



**Kalungu v Director of Public Prosecution (Criminal Appeal
E042 of 2021) [2022] KEHC 14478 (KLR) (25 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14478 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL APPEAL E042 OF 2021
RK LIMO, J
OCTOBER 25, 2022**

BETWEEN

MWAMULI KALUNGU APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

*(Appeal against the Conviction and Sentence vide Kitui
Chief Magistrate's Court Sexual Offence No. 39 of 2015.)*

JUDGMENT

1. Mwamuli Kalungu, the appellant herein was charged with the offence of defilement contrary to section 8 (1) (3) of the *Sexual Offence Act* No 3 of 2006 *vide* Kitui Chief Magistrate's Court Sexual Offence No 39 of 2015. The particulars as per the charge sheet were that on May 8th, 2015 at around 11:00 am at [Particulars withheld] Location within Kitui County, he unlawfully and intentionally did an act of penetration to (name withheld) a child aged 14 years by inserting his genital organ namely penis into her genital organ namely vagina. He also faced an alternative charge of committing an indecent act with a child but was convicted on the main charge.
2. The appellant denied committing the offence but after trial, he was found guilty convicted and sentenced to serve 20 years' imprisonment.
3. He felt aggrieved by both conviction and sentence and filed this appeal raising the following grounds namely: -
 - i. That the learned Magistrate erred in both law and fact by relying on an evidence which were not proved beyond doubt.
 - ii. That the trial court misdirected itself by relying on unproven document which were a frame up.



- iii. That the prosecution's case was not collaborated.
 - iv. That the time reflected on the charge sheet did not reflect the time given by the evidence.
 - v. That the crime scene was not properly collaborated.
 - vi. That the trial court erred by convicting the appellant on a case that was never investigated.
 - vii. That the sentence imposed was excessive.
4. In his written submissions dated June 22, 2022, the appellant contends that there was no way he could defile a minor in broad day light and in the presence of another minor. He submits that the scene of crime was a river where many people went to fetch water from and wonders if it was possible for an offence of such nature to occur in the circumstances.
 5. He submits that the prosecution had a duty not just to place him at the scene of crime but prove that he was the perpetrator.
 6. He blames the complainant's mother for framing him. He avers that according to her, she received information on defilement on May 9, 2015 and reported the matter on May 10, 2015. He has however not given the basis as to why the complainant's mother was motivated to frame him up but, I will get back to that issue later in the judgement.
 7. He submits that PW2 and PW3 gave contradictory evidence in respect to the time of the offence. He points out that PW3 testified that it was 8 am while PW1 stated that it was 11am. He contends that the contradiction is indicative of a frame up.
He adds that, if the complainant had been defiled on May 8, 2015, the mother could not have waited until May 10, 2015 to report.
 8. He further points out that the complainant had told the doctor who examined her that she did not know the perpetrator. He contends that that evidence contradicts the evidence given by the complainant who indicated in her evidence that she knew the appellant.
 9. The appellant submits that on the basis of the above contradictions, the prosecution's case against him stood unproven. He relies on the decision of *Pius Arap Maina v Republic* [2013] eKLR.
 10. He further contends that the sentence meted out against him was too harsh considering that he was a first offender and a sole bread winner to his family.
 11. The respondent through the director of public prosecution expressed no opposition to this appeal but that notwithstanding, this court will determine it on the merit.
 12. The main issue in this appeal is whether the prosecution discharged their burden of proof by establishing and proving all the ingredients of the offence against the appellant.
 13. As observed above, the appellant was charged with the offence of defilement. For a conviction to be sustained in such a case the prosecution should establish and prove the following ingredients of the offence namely: -
 - i. Penetration
 - ii. Age of the victim
 - iii. Positive identification of the offender



14. The trial court evaluated the evidence tendered and found that all the above ingredients was proved beyond reasonable doubt. The work and the mandate of this court as an appellate court is to re-evaluate or re-assess the evidence tendered and come to own conclusion bearing in mind that unlike the trial court, this court does not have benefit of having seen the witness testifying.

(i) Penetration

15. The prosecution case in respect to this element was based on the evidence of PW2 (complainant) and the Medical evidence tendered by Dr Mureithi Miano (PW4).
16. The complainant gave a narrative to the trial court on what happened to her on May 8, 2015 (the material date). She testified that she was going to fetch water in a river at around 11 am when she met the appellant who according to her pulled her before defiling her. Her narrative was quite clear. She stated;

