2021 by Dr Muthomi and her P3 form PEXH. 2 tendered by PW3 Dr Belinda Kathure reveals that complainant had minor bruise on parietal aspect of the vulva but hymen was intact. Appellant's house was identified by PW4 Peter Mutwiri Magiri to PW5 PC Hussein Kiplagat and Appellant was arrested from therein on October 27, 2020. PW6 PC Naserian Lenanida investigated the complainant's complaint and appellant was subsequently charged.



- 3) Appellant in his sworn defence denied the offence. He stated that he was not positively identified as the person that defiled the complainant.
- 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 five grounds which I have paraphrased as follows:
 - 1) That *voire dire* examination was not properly conducted
 - 2) That the prosecution case was not proved beyond reasonable doubt
 - 3) That appellant's defence was not given due consideration.
4. That the time spent in custody was not considered as stipulated under section 333(2) of the [Criminal Procedure Code](#).

Analysis and determination

6. The appeal proceeded by way of written submissions. 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). I have considered the appeal and I shall deal with it as set out herein below.
7. Section 19 of the [Oaths and Statutory Declarations Act](#) cap 15 of the Laws of Kenya provides that:

19(1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (cap 75), shall be deemed to be a deposition within the meaning of that section. (Emphasis added).
8. "A child of tender years" is described under section 2 of the [Children's Act](#) as "a child under the age of 10 years. The children in this case are about 9 and 5 years respectively and are therefore children of tender years. Section 4(3) of the same Act requires all judicial and administrative institutions, and all persons acting in the name of these institutions to treat the interests of the child as the first and paramount consideration in every matter concerning the child. (Emphasis added).
9. Complainant was 14 years when she testified and therefore not a child of tender years whose evidence ought to have been subjected to *voire dire* examination.



Age of complainant

10. 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”.

11. That complainant was born on April 05, 2007 has been demonstrated by her certificate of birth PEXH. 1. 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(3) of the Act.

Penetration

12. 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.”

13. The P3 form PEXH. 2 reveals that complainant had a minor bruise on parietal aspect of the vulva from which the doctor formed an opinion that there was evidence of vaginal penetration. I therefore find that the trial magistrate correctly found that penetration was proved.

Identity of the assailant

14. In the case of *R v Turnbull*, [1976] 3 All ER 551 Lord Widgery CJ observed as follows on identification:

“the quality of identification evidence is critical; if the quality is good and remains good at the close of the defence case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger”.

15. Complainant stated that she had previously seen appellant on her way to school but he was unfamiliar. As is normal in sexual offence. Complainant was the sole to the commission of the offence. The first people that she reported the incident to were her mother and sister. The two did not testify and there is therefore no evidence that complainant described the assailant to them. PW4 Peter Mutwiri Magiri and PW5 PC Hussein Kiplagat who arrested appellant in the absence of the complainant did not tell court how they identified appellant as the assailant. Similarly, the investigating officer did not interrogate the complainant to find out how she identified appellant as the assailant. did not and appellant was arrested from therein on October 27, 2020.

16. From the analysis of the complainant’s evidence, I find that she did not give the description of her assailant and there has been no basis for which appellant was arrested and charged, appellant was identified in the dock. In the case of *Gabriel Kamau Njoroge vs Republic* (1982 -88) 1 KAR page 1134, the Court of Appeal held as follows:

“Dock identification is worthless; the court should not rely on a dock identification unless this has been preceded by a properly conducted identification parade. A witness should



be asked to give description of the accused and the prosecution should then arrange a fair identification parade.”

17. From the summation of the evidence in this case, I find that the Appellant was not properly identified as the assailant and the Prosecution case was therefore not proved to the required standard.
18. Had the appeal not succeeded, I would have been under an obligation to apply the provisions of section 333(2) of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya) which obligates the court to take into account the period an accused has spent in custody in determining the sentence.
19. In the end, I find that had the learned trial magistrate given due consideration to the defence challenging his identification, she might have arrived at a different conclusion. Consequently, I this appeal succeeds. Unless otherwise lawfully held, it is ordered that the Appellant shall be set at liberty. It is so ordered.

DELIVERED AT MERU THIS 26TH DAY OF MAY 2022

WAMAE T W CHERERE

JUDGE

Appearances

Court assistant - Kinoti

Appellant - present in person

For the State - Ms Nandwa (PC 1)

