



REPUBLIC OF KENYA



KENYA LAW
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**Musia v Republic (Criminal Appeal E031 of 2023)
[2025] KEHC 9590 (KLR) (1 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 9590 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E031 OF 2023**

S MBUNGI, J

JULY 1, 2025

BETWEEN

CANEL MUSIA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentencing of Hon. R.A Kipngeno(PM)
in Butali SPMC SO Case No. 48 of 2018 delivered on 31st May, 2023)*

JUDGMENT

1. The Appellant was arraigned before the Principal Magistrate at Butali in Sexual Offences Case No. 48 of 2018 charged with the offence of defilement contrary to section 8[1][3] of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on the 29th day of December, 2018 at [Particulars withheld] area, Chegulo Location in Kakamega North Sub County within Kakamega County, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of JS a child aged 14 years.
2. In the alternative, the Appellant was charged with the offence of indecent act with a child contrary to section 11[1] of *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on the 29th day of December, 2018 at [Particulars withheld] area in Kakamega North Sub County within Kakamega County, the Appellant unlawfully and intentionally touched the buttocks, breasts, anus and the vagina of JS a child aged 14 years.
3. The Appellant pleaded not guilty to the charge and the case proceeded to full trial with the prosecution calling a total of three [3] witnesses.
4. PW1 was the victim who testified that at the time of the incident, on the 29/12/2018, she was 13 years old. On that night, she was in the house watching TV before stepping out for a short call. She was



- called by the Appellant and she went to the Appellant's video shop. On entry, the Appellant turned off the video, removed his clothes, only remaining with a pant, then he blocked her mouth and asked her to remove her clothes to which command she complied and the Appellant raped her.
5. While in the house, which also served as a video shop, she heard people speaking outside who commanded the Appellant to open the door. The Appellant complied and when the people entered, they found the witness tucked in the blanket. The people informed her parents and together with the Appellant they were arrested and later taken for treatment at a Malava hospital.
 6. On cross-examination she stated that the incident happened at 10 p.m. though she had a torch with her when she went for a short call. She further stated that she had never seen the Appellant prior to the incident.
 7. PW2, a Clinical Officer, testified that the victim was treated at Malava Hospital on 30/12/2018 and the examination revealed that she had bruises on labia minora, the hymen was broken and she had discharge. She further stated that the laboratory tests showed epithelial cells though there were no spermatozoa seen. On cross-examination she stated that epithelial cells were an indication that there was rubbing.
 8. PW2 was recalled and the testimony recorded as that of PW3. She essentially reiterated her testimony then produced P3 Form and Post Rape Care [PRC] Form as Exhibit 2 and 4 respectively.
 9. PW4, stepped in for the Investigating Officer and testified that she took over from the initial Investigating Officer following a transfer from the station. From the file handed over, the case was captured to be that on 29/12/2018 at around 10 p.m., the victim went to answer a call of nature, met the Appellant who was a neighbour who invited her into his house. She went to the house where the Appellant seduced her to be his girlfriend and before she left the Appellant grabbed her, blocked her mouth, removed her pants and had sex with her.
 10. He added that the file read that the mother became suspicious after she took long and this prompted her to scream catching the attention of other tenants save for the Appellant who did not come out. A neighbor peeped through the Appellant's window and saw the victim in the bed of the Appellant. They reported the matter at Masakha Police Post where an officer forced him to open the door and they were arrested and later taken for treatment.
 11. She stated that one Catherine Agetia, a neighbour, recorded her statement but had since died. One Diana Akoth who also recorded her statement was a wife to a police officer who had since been transferred and that the mother of the victim did not wish to testify.
 12. On cross-examination she stated that the victim's mother had died.
 13. The evidence of PW4 marked the close of the prosecution case after which the court found that a prima facie case had been established and the Appellant was put on Defence.
 14. The Appellant was the only defence witness, gave unsworn evidence to the effect that on 29/12/2018 he was at Masakha market where he ran a video shop which he would close at 10 p.m. after which neighbours would come to watch gospel music. He explained that there was a room at the shop where he slept. On the material day, as he prepared to sleep, he heard a knock at the door and when he opened, he found it was the complainant. The complainant told him she could not sleep and wanted to watch movies. He then opened a movie for her but soon thereafter the neighbours came and accused him of having slept with the minor. His defence was that he had been set up.