“He pulled me and I fell. My right leg was injured. He pulled my pants. He cut my pants with a razor blade. He removed his pants. He defiled me. No one came as he defiled me at the path.” She further testified that after the ordeal, she went home and washed the clothes she was wearing.
17. The evidence of the complainant was corroborated to some extent by the evidence of Mwendu Mbiti (PW3) who was a twin sister. She testified that the complainant informed her after coming from the river that she had been defiled. She further testified that the complainant informed her mother what had happened to her the following day on May 9, 2015 at 8 PM and that the mother went to Kabati police station to report the incident.
18. MM (PW1), the mother of the complainant testified that on the material date she was at [Particulars withheld] Market the whole day selling chapatti and that at 5pm, she went home and that the complainant asked her to help her with some ointment known as “robu” without revealing why she need the ointment. She testified that she later slept and the following day on May 9, 2015 she went back to [Particulars withheld] Market and spent the whole day there. She told the trial court that she went back home at around 7pm and received the news regarding defilement from complainant’s twin sister. She added that she demanded from the complainant why she had not reported the previous day and she informed her that she was scared. She testified that her daughter (complainant was 14 years old) and that she went the following day to report at Kabati Police Station and thereafter escorted the girl to Kitui Hospital for examination and treatment The evidence of PW1 in my view corroborated the evidence of PW3 as well as the evidence of the complainant (PW2) in regard to the chain of events. I do not find any significant contradictions. While it is true that PW3 stated that her sister, the complainant herein went to fetch water at around 8am, she did not say that was the time the girl was defiled as the appellant contends. She stated that her twin sister went to the river to fetch water at 8 am and the complainant stated that she was at the river at 11am when the appellant emerged and defiled her. There is no major contradiction there.
19. The medical evidence tendered by Dr Miano (PW4) in my view corroborated the complainant’s evidence that she was defiled and injured on her knee in the process. The said doctor testified on behalf of the late Dr Mutuku and stated that having worked with the later Doctor, he was familiar with his handwriting and signature. He tendered medical evidence properly and the appellant as a matter of fact expressed no objection. The doctor tendered P3 form and prc form as P Ex 2 and 3 respectively and both documents indicted that penetration was positive with the “knee injury signifying struggle.”
20. The medical evidence in my view proved beyond any reasonable doubt that the victim was defiled. Infact the doctor captured well in the P3 Form that defilement was reported 3 days after the incident.



That information clearly corroborates the narrative given by the victim's mother that she reported the incident on May 10, 2015 after she learnt about it on May 9, 2015 at 8pm after getting home from work. That in my view cannot suggest that there was any grudge or frame up. This was a mother of a victim who only learnt about the defilement a day after it had occurred. The victim was afraid to inform her mother which is normal for a girl of that age. I find the evidence given by the mother that the girl asked her for some ointment on the material day at 5pm when she got home and though the nature of "robu" ointment was not given, the same in my view is a clear pointer of the fact that the girl was probably in pain and wanted to get something to relief her pain.

This court finds that the prosecution's case clearly proved the element of penetration to the required standard.

(ii)Age

21. On the element of age, both the victim (PW2), the twin sister (PW3) and the mother (PW1) all testified that the age of the complainant was 14 years. The medical document to wit the P3 Form (P Ex 3) also indicates that the victim was 14 years of age. The appellant as not challenged that fact in this appeal and this court finds that the element of age was proved beyond doubt.

(iii)Positive identification of the Appellant

22. The appellant is a neighbour to the complainant. He was well known as the complainant even knew one of his children. PW1 also knew him as a neighbour and from the evidence tendered, there was absolutely no evidence that the appellant was framed. The appellant himself gave no evidence that the complainant or her mother had ill motives to lie against him over a serious matter like defilement.

23. When placed on his defence, the appellant simply denied committing the offence and claimed that the witnesses who testified never saw him committing the act. He further blamed the victim's father for framing him. In this appeal he has changed the narrative and instead blamed the victim's mother. That in my view is indicative of second thoughts with a view to escaping the dragnet of the law.

This court finds that the evidence tendered clearly connects him with the commission of the offence. The prosecution's case against the appellant was overwhelming and I find that the trial court correctly reached the conclusion that he was guilty as charged.

The evidence tendered by the prosecution was sufficient to found a conviction because, upon re-evaluation of the evidence I have reached the same conclusion.

24. On sentence, the issue of age having been established to be 14 years, the sentence prescribed under section 8(3) of *Sexual Offence Act* is a minimum of 20 years. Looking at the violence visited upon the minor which resulted in her injury to the knee and use of a razor blade to cut her pant in my view shows that the sentence meted was justified and the appellant cannot grieve that the sentence was excessive. The law provides for the same and I do not find that the same was excessive given the circumstances of the case.

In the premises, this court finds no merit in this appeal. The same is disallowed. The conviction and sentence are upheld.

DATED, SIGNED AND DELIVERED AT KITUI THIS 25TH DAY OF OCTOBER, 2022.

HON. JUSTICE R. K. LIMO

JUDGE

