**Kachili v Republic (Criminal Appeal E017 of 2023)**
**[2024] KEHC 6789 (KLR) (4 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 6789 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT VOI**

**CRIMINAL APPEAL E017 OF 2023**

**GMA DULU, J**

**APRIL 4, 2024**

**BETWEEN**

**DUNCAN KITAI KACHILI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(From the conviction and sentence in Voi Magistrate Sexual Offence Case No. E019 of 2021)***

## JUDGMENT

1. The appellant was convicted after a full trial for defilement Contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No. 6 of 2006
2. The particulars of the offence were that on 25th July 2021 and 26th July 2021 in Voi sub - County within Taita Taveta County intentionally and unlawfully caused his genital organ (penis) to penetrate the female genital organ (vagina) of JA a girl aged 17 years.
3. On conviction, he was sentenced to serve fifteen (15) years imprisonment.
4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal which was filed by counsel Juma Nyaga & Company on the following grounds-
    1. The conviction is completely unjustifiable in light of the evidence of medical expert PW4 that there was absolutely no evidence of commission of the offence
    2. The court erred in not requiring corroboration of the complainant's evidence in the circumstances of this case
    3. That the honorable court failed to acknowledge that there were serious inconsistencies in the prosecution's case and evidence

4. The trial court misdirected itself in shifting of the burden of proof to accused and requiring the defence to explain the whereabouts of the complainant or her movements

5. That charges were not proved to the required standard

6. And the Appellant shall argue that the court severely misdirected itself in the case in whole

7. And the Appellant shall argue that the conviction was not warranted in all circumstances of the case

8. And the Appellant shall argue that the sentence imposed was unduly harsh and unjustified and not based on the correct principles of law.

5. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant in person as well as the submissions filed by the Director of Public Prosecutions. I note that the Director of Public Prosecutions has conceded to the appeal because of the doctor's (PW6) evidence that medical examination did not reveal any factors that would show indecent sexual penetration.

6. This being a first appeal, I am duty bound to examine all the evidence on record afresh and come to my own independent conclusion and inferences – see Okeno vs Republic [1972] EA32

7. In accordance with the provisions of Section 107 of the *Evidence Act* (Cap 80), the burden was on the prosecution to prove all the elements of the offence. This being a criminal case, the standard of proof is beyond any reasonable doubt – see *Sawe vs Republic* (2003) eKLR

8. In proving of their case, the prosecution called six (6) witnesses. On his part, the appellant tendered sworn defence testimony and called two defence witnesses.

9. As has been held consistently by the courts, the main elements of the offence of defilement are first the age of the victim who should be below 18 years of age. Secondly, penetration of a sexual nature even if partial. Thirdly, the positive identification of the culprit or perpetrator – see *Charles Wamukoya Karani vs Republic* Criminal Appeal no 72 of 2013.

10. With regard to the age of the alleged victim herein PW1 JA, a birth certificate was relied upon by her. The mother PW2 SAJ testified that PW1 was a standard 8 primary school pupil, but did not testify to the age. PW3 LMM the grandmother of the victim testified that PW1 was aged 17 years. PW4 John Murimi a teacher at (Particulars withheld) Primary school testified that the victim (PW1) was 17 years old. PW5 PC Veronica Makovu the Investigating Officer produced the birth certificate of JA a daughter of SAJ as an exhibit, in which the date of birth was recorded as 20/03/2004.

11. In my view, the prosecution proved beyond any reasonable doubt that PW 1 was 17years and a few months at the time of the alleged offence.

12. I now turn to penetration. The evidence on record on this element is that of the complainant PW1 alone .The medical evidence of PW 6 Dr. Joto Nyawa is to the effect that there was no sign of sexual penetration.

13. In sexual offences, the provisal to section 124 of the *Evidence Act* is to the effect that the evidence of a single victim witness of a sexual offence does not require corroboration to sustain a conviction, provided that it is believable and so believed for reasons recorded in the Judgement.

14. In the present case, in my view the evidence of PW1 the victim is not believable. First reason is that she was very reluctant to say that she was sexually penetrated until she was taken through interrogation by

parents, elders, teachers, and only said that she was so penetrated at the police station. She was thus in my view, coerced to say so.

15. The second reason is that the defence evidence is very clear that after going to be hair dressed by the wife of the appellant, PW1 on her own decided to sleep in that home and was actually found there by her grandmother. The only thing which created suspicion was that she failed to go back home and also failed to go to school. In my view, failure to return home alone could not establish sexual penetration.

16. The third reason was that the medical evidence of PW6 Dr. Joto Nyawa was to the effect that on medical examination, there was no sign or indication of recent sexual penetration.

17. In those circumstances and with the evidence on record, I find that sexual penetration was not proved. I will thus allow the appeal on that account and thus agree with the Prosecution Counsel who conceded to the appeal.

18. With regard to proof of the culprit, as I have found that sexual penetration was not proved, I also find that the prosecution did not prove that the appellant was the culprit or perpetrator.

19. To conclude as penetration was not proved, the appeal will succeed and conviction quashed and sentence set aside.

20. Consequently and for the above reasons, I allow the appeal quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED THIS 04TH DAY OF APRIL 2024 AT VOI IN THE OPEN COURT.**

**GEORGE DULU**

**JUDGE**

In the presence of:-

Alfred/Trizah – Court Assistants

Appellant in person

Mr. Sirima for State