15. In a judgment of the trial court delivered on 31st May, 2023, the trial court adjudged the Appellant guilty of the offence of defilement, convicted him as charged and sentenced him to serve a prison term of ten [10] years.
16. The Appellant felt dissatisfied with the judgment of the trial court and lodged this appeal vide amended grounds of appeal dated 24th January, 2024. He premises the appeal on the grounds that;
 - a. That the learned magistrate grossly erred in both law and facts by convicting the appellant without considering that the medical evidence used to prove penetration was doubtful and was full of contradiction.
 - b. That the learned magistrate erred in both law and facts by convicting me without considering that crucial witnesses were not called to testify [eye witnesses who were also neighbors].
 - c. That the learned magistrate erred in both law and facts by sentencing me to 10 years imprisonment even after agreeing in his judgment that penetration whether partial or complete was not conclusively proved.
 - d. That the learned magistrate grossly erred in both law and facts by failing to consider that photocopied birth certificate was doubtful because one would wonder how the investigating officer managed to get a copy which is prone to alteration but not the original birth certificate and from where.
 - e. That the learned magistrate erred in law and facts by admitting the evidence of the same person as pw2 and pw3 with contradictory evidence.
 - f. That the learned magistrate erred in both law and facts by failing to consider that the prosecution deliberately left out crucial witnesses without proper explanation.
17. The appeal has been canvassed by way of written submissions as below.

Appellant's Submissions

18. The Appellant makes the submissions that the prosecution failed to prove its case beyond reasonable doubt to warrant the conviction. On the element of penetration, he contends that PW2 neither indicated the hospital she worked with as a Clinical Officer nor did she give her qualification and education background. He argues that the witness further failed to disclose whether the hymen was a fresh tear. Having stated that there were no spermatozoa upon examination, the Appellant argued that there was no proof of penetration. He further pointed out that PW2 testified twice, initially as PW2 and later as PW3, gave inconsistent and contradictory evidence. He stresses the fact that the witness gave two outpatient Nos, 0303xxxx/xx and 03xxxx/xx for the same victim.
19. For the age of the victim, the Appellant contends that the evidence on record was contradictory in that PW2 indicated that the victim was 17 years, charge sheet indicated she was 14 years, PW3 told the court she was 14 years and that no original Birth Certificate was tendered. He questions how the Investigating Officer obtained a copy of the Birth Certificate if the victim's mother was deceased.
20. He further argues that the prosecution failed to call crucial witnesses such as the neighbour who is alleged to have peeped through the window and saw the girl in bed with the Appellant as well as the police officer who allegedly forced the Appellant to open the door and executed the arrest.



Respondent's Submissions

21. On the age of the victim, the Respondent submits that the Appellant did not contest to the production of the copy of the Birth Certificate which showed that the victim was born on 13/9/2004 and the offence happened on 29/12/2018 making the age of the child to be 14 years at the time of the offence.
22. On the element of penetration, it is submitted that it was proved by PW1 whose evidence was corroborated by PW3 who produced the P3 and PRC form and that in the event of any contradiction, then the evidence of PW1 alone stands sufficient by virtue of Section 124 of the *Evidence Act*. It is stressed that the victim narrated how she was ordered to remove her clothes, how her mouth was covered and how she was ultimately raped. They add that penetration is not proved by the presence or lack thereof of spermatozoa and in that regard, the decision in *CMM v Republic* [2022] eKLR is cited.
23. On identification of the Appellant, the Respondent submits that the Appellant was arrested together with the victim and escorted to the police station. The court is urged to find that the Appellant had spent a considerable amount of time with the victim to enable her get acquainted and be able to positively identify the him.
24. On the sentence imposed, it is argued that Section 8[3] of the *Sexual Offences Act* provides for a mandatory sentence of not less than 20 years for the defilement of a child aged between twelve and fifteen years. For that reason, it is prayed that the sentence be enhanced to twenty [20] years.

