



**Msafari v Republic (Criminal Appeal E052 of 2021)
[2024] KEHC 6801 (KLR) (17 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 6801 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E052 OF 2021
GMA DULU, J
APRIL 17, 2024**

BETWEEN

ANDREA MKAYA MSAFARI APPELLANT

AND

REPUBLIC RESPONDENT

(From the conviction and sentence in Sexual Offence Case No. E10 of 2020 at Voi Law Courts delivered on 19th April 2021 by Hon. F. M. Nyakundi (SRM))

JUDGMENT

1. The appellant was convicted of defilement contrary to Section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of offence were that on 12th October 2020 at [Particulars withheld] in Voi Sub County within Taita Taveta County intentionally caused his penis to penetrate the vagina of F. I. C. a girl aged 15 years.
3. On conviction, he was sentenced to ten (10) years imprisonment.
4. Dissatisfied with the conviction and sentence, he has come to this court on appeal relying on the following amended grounds:-
 - a. The learned Magistrate erred in failing to appreciate the fact that the critical elements of defilement namely penal penetration and identity of the alleged perpetrator remains a mirage and which occasioned prejudice to the appellant's case.
 - b. The learned Magistrate erred in failing to take into consideration that the instant matter was riddled with material discrepancies capable of unsettling the verdict arrived at.



- c. The learned Magistrate erred in failing to consider the bad blood (grudge) over pending bills and apparent misdirection by the trial Magistrate occasioning a serious dereliction of justice.
 - d. The trial Magistrate misapplied Section 124 of the *Evidence Act*.
 - e. Proof not to the required standards.
5. The appeal was canvassed through written submissions. 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 is a first appeal. I am thus 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 called one witness DW2.
 8. The critical ingredient of defilement are the age of the complainant (victim) who should be below 18, penetration of a sexual nature, and positive identification of the perpetrator – see [Charles Wamukoya v Republic](#) – Criminal Appeal No. 72 of 2013.
 9. I am mindful of the fact that the burden was on the prosecution to prove each of the elements of the offence.
 10. With regard to the age of the alleged victim herein, she testified as PW1. She relied on a birth certificate to claim that she was born on 29th May 2005. The mother PW2 Getrude Mwakija Mshai corroborated this evidence of age. The birth certificate was produced as an exhibit by PW5 Cpl. Elma Mtwana the investigating officer. I find that the prosecution proved beyond any reasonable doubt that the alleged victim (PW1) was 15 years at the time of the alleged incident.
 11. With regard to penetration of a sexual nature PW1 stated that she was so penetrated on 12th October 2020 by a person she knew. It was her testimony that the perpetrator threatened her with a knife in the afternoon in a neighbour's house.
 12. PW1 reported the incident to her mother. On 13th October 2020 a report was made to the police, and PW1 was taken for medical treatment, and PW4 Dr. Joto Nyawa testified that the hymen was broken and there were signs of recent sexual penetration of forceable nature due to bacterial infection found, though injuries were not noted as she was taken to hospital on 14th October 2020.
 13. In my view, the evidence of PW1 on sexual penetration was believable as she gave an account of how she was threatened with a knife, which was the reason of not reporting the incident to her mother immediately on 12th October 2020.
 14. In my view, the trial court was correct in finding that sexual penetration was proved. I also so find.
 15. I now turn to the identity of the perpetrator. The victim PW1 mentioned the appellant as the perpetrator. The appellant denied the allegation.
 16. In my view, the evidence of PW1 was believable in terms of the proviso to Section 124 of the [Evidence Act](#) (Cap.80). Firstly, the incident occurred in broad daylight, and in fact the appellant confirms seeing PW1 at Amina's house that day. There is thus no possibility of mistaken identity as both knew each other before.
 17. Secondly, the appellant called a defence witness DW2 Amina Mbugua his sister. However, though the appellant stated in his defence that they ate lunch together with PW1 and Amina that day, Amina



DW2 agrees with the victim's evidence that Amina could not have seen PW1 that day as Amina was sleeping. Thus the appellant was misleading the court. His defence story was not true.

18. Thus like the trial court, I find that the appellant was positively identified as the culprit. I will uphold the conviction.
19. With regard to sentence, I note that the appellant was sentenced to ten (10) years imprisonment, which is a very lenient sentence under the *Sexual Offences Act*. As the prosecution has not asked for enhancement of the sentence, I will leave it at that.
20. Consequently and for the above reasons, I dismiss the appeal and uphold both the conviction and sentence of the trial court. Right of appeal 14 days explained.

**DATED, SIGNED AND DELIVERED THIS 17TH DAY OF APRIL 2024 IN OPEN COURT AT VOI.
GEORGE DULU**

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:-

Alfred – Court Assistant

Appellant in person

Ms. Kanywira for State

