



REPUBLIC OF KENYA



**KENYA LAW**  
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**Omasete v Republic (Criminal Appeal 50 of 2017)  
[2022] KEHC 11892 (KLR) (25 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 11892 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CRIMINAL APPEAL 50 OF 2017  
LK KIMARU, J  
JULY 25, 2022**

**BETWEEN**

**RONALD OMASETE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From original conviction and sentence in Sexual Offence No. 158 of 2015 of Kitale  
Chief Magistrate's Court delivered on 22nd June 2017 by Hon. V.O. Adet SRM)*

**JUDGMENT**

1. The Appellant, Ronald Omasete 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 the September 6, 2015 in Trans-Nzoia County the Appellant intentionally caused his penis to penetrate the vagina of MNW a child 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 caused his penis to contact the vagina of MNW, a child aged 14 years. When the appellant was arraigned before the trial court, he pleaded not guilty to the charge. After a full trial, the appellant was convicted of the main charge and sentence to serve twenty (20) years imprisonment.
2. Aggrieved by his conviction and Sentence, the appellant filed an appeal to the court. In his petition of appeal, the appeal raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on that basis of fabricated evidence. He faulted the trial magistrate for convicting him despite the fact that no documentary evidence was adduced in court to support the finding regarding the age of the complainant. He was aggrieved that his defence was rejected despite the fact that it raised substantial issues that raise reasonable doubt as to the prosecution's case. He faulted the trial court for shifting the burden of proof from the prosecution to the defence. In the premises



therefore, the appellant urged the court to allow the appeal, quash the conviction and set aside the custodial sentence imposed on him.

3. Mr Nakitare, learned Counsel for the appellant made oral submission to the effect that the prosecution had not proved the charge that the appellant was convicted of to the required standard of proof beyond any reasonable doubt. He pointed out that there was contradictory evidence regarding the age of the Complainant. PW1 was not sure as to the age of the complainant – in one instance he said that the complainant was aged 10 years and in another 14 years. This was proof that the evidence was fabricated. He submitted that several witnesses were said to have been at the vicinity when the alleged sexual assault took place. However, none of the said witnesses were called to testify in the case. This, in the appellant's view, was fatal to the prosecution's case.
4. On penetration, Learned Counsel submitted that medical evidence did not support the claim by the complainant that she had been defiled. The medical evidence found that the complainant had no injuries on her private parts. Regarding the appellant's arrest, Learned Counsel submitted that it was not clear from the evidence adduced by the prosecution witnesses, especially the investigating officer, under what circumstances the appellant was arrested. One version was that the appellant was apprehended immediately after the act, while another version was to the effect that the appellant was arrested two days after the alleged incident. In the appellant's opinion, this was proof of his assertion that the evidence against him was fabricated by the prosecution.
5. Mr Nakitare urged the court to find that failure by the prosecution to produce the Complainant's birth certificate meant that the prosecution had failed to establish the age of the complainant to the required standard of proof. This was further proof that the evidence against the appellant had been invented. As regards the identity of the perpetrator, the appellant submitted that the complainant had testified that she saw the perpetrator for the first time on the day of the alleged sexual assault. She could not therefore be certain that it was the appellant who was the perpetrator. In conclusion, Learned Counsel submitted that the entire prosecution evidence raised reasonable doubt that it was the appellant who had committed the offence. He urged the court to allow the appeal.
6. On its part, the prosecution presented to court written submissions in opposition to the appeal. The prosecution submitted that the three essential ingredients to establish the charge of defilement, being the age of the victim (complainant), the aspect of penetration and the identity of the perpetrator were established to the required standard of proof. The complainant gave compelling evidence that the appellant took her to a maize plantation and then sexually assaulted her. PW2 found the appellant in the act. The medical evidence adduced established that indeed the complainant had been defiled. There was spermatozoa seen during medical examination. There was no doubt as to the identity of the appellant as the complainant knew him prior to the sexual assault. As regards the age of the complainant, an age assessment was done which established the complainant's age to be 14 years at the time of the Sexual assault. The prosecution submitted that the appellant's defence was properly considered by the trial court and found to be without merit. For the above reasons, the prosecution urged the court to dismiss the appeal and confirm the conviction and sentence.
7. This being a first appeal, it is the duty of this court to reconsider and to 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 verdict of the trial court. In doing so, this court is required to be cognizant of the fact that it neither saw nor heard the testimony of the witnesses and therefore should be circumspect in that regard. The issue for determination by this court is whether the prosecution established to the required standard of proof the charge laid against the appellant.