Issues, Analysis and Determination

25. The court has considered the grounds of appeal together with the proceedings of the lower court, the resultant judgment as well as the submissions by both the Appellant and the Respondent and discerns the issues for determination to be:
 - a. Whether the offence of defilement was proved to the required standard against the Appellant?
 - b. Whether the evidence of the prosecution witnesses was marred with contradictions and its effect on the case?
 - c. Whether the prosecution failed to call key and critical witnesses? If this be in the affirmative, what is the effect on the case?

Analysis

Whether the offence of defilement was proved to the required standard against the Appellant

26. To discharge its burden under Section 8[1] of the *Sexual Offences Act*, the prosecution must prove that it is the Accused who committed an act which caused full or partial penetration with a child, named in the charge. The prosecution has to prove the age of the victim, penetration and positive identification of the perpetrator.
27. Here the Appellant contends that the age of the victim was not conclusively proved owing to the contradictory evidence tendered. It is stressed that PW2 testified that the victim was seventeen [17] years of age, the Charge Sheet indicated that she was fourteen [14] years while the victim herself stated that she was thirteen [13] years. A careful analysis of the proceedings on record reveals that to be the accurate position.
28. The law stands that there are several ways of proving age including the oral testimony of the mother, age assessment, Baptismal Cards and a Birth Certificate. The best evidence to determine age is a Birth



Certificate. PW4 produced a copy of the complainant's Birth Certificate which showed that she was born on 13/9/2004. That document as the proof of age has been challenged by the Appellant on the basis that there was no reason why the original was never produced. The Appellant equally questions the authenticity of the copy.

29. To this court, it is plain a learning that, documents be produced in original form and where one wishes to rely on a copy of a document, there is a legal duty that he serves a notice and offer an explanation before the court why the original cannot be availed. Before the trial court, no explanation was given on the difficulty to produce the original. In fact, the record as kept does not even show that a copy was to be produced and that the Appellant, who was acting in person, given a chance to comment.
30. On the question of what document produced to prove the victim's age, the Respondent, in the written submissions, does not dispute that only a copy was produced but tacitly concedes then contend that the Appellant did not object to the production of the copy. It is an indubitable principle of law that one cannot acquiesce to violation or sidestepping of the law. In the original record availed in this appeal, the document produced and kept in the file is indeed a photocopy and not certified. The court finds that the copy of the Birth Certificate was improperly produced and irregularly admitted in evidence by the court and that it falls short of being sufficient proof of the age.
31. That determination leaves the only other evidence on age to be that of the minor victim. That evidence even alone is sufficient if the court gets satisfied that the same is cogent and the victim is believed to have said the truth. In the judgment appealed against, there is no record in the judgment
32. that the court was satisfied that the victim was truthful. No attempt was made by the prosecution and the court to find out from the complainant when she was born, rather the copy of the Birth Certificate, which the court has found to have been improperly produce, was given the undue reliance.
33. Owing to the very severe treatment the law accords the offence of defilement and tied to the age of the victim, more should have gone into establishing the age but such was never pursued. The court finds that the ages was not sufficiently proved. Because the three ingredients must all be proved, the absence of one is sufficient to upset the conviction. With the finding that the age was not sufficiently proved, the court finds no justification to interrogate if the other ingredients were themselves proved. It is thus found and determined that without proof of the age, the conviction reached was unsafe and must thus be upset. It is quashed.
34. Having been so quashed, even the plea by the prosecution for enhancement of the sentence based on age, becomes moot and foregone thus not available for consideration by the court because the sentence cannot stand in the absence of a conviction.
35. Accordingly, for the reasons set out above, this appeal succeeds in entirety in that the conviction is quashed and sentence set aside. Let the Appellant be set at liberty forthwith unless otherwise lawfully held.
36. Right of appeal within fourteen [14] days.

DATED AND SIGNED THIS 12TH DAY OF JUNE, 2025.

PATRICK J O OTIENO

JUDGE

DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 1ST DAY OF JULY, 2025.

S. MBUNGI



JUDGE

In the presence of:

Ms. Osoro for the DPP on-line

Appellant present on-line

Court Assistant: Ang'ong'a

