**Mtenzi v Republic (Criminal Case E084 of 2023)**
**[2025] KEHC 1835 (KLR) (18 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1835 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**CRIMINAL CASE E084 OF 2023**

**SM GITHINJI, J**

**FEBRUARY 18, 2025**

**BETWEEN**

**JAMES JACOB MTENZI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from judgment, conviction and sentence imposed in Kaloleni Sexual Offence No. E036 of 2022 delivered on 28th September 2023 by Hon. R.Amwayi - Principal Magistrate)***

## JUDGMENT

1. The Appellant is before this court on a first appeal having been charged with the offence of defilement of a child contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on diverse dates between 26th day of December 2022 and 27th December 2022 at [particulars withheld] village, Kaloleni location, Kaloleni sub-county in Kilifi County within Coast region the appellant intentionally and unlawfully committed an act which caused his male genital organ namely penis to penetrate the female genital organ namely vagina of S.J.T a child aged 15 years.

2. In the alternative the appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The facts hereof being that on diverse dates between 28th day of December 2022 and 27th day of December 2022 at [particulars withheld] village, Kaloleni Location, Kaloleni Sub-county in Kilifi County within Coast region, the appellant intentionally and unlawfully committed an act which caused his male genital organ namely penis to touch the female genital organ namely vagina of S.J.T, a child aged 15 years.

### Prosecution's Case

3. During the trial the prosecution called four (4) witnesses whereas the defence called two witnesses.

4. In support of the prosecution's case, S.J.T PW1 (complainant) testified that she was 16 years old having been born on 12.8.2007 and that she was a student at [particulars withheld] Girls High School. She knew the appellant herein as a person who would teach them dance in church. On 26.11.2022 she had gone to church to practice dancing whereas on 27.11.2022 she went to church and later to the appellant's home. They talked and he later escorted her. The appellant, bought her a flower on 4.12.2022 and told her that he loved her. On 25.12.2022 the appellant met her when she had been sent for medicine by her uncle. She spent the night at the appellant's house, though nothing happened between them that night. On the 26.12.2022 she once again spent the night at the appellant's home and they had sexual intercourse. Meanwhile she was being searched for by her family members. The appellant escorted her back home but they met her uncle on the way who called her parents. They were interrogated and the appellant was arrested.

5. FT (PW2) testified that the complaint was her niece. She did not know the appellant. She had received a call from Saumu her sister inquiring on PW1 whereabouts. Then later she received a call from the appellant informing her that PW1 was at home. On arrival the appellant and PW1 were nowhere to be seen. She called once again and both the appellant and PW1 informed her where they were. She made a report at the police station.

6. On cross examination she testified that the appellant had called to inform her where they were, when they were arrested after reporting the same. Further, that PW1 had gone missing from the 25.12.2022 to 27.12.2022.

7. Mwangolo Chigulu(PW3) testified that she was a clinical officer at Mariakani Sub-County Hospital. She produced a P3 form, Post Rape Care form and a lab request form. Further, that PW1 had been taken to hospital on the 28.12.2022 on allegation of having been sexually assaulted by someone known to her. On examination she had a normal unkempt outer gentalia with loose sphincter vaginal muscles with whitish vaginal discharge, the hymen was absent. Upon conducting lab test, her urine had epithelial cells and the rest were normal. She then filled the P 3 form and Post Rape Care form.

8. On cross examination, she confirmed that the sphincter vaginal muscles was loose and hymen absent. Though she had not confirmed the age of the injury, the same was not mandatory for victims of defilement. Further, that PW1 was 15 years as was indicated in the birth certificate.

9. It was the evidence of PC Elvis Otieno (PW4) from Kaloleni Police station who is the investigating officer that a lady namely FT had reported that her niece was being held by the appellant since the 25.12.2022 when she went missing. He then proceeded to the scene together with the said FT(PW2) and found the appellant together with the complainant who was a form one student. The complainant (PW1) was escorted to Mariakani Sub-County hospital where she was examined and a P3 form filled. Thereafter they were escorted to the police station to record their statements. He further testified that he was informed the complainant was a member of Upendo Fellowship church where the appellant was also a pastor. The appellant had lured the complainant to his home while within the church premises and stayed with her from the 25.12.2022 up to the 27.12.2024.

10. On further interrogation, the appellant admitted to have seduced the complainant who was a minor aged 15 years, having been born on the 12.8.2007.

