



REPUBLIC OF KENYA



KENYA LAW
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**Kimeu v Republic (Criminal Appeal E043 of 2021)
[2022] KEHC 12259 (KLR) (27 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12259 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E043 OF 2021**

GMA DULU, J

JULY 27, 2022

BETWEEN

JUSTUS KYALO KIMEU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. Otieno J. in Makueni Chief Magistrate's Court CMCR (S.O) Case No.30 of 2020 pronounced on 16th September 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 2 of 2006. The particulars of offence were that on June 30, 2020 at about 12:00 pm at Ngomanu Village Thwake Sub-Location Katangini Location in Mbooni East Sub-County within Makueni County intentionally and unlawfully did cause penetration with his genital organ (penis) to the genital organ (vagina) of LKN a girl aged 16 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 offence being that on the same date and time and at the same place unlawfully did an indecent act by touching private parts LKN a girl aged 16 years.
3. He was charged with a second count of resisting arrest to a police officer contrary to section 254(b) of the *Penal Code*. The particulars of offence were that on June 30, 2020, at 6:30pm at Thwake Sub-Location within Makueni County while being arrested for the offence of defilement resisted No 53674 Cpl Stephen Kibet a police officer who at the time of the resistance was acting in due execution of his duty.
4. He denied all the charges. After a full trial, he was convicted of defilement and sentenced to 12 years imprisonment. He was acquitted of the second count of resisting arrest.



5. Dissatisfied with the conviction and sentence of the trial court, the appellant has come to this court on appeal, relying on the following grounds –
 1. That the complainant (Pw1) was sent honey by her parents from his father.
 2. That the time recorded of one hour (1hr) to defile Pw1 is not practical.
 3. That the case was fabricated on him by Pw1's parents and his father – family grudge.
 4. That the medical evidence did not show that Pw1 was defiled.
 5. That he is a young person (condemned) to serve all these years behind bars.
 6. That he prays for leniency in judgment giving.
6. 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.
7. I have to start by reminding myself that as 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 see *Okeno v Republic* [1972] EA 32.
8. In proving their case, the prosecution called five (5) witnesses. On his part, the appellant elected to remain silent.
9. Pw1 was the alleged victim who stated that she was sent by her parents to the home of the parents of the appellant to take honey, when the appellant pulled her into his house and forcefully had sexual intercourse with her, while threatening to cut her with a machete. She stated that she was 17 years at the time of testifying, that is 16 years at the time of the incident.
10. Pw2 JMN was the mother of the victim who relied on a child immunization card to demonstrate the date of birth of the victim. It was her evidence that she sent the victim to collect honey, only for her to come back without the honey but with a complaint that Kasimu the appellant had forcefully defiled her.
11. It was her further evidence that shortly, the assistant chief arrived and confirmed occurrence of the incident and that a report made to the police, and the victim taken to Makueni County Referral Hospital.
12. Pw3 Sammy Kimeu the father of the appellant described how the appellant locked himself in the house with the victim who screamed thus attracting his attention. It was his evidence that when members of the public and the police confronted the appellant, he threatened them with a machete, locked himself in the house until police threw tear gas through the window, and then he came out and was arrested.
13. Pw4 Stella Nthambi Muasya a Clinical Officer confirmed that the victim was treated at Makueni County Referral Hospital and a P3 form filled. The victim was normal; hymen was missing but not freshly broken. Pw5 Cpl Stephen Kibet was the Investigating Officer who recommended the charges against the appellant.
14. As I have stated herein before, the appellant elected to keep quiet in his defence.
15. The elements of the offence of defilement are the age of the victim, penetration, and the identity of the culprit.



- 16. In my view, from the evidence of Pw1 and Pw2 on record, the age of the victim was proved by the prosecution beyond reasonable doubt to be 16 years at the time of the alleged incident.
- 17. With regard to penetration, though no fresh laceration was found in the sexual organ of the victim, from the evidence of Pw1 the victim, and that of the appellant’s father Pw3, it is clear to me that the appellant forcefully penetrated the victim sexually in the house while threatening her with a machete.
- 18. With regard to the culprit, the victim knew the appellant before; the incident occurred just after 12 noon in broad daylight, and the father of the appellant confirmed that the appellant locked himself in the house with the victim. In my view the prosecution proved beyond any reasonable doubt that he appellant was the culprit.
- 19. Though the appellant states, on appeal, that he was implicated in this matter because of an existing grudge by the parents of the victim and his own father, in my view that contention is an afterthought, as no questions suggesting existence of such grudge were asked by him in cross-examination, and also the appellant ultimately chose to keep quiet and say nothing in his defence. Thus the existence of a grudge was not a matter for consideration by the trial court. It cannot be an issue for consideration by this court.
- 20. The sentence imposed is a lawful sentence, and I will not interfere with the same.
- 21. I thus find no merits in the appeal. I dismiss the appeal, and uphold both the conviction and sentence of the trial court.

Right of appeal explained.

DELIVERED, SIGNED & DATED THIS 27TH DAY OF JULY 2022, IN OPEN COURT AT MAKUENI.

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GEORGE DULU
JUDGE

