



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 122 OF 2019**

**JAMES MUCHIRI.....APPLICANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

*(An appeal from the judgment of Hon. P. Wambugu, Principal Magistrate, delivered on 11<sup>th</sup> July 2019 in Chief Magistrate' Court at Kwale Criminal Case 103 of 2017)*

**JUDGMENT**

1. The appellant James Muchiri was sentenced in Kwale Magistrate's Court Sexual Offence Case No. 103 of 2017 where he was charged with the offence of defilement contrary to Section 8(1) of the Sexual Offences Act No. 3 of 2006.
2. The particulars to the charge were that James Muchiri on the 22<sup>nd</sup> day of October, 2017 in Diani Location in Kwale County within Coast Region intentionally and unlawfully caused his penis to penetrate the vagina of BKK a girl aged 13 years.
3. The appellant was also charged with an alternative count of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.
4. The prosecution tendered the evidence of PW 1 – Zainab Kajembe Clinical Officer who examined the complainant, treated her and filled P3 form at Diani Health Centre. P3 form, treatment notes and PRC form were produced as exhibits 1, 2 and 3 respectively. She observed painful vagina with fresh cuts and broken hymen. This made the Clinical Officer conclude that the complainant was defiled.
5. Injury was assessed as harm.
6. The complainant 12 years old girl testified that the complainant who was known to her as a neighbour went to their house while armed with a knife and found her sleeping in the coach in the kitchen at 12.00 noon and defiled her while strangling her. She said the appellant closed the door, held her by the neck and told her to remove her clothes. That she started struggling and screaming. That the appellant removed her skirt, biker and defiled her. She said he laid on top of her. She said that Safari a neighbour's child heard her screaming and when he came and saw them he went away and called the mother.
7. That appellant ejaculated and ran away but found complainant's grandmother outside.
8. That when she explained to her grandmother what happened they went to appellant's land. That when asked what he had done he said the complainant was no longer a child but a full woman. Police was called and appellant was arrested.
9. PW 2 denied having called the appellant into their house. She said appellant attacked her with a knife. She said that appellant had tried to seduce her. She said she had no grudge against appellant.
10. PW 32 Safari Museveni said he had gone to borrow wheelbarrow at complainant's grandmother house and he heard complainant screaming inside the house and when he went to check he found appellant holding a knife and he was naked and complainant who was also naked was screaming. That he called Mutuku and his mother when he realized the complainant was in danger.
11. He said his brother was sent to call the complainant's mother. He said that appellant and complainant had done 'tabia baya'.
12. PW 5, PW 3's mother testified that she had send PW 3 to go and get a wheelbarrow from complainant's home but then he ran back. That

is when James told her that the appellant “**baba Muthoni**” was in the house with BKK who was screaming. That she rushed to scene and found appellant was leaving while pulling up his trouser.

13. PW 5 testified that the appellant ran to a bush and called children while they called the complainant’s grandmother. PW 5 said she found the complainant crying and her panty was on the floor.

14. That when complainant’s grandmother came the complainant told her what had happened and they also explained. That 2 men caught the appellant and took him to where the grandmother of the complainant was. That when he was asked what he did he said he had bought the complainant samosa. That he said the complainant was no longer a child.

15. PW 4 the complainant’s mother testified and said she was at her shop on Saturday having left the complainant at home. That Peter Mutuku went to call her because Safari – PW 3 found appellant having sex with the complainant. That when she went she found the appellant calling children while the complainant was inside crying.

16. That when she went to call the appellant he ran away. She said the appellant was their Nyumba Kumi. She produced Health Records Card to the complainant was born on 28<sup>th</sup> December, 2004. She said appellant was in John’s land and when he saw her he ran to his house.

17. PW 6 Peter Mutuku testified that Safari had gone for wheel barrow at PW 6’s grandmother’s house and he found appellant lying on complainant on the couch.

18. That Safari called him and he also went and found the appellant lying on top of the complainant who was crying.

19. That they called their mother Elizabeth and when they returned they saw appellant leave while fastening his trouser.

20. That they raised alarm and members of public came and arrested the appellant.

21. PW 6 said the appellant had jubilee T-shirt and they saw him open the door and come out while dressing up. He said the appellant had a knife and they could not arrest him as there were no people around.

22. Cpl. Emma Mututa investigated the case and prepared charges against

23. Upon close of prosecution witnesses evidence appellant was placed on defence, he gave unsworn statement. He said he was a care taker at Winds Beach Cottages. He said he knew the complainant but denied having committed the offence. He said he was at work on the material day and when he had gone home to relax he heard people knock at the gate. That they called him for Nyumba Kumi meeting and he told them he would send a representative. That when it was said all employees were required, he went for the meeting at the chairlady’s house. That he refused to enter the room and the girl was brought out beaten. That they asked him what he did and he denied.