11. On cross-examination he confirmed to the court the truth of his evidence in chief and that he had visited the scene of crime which was the appellant's house where the offence took place.

12. The prosecution closed it case and the learned magistrate held that the prosecution had established a prima facie case against the appellant to warrant him be placed on his defence. He was placed on his defence under section 211 of the *Criminal Procedure Code*.

**Defence Case**

13. In his defence the appellant testified that he resided in [particulars withheld] and that he earned his daily bread from farming. He denied the charge and further stated that on the 25.12.2022 he was at Upendo Fellowship Ministry from 8.00 a.m to 1.00p.m when his friend George Karisa visited him(DW2). He therefore had spent with him at his house and on 27.12.2022 when he left his friend and went to Kaloleni. However on his way he met the complainant who called him. He accompanied her to the aunt's place. She started to scream when she saw the aunt. He denied being the complainant's boyfriend and that he committed the offence charged with.

14. On cross-examination the appellant denied ever inviting the complainant to his house and instead it is the complainant who had invited him. In re-examination he denied ever defiling the complainant even though he knew her as a member of Upendo Fellowship church and that he had been implicated for being with her in the said church.

15. George Karisa(DW2) testified that he was a businessman in Kilifi though he lived in Kiwindani. He confirmed he knew the appellant and that he was with the appellant from 20.12.2023 to 27.12.2023 when the complainant alleges to have been with the appellant.

16. On cross-examination he stated that he was seen by the appellant's brother but he denied colluding with the appellant to mislead the court.

17. The defence case was closed and Parties filed their respective submissions.

**Judgment of the trial magistrate**

18. Upon closure of the evidence, judgment was delivered on the 18th September 2023. The trial magistrate held that she had evaluated both the evidence of the prosecution and that of the defence. The evidence of the complainant was believable unlike that of the appellant which was of mere denial and a made up story which did not cast a doubt on the prosecution's evidence. Therefore, the ingredients of the offence of defilement had been proved to the required standard that is beyond any reasonable doubt. The appellant was convicted under section 215 of the criminal procedure code on the main count of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*.

19. On mitigation, the learned magistrate considered the pre-sentence report, the nature of the offence of which was rampant in the area and sentenced the appellant to 10 years imprisonment.

**The Appeal**

20. The appellant dissatisfied with the judgment of the trial magistrate, filed his memorandum of appeal raising the following grounds:-

    1. That prima facie case was not established.

    2. That the case was not proved beyond reasonable doubt, since there are reasonable doubts as to the real culprit.

    3. That the learned magistrate erred in law and in fact by concluding that the element of penetration was established.

    4. That the learned magistrate erred in law and fact by finding that the prosecution case is believable.

5. That the honorable magistrate erred in fact and law by failing to weigh the defence case properly.

21. The appellant prayed that the appeal be allowed and that the conviction and sentence of the trial magistrate be quashed.

22. The appeal was canvassed by way of written submissions.

**Appellant's Submissions**

23. The appellant urged this court to find merit in his appeal. On the first issue, it was argued that the learned magistrate erred in holding that the prosecution had established a prima facie case. Counsel urged that the clinical officer (PW3) Mwangolo Chigula produced a P-3 form but he could not confirm whether there was penetration, and he failed to produce evidence that the action was done by the appellant, yet the complainant in her initial evidence had stated that she had not had sexual intercourse with the appellant only for her to later change the evidence; and further that the complainant had been coached on what to say. The trial magistrate had erroneously relied on this evidence to form a basis for holding that the prosecution had established their case beyond reasonable doubt.

24. The appellant placed reliance in *Republic v. Bernard Obunga Obunga, criminal case no. 31 of 2013*(2015) eKLR

25. Further, that the trial magistrate relied on hearsay evidence which was uncorroborated to hold that the prosecution had proved its case beyond a reasonable doubt. The court has been called upon to find that the evidence on record does not corroborate that of the complainant. There is doubt as to who committed the offence. The appellant's evidence was not factored and yet on the 25.12.2022, he was with DW2. DW2 confirmed to the court that on the diverse dates he was with the appellant. This was clear evidence that the appellant was not with the complainant and thus the appellant could not have been the person who penetrated the complainant.

26. Further, that the appellant's evidence raised doubt in the prosecution's evidence and the appellant was wrongly convicted and sentenced.

