



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kiseko v Republic (Criminal Appeal E025 of 2020)
[2022] KEHC 12245 (KLR) (29 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 12245 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E025 OF 2020
GMA DULU, J
JUNE 29, 2022**

BETWEEN

JOSEPH KIUVU KISEKO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence of Hon.
C. A. Mayamba in Kilungu Principal Magistrate's Court PMCR
(S.O) Case No.43 of 2020 pronounced on 3rd November, 2020)*

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 in the month of July 2020 at unknown dates at Wathini Sub-Location in Makueni County, intentionally caused his penis to penetrate the vagina of JMM a child aged 12 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 in the same month and at the same place intentionally touched the vagina of J.MM a child aged 12 years with his penis.
3. He denied both charges. After a full trial, he was convicted on the main count of defilement and sentenced to 25 years imprisonment.
4. Dissatisfied with the conviction and sentence of the trial court, the appellant has come to this court on appeal on the following grounds –
 1. That the trial magistrate erred by convicting him on fatally defective charge sheet.



2. That the magistrate erred in both points of law and facts by convicting him while he failed to consider that the prosecution evidence was untenable, unworthy, contradictory, and inconsistent and full of lies, hence not capable to pass the test of credibility.
 3. That the trial magistrate erred both in law and facts when he convicted him by failing to consider one of the key ingredients establishing the offence of defilement i.e. penetration, identification which were not proved by the prosecution beyond reasonable doubt as established by law.
 4. The trial magistrate erred both in law and facts by convicting him without regards to his basic rights of disclosure of the prosecution evidence which was intended to be brought against him as laid down under Article 50(2), (c), and (j) of the Constitution of Kenya 2010.
 5. That his conviction, based on the evidence was manifestly unsafe.
5. The appeal was canvassed through filing of written submissions. In this regard, I have perused and considered the submissions filed by the appellant and those filed by the Director of Public Prosecutions.
 6. This being a first appeal, 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 five witnesses. On his part, the appellant tendered sworn testimony and did not call other evidence.
 8. This being a defilement case, the prosecution was required to prove beyond any reasonable doubt all the three ingredients of the offence that is the age of the complainant, the fact of sexual penetration and thirdly, the identity of the culprit.
 9. With regard to the age of the complainant, Pw1 JM stated that she was 12 years old. She relied on her birth certificate which she identified. Pw2 PMK the custodian of Pw1, also stated that the complainant was 12 years old. The birth certificate was produced as an exhibit by Pw5 PC Mwanaidi Hussein the Investigating Officer. In my view, the prosecution proved beyond reasonable doubt that the complainant was 12 years old at the time of the incident in July 2020 as it was recorded in the birth certificate that she was born on May 14, 2008.
 10. As regards penetration of a sexual nature, the complainant Pw1 said that she was so penetrated. The evidence of Pw4 the Clinical Officer Jackson Nzivu was that the medical treatment and medical report form on the complainant were done at Sultan Hamud Hospital in August 2020. The allegation was that the complainant was defiled on unknown date in July 2020. The hymen of the complainant was broken and there were no lacerations in the vagina. The complainant (Pw1) stated in her evidence that she did not remember the date of the incident.
 11. In my view, the prosecution failed to prove sexual penetration beyond any reasonable doubt. This is because firstly, the fact of hymen of the complainant found to be missing is not conclusive evidence of sexual penetration as medically the hymen can be missing for various other reasons including vigorous exercises. Secondly, for a child of 12 years, in my view, Pw1 the victim should have remembered the dates or at least the week in July when the incident occurred, as it would be a serious incident in her life. Thirdly, from the evidence on record, the people who started the story about the incident and informed Pw3 Peter Masila the Assistant Chief did not testify, thus the source and truth of the information could not be tested.



12. I thus find that the prosecution did not prove beyond reasonable doubt that there was sexual penetration on the complainant as alleged.
13. As to the identity of the culprit, I have no doubt from the evidence on record that the appellant was well known to the complainant. However, having found that the prosecution did not prove sexual penetration, I also find that the appellant was not the culprit. From the evidence on record, it could as well be the case that because of pressure from the Assistant Chief, the complainant had to mention somebody, and the next door neighbour, the appellant was thus mentioned. I find that the appellant was not proved by the prosecution to be the culprit.
14. Consequently and for the above reasons, I find merits in the appeal. 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 29TH DAY OF JUNE, 2022, IN OPEN COURT AT MAKUENI.

.....

GEORGE DULU

JUDGE