8. For the prosecution to establish the charge of defilement, it is required to prove three essential ingredient, being; the age of the victim (complainant), the aspect of penetration and finally the identity of the perpetrator. (See *Daniel Wambugu Maina v Republic* [2018] eKLR.) In the present appeal, the complainant, MNW testified that she was fourteen (14) years at the time she testified before court. Although no documentary evidence in form of a birth certificate or birth notification was produced into evidence, the complainant was examined by PW3 Pharis Silali, a dentist based at Kitale County referral Hospital who formed the opinion, after X-raying the complainant’s jaw, that she was fourteen (14) years of age at the time of examination. This court therefore, upon re-evaluating this evidence on the age of the complainant hold that the prosecution established to the required standard of proof that the complainant was fourteen (14) years of age at the time of the alleged sexual assault. She was therefore a child within the meaning ascribed to the term under Section 2 of the *Children Act*.
9. As regards penetration, the complainant testified that on September 6, 2015 at about 5.00 pm, while she was going to a poshomill, the appellant accosted her and dragged her to a maize plantation whereupon he removed her clothes, then his and then sexually assaulted her. The complainant testified that at the time she was with, among others, M and W. PW2 BNK, the complainant’s aunt, testified that on the material day, while she was at home, a boy by the name W went to her house and informed her that the complainant had been taken into a maize plantation. PW2 rushed to the scene and found both the complainant and the Appellant in the state of undress- the appellant was lying on top of the complainant. When PW2 confronted the appellant, he assaulted her before running away. However, the appellant was apprehended by members of Public a few metres from the scene of crime. PW2 testified that she took the complainant on the same day to Ndal Sub-County Hospital where she was seen and treated. From the medical treatment notes prepared at the said hospital and the P3 from which was produced as prosecution’s exhibit No. 1 and 2 respectively, the medical examination established that indeed the complainant had been penetrated. According to PW4 Kirwa Labatt, a clinical officer based at Kitale County referral hospital, the complainant “had no injuries on the private parts, there was no discharge, Result of the laboratory indicated that she had infection and sperms. High vaginal swab showed epithelial cells and spermatozoa. Hymen was torn.” Upon re-evaluation of both oral evidence of the complainant and PW2 , and of both oral evidence of the complainant and PW2, and the medical evidence adduced by PW4, this court holds that the prosecution established to the required standard of proof beyond any reasonable doubt that indeed the complainant was penetrated.
10. On the question of identity of the perpetrator, the appellant submitted, in essence, that he was a victim of mistaken identity. He had just been in the area on the same day that it was alleged that he had committed the offence. He asserted that the complainant and PW2 could not therefore claim they were positive and that they had identified him. The Appellant questioned why the witnesses mentioned by the complainant and PW2 were not called to testify in the case. The complainant in her testimony identified the appellant by his name. PW2 testified that the appellant was the brother of a neighbour by the name Baba Johnny. She had seen him for about three (3) days prior to the incident.
11. Upon re-evaluation of this evidence in regard to the identification of the appellant as the perpetrator, this court holds that the prosecution did indeed establish to the required standard of proof beyond any reasonable doubt that the appellant was properly identified as the perpetrator at the scene of crime. Both the Complainant and PW2 knew the appellant prior to the sexual assault. His identify was not in doubt. A further evidence that buttressed and corroborated the testimony of the complainant regarding the identity of the appellant is that of PW2 who testified that he found the appellant in the act. He was caught red-handed sexually assaulting the complainant. Although he attempted to escape from the scene of crime, he was apprehended by members of the public and taken to the Police. Although there is variance regarding the actual date the appellant was arrested, this court is of the



considered view that this was a minor discrepancy that did not affect the overall credibility of the prosecution's evidence against the appellant. The appellant chose not to adduce any evidence in his defence. The prosecution's evidence against him therefore stood unchallenged.

12. In the premises therefore, this court finds the Appellant's appeal to be without merit. It is hereby dismissed and the conviction and sentence of the trial court confirmed. It is so ordered.

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

**L. KIMARU**

**JUDGE**