27. On the third issue, the appellant submitted that the trial magistrate erred in concluding that the appellant was guilty of penetration in the absence of evidence in support, yet this is a key ingredient. The appellant denied ever committing such an offence.

28. This court is further urged to find that the trial magistrate failed to believe the appellant's evidence but went ahead to rely on the prosecution's evidence. The witness's evidence did not agree and neither is the absence of hymen enough ground to hold that the appellant is the person who had penetrated the complainant.

29. In addition, Counsel argued that the appellant's witness evidence was not factored by the trial magistrate for failure to know the appellant's family. He urges this court to find that the appeal is merited for failure of evidence linking the appellant to the penetration of the complainant.

30. Lastly this court is urged to find that the defence casted doubts on the truth of the prosecution's case and allow the appeal, quash the conviction and sentence of the trial magistrate.

**Respondent's Submissions**

31. In opposing the appeal, the prosecution filed its submissions dated 12th April 2024. This court has been called upon to re-visit the evidence on record afresh, re-evaluate it and re-analyse the same, bearing

in mind that the trial magistrate had the advantage of observing the demeanor of the witnesses and hearing them as they gave evidence, as was held in the Court of Appeal decision in Mark Oururi Mose v. R(2013)eKLR.

32. To prove the offence of defilement, the court has been referred to the decision in George Olunga v. Republic[2016]eKLR, which enumerated the ingredients as follows:-

    1. Age of the victim

    2. Penetration

    3. Identity: - which ingredients were to be proved by the prosecution for a conviction and sentence to hold.

33. Counsel submitted that the age of the complainant had been proved. The complainant had testified that she was 16 years old on 30.3.2023 at the time of giving evidence and therefore when she was defiled she was 15 years. The birth certificate was produced by the police officer as an exhibit and it shows the complainant age as 15 years.

34. On penetration, PW1 evidence is clear that she had sexual intercourse with the appellant on the 26.12.2022. The appellant had told her he could not wait for four years to have sexual intercourse with her and they both undressed, slept on the mattress, where he touched her breasts, kissed her and then penetrated her vagina using his penis. This was corroborated by the evidence of the medical officer PW3, who testified that her outer genitalia was unkempt with loose sphincter vaginal muscles; there was a whitish discharge and hymen was absent, which is proof of penetration. The P3 form, the lab report and the Post Rape Care form were all produced in court in support of the prosecution's case.

35. On their relationship, the evidence of the appellant is vivid that while he was on the way the complainant PW1 had called him. Further that he knew PW1 as a church member and a student in the dance class in church. The court is urged to find that the ingredients had been proved.

36. On ground 2, 3 and 4 counsel submitted that the appellant had been positively identified by the complainant and it had been supported by the medical evidence produced in court.

37. On ground five, counsel urged this court to find that the appellant had given sworn evidence and called one witness. Even though he had alleged to have been in church from 8.00am to 1.00p.m and left to be with his friend (DW2) who had travelled from Kilifi to see him, the same was held to be of mere denial. In the circumstances this court has been urged to find that the prosecution proved its case beyond reasonable doubt and that the appeal lacks merit.

**Analysis and Determination**

38. This being a first appeal, this court is expected to re-evaluate the evidence tendered before the trial court and come up to its own logical conclusion by taking into account the fact that it did not have the advantage of seeing and hearing the witnesses tender their evidence and or witnesses demeanour. This court is guided by the Court of Appeal decision of Okeno v. R (2024) KEHC 2894 (KLR)

39. Having considered the lower court's record, the grounds of appeal and the submissions of the parties, this court finds the following issues for determination.

    1. Whether the prosecution proved the case beyond reasonable doubt

    2. Whether the defence was considered

    3. Whether the conviction and the sentence is sound.

40. It is trite law that criminal offences require proof beyond reasonable doubt. Lord Denning in Miller v. Ministry of Pensions (1947) 2ALL ER,372 stated as follows:

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence, 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice."

41. The prosecution had the burden to prove the ingredients of the offence of defilement which can be summarised as follows:

A. Age of the victim who must be a minor below 18 years old.

B. Penetration and,

C. Proper identification of the perpetrator.

42. On the age of the victim, the Court of Appeal in Edwin Nyambogo Onsongo v. Republic (2016)eKLR held as follow in respect of proving the age of the victim in defilement cases:

> " the question of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of the evidence preferred in proof of the victims age, it has to be credible and reliable."

