



**Mwakulomba v Republic (Criminal Appeal E051 of 2022)
[2024] KEHC 2331 (KLR) (5 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2331 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E051 OF 2022
GMA DULU, J
MARCH 5, 2024**

BETWEEN

JOSEPH MWAGOTI MWAKULOMBA APPELLANT

AND

REPUBLIC RESPONDENT

(From the conviction and sentence in Sexual Offence Case No. 007 of 2020 at Voi Law Courts delivered on 11th January 2022 by Hon. C. K. Kithinji (PM))

JUDGMENT

1. The appellant was charged in the Magistrate's court with defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of offence were that on 3rd September 2018 at around 3:30p.m at [particulars withheld] in Mwatate Sub Count within Taita Taveta County intentionally and unlawfully caused his penis to penetrate into the vagina of LB a girl aged 4 years.
2. In the alternative, he was charged with committing an indecent act with a child contrary to Section 11(1) as read with Section 2(1) of the [Sexual Offences Act](#), the particulars of which being that on the same date and at the same place intentionally and unlawfully touched the vagina of LB a child aged 4 years with his penis.
3. He denied both charges. After a full trial, he was convicted of both the main count of defilement contrary to Section 8(1) of the [Sexual Offences Act](#), as well as for committing an indecent act with a child contrary to Section 11(1) of the same Act. He was sentenced to life imprisonment for defilement, and the sentence for committing an indecent act was left in abeyance.
4. Aggrieved by the decision of the trial court, the appellant has come to this court on appeal and relied upon the following grounds:-



1. The trial Magistrate erred in not considering that the identification of the alleged culprit was not adequately proved thus occasioning injustice.
 2. The lower court erred in convicting and failed to bear in mind that the medical reports that were availed in court to support the charges had insufficient grounds to sustain the conviction thus occasioning injustice.
 3. The lower court continued to err by convicting but failing to notice that the inconsistencies as some essential witnesses were unsummoned to testify – thus a miscarriage of justice occurred.
 4. The learned Magistrate erred when convicting but failed to notice that the case was marred with contradictions and inconsistencies thus occasioned injustice.
 5. The trial court further erred by convicting the appellant and imposing harsh sentence but failed to note that in a case like this one, DNA was crucial to withstand the witnesses allegations thus occasioned injustice.
 6. The trial Magistrate further erred and failed to notice that the investigations were shoddily done hence occasioned injustice.
 7. The trial court erred in convicting the appellant with a harsher sentence in not considering that before being convicted it was liable or fair for the trial court to ensure that the appellant's age be examined by an expert to ascertain the truth of his age thus occasioned injustice.
 8. The trial court erred in failing to notice that the Sexual Offences Act is termed as a capital offence, thus it was better for the appellant to have been represented in court as stipulated in Article 50(2)(h) of the Constitution of Kenya 2010, thus occasioned injustice.
 9. The learned Magistrate erred by convicting and sentencing the appellant yet failed to find and appreciate that the appellant was a minor at the time of commission of the offence.
5. 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.
 6. This being a first appeal, I start by restating that 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.
 7. In proving their case, the prosecution called five (5) witnesses. On his part the appellant tendered sworn defence testimony and did not call any additional evidence.
 8. I will start with the technical point that the trial Magistrate convicted the appellant for both the main count of defilement contrary to Section 8(2) of the Sexual Offences Act, as well as the alternative count of committing an indecent act with a child contrary to Section 11(1) of the Act. In my view that was an error committed by the trial court. Since the two charges were in the alternative, the appellant could be convicted on either of them, and not both at the same time. I will revert to this issue later.
 9. The elements of defilement have been addressed severally by courts in Kenya. First, the age of the complainant who should be below 18 years. Secondly, sexual penetration. Thirdly, the positive identity of the culprit or perpetrator.
 10. Was the age of the complainant herein proved? I note that a birth certificate was relied upon wherein the date of birth of PB was recorded as 20th November 2013. That document has not been challenged,



and both the Magistrate and the appellant saw this young girl in court, and she was not sworn when testifying because of the age factor.

11. I find that the prosecution proved the age of the complainant PW1 beyond reasonable doubt.
12. Was sexual penetration proved? The evidence on this element is that of the complainant PW1, as well as the medical evidence. PW1 was a child of tender years aged 4 years at the time of the incident. She was a victim of a sexual offence, thus if her evidence is believable, it can prove a fact without any further corroboration, in accordance with the proviso to Section 124 of the Evidence Act (Cap.80).
13. The medical evidence tendered by PW4 Dr. Furaha Faraj was that he was not the person who rendered medical treatment to the complainant, but relied on treatment notes from Mwatate Sub County hospital.
14. Though PW4 testified to the hymen of PW1 being broken, he also stated that he did not examine PW1. Thus in my view, he relied on hearsay evidence did not confirm whether the hymen of PW1 was broken, though he had the opportunity to do so.
15. In those circumstances, I find that the prosecution did not prove beyond reasonable doubt that sexual penetration occurred. Thus the conviction for defilement cannot stand.
16. Did the prosecution prove the identity of the culprit? I note that according to PW1 and PW2 the incident occurred in broad daylight. The appellant himself stated that PW1 and PW2 were neighbours whom he knew well before. Though he alleged an existing grudge due to the goats he herded having destroyed crops of PW2, in my view that cannot be a basis for PW1 and PW2 implicating him in such a serious crime.
17. I find that the identity of the appellant was proved beyond reasonable doubt.
18. In totality, with the evidence on record, I find that the prosecution proved the lesser offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. I will thus quash the conviction for defilement and set aside the sentence imposed, and instead substitute a conviction for committing an indecent act, and sentence the appellant accordingly.
19. I note that the appellant has raised an issue that he was sentenced like an adult, while, at the time of commission of the offence, he was a minor having been born in 2000. In my view, that complaint was overtaken by events as a re-trial was ordered, and he was thereafter sentenced on 26th February 2022 long after attaining majority age.
20. Consequently and for the above reasons, I quash the conviction for defilement and set aside the life imprisonment sentence imposed. Instead, I convict the appellant for the alternative count of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. I order that the appellant will now serve ten (10) years imprisonment from 4th September 2018, when he was arrested. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 5TH DAY OF MARCH 2024 IN OPEN COURT AT VOI.

GEORGE DULU

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JUDGE

In the presence of:-



Alfred – Court Assistant

Appellant

Ms. Moke for State

