



**Mkusi v Republic (Criminal Appeal 89 of 2019)  
[2022] KEHC 12475 (KLR) (25 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12475 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CRIMINAL APPEAL 89 OF 2019  
LK KIMARU, J  
JULY 25, 2022**

**BETWEEN**

**ABRAHAM MREFU MKUSI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal arising out of conviction and sentence of Hon. M. Nyang'ara  
Osoro (Resident Magistrate) in Kitale Chief Magistrate's Court  
Criminal Case (S.O) No. 5 of 2019 delivered on 24th July 2019)*

**JUDGMENT**

1. Abraham Mrefu Mkusi, the appellant herein, was charged with the offence of defilement of a child contrary to section 8 (1) as read together with section 8 (4) of the *Sexual Offences Act*. The particulars of the offence were that on diverse dates between December 31, 2018 and January 5, 2019 at [particulars withheld] Village within Trans-Nzoia County, the appellant intentionally caused his penis to penetrate into the vagina of VNN, a child aged sixteen (16) years old. In the alternative, the appellant was charged with the offence of 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 diverse dates between December 31, 2018 and January 5, 2019 at [particulars withheld] Village within Trans-Nzoia County, the appellant intentionally caused the contact between his penis and the vagina of VNN, a child aged sixteen (16) years. When the appellant was arraigned before the trial court, he pleaded not guilty to the charges. After full trial, the appellant was convicted on the main charge and sentenced to serve fifteen (15) years imprisonment.
2. The appellant was aggrieved by his conviction and sentence. The grounds in support of his appeal were that the prosecution failed to discharge their burden of proof to the required standard. Consequently, the trial court arrived at an erroneous decision. He faulted the trial court for relying on fabricated, circumstantial and insufficient evidence to convict him. Finally, he lamented that the trial court failed



to consider his defence. He therefore urged this court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.

3. The appeal was heard on the basis of parties' rival written submissions. According to the appellant, the element of penetration was not proved to the required standard of proof beyond any reasonable doubt. He urged this court to consider that the complainant held herself out as an adult as she consented to have sexual intercourse with the Appellant. On identification of the perpetrator, the appellant submitted that the findings were doubtful, unsatisfactory and insufficient to sustain a conviction against the appellant. He added that there were glaring contradictions in the testimonies of the prosecution witnesses that it could not be positively ascertained whether the appellant was the perpetrator. He maintained that while the prosecution has the discretion to call any particular or number of witnesses, there were crucial witnesses that were not called to testify. The absence of their evidence thus cast doubt on the evidence of the prosecution. Finally, he submitted that his defence was cogent and ought to be considered.
4. Miss Mumu, learned prosecutor, submitted that all the ingredients to establish the charge of defilement had been sufficiently proved. She further submitted that the trial court's judgment was based on the evidence on record. That there were no material contradictions and gaps that would change the outcome of the appeal. Finally, she submitted the sentence was merited due to the rampant and prevalence of the cases in the area. She urged the court to uphold the conviction and affirm the sentence that was imposed on the appellant.
5. The prosecution called a total of five (5) witnesses in its bid to establish the charges preferred against the appellant. PW1, the Complainant, VNN, a sixteen (16) year old girl was born on April 11, 2003. Her birth certificate was produced in evidence and marked prosecution exhibit 1. On December 31, 2018, the complainant went to [particulars withheld] after attending a church service. Her siblings informed her that their father was upset with her because of that. As a result of this, the complainant elected not to go back home. While walking on the road, the complainant met the appellant at midnight who offered to stay with her for a couple of days. She stayed with him from December 31, 2018 to January 5, 2019. She had never met him prior to that day. During that period, the appellant and the complainant had sexual intercourse.
6. The disappearance of the complainant prompted her family to look for her. She was later found at the appellant's house by PW3 AW, the complainant's brother on January 6, 2019. The appellant and the complainant were taken to Kitale Police Station.
7. The complainant was taken to hospital by her father, PW2, FWN. She was seen on January 6, 2019 by Geoffrey Nyongesa, (PW4) a clinical officer working at Kitale County Referral Hospital. On physical examination, her genitalia was normal. She suffered no bruises. There was a white foul smelling discharge with bloody stains. Her hymen was broken. She tested positive for a urinary tract infection. His conclusion was that the complainant had been sexually assaulted by way of penetration. He then treated her. He produced into evidence the treatment notes and P3 form marked in evidence respectively as prosecution exhibits 2 and 3.
8. The complaint was received by PW5, Police Constable May Umazi, the investigating officer on January 7, 2019. She then conducted investigations, recorded witnesses' statements and processed the evidence on record. She then charged the appellant with the present offence.
9. After close of the prosecution's case, the trial court found that the appellant had a case to answer. He was placed on his defence. The appellant's sworn testimony was that he was twenty three (23) years old at the time of the alleged offence. On January 5, 2019, the appellant went home after playing football during the day. During the night, while he was asleep, one Tabalia knocked at his door. He asked to