43. In prove of the age of PW1 , she testified to be 16 years old at the time she stood in court to testify on the 30.3.2023. Therefore at the time of the alleged defilement she was 15 years old. This was corroborated by the police officer who testified that he had the birth certificate of PW1 which showed that she was born on the 12.8.2007. The birth certificate was properly identified and later it was produced as an exhibit. The age was not challenged by the appellant in the entire case. This court finds that the trial magistrate properly held that the minor was 15 year old at the time of defilement.

44. On the issue of penetration, section 2 of the *Sexual Offences Act* defines penetration as:

> " penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person."

45. The victim stated that the appellant herein had enticed her with flowers on the 4.12.2022 when there was a major fundraising. On 25.12.2022 the appellant informed her that he would pick her up from the field and take her to his home. On the 25.12.2022 they did not engage in any sex but on the 26.12.2022, they had sexual intercourse. The appellant had told her that he wanted to have sexual intercourse with her and that he could not wait for four (4) years for her to mature since she was s a minor. Though she had told him she was not ready for the same, they undressed, slept on his mattress on the floor where the appellant touched her breasts, kissed her and then penetrated her vagina with his penis. The following morning, he gave her water to shower and at 8.00 p.m he escorted her back to her home.

46. The evidence of the victim is corroborated by the evidence of the clinical officer(PW3) who testified that the victim was taken to Mariakani Sub County Hospital on the 28.12.2022 with a history of sexual assault. He examined the victim and noted that she had a normal unkempt outer genitalia with loose sphincter vaginal muscles with whitish vaginal discharge; and the hymen was absent. When the lab tests were done, the result showed the urine had epithelial cells, which was proof of penetration. He produced the P3 form, the Post Rape Care form and the lab test request form as exhibits.

47. On cross-examination, he confirmed that the victim was not sexually active and therefore it also corroborated the victim's evidence that the encounter with the appellant was the first.

48. Though the appellant in his evidence had stated that on the 26.12.2022 he was with his friend (DW2) and therefore there is no way he could have been with the victim, the same is a made story as was held by the trial magistrate. The victim being 15 years old at the time, could remember well what had happened to her. The trial magistrate had factored appellant's evidence together with that of his witness(DW2).

49. On identification, the Court of Appeal decision in Peter Musau Mwanzia v. Republic (2008)eKLR expressed itself as follows:

> " We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness in seeing that suspect at the time of the offence can recall very well having seen him earlier on or before the incident "

50. This court has analysed the evidence on record which is vivid. The victim was able to identify the appellant as a dance teacher, and as a person with whom they attended the same church. Further that she had been with the appellant on the 27.11.2022 when she went with him to his house. The appellant had also testified that the victim had called him on 25.12.2022 and he had agreed to take her to an uncle for medication. The victim and the appellant are persons who interacted often. Further the police officer confirmed that the appellant is the person who was arrested in the company of the victim just as PW2 who stated that the appellant had been found together with the victim. All these witnesses identified the appellant. This court finds that the appellant was properly identified.

51. Turning to the sentence, Section 8(1) of the *Sexual Offences Act* provides that:

> a person who commits an act which causes penetration with a child is guilty of an offence termed defilement."
>
> 8(3) a person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

52. The evidence on record shows that the appellant knew the victim was a minor as he even told her that he could not wait for 4 years for her to mature so as have sexual intercourse with her. He nevertheless went ahead to entice her and eventually lured her into a sexual intercourse. He held the victim from the 25.12.2022 to 27.12.2022 when he escorted her home. As a church leader who is expected to be a role model, mentor, and spiritual guide in showing the morals of the youth, he did the most unexpected act in commission of the offence.

53. The law provides for a minimum sentence of 20 years for the offence, and the meted 10 years imprisonment is therefore an illegal sentence of which needs correction.

54. I have therefore confirmed the conviction and altered the sentence from that of 10 years to that of 20 years imprisonment in compliance with provisions of section 8(3) of the *sexual offences Act* No. 3 of 2006.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 18th DAY OF FEBRUARY, 2025.**

**.....**

**S.M. GITHINJI**

**JUDGE**

In the Presence of; -

Ms Mkongo holding brief for Mr. Mwangi for the State

Appellant virtually