



REPUBLIC OF KENYA



**Mutethia v Republic (Criminal Appeal E152 of 2021)  
[2022] KEHC 16341 (KLR) (16 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16341 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL E152 OF 2021  
EM MURIITHI, J  
DECEMBER 16, 2022**

**BETWEEN**

**RAPHAEL MUTETHIA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence by Hon. P.M Wechuli SRM in Tigania Criminal Case (S.O) No. 17 of 2020 on 2/9/2021)*

**JUDGMENT**

1. Raphael Mutethia, the appellant herein was charged with the offence of defilement contrary to section 8 (1) as read with section 8(4) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on diverse dates between March 20, 2020 to April 13, 2020 in Tigania West Sub County within Meru County, he intentionally caused his penis to penetrate the vagina of WN a child aged 17 years. He also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on the same date and place, he intentionally touched the buttocks/breasts and the vagina of WN a girl child aged 17 years old.
2. Upon full trial, he was convicted on the main charge of defilement and sentenced to 15 years imprisonment.
3. Dissatisfied with the conviction and sentence, the appellant lodged this appeal setting out 8 grounds of appeal as follows;
  1. The learned trial magistrate erred in law and fact by failing to note that there was grudge between the appellant and the relatives of the complainant.
  2. The learned trial magistrate erred in law and fact by failing to note that the broken hymen is not proof of defilement.



3. The learned trial magistrate erred in law and fact by failing to note that key witnesses were not called.
4. The learned trial magistrate erred in law and fact by failing to take into account the period spent in custody under section 333(2) of the *Criminal Procedure Code*.
5. The learned trial magistrate erred in law and fact by relying on uncorroborated and contradicting evidence tendered by the prosecution witnesses.
6. The learned trial magistrate erred in law and fact by failing that the investigators of this case failed to investigate the case to the required standard of law.
7. The learned trial magistrate failed to consider his mitigation.
8. The learned trial magistrate erred in law and fact by failing to consider his defence.

### **Duty of Court**

4. This being a first appeal, the court is duty bound to re-appraise and re-analyse the evidence afresh, draw its own conclusions and make its own independent findings, bearing in mind that it did not have the advantage of seeing the witnesses testify. See *Okeno v R* [1972] EA 32.

### **Evidence**

5. PW1, WN, the complainant herein, and a from 2 student at [Particulars Withheld] testified that, “I know Raphael Mutethia. He used to be my class mate and we used to stay together. We were friends. On 20/3/2020 at 1830 hours I recall I was alone at home. No one was present. Auntie had gone to a chamaa. She is R. Mutethia used his brother’s phone to call me. He told me to go to his place. I went and stayed there for 3 days. My father and his brother HK came for me. Sub chief also came. I stayed with Mutethia the first day. The next two days I stayed with his mother. They found me with their mother. Mutethia was absent. That first day nothing happened between me and him. We then went to Nchiru police station. I was treated (p3-mf11) MFI-1, Lab request- mf12) MFI-2, (Bundle of receipt-MFI 3a-b). I wrote my statement. (Birth certificate- mfi-XX) original. In the course of this case there is a friend of Mutethia who met me at the shops. He said if Mutethia is jailed he shall kill me.”
6. The witness was not cross examined by the appellant.
7. PW2 MN, the complainant’s aunt, testified that:

“I know the accused. He is a neighbour. WN is my niece. On 6/4/2020 I recall W ran away from home. She schools from her aunts place. Her aunt told me W was not at home. We searched for her. Later H my boy called me. He said W is a Mutethia home. H went with the chief and arrested Mutethia. She did not tell me what had happened. Mutethia is in dock.”
8. On cross examination, she stated that, “Chief found you with W. She was not at your mothers place.”
9. PW3 HK, the complainant’s uncle testified that:

“I usually see the accused. On 6/4/2020 at 7 am I was at home. W had gotten lost. I went and informed the chief. In a certain canteen I heard boys say W is at Mutethia’s. I went and



informed chief. I went and heard W's voice at Mutethia's. He was arrested. I went to his place with the chief."

