



**Mbondi v Republic (Criminal Appeal E036 of 2022)  
[2024] KEHC 296 (KLR) (12 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 296 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CRIMINAL APPEAL E036 OF 2022  
GMA DULU, J  
JANUARY 12, 2024**

**BETWEEN**

**SHADRACK KIAMBA MBONDI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the conviction and sentence in Sexual Offence Case No. E020 of 2021 delivered on 25th August 2021 at Kilungu by Hon. C. A. Mayamba(PM))*

**JUDGMENT**

1. The appellant was tried in the Magistrate’s court and convicted of defilement contrary to Section 8(1) as read with sub section (2) of the *Sexual Offences Act*, the particulars of which being that on 19<sup>th</sup> July 2021 at around 00.30hours at Kiliani village in Watema Location within Makueni County intentionally caused his penis to penetrate the vagina of C.M.M a child of 4 years.
2. On conviction, he was sentenced to life imprisonment.
3. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal and relied on the following grounds:-
  1. The learned trial Magistrate erred both in law and facts when he never re-evaluated and re-weighted both the evidence from the prosecution side and the defence side to see whether there was proof beyond reasonable doubt.
  2. The learned trial Magistrate erred both in law and facts when he never considered whether the evidence by the complainant was voluntary or guided.



3. The learned trial Magistrate erred in law and facts by not availing before the trial court all vital exhibits as the law prescribes so as to comply with the rule of law of our country.
  4. The trial Magistrate erred both in law and facts when he rejected the defence adduced by the accused person which had brought to light conflicts and former disputes.
  5. The learned trial Magistrate erred completely in terms of the law and facts when he convicted and sentenced the appellant to a defective charge.
  6. The learned trial Magistrate erred both in law and fact by convicting him without considering that there was no evidence to prove penetration on which the prosecution could not prove the offence of defilement to the required standard in law beyond reasonable doubt.
  7. The learned trial Magistrate erred in fact and in law in shifting the burden of proof to the appellant misapprehending and misdirecting himself on the evidence, hence arriving at the wrong conclusion by failing to observe that the prosecution evidence was untenable, unworthy, inconsistent and full of lies which required him to resolve the doubts in favour of the appellant.
  8. The learned trial Magistrate erred both in law and facts when he convicted him without properly applying Section 124 of the *Evidence Act* for using uncorroborated evidence to convict and sentence the appellant.
4. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions.
  5. This being a first appeal, I am duty bound to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences – see *Okeno v Republic* (1972) EA 32.
  6. In proving their case, the prosecution called eight (8) witnesses. On his part, the appellant tendered sworn defence testimony, and did not call any additional witnesses.
  7. The main ingredients of the offence of defilement for which the appellant was convicted are three (3). The first is the age of the victim. The second ingredient is the proof of sexual penetration. The third ingredient is the positive identity of the culprit. Each of these elements has to be proved by the prosecution beyond reasonable doubt, as this is a criminal case.
  8. The appellant has raised a technical ground of the charge being defective. I note that the sections of the law in the charge sheet are described as Section 8(1) as read with Section (2) of the *Sexual Offences Act*. The proper description should have been Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*.
  9. The above error however, in my view is not fatal to the charge, as the appellant was not prejudiced or misled in any way. The error is curable under Section 382 of the *Criminal Procedure Code* (Cap.75). I dismiss that ground.
  10. All the other grounds go to the adequacy of the evidence to sustain a conviction.
  11. With regard to the age of the complainant PW1, a birth notification was relied upon. It was produced in evidence as an exhibit by PW8 PC Justus Mutuma the investigating officer. In my view, the prosecution



- proved beyond reasonable doubt that the complainant (PW1) was 4 years old at the time of the alleged incident.
12. With regard to sexual penetration, PW1 and PW2 a wife and husband and parents of the complainant testified on how their family was attacked after midnight by a male person who threatened to rape PW2 Lucy Nduku Mainge in front of her husband PW3 Martin Mule Kayulu. Both had to run away as the attacker was armed with a machete and had overpowered PW3.
  13. PW1 the complainant stated that after the parents ran away, the attacker defiled or injured her in the private parts. The medical evidence tendered by PW8 Eric Kiriamani a Clinical Officer at Kilungu hospital was to the effect that the hymen of PW1 was missing, and fresh lacerations were noted in the labia majora and labia minora of the vagina of the complainant (PW1).
  14. In my view, with the evidence on record, the prosecution proved beyond reasonable doubt that PW1 was sexually penetrated.
  15. I now turn to the identity of the culprit. The incident occurred at night. However, PW2 and PW3 knew the attacker well. He was a neighbour and talked about his intention to rape PW2. In my view, there was no possibility of mistaken identity. Thus just like the trial Magistrate, I find that the prosecution proved beyond reasonable doubt that the appellant was the perpetrator or culprit. I will uphold the conviction.
  16. With regard to sentence, in my view the sentence is lawful, and the manner in which the appellant committed the offence on a young defenceless child calls for a severe sentence. I thus also uphold the sentence.
  17. Consequently, and for the above reasons, I find no merits in the appeal. I dismiss the appeal and uphold both the conviction and sentence. Right of appeal explained.

**DATED, SIGNED AND DELIVERED THIS 12<sup>TH</sup> DAY OF JANUARY 2024 VIRTUALLY AT VOI.  
GEORGE DULU**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

**In the presence of:-**

Appellant

Ms. Omolo for DPP