speak to the appellant. When the appellant opened the door, he found several people outside his house. He was then arrested and escorted to Kitale Police Station. He was arraigned in court on January 8, 2019 where he denied committing the offence.

10. This being a first appeal, it's the duty of this court to re-consider and to re-evaluate the evidence adduced before the trial magistrate 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 be mindful that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding the demeanour of the witnesses (See *Njoroge v Republic* [1986] KLR 19). In the present appeal, the issue for determination by this court is whether the prosecution established to the required standards of proof beyond reasonable doubt that the appellant committed the offence that he was charged with.
11. In order to sustain a conviction on a charge of defilement, the prosecution must establish the following three ingredients:
  1. Age of the complainant
  2. Penetration
  3. Identification of the perpetrator
12. The first ingredient is that of the Complainant's age. The complainant testified that she was born on April 11, 2003. She produced her birth certificate when she adduced evidence of her age at the time of the offence. She was sixteen (16) years old at the time of the incident. This court finds that the birth certificate sufficiently proves that the complainant was sixteen (16) years old at the time of the incident. The complainant was a child within the meaning ascribed to the term under section 2 of the *Children Act*.
13. The second ingredient is that of penetration. Section 2 (1) of the *Sexual Offences Act* defines "penetration" to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person."
14. The complainant's evidence was that on diverse dates between December 31, 2019 and January 5, 2019, the appellant had sexual intercourse with her. On physical examination, PW4 observed that the complainant's genitalia was normal. There was a white foul smelling discharge with bloody stains. Her hymen was broken. She tested positive for a urinary tract infection. His conclusion was that the complainant had been defiled by way of penetration. This court finds that penetration was proved to the required standard beyond any reasonable doubt.
15. The last ingredient that the prosecution had to establish was the identity of the perpetrator. The complainant testified that she met the appellant for the first time on December 31, 2018. They cohabited until January 5, 2019 when the complainant was found by her brother PW3 sleeping at the appellant's house. During this period, the complainant testified that she "consensually" had sexual intercourse with the appellant. However, it is trite law that a child, under the *Sexual Offences Act*, cannot consent to sexual activity. The learned magistrate had no reason to doubt the credibility of the complainant's testimony. Her evidence resonated with the truth. This courts arrives at the same findings and concludes that the appellant was positively identified as the perpetrator of the sexual assault and shall not depart from that finding.
16. This court finds that the prosecution established the ingredients of defilement to the required standard of proof beyond any reasonable doubt. Consequently, the appellant's appeal against the conviction lacks merit. It is hereby dismissed.



17. The appellant was under the *Sexual Offences Act* sentenced to serve fifteen (15) years imprisonment. In his mitigation at trial, the Appellant submitted that he was married and had one (1) child. He didn't know where they were but nonetheless prayed for a lenient sentence. Taking into account the circumstances of the offence and the nature of the relationship the appellant had with the complainant, this court sees reason to interfere with the sentence imposed on the appellant. Consequently, the appeal against the sentence succeeds. This court sets aside the sentence of fifteen (15) years imprisonment and substitutes the same with a sentence of ten (10) years imprisonment. The sentence shall run from the date the appellant was arraigned in court *ie* January 18, 2019.
18. It is so ordered.

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

**L KIMARU**

**JUDGE**