10. On cross examination, he stated that:

"W was at your house. She was at your mothers place when we went. She went and took the key to your house and removed her items therefrom. She was just cooking at your mums place. You have your chief and we have ours. It's like 1.5 km from your home to ours."

11. PW4 Geoffrey Muthomi, a clinician at Miathene Hospital produced PW1's P3 form as PEx 1, treatment notes as PExh 2, receipt as PEX 3a and treatment notes as PEX 3b. On examination, the labia majora and minora were intact, the hymen was torn but not fresh, and although all investigations were negative, he made a conclusion of defilement.

12. The doctor was not cross examined.

13. PW5 Tabitha Karee, the assistant chief of Lentule sub location, testified that, "On 12/4/2020 I received a call from K that the complainant had been missing from 16/3/2020 after the covid pandemic broke out. On 14/4/2020 I got the area manager and uncle of the child. We went to family of Karani and found W with the accused. The girl was in the kitchen with the mother of the accused. The accused ran when he saw us. We followed him and arrested him. He is in dock."

14. On cross examination, she stated that:

"We got the girl with your mother cooking. Clothes were in your house. She told us you knew we were coming and you ran. The girl ran away on 16/3/2020. When schools closed she stayed with you all that long as you locked her in. I got report on 12<sup>th</sup>, I got you and W on 13<sup>th</sup> K said they did not have information on...But they had been tracking you."

15. PW6 PC Salome Ndungu of Nchiru police station and the investigating officer herein, testified that:

"On 13/4/2020 the accused was brought to the station with the minor by the assistant chief Tabitha. He was allegedly cohabiting with the minor we placed him in cells. On 14/4/2020 we escorted both of them to hospital. They were examined. P3 was filled. The doctor concluded that there was defilement. I took them to station. I recorded complainant statements. I confirmed girl's age. We took her for age assessment. I have the report. (age assessment report) (pex 5). That person is in dock. In his statement the accused confirmed that he was cohabiting with the girl."

16. On cross examination, she stated that:

"Its not true you were beaten at the station until you accepted the offence. It is the officer I found at the station who beat me. The doctor confirmed she was 16 years old. The girl herself confirmed she was staying with you. You also confirmed in your statement you were staying with the girl."

17. When placed on his defence, the appellant gave unsworn statement as follows:

"I am a construction worker. The charges are false. I do work in far places I even go to Isiolo. That day I came from Isiolo and went home. I found my mother with a girl called WN. I entered into my house. N uncle came to look for her. They found her in our home. I was



arrested. I told chief and others that I was not with the girl. I told them that she was with my mother's home they did not listen. I was arrested.”

### Submissions

18. The appellant urged that the prosecution did not conclusively prove that there was penetration and that he had caused the said penetration, and cited *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013, *Sekitoliko v Uganda* [1967] EA 53 and *P.K.W v R* [2012] eKLR. He submitted that the clinician's conclusion that there was defilement was not supported by the evidence presented, as broken hymen is not proof of defilement. He urged that the whole case against him was based on suspicion, and relied on *Michael Mugo Musyoka v Republic* [2015] eKLR, *Joan Chebichi Sawe v Republic* [2003] eKLR and *Punjab v Jagir Singh* [1974] 3 SCC 277. He urged that since there was no direct, cogent, convincing and compelling evidence to warrant his conviction, as the evidence fell short of the standard required, his appeal ought to be allowed, the conviction quashed, the sentence set aside and he be set at liberty, and cited *State v Coetzee* [1997] 2LRC 593, *R v Gagnon (L)*. 2006 SCC 17. [2006] 1 S.C.R. 621 and *Mbugua Kariuki v R* [1979] KLR.
19. The respondent submitted that it proved beyond reasonable doubt all the three elements of defilement as set out in *Kaingu Elias Kasomo v Republic* [2010]eKLR, *Joseph Kiet Seet v Republic* [2014]eKLR, *Francis Omuroni v Uganda Court of Appeal*. Criminal Appeal No 2 of 2000 and *Sabali Omar v Republic* [2017]eKLR. It urged that the appellant was well known to the complainant because he was her class mate, and cited *Anjonini & others v Republic* [1989]KLR. It urged that the trial court took into account the appellant's mitigation, the gravity of the offence and the age of the victim, when it sentenced him to 15 years imprisonment. It prayed for the dismissal of the appeal as it had proven its case against the appellant beyond reasonable doubt.

