



**Muriuki v Republic (Criminal Appeal E007 of 2021)
[2022] KEHC 10968 (KLR) (4 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 10968 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL APPEAL E007 OF 2021**

**M MUYA, J
AUGUST 4, 2022**

BETWEEN

NICHOLAS GITONGA MURIUKI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the Judgment and Sentence
in Karatina SPMS S.O 23 of 2020 Hon. Kosgei SRM)*

JUDGMENT

1. The appellant above mentioned was convicted and sentenced to seven years imprisonment for the offence of defilement contrary to section 8 (i) as read with Section 8 (4) of the [Sexual Offences Act](#) No.3 of 2006.
2. The particulars were that on the 25th day of June 2020 in Mathira Sub-County, within Nyeri County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of BW a girl aged 17 years. Being dissatisfied with the conviction and sentence, the appellant has lodged this appeal whose ground's are:-
 1. That the trial magistrate erred in law and in fact in basing conviction of the evidence of PW1 yet the same was unreliable and inconsistent with the charge particulars
 2. That the Hon. Trial magistrate failed to observe that the prosecution evidence was contradicting and uncorroborated in that PW1 was not defiled on 25th June 2020 as stated in the charge particulars.
 3. That the trial magistrate erred in law and fact in overlooking that crucial witnesses were not availed to testify leaving the entire prosecution case in doubt.



4. That the Hon. Trial magistrate erred in law and in fact in overlooking that failure by the prosecution to avail the named “Sos peter” was fatal to the prosecution case. This being the first appellate Court, it has the duty of evaluating afresh the evidence adduced in court so as to arrive at an independent determination. *Okeno-Versus-Republic* (1972) E.A. 32.

Brief facts

3. The complainant testified as PW1. She narrated in Court of how she met the appellant who was known to her before and how they made arrangements to spend the night at his rented house.
4. She testified to have stayed with him for five days and had sexual encounters with him for that period.
5. The Doctor who examined the complainant found no physical injuries but the hymen was absent. There was a whitish discharge present from her genitalia.
6. The investigating Officer testified as PW3. She testified on how on the 25th day of June 2020 two ladies went to Karithaini Police Station in the company of the complainant and reported that she had informed them that her boy friend (the appellant) abandoned her after staying with her for 4 days and she was not able to trace him. She traced the appellant with the help of the complainant and caused him to be charged with this offence.
7. The appellant in his unsworn testimony testified that he is a businessman who deals with the sale of Macadamia nuts and that on the 26th day of June 2020, he opened his business at around 7.00 a.m. and closed at 5.00 p.m. the same day. From 5.00 p.m to 8.00 p.m., he went to operate his boda-boda business. The following day he went to work as usual. On 27th June 2020 he was called by a customer of his, one by the name of Sos-peter who was in the Company of his wife. They were also in the company of the complainant and her father. He did not understand what they were conversing about and was surprised when an officer of police went to where they were and arrested him for something he did not know or commit.

Legal analysis and determination.

8. The appellant herein was convicted for the offence of defilement. In the case of *Wamukoya Karani – Versus – Republic* criminal appeal No. 72 of 2013. It was held:-
The critical ingredients forming the offence of defilement are
 - (1) Age of the complainant
 - (2) Proof of penetration
 - (3) Positive identification of the assailant.

Age of the Complainant

9. A perusal of the charge sheet indicates that the victim was aged 17 years at the time of the incident.
10. A birth certificate which was produced in court as exhibit No. 1 shows the victim to have been born on 13th June 2003. The incident is indicated in the charge sheet to have taken place on 25th June 2020.
11. By deduction, this translates to 17 years. Moreover the issue of age does not appear to be in serious contention.



Penetration

12. The appellant's contention is that the mere absence of a hymen does not necessarily mean that sexual intercourse did take place. Further if there was penetration, the Doctor did not indicate whether it was old or recent.
13. The complainant did testify that the appellant who was her boyfriend had sexual intercourse with him for five days as he had told her that he had no wife. He had also promised to take her to Nakuru.
14. During cross-examination she testified that she was at the appellants house from Sunday to Friday and they had sex on Monday, Tuesday Wednesday, and Thursday. This corroborates the evidence of the medical Doctor on penetration.

Identification

15. The Complainant knew the appellant as her boyfriend. They effectively had eloped and cohabited for close to a week in appellants house but for one reason or another a misunderstanding arose and with the help of members of public the matter was reported to police and the appellant was arrested and charged with this offence. Efforts to have mediation were thwarted by police as this was a case for defilement.
16. In her judgment the learned trial magistrate did note that there was discrepancy in the victims evidence as regards the issue of dates.
17. The particulars of the charge placed the offence to have been perpetrated on the 25th day of June 2020. She does indicate in her Judgment at pages 31-33. "That she had to check the calendar for the year 2020 and found that 25th June 2020 was a Thursday and not a Saturday as alleged by PW1 and that plea was taken on 29th June 2020 which was a Monday having been arrested on 28th June 2020 as per the charge sheet."
18. During cross-examination the victim was emphatic that she had sex with the appellant from Monday, Tuesday, Wednesday and Thursday. Thursday happens to have been one of the days that the two had Sexual Intercourse and that Thursday was on the 25th June 2020 as per the particulars of the charge. Granted that the victim did state the day to have been a Saturday. This was a mistake on the face of the record.
19. Section 382 of the Criminal Procedure Code provides:- "Subject to the provisions hereinabove contained, no finding, sentence or order passed by a court of Competent Jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge proclamation, order Judgment or other proceedings before or during the trial or any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of Justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of Justice the Court shall have regard to the question whether the objection could and should have been raised of at an earlier stage in the proceedings."
20. In the circumstances of this case I am not persuaded that the error and or mistake on the date, amounted and or occasioned a failure of Justice. There is overwhelming evidence from the victim that she had eloped with the appellant and had Sexual Intercourse with him for close to a week.
21. In a case involving a Sexual Offence, the provision to Section 124 of the *evidence Act* stipulates that corroboration is not mandatory if the trial court satisfies itself that the complainant is a truthful witness.



Conclusion

22. Apart from the variance between the dates appearing on the charge sheet and the facts adduced in court, I find no other material contradiction in the evidence before the court.
23. That variance was found not to have occasioned a failure of Justice, Moreover, no objection was raised at an earlier stage of the proceedings.
24. The appellant was charged with defilement Contrary to Section 8 (i) as read with Section 8 (4) of the *Sexual Offences Act* which carries an imprisonment term of not less than fifteen years.
25. In sentencing the appellant the trial Court observed that it had taken into consideration the *Muruatetu* case on minimum Sentences and handed him a Sentence of Seven years imprisonment.
26. It is noted that in his mitigation the appellant had informed the court that he was aged 27 years, married with two children. At no time in the proceedings did he inform the court that he thought that the girl was aged more than 18 years.
27. I find both the conviction and sentence were lawful and they are upheld. The appeal has no merit and is dismissed.

JUDGMENT READ, DELIVERED, DATED AND SIGNED AT NYERI THIS 4TH OF AUGUST, 2022.

HON. JUSTICE M. MUYA

JUDGE

In the presence of:

In person for appellant

Miss Waweru for Respondent

Court Assistant: Kinyua

30 day Right of Appeal.

