



REPUBLIC OF KENYA



**KENYA LAW**  
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**Julius v Republic (Criminal Appeal E032 of 2021)  
[2022] KEHC 12326 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 12326 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL APPEAL E032 OF 2021**

**A. ONG'INJO, J  
JUNE 23, 2022**

**BETWEEN**

**JOSEPH NGALA JULIUS ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgment of Hon. David Odhiambo Resident Magistrate, delivered on 22nd April 2021 in Shanzu Principal Magistrate Court Sexual Offences Case No. 59 of 2018)*

**JUDGMENT**

1. The appellant herein Joseph Ngala Julius was accused in Shanzu Chief Magistrates Court in Sexual Offence Case No 59 of 2018 with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No 3 of 2006.
2. Particulars are that Joseph Ngala Julius on 20<sup>th</sup> day of May 2018 at pending area in [Particulars Withheld] Sub-county within Mombasa County intentionally caused his penis to penetrate the vagina and anus of SKP a child aged 11 years.
3. In the alternative the appellant was charged with the offence of indescent act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006. Three witnesses testified in support of prosecution case that the appellant defiled the minor. The accused was placed on defence and he also gave sworn statement.
4. Having considered the evidence on record for the prosecution and the accused the trial Magistrate found appellant guilty and convicted him and he was sentenced to serve 15 years in jail.
5. The appellant was aggrieved by the conviction and sentence and he filed the appeal herein on the following amended grounds filed on March 31, 2022:-



- i. That the learned trial Magistrate erred in law & fact for appreciating that there was positive identification established while during reporting the same was not established.
  - ii. That the learned Magistrate erred in law & facts by not appreciating the fact that the main ingredients of defilement which is penetration was not proved beyond reasonable doubt.
  - iii. That the learned trial Magistrate erred in law and infact by not appreciating the fact that section 124 Makers it mandatory for the trial court to record the reasons why it believed the complainant told the truth.
  - iv. That the learned trial Magistrate erred in law & fact by not appreciating the fact that the minor was incapable of giving sworn evidence as she did not understand the solemnity of an oath during conduct of *voire dire*.
  - v. That the learned Magistrate erred in law and fact by failing to give reasons why he didn't believe the defence evidence yet the same was truthful and straight forward and believable as it was made on oath.
  - vi. That the learned Magistrate erred in law & fact by convicting the appellant, yet the prosecution had totally and conspicuously failed to prove not only its case beyond all reasonable doubt but also on prima facie basis to warrant the appellant to defend himself.
6. The prosecution case was that the complainant. PW 1 – SP had gone to fetch firewood in company of her brothers when the appellant held her hand and pulled her into the house after taking her brother to go. That her brothers refused to go. He stayed outside. That the appellant removed complainants part and inserted his penis into her vagina & anus after removing his trousers. PW 1 said the appellant closed her mouth and prevented her from screaming and he defiled her several times.
  7. That when he left her he told her not to tell anyone. PW 1 said she was feeling a lot of pain. She said she felt as if she had been cut in her private parts. That her brother H told her to go and tell Ngalas mother what had happened to her. That when her mother came back she reported that Ngala had defiled her.
  8. They made a report at Bamburi Police Station and they were referred to hospital – where she was given medicine and told to go back the following day and she was examined in her private parts. PW 1 identified accused/appellant in court as the one who defiled her. She said Ngala was their neighbour and his sister was her friend.
  9. PW 2 DA testified that she left her 3 children at home and on return one of them told her that S had been defiled by Ngala the appellant herein. That her son P also told her the appellant had defiled S. That when she went out to look for S the complainant she found her crying and she narrated what had happened.
  10. PW 2 reported the matter at Bamburi Police Station and she took complainant to hospital where she was examined and it was established she had been injured. PW 2 said the complainant was 11 years as she was born on August 14, 2018 and she produced her certificate of birth EX P1. That accused was arrested and taken to police station where he was charged. PW 2 said there was a cut in the complainant's private parts.
  11. PW 3 dr Uba Abdulkadir produced PRC form filled by dr Sanda Mndeyi who examined the complainant. He said that the complainant had abrasive of external vagina and lacerations at the anal orifice at 5.00 O'clock. He also produced P3 form filed by dr Munir at Coast General Hospital. In the P3 form the hymen was intact but there was abrasion on the vagina and anus at 6.00 O'clock.



