



**Zakayo & another v Republic (Criminal Appeal E026 & E032 of 2020
(Consolidated)) [2022] KEHC 12654 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12654 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E026 & E032 OF 2020 (CONSOLIDATED)**

GMA DULU, J

JULY 28, 2022

BETWEEN

MUTISO MWANGANGI ZAKAYO 1ST APPELLANT

NASIB JUMA 2ND 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 two appellants were charged in the magistrates' court, each with a main count and an alternative count. They were charged with separate counts but relating to the same victim and were tried together.
2. With regard to Nasib Juma, he was charged with a main count of 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 on January 26, 2019 at [particulars withheld] within Makueni County intentionally and unlawfully caused his male organ namely penis to penetrate the vagina of WD (name withheld) a child aged 12 years.
3. In the alternative, he was charged with indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, the particulars of which being that on the same date and at the same place unlawfully caused his male organ namely penis to touch the vagina of WD a child aged 12 years.
4. On his part, Mutiso Mwangangi Zakayo was also charged with a main count of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. The particulars of the offence being that on January 26, 2019 at [particulars withheld] intentionally and unlawfully caused his male organ namely penis touch the vagina of WD a child aged 12 years.



5. In the alternative, he was charged with indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#). The particulars of offence being that on the same date and at the same place intentionally and unlawfully caused his male organ namely penis to touch the vagina of WD a child aged 12 years.
6. They denied both charges. After a full trial, each of the two appellants was convicted on the respective counts of defilement, and each was sentenced to serve 15 years imprisonment.
7. Dissatisfied with the conviction and sentence of the trial court, both appellants came to this court on separate appeals. The two appeals were heard together, that is Criminal Appeal No 26 of 2020 for Muriso Mwangangi Zakayo, and Appeal No 32 of 2020 for Nasib Juma. The file in Criminal Appeal No 26 of 2020 is hereby treated as the lead file, and this decision is a consolidated judgment in respect of the two appeals.
8. The grounds of appeal are that the appellants did not plead guilty to the charges, that the medical evidence was doubtful, that the magistrate did not consider the appellant's sworn defences, and that the credibility of the complainant's evidence was doubtful.
9. The appeals were canvassed through written submissions. In this regard, I have perused and considered the submissions filed by each of the two appellants, and the submissions filed by the Director of Public Prosecutions.
10. This being a first appellate court, I am duty bound to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences bearing in mind that I did not have the opportunity to see witnesses testify to determine their demeanor – see [Okeno v Republic](#) [1972] EA 32.
11. In proving their case, the prosecution called four (4) witnesses. On their part, each of the two appellants tendered sworn defence testimony and called one witness.
12. At the conclusion of both the prosecution and the defence evidence, the trial magistrate found that the prosecution had proved their case against each of the two appellants, convicted them of defilement and sentenced them. Therefrom, arose the present two appeals.
13. The elements of the offence of defilement are three that is the age of the victim which should be below 18 years. The second element is sexual penetration, even if of a partial nature. The third element is the identity of the culprit.
14. Was the age of the victim proved to be 12 years as alleged? In this regard, the evidence of the victim Pw1 Winfred Maleli and that of her mother Pw2 Virginia Nduku, was relevant. Both tendered evidence that the victim was 12 years old at the time of the alleged incident. A child immunization card of the victim was relied upon. A birth certificate was also produced by Pw4 PC Michael Kithome the investigating officer.
15. I find and hold that the prosecution proved beyond reasonable doubt that the victim was aged 12 years, at the time of the incident.
16. Did penetration of a sexual nature occur on the victim? On this element, Pw1 the victim testified that she was forcefully sexually penetrated in the bush that morning by a person who was assisted to do so by 4 others. The medical evidence produced by Pw3 Anthony Masila a doctor, was to the effect that minor lacerations were noted in the external vagina of the victim.
17. In my view, the prosecution proved beyond any reasonable doubt that penetration of a sexual nature did occur on the victim as alleged.



- 18. I now turn to the identity of the appellants as the culprits. The evidence of Pw1 the victim was that she did not know the assailants before. She said that the incident occurred in broad daylight in the morning. She reported the incident immediately to her mother Pw2, and uncle and that the appellants were arrested by the members of the public based on her description. Thirdly, she testified that she identified the two appellants at the police station when she saw them there, though no identification parade was conducted.
- 19. Both appellants on their part, tendered sworn defence testimony and each described what they were engaged in on the alleged date of incident. Each called a defence witness who supported their version. They denied committing the offence and stated that they were arrested by the public on different allegations, not for defilement.
- 20. The burden is always on the prosecution to prove each element of an offence in a criminal case, beyond any reasonable doubt. In my view, in the present case, the prosecution did not prove beyond reasonable doubt that the appellants were the culprits.
- 21. The main reason why the prosecution did not prove that the appellants were the culprits, was that none of the people who participated in their arrest were called to testify in court. In my view, the people who arrested the appellants would be crucial witnesses in describing the purpose or reasons for which they arrested the appellants, and how they identified them to be culprits. As it stands, from the evidence on record, the appellants herein might have been arrested for a completely different reason, not necessarily the defilement offence herein.
- 22. Secondly, the fact that the victim Pw1 said that she identified the appellants at the police station on seeing them after arrest, does not satisfy the legal standards of identification of a criminal suspect, as they were arrested in her absence and no form of identification parade was conducted for the purposes of identifying them as the culprits. Thus no positive identification of the appellants as the culprits was proved by the prosecution. On that account alone, their appeals against conviction will succeed. The sentence will also have to be set aside.
- 23. Consequently, and for the above reasons, I allow both appeals, quash the conviction and set aside the sentence on each of the appellants. I order that each of the two appellants be set at liberty unless otherwise lawfully held.

DELIVERED, SIGNED & DATED THIS 28TH DAY OF JULY 2022, IN OPEN COURT AT MAKUENI.

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George Dulu
Judge

