



**Mutisya v Republic (Criminal Appeal E069 of 2022)
[2024] KEHC 35 (KLR) (12 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 35 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E069 OF 2022
GMA DULU, J
JANUARY 12, 2024**

BETWEEN

MUSYOKA MUTISYA APPELLANT

AND

REPUBLIC RESPONDENT

(From the conviction and sentence in Sexual Offence Case No. 103 of 2019 at Makindu Law Courts delivered on 26th August 2021 by Hon. Benson N. Ireri (SPM))

JUDGMENT

1. The appellant was convicted in the Magistrate’s court with defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#) and sentenced to fifty (50) years imprisonment.
2. Dissatisfied with the conviction and sentence, he has come to this court on appeal and relied on five (5) grounds as follows:-
 1. The learned Magistrate erred in convicting and sentencing him with out observing that there was great contradictory evidence in the whole case.
 2. The learned Magistrate erred in convicting him when there was no evidence of penetration without which the offence of defilement could not be proved beyond any reasonable doubt.
 3. The learned Magistrate erred by shifting the burden of proof to the appellant and misapprehending and misdirecting himself on the evidence hence arriving at a wrong conclusion by failing to observe that the evidence of the prosecution witnesses were untenable, unworthy, contradictory, inconsistent and full of lies, which should have been resolved in favour of the appellant.
 4. The learned trial Magistrate erred by convicting him without applying the Section 124 of the [Evidence Act](#) and using uncorroborated evidence to convict and sentence the appellant.



5. The learned Magistrate erred in dismissing his sworn defence which alleged the possibility of being framed.
3. 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.
4. In determining the appeal, I have to bear in mind that the burden was on the prosecution to prove their allegations against the appellant – see Section 107 of the Evidence Act (Cap.80). This being a criminal case, the standard of proof was beyond any reasonable doubt.
5. As a first appellate court also, I am duty bound to freshly evaluate the evidence on record and come to my own independent conclusions and inferences.
6. In proving their case, the prosecution called five (5) witnesses. On his part, the appellant tendered unsworn defence testimony and did not call additional witnesses.
7. With regard to the age of the complainant who testified as PW2 a birth certificate was relied upon. It was identified by PW1 D D M her grandmother and produced as an exhibit. She was born on 1st December 2008. I find that the prosecution proved the age of the complainant beyond reasonable doubt to be 11 years.
8. Was sexual penetration proved? The evidence on this was that of the complainant PW2 and the medical evidence of PW4 Dr. James Mbiyu who produced a medical report prepared by Dr. Masila indicating that the hymen was broken but no lacerations noted.
9. On her part, PW2 stated that somebody took her to the bush as she herded goats and lay her down and inserted his penis in her vagina.
10. In my view, the evidence of the prosecution on record with regard to actual sexual penetration was contradictory. In my view if indeed there was sexual penetration, the medical evidence would have disclosed signs of such recent friction, which was not so disclosed by the medical evidence herein.
11. I find that the prosecution proved indecent act and not penetration of a sexual nature. The offence thus committed was an indecent act.
12. With regard to whether the appellant was the culprit, from the evidence on record, there was no possibility of mistaken identity. The appellant and the complainant and other witnesses were familiar people. No possibility of mistaken identity. I find that the prosecution proved beyond reasonable doubt that the appellant was the culprit.
13. I find no basis for the appellant's allegation that the Magistrate shifted the burden of proof to him. I also find no basis for the allegation that the Magistrate did not consider the defence. I dismiss those grounds.
14. To conclude, I quash the conviction for defilement. Instead, I convict the appellant for indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. I set aside the sentence imposed, and instead order that the appellant will serve ten (10) years imprisonment from the date he was sentenced by the trial court.

DATED, SIGNED AND DELIVERED THIS 12TH DAY OF JANUARY 2024 AT VOI VIRTUALLY.

GEORGE DULU

JUDGE



In the presence of:-

Ms. Nusura – Court Assistant

Appellant

Ms. Omolo for State

