



REPUBLIC OF KENYA



**KENYA LAW**  
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**Masinde v Republic (Criminal Appeal 15 of 2020)  
[2022] KEHC 12474 (KLR) (25 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12474 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CRIMINAL APPEAL 15 OF 2020  
LK KIMARU, J  
JULY 25, 2022**

**BETWEEN**

**MOSES MAYUNGA MASINDE ..... APPELLANT**

**AND**

**REPUBLIC ..... PROSECUTION**

*(From original conviction and sentence in Criminal Case No. 4147  
of 2016 of the Chief Magistrate's Court at Kitale delivered by Hon.  
V.W. Wandera (CM) and M.I.G. Morang'a (SPM) on 19/2/2020)*

**JUDGMENT**

1. The appellant Moses Mayunga Masinde was charged with defilement of a child contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. The particulars of the offence were that on 18<sup>th</sup> June 2017 in Kiminini Division of Trans Nzoia County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of LNW, a girl aged 14 years. In the alternative, the appellant was charged with committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on the same day and in the same place the appellant intentionally caused contact between his penis and the vagina of LNW a girl aged 14 years. When the appellant was arraigned before this court, he pleaded not guilty to the charge. After a full trial, the appellant was convicted of the main count of defilement and sentenced to serve 15 years imprisonment.
2. The appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court. In his petition of appeal, the appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of evidence that was contradictory and tinged with bias in that no independent witness was called to testify as to the circumstances in which the offence is said to have been committed. The appellant faulted the trial magistrate for relying on the extraneous factors to convict him yet the prosecution had failed to prove its case to the required standard proof beyond any reasonable doubt. The appellant was aggrieved that the essential ingredients



to establish the charge of defilement including the age of the complainant and medical evidence were not established to the required standard of proof. The appellant urged the court to find that the evidence adduced before the court by the prosecution witnesses was framed so as to fix the appellant. The appellant further urged the court to find that the period between the time the offence is alleged to have been committed and the arrest of the appellant militated against the finding that the complainant had positively identified him at the scene of crime. The appellant faulted the trial magistrate for shifting the burden of proof to the appellant yet in all circumstances it was the prosecution who were required to prove the charge to the required standard of proof. In the premises therefore, the appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.

3. Prior to the hearing of the appeal, both the appellant's Counsel and learned prosecutor agreed to file written submissions in support of their respective client's cases. This court has carefully read the said submissions. It has also had the benefit of reading the proceedings and judgment of the trial court. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced before the trial magistrate's court so as to reach its own independent determination whether or not to uphold the conviction of the appellant. In doing so, this court is required to always have in mind the fact that it did not see nor hear the witnesses as they testified and therefore cannot make any comment regarding the demeanour of the witnesses (see *Njoroge v Republic* [1987] KLR 19).
4. In the present appeal, the issue for determination by this court is whether the prosecution proved the charge of defilement to the required standard of proof beyond any reasonable doubt.
5. The thrust of the appellant's appeal is that the prosecution had failed to establish the charge against him to the required standard of proof beyond any reasonable doubt. The appellant was particularly irked that the trial court failed to properly evaluate the evidence regarding whom the alleged perpetrator of the sexual assault was. The appellant submitted that the perpetrator was identified only by the name "Moses" yet there were many people going by that name. He wondered why, if indeed the complainant was positive that she had identified him, it took two months for his arrest to be procured.
6. The appellant was not satisfied that the age of the complainant was established to the required standard of proof or that the medical evidence adduced established penetration. The appellant pointed out that there was contradiction between the initial medical treatment notes and the P3 form which failed to establish whether the allegation made by the complainant that she had been sexually assaulted was true or not. The appellant was of the view that all these pieces of evidence taken in totality raised reasonable doubt that the only conclusion that this court can reach is to allow the appeal and quash the appellant's conviction.
7. On its part, the prosecution was emphatic that it had established the ingredients of age, penetration and the identity of the perpetrator to the required standard of proof. In its submission, the prosecution urged that the complainant's oral evidence coupled with that of medical evidence had established that indeed the complainant was sexually assaulted. Penetration was proved. As regard the age of the complainant, an age assessment was medically done which established the complainant's age at the time was fourteen (14) years. Regarding the identity of the perpetrator, it was the prosecution's case that the appellant was known to both the complainant and her mother prior to the sexual assault. His identification as the perpetrator was therefore that of recognition rather than that of a first time identification of a stranger. The prosecution therefore urged the court to disallow the appeal.
8. For the prosecution to establish the charge of defilement, it was required to prove the age of the complainant, penetration (the sexual act) and the identity of the perpetrator. In her testimony before court, the complainant testified that she was fourteen years old at the time. Although she did not produce her birth certificate, an age assessment of the complainant was undertaken by PW4 Pharis



Silali, a Community Oral Health Officer by X-raying the complainant's teeth. In his assessment, based on the number of teeth that had erupted and the root formation of the teeth, the complainant's age at the time was fourteen (14) years. The age assessment report was produced as prosecution's Exhibit No. 1(a). Upon evaluation of this evidence, this court is satisfied that the prosecution established the age of the complainant to be fourteen (14) years to the required standard of proof beyond any reasonable doubt. The complainant was therefore a child within the meaning ascribed to the term under section 2 of the *Children Act*.

9. As regards whether there was penetration, the complainant testified that on June 18, 2017 while she was at their farm top dressing Napier grass, the appellant emerged from the neighbour's sugar plantation, dragged her into the sugar plantation and then forcefully had sexual intercourse with her. The complainant testified that it was her first time to have sexual intercourse. While in the act, PW2 PW, the complainant's mother found the appellant on top of the complainant. According to both PW1 and PW2, when the appellant saw PW2, he took off and left the complainant lying on the ground. PW2 reported the incident to the police on the same day. She took the complainant to the hospital on the following day where she was seen by PW3 Peter Masake who noted that the complainant's hymen had been perforated. There was a whitish discharge from the vagina. He filled the P3 form which was produced into evidence as Exhibit No. 3 while the medical treatment notes were produced as Exhibit No. 2. On re-evaluation of this evidence, this court finds no reason to depart from the verdict of the trial court that indeed penetration was established to the required standard of proof beyond any reasonable doubt. The complainant's and her mother's oral testimony coupled with medical evidence proved penetration.
10. The last issue for determination is the question of the identity of the perpetrator. According to the evidence of the complainant and her mother PW2, the appellant was known to them prior to the sexual assault. Although the appellant denied that he was known to the complainant and her mother at the time, it was clear from their testimony both in chief and in cross-examination that the two witnesses were testifying in regard to someone that they knew.
11. Both the complainant and her mother referred to the accused by his name "Moses". It was obvious they had no doubt in their mind as to the Moses they were referring to. They were referring to Moses the appellant. This court agrees with the prosecution that the evidence adduced by the prosecution regarding the identity of the perpetrator of the sexual assault was not that of an identification of a stranger but that of recognition by people who knew each other by close interaction in the same village. This court therefore holds that the prosecution established, to the required standard of proof, that it was the appellant who sexually assaulted the complainant.
12. In the premises therefore, upon re-evaluation of the entirety of the evidence adduced, this court holds that the appellant's appeal against conviction lacks merit and is hereby dismissed. The appellant's defence was properly considered by the trial court and has been considered by this to be without merit. As regards sentence, the same is merited. This court shall not interfere with the same. It is so ordered.

**DATED AT KITALE THIS 25<sup>TH</sup> DAY OF JULY 2022.**

**L. KIMARU**

**JUDGE**