### Analysis and Determination

20. The issues for determination from the grounds of appeal are whether ingredients of the offence of defilement were proved beyond reasonable doubt by consistent evidence by the prosecution witnesses; and whether the pre-trial period, the appellant's mitigation and defence were considered.
21. The appellant alluded to a grudge between him and the complainant's relatives. However, the same was not raised in his defence or followed up during cross examination of the prosecution witnesses.
22. The appellant also lamented that key witnesses were not called to testify without detailing with specificity, which witnesses these were.
23. The key ingredients of the offence of defilement are proof of the age of the complainant, proof of penetration and proof that the person before court was the perpetrator of the offence.
24. On age, PW6 produced the complainant's age assessment report as Pex 5 which proved that she was 16 years old. There is therefore no doubt that the complainant was aged 16 years at the time of commission of the alleged offence.
25. The next element is penetration which is defined under section 2 of the Act to mean “the partial or complete insertion of the genital organs of a person into the genital organs of another person.”
26. The evidence on record which the trial court relied on to convict the appellant was the complainant's own testimony together with the medical documents adduced therein. In his evidence, PW4 told the court that when the complainant was examined, the labia majora and minora were intact, her hymen was torn but not fresh and all the other investigations were negative. Despite the above findings, he still concluded that the complainant had been defiled.



27. The complainant was categorical in her sworn testimony that, "...I stayed with Mutethia the first day. The next two days I stayed with his mother....That first day nothing happened between me and him." PW3 confirmed on cross examination that when they went with PW5 to arrest the appellant, they found the complainant with the appellant's mother.
28. Consequently, this court finds that the prosecution did not prove penetration at all. It is not disputed that the complainant and the appellant were well known to each other as they were class mates and neighbors. However, since the ingredient of penetration was not proved at all, this court finds the appellant's conviction was manifestly unsafe and it ought to be quashed.
29. This court agrees with the appellant's contention that the clinician's conclusion that there was defilement was not supported by the evidence on record. It would appear that the appellant's prosecution was based on the fact that the complainant had been found at his mother's home after having "been lost" for some time but no material evidence proved penetration by the appellant on the alleged dates in the charge or otherwise. It could only be suspected that the appellant having stayed with the girl overnight in his house, he had sexual intercourse with her. No conviction may be based on suspicion, no matter how strong the basis of the suspicion.
30. The appellant's defence was duly analyzed by the trial court when the trial court ruled that:

"In his defence the accused said that he was at Isiolo at the material time. However he never gave any alibi notice to this effect for the same to be investigated. His evidence that the victim only went to visit his mother was further defeated by the victim herself who said that it is the accused who called her to that home."

That may be so, but there is no evidence of penetration, the key ingredient of the offence of defilement.

31. The appellant was arrested on 13/4/2020 and admitted to bail on 20/4/2020 which was suspended on 29/7/2021 until the delivery of the judgment on 2/9/2021. That period of approximately 5 weeks ought to have been factored in during sentencing pursuant to the provisions of section 333(2) of the *Criminal Procedure Code*.

### **Orders**

32. Accordingly, for the reasons set out above, the appellant's appeal is allowed, his conviction is quashed, his sentence is set aside and he is set at liberty unless otherwise lawfully held.

Order accordingly.

**DATED AND DELIVERED ON THIS 16<sup>TH</sup> DAY OF DECEMBER, 2022.**

**EDWARD M. MURIITHI**

**JUDGE**

### **Appearances:**

Parties in Person.