24. That when they said he had slept with the complainant he denied and even his boss confirmed he did not do so.

25. That he urged that they go to police station and he was arrested and charged. He said he was prejudiced.

26. Based on the evidence on record the trial magistrate found that the prosecution case established the ingredients of defilement namely penetration, ae of the complainant and identification of the appellant as the perpetrator of the offence. He said the appellant was found red handed by Safari and Mutuku in the act.

27. The appellant was therefore found guilty and convicted upon receiving victim Assessment Report and hearing appellant’s mitigation, appellant was sentenced to serve 20 years imprisonment.

28. The appellant was aggrieved by the conviction and sentence and filed amended grounds of appeal as follows:-

**1) That the learnt trial magistrate erred in law and lack in convicting him without considering that age being an essential element in a case of defilement was not proved beyond reasonable doubt.**

**2) That the learned trial magistrate erred in law and fact in convicting the appellant without considering that penetration was not proved.**

**3) That the learned trial magistrate erred in law and fact unconvicting the appellant without considering that medical evidence adduced in court did not support the charge of defilement.**

**4) That the learned trial magistrate erred in law and that in convicting the appellant without considering that the present case was poorly investigated.**

**5) That the learned trial magistrate in law and fact and fact in convicting the appellant without considering that the source of arrest was not established.**

**6) That the learned trial magistrate erred in law and fact in convicting the appellant without considering that the present case was manned with contradictions and discrepancies.**

**7) That the learned trial magistrate erred in law and fact in convicting the appellant without considering his reasonable defence.**

29. The appellant herein was conversed by way of written submissions.

30. The appellant in his submissions argued that complainant's age was not to be 13 years. He also questioned why it took 2 days to take complainant to hospital. He said the clinical officer said there were no fresh cuts and missing hymen.

31. He also said that complainant's clothes were never examined. He said that there were no bruises on the neck to prove complainant was strangled as she alleged. The appellant also submitted that since there was not spermatozoa there was no evidence of penetration .appellant submitted that he was framed up as evidence of PW 1 and PW 2 lacked credibility. He further submitted that medical evidence did not support offence of defilement and there is there was no proof beyond all reasonable doubt.

32. In regard to investigations appellant argued that same was shoddy and investigating officer did not visit scene and her evidence as to scene which she said was in shamba contradicted that of other witnesses who said it was in the house.

33. On whether it was established how he was arrested, the appellant argued that his arrest had no connection with the offence herein and the witnesses were children who could easily be coached to sing the tune of adult witnesses who were away during alleged commission of offence. While relying on the case of Mwakalu Mwanze Gele Mtenzi CR. Appeal No. 9 of 2018 the appellant urged the court to analyse and re-assess the whole issue as the inconsistencies and contradictions hence occasioned him injustice.

34. Appellant said evidence of PW 3 and PW 1 contradicted each other in terms of time the offence took place whether 2.00 p.m or 12.00 p.m. the appellant referred to authority in Samuel **Achieng Alego CR.APP. No. 187 of 2015** where age sentence was substituted with 5 years.

35. On defence and mitigation appellant said that this charges came after he had disagreed with the complainant's mother who wanted her to connect her to clients to Trade Winds Hotel Cottages but instead he proposed the girl on account the complainant's mother was old and could not be accepted by the Europeans who preferred young girls. He said this higgered a grudge between his family and the complainant's family. He said his defence was truthful and even his boss was with him shortly before he went to relax.

36. The respondents submissions were that age of complainant was proved to be 13 years as per as per the Health Records which showed she was born on 28.12.2004 and she was 1<sup>st</sup> taken to hospital on 4<sup>th</sup> January 2005.

37. The Respondent counsel also argued that medical reports produced in court estimated the age of complainant at 13 years and that terms was adequately proved.

38. On whether penetration was proved, the respondent's counsel argued that PW 1 examined the complainant the same day and found her hymen was broken and there was slight tenderness's on the vagina with no fresh cuts. She said that there was proof that complainant was defiled. The respondent counsel argued that there were no discrepancies or contradictions in the multiple medical report. The respondent urged the court to dismiss the grounds of appeal that they were inconsistencies in the prosecution case.

39. On conduct investigations it was submitted that investigating officer receive the appellant at the station from members of public and recorded statements and after escorting complainant to hospital the same evening appellant was taken to court and charged.

40. The respondent's counsel submitted that the appellant's unsworn statement was considered by the trial court and found to be wanting in light of evidence by the prosecution – page 44 and it was not true that his defence was ignored.