12. The prosecution closed its case without evidence of the investigating officer and accused was placed on defence.

### **Accused Persons Case**

13. Appellant gave sworn statement and said he was arrested by sungu sungu when he had gone to work on May 20, 2018 at night and he was taken to Bamburi Police Station. He said that the mother helped complainants mother when she was pregnant and later they agreed and she told accused persons mother she would teach her a lesson because she had big children helping her.
14. He said he was arrested with allegations of defilement less than one week after PW 2 differed with his mother. He said there was a witness who heard PW 2 tell the complainant what to come and say in court. Accused was given a date to call his witness on October 19, 2020 but the witness didn't attend.
15. On December 22, 2020 appellant sought for summons to be issued to James Kazungu who was working in a hotel in Watamu and a further date was granted on 21/1/2021, 3/2/2021 and finally on March 25, 2021 when he said he didn't have a witness to call as he was told his witness moved from where he was staying and he could not reach him on phone.
16. The trial Magistrate found the prosecution had proved the charge beyond all reasonable doubt and convicted the appellant.
17. This appeal was canvassed by way of written submissions.
18. The appellants submissions were filed on March 31, 2022. The appellant submitted that evidence of identification of assailant was based on PW 1's had not support. He submitted that his name was not mentioned as the person well known to the complainant. He said his name was given as an afterthought.
19. The appellant also argued that the ingredients of penetration was not proved beyond all reasonable doubt. He argued that the notes at page 28 concluded that complainant was sexually assaulted and not defiled. He said there were inconsistencies in the medical records which are material.
20. The appellant submitted that the trial court did not warn himself of the dangers of acting on in corroborated evidence of the complainant and contradicting in the medical report. He also argued that the doctors evidence did not point at him in anyway nor did it show crime committed.
21. The appellant further submitted that the trial court did not give reasons why the evidence of the complainant was believed in compliance with the provisions of section 124 of the *Evidence Act*. He said that the contradictions in prosecution case bring into question the credit worthiness of the complainant. The appellant relied on the holding in *Omuroni vs Republic* (2002) 2EA 508 to support the position that reasons must be given why the court holds a witness is credible or not credible.
22. The appellant further questioned why the complainants brother who witnessed him defiling the complainant was not called. He urged the court to draw adverse inference to the failure to avail a witness – Reference is made to the case of *Ritro vs Another vs Republic* CA No 99 of 1986, *Republic vs Uberele* (1938) KLR 413 and *Bukenya & Another vs Republic*.
23. The appellant further submitted that the complainant was made to take an oath when it was not established in the voire dire examination that she understood the nature of an oath. He argued that failure to record terms in which the judge is persuaded and satisfied that a child understands the nature of the oath is fatal – See *John Mururi vs Republic* and *Kinifula vs Republic* [2004] 1KLR 256 at page 265. *Nyasani stg Bichana vs Republic* (1958) EA 190.



24. In ground 5 the appellant submitted that no eye witnesses were called and that the prosecution closed its case before calling the investigating officer. He said the prosecution deliberately avoided to avail the investigating officer for fear of their impact on their case. He argued that there was no evidence to warrant him being placed on defence.
25. On ground 6 the appellant submitted that his defence was not considered and no valid reasons were given as required Section 169 of *Criminal Procedure Code* why it was dismissed. Ref *Macharia vs Republic* [1975] EA 193 at page 195.
26. The respondents submissions dated May 18, 2022 was filed on 19/05/2022. The respondent submitted that the ingredients of the offence of defilement under section 8(1) as read with section 8(3) of the *Sexual Offences Act* had been proved beyond all reasonable doubt.
27. On the issue of application of section 124 of the *Evidence Act* is submitted that the trial Magistrate had the chance to observe the complainants demeanor and found her as truthful & properly relied on her evidence to convict the appellant. It was argued that the contradictions the appellant alludes to were never raised when he cross examined witnesses. It was argued that evidence of complainant that there was penetration was corroborated by medical evidence.
28. The respondent relied in the holdings in *Basita vs Uganda SC CR Appeal No 35 of 11995* and *JWA vs Republic* [2014] eKLR to support its position as to corroboration and application of Section 124 of the *Evidence Act*.

### **Analysis and Determination**

29. This being a 1<sup>st</sup> Appeal the duty of this court is to analyze and re-evaluate the evidence as a whole and draw our conclusion as washed by the Court of Appeal in *Kiilu & Another vs Republic* [2005] 1KLR 174.
30. The appellant was charged and convicted for the offence of defilement of a 11 years old child. The issues that arise for determination as framed in the appellants amended grounds of appeal filed together with submissions are:-
  - i. Whether the appellant was positively identified
  - ii. Whether the charge of defilement was proved beyond all reasonable doubt particularly the ingredient of penetration.
  - iii. Whether the trial Magistrate properly applied section 124 of the *Evidence Act*.
  - iv. Whether the complainant understood the nature of an oath so as to give sworn statement.
  - v. Whether the appellants defence was considered.
  - vi. Grounds 1 & 2 of the grounds of appeal are 2 of the ingredients of the offence of defilement namely penetration and identity of the assailants.
31. Whether the prosecution proved penetration the complainant testified that the appellant herein who was their neighbour found when she had gone with her siblings to fetch firewood when he held her hand dragged her into the house removed her panties and inserted his penis into her vagina and anus.
32. PW 1 said she tried to scream but the appellant blocked her mouth and defiled her severally for about 30 minutes behind locked door. She said when she was defiled she felt as if she had been cut in her private part. When her mother PW 2 returned she reported to her and she was taken to hospital and it was found she had abrasion in the vagina and lacerations on the anus at 6 O'clock.



33. The appellant argued that the initial treatment notes/medical report at page 28 didn't indicate that there was any penetration. The definition of penetration in the *Sexual Offences Act* is either partial or complete insertion of one's genital organs into the genital organs of another. This court has seen the said report and it is indicated the victim had evident bruising on the right perianal area. Although the victim's hymen was intact there was evidence of penetration in the anus and that amounts to defilement.
34. Whether the appellant was positively identified, the incident happened during the day when the complainant and her siblings were fetching firewood. She recognized the appellant as a neighbour and the appellant didn't deny this fact.
35. The accused person attributed his being charged to alleged disagreement between his mother and the complainants mother but he didn't cross examine the complainant and her mother on the alleged disagreement.
36. The appellant also claimed that the complainant had been coached on what to come and say in court but the complainant testified in a very consistent manner and the trial Magistrate observed that he believed her evidence as she didn't waver during her testimony or even in cross examination.
37. This court finds that the trial Magistrate complied with provisions of section 124 of the *Evidence Act* and also properly examined the complainant on voire dire examination and established nature of oath and was intelligent enough to testify on oath.
38. I do find that the prosecution's case was proved beyond all reasonable doubt and the appeal is dismissed for lack of merit.

**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 23<sup>RD</sup> DAY OF JUNE 2022**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

**In the presence of:-**

Ogwel – Court Assistant

Mr. Ngiri for State

appellant – present in person

**Hon. Lady Justice A. Ong'injo**

**Judge**

