



REPUBLIC OF KENYA



**Bundi v Director of Public Prosecutions (Criminal Appeal
E111 of 2023) [2024] KEHC 3257 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3257 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E111 OF 2023
TW CHERERE, J
MARCH 14, 2024**

BETWEEN

ROYFORD BUNDI APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

*(Being an appeal from original judgment and conviction in Nkubu Criminal
Case S. O No. E032 of 2021 by Hon.E.Ayuka (PM) on 02nd August, 2023)*

JUDGMENT

1. Royford Bundi (Appellant) was charged with defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* No. 3 of 2006 (the Act). Appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006. The offences were allegedly committed between 15th and 16th August, 2021 against WK a child aged 16 years.
2. Complainant stated that on 15th August, 2021, she met one John that he did not know before and upon his invitation accompanied him to his house where they spent the night and had sexual intercourse. The matter of her sleeping out was reported to the police by her mother and her headteacher escorted her to hospital where she was examined. She identified Appellant at the police station as the one that had sex with her and it was there that she learnt that his name was Rayford. In cross-examination by Appellant, she stated she knew him before the material date.
3. Upon complainant's mother getting information that complainant had spent a night out, she reported the matter to police. Upon interrogation, complainant informed police that she had slept in the house of one John with whom she had sexual intercourse.
4. On examination by a clinical officer on 16th August, 2021, complainant had a swollen vulva, hymen was broken and she had a whitish discharge from which a conclusion was made that she had been defiled.



5. The investigating officer upon receiving complainant's report on 16th August, 2021 escorted her to hospital and later in the evening of the same day arrested and caused Appellant to be charged. The witness tendered complainant's certificate of birth that reveals that she was born on 29th July, 2005.
6. Appellant in his sworn defence denied the offence and raised the defence of alibi. He stated he did not know the complainant and that he spent the night of 15th and 16th August, 2021 at Gacici area in a house he used to share with Evans Mutwiri who in his evidence stated that he spent the material night in the same house with the Appellant.
7. After considering both the Prosecution and Defence cases, the learned trial magistrate found the Prosecution case proved and on 02nd August, 2023 convicted and sentenced Appellant to serve 10 years' imprisonment
8. Dissatisfied with both the conviction and sentence, Appellant lodged the instant Appeal on grounds that:
 - i. Prosecution case was not proved
 - ii. The defence was not given due consideration
 - iii. The sentence was unconstitutional
9. This being a first appeal, the court's duty is as was stated by the Court of Appeal in *Mark Oiruri Mose v Republic* [2013] e KLR that:

“It has been said over and over again that the first appellate Court has the duty to revisit the evidence tendered before the trial Court afresh, analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that.”
10. The elements constituting the offence of defilement are proof of penetration, the age of the minor and the identity of the assailant (See *C.W.K v Republic* [2015] eKLR) which I will consider later in this judgment.
11. It is trite that the age of a minor is a critical component of a defilement charge and that it is an element which must be proved by the prosecution beyond reasonable doubt. (See *Kaingu Kasomo vs. Republic Criminal Appeal No. 504 of 2010*).
12. Proof of the age of a victim of defilement is crucial because the prescribed sentence is dependent on the age of victim. (See *Hadson Ali Mwachongo vs Republic Criminal Appeal No. 65 of 2015 [2016] eKLR & Alfayo Gombe Okello vs. Republic Cr. App. No. 203 of 2009[2010] eKLR*).
13. Complainant's certificate of birth tendered in evidence reveals she was born on 29th July, 2005 and was therefore 16 years when she was allegedly defiled.
14. Concerning penetration, Section 2 of the Act defines penetration to entail: -

“partial or complete insertion of a genital organ of a person into the genital organ of another person.”
15. The P3 form reveals that complainant had swollen vulva, hymen was broken and she had a whitish discharge and I find that the trial magistrate correctly found that penetration was proved.



16. Concerning Appellant’s culpability, I have considered the case of Stephen Nguli Mulili v Republic [2014] eKLR the Court of Appeal had this to say regarding reliance on Section 124 of the Evidence Act to convict:

“as a general rule of evidence embodied in Section 124 of the Evidence Act, an accused person shall not be liable to be convicted on the basis of the evidence of the victim unless such evidence is corroborated. The proviso to that section makes an exception in sexual offences and provides as follows:

“Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

17. Both Appellant and Complainant stated that they did not know each other before the material date and it is therefore no wonder that the Complainant stated she was defiled by one John.

18. It is not disputed that Appellant is not John but Rayford. There is no evidence that Complainant was present when Appellant was arrested. The arresting officer did not explain how she was able to identify Appellant in the absence of the Complainant. The arresting officer’s denial that Complainant did not inform her that she had been defiled by one John flies in the face of Complainant’s own evidence that she reported that she had been defiled by one John.

19. Since Complainant was a stranger to the John that defiled her, it would have been prudent for the investigating officer to put to test the complainant’s evidence by conducting an identification parade to ensure that there was no mistaken identity as to the person that defiled her.

20. It is worth noting that Complainant did not give the description of the assailant and only identified Appellant at the police station after his arrest.

21. From the analysis of the Complainant’s evidence, I find that not having given description of her assailant and there has been no basis for which Appellant was arrested and charged, Appellant was identified after arrest and such identification in my considered view is worthless.

22. Appellant raised the defence of alibi. The Supreme Court of Nigeria in the case of Ozaki & Anor Vs The State (1990) LCN/2449(SC) held as follows:

“it is settled law that the defence of alibi raised by an accused person is to be proved on a balance of probability” and that for it to be rejected it must be incredible and that the defence of alibi must be weighed against the evidence offered by the prosecution.

23. The Court of Appeal in the case of Kiarie v Republic [1984] KLR held THAT:

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.

24. I have weighed the prosecution case vis a vis the defences of alibi raised by Accused. From the summation of the evidence in this case, I find that the Appellant was not properly identified as the assailant and had the learned trial magistrate given due consideration to the defence of alibi that was corroborated, he might have come to the conclusion that and it introduced a doubt that is reasonable considering that the case of the prosecution against Appellant cannot be said to have been watertight.



25. Section 8 (4) of the Act under which Appellant was charged prescribes a sentence of imprisonment for a term of not less than fifteen years. Had the Appeal not succeeded, the appeal on sentence would have failed for the reason that the of 10 years imprisonment term imposed by the trial court is lawful.
26. From the foregoing analysis, I find that the conviction and sentence imposed on Appellant were unsafe.
27. In the end, this appeal succeeds and it is hereby ordered:
 1. The conviction is hereby quashed
 2. The sentence is set aside
 3. Unless otherwise lawfully held, it is ordered that the Appellant shall be set at liberty.

DELIVERED AT MERU THIS 14TH DAY OF MARCH 2024

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistants - Kinoti/Munene

Appellant - Present in person

For the State - Ms. Rotich (PC-1)