41. The respondent urged the court to dismiss the appeal.

42. Having set out the evidence on record for the prosecution and defence as well as the judgement of trial court and submissions by respective parties to this appeal, the issues that fall for determination are:-

**1) Was the complainant defiled?**

**2) What is this age of the complainant? Was it proved?**

**3) Was the perpetrator identified?**

**4) Was the appellant framed because of a feud in the neighbourhood.**

**5) Are there inconsistencies and contradictions in the prosecution's case which were fatal to their case?**

**6) Was the appellant's defence and mitigation considered?**

43. I have analysed and re-evaluated the record of the lower court, the judgement of the trial magistrate as against the grounds of appeal and submissions and find that the age of the complainant was proved beyond all reasonable doubt by the evidence adduced by herself – PW 2 and her mother – PW 4 who said she was 13 years as well P3 form and PRC form which confirmed the complainant was 13 years old.

44. However, in consideration that complainant went to hospital before taking a bath had the appellant succeeded in penetrating her vagina, one would have expected bruises/wounds/cut etc but the treatment notes show that although hymen was absent there were no signs of bruises. It may mean that her hymen was not broken on the material day.
45. PW 3 Safari Museveni said he had gone to borrow wheelbarrow from the complainant's parents home when he heard the complainant screaming in the house and when he peeped he saw appellant holding a knife and both the appellant and complainant were naked. He called Mutuku – PW 6 and his mother PW 5 Elizabeth Mwendu and when they came they saw appellant leaving while adjusting his trouser.
46. PW 6 and his mother confirmed they saw appellant leave the house where PW 2 complainant was crying. PW 6's mother Elizabeth Mwendu said she entered the house found the complainant crying and her panty was on the floor.
47. PW 6's mother Elizabeth send for complainant's grandmother and the mother and when they came and appellant was bragging to them how complainant had become a woman and was no longer a child, he was arrested and taken to the police station. Was PW 3 and PW 6 coached to come and implicate the appellant because of a feud in the neighbourhood against the appellant, it is only complainant who said the appellant who was a member of Nyumba Kumi used to go to their house to ask her for sex.
48. Complainant denied in cross examination that she called the appellant to go into their house. She said she had no grudge with appellant but he had tried to seduce her. PW 3 said he was not told what to come and say in court.
49. The appellant in cross examining PW 4 MK, the complainant's mother did not raise the issue that she disagreed with him when he refused to connect her to European clients who were visitors at the hotel where he was working. This is an issue that has cropped from nowhere in his submissions.
50. PW 4 said she had no grudge with the appellant who was Nyumba Kumi member.
51. Elizabeth Mwendu – who is listed as PW 5 said she found appellant leaving complainant's house while pulling his trouser up and that he said he had bought samosa for the complainant. She said she had no grudge with appellant.
52. Peter Mutuku – PW 6 said he found appellant lying on top of complainant who was crying. There is no evidence that he had a grudge with the Appellant.
53. It is PW 3, PW 5 and PW 6 who found the appellant in the act of trying to have sexual intercourse with the complainant.
54. It has not been shown that alleged disagreement between PW 4 and appellant motivated PW 3, pw 5 and pw 6 was at the shop and she was only called and told that 'baba Muthoni' was found in the house with the complainant who was crying. Allegations by appellant as to how he disagreed with PW 4 is also not in the grounds of appeal and was not raised at trial and is therefore an afterthought.
55. The evidence of PW 3, PW 5 and PW 6 cannot be said to have been a fabrication frame up as they have nothing to do with complainant and the appellant.
56. I do find that alleged inconsistencies and contradictions do not go to the root of the evidence adduced by the prosecution witnesses and are therefore not fatal.
57. The appellant's unsworn statement confirmed he was a member of Nymba Kumi in Maweni area. He alleged that complainant was beaten but that did not come out of the prosecution's case during cross examination.
58. PW 3 heard complainant crying in the house where appellant was seen holding a knife and was naked and the complainant was also naked. PW 3 called PW 6 and send him to call their mother PW 5. PW 5 found appellant leaving the house while adjusting his trouser in the house where appellant came from the complainant was crying and PW 5 found her panty on the floor.
59. The appellant alleged he called his boss who came and said he did not commit the offence. He did not give the name of his boss for the trial magistrate said that appellant placed himself at the scene. I do find that the unsworn statement of the appellant had no probative value but also it did not displace the strong evidence by prosecution witnesses that he attempted to defile the complainant.
60. This court finds that from the evidence on record the appellant was guilty of attempted defilement and not defilement. This court quashes the conviction for offence of defilement and sets aside sentence and find appellant guilty of offence of attempted defilement. Appellant is therefore convicted of the offence of attempted defilement and sentenced to serve 10 years imprisonment commencing from the date when he was arrested as it appears from the record that he was never released on bond i.e 24.10.2017.

Orders accordingly

**JUDGEMENT DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 25<sup>TH</sup> DAY OF JUNE, 2021.**

**HON. LADY JUSTICE ADWERA ONG'INJO**

**JUDGE**

25.6.2021

**In the presence of:-**

Ogwel – court assistant

Ms. Karanja for Respondent

Appellants – N/A

**HON. LADY JUSTICE ADWERA ONG'INJO**

**JUDGE**

25.6.2021