



**Muchine v Republic (Criminal Appeal E045 of 2021)
[2024] KEHC 3738 (KLR) (12 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3738 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E045 OF 2021**

**M THANDE, J
APRIL 12, 2024**

BETWEEN

JOHN MUCHINE APPELLANT

AND

REPUBLIC RESPONDENT

*(An Appeal arising out of the conviction and sentence of Hon. P. E. Nabwana
RM delivered on 14.10.21 in Lamu Sexual Offences Case No. E006 of 2021)*

JUDGMENT

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the [Sexual Offences Act](#) (SOA) and an alternative charge of committing an indecent Act with a child Contrary to Section 11 (1) of the [SOA](#). He was also charged with the offence of defilement of a person with mental disabilities contrary to Section 17 of the [SOA](#) and alternative charge of committing an indecent Act with a child Contrary to Section 11 (1) of the [SOA](#). The third charge that the Appellant faced was defilement of imbecile contrary to Section 146 of the [Penal Code](#).
2. The Appellant was tried and convicted of count 1 and sentenced to 15 years imprisonment. The other counts were dismissed by the trial court. The particulars of the offence of which the Appellant was convicted, are that on diverse dates in October 2020 to 16.1.21, at Mpeketoni sub-county within Lamu County, he intentionally and unlawfully caused his penis to penetrate the anus of BG (the Complainant), a boy aged 17 years.
3. Being aggrieved with both the conviction and sentence the Appellant filed a petition of appeal on 4.11.21. On 19.10.23, he filed amended grounds of appeal in which he faults the trial Magistrate for failing to consider that the case was fabricated and that there were inconsistencies in the prosecution evidence and that the case was not proved beyond reasonable doubt.



4. As a first appellate Court, I have also subjected the evidence adduced before the trial magistrate to a fresh analysis and evaluation while giving due allowance for the fact that unlike the trial court, I neither saw nor heard the witnesses. See *Okeno v. Republic* [1972] EA 32.
5. The facts of the case according to the prosecution are that PW1 JN, the Complainant's mother was informed by PW3 MW, that the Complainant had been defiled by the Appellant. On inquiring from the Complainant, he admitted that since December 2020, the Appellant would ask him to touch his penis and would later insert it in the Complainant's anus. Thereafter a watery substance would pour out. When he complained of pain, the Appellant would tell him that he would get used to it. The Complainant has mental challenges arising from an illness he had at infancy.
6. Both the Appellant and Respondent filed their submissions which I have duly considered.
7. The critical elements forming the offence of defilement are the age of the complainant, proof of penetration and positive identification of the assailant. (See *Dominic Kibet Mwareng v Republic* [2013] eKLR).
8. It is not in doubt that the Complainant was a 17 year old minor at the material time. His health clinic card on record shows he was born on 31.8.03.
9. The Appellant's main complaint is that penetration was not proved. Penetration is defined in Section 2 of the SOA as the partial or complete insertion of the genital organ of a person into the genital organs of another person. Section 2 proceeds to define "genital organs" to include the whole or part of male or female genital organs and for purposes of the SOA, includes the anus.
10. PW2 TW, the Complainant's sister testified that her cousin PW3 had informed her that the Appellant had sodomized the Complainant. She interrogated the Complainant who told her that the Appellant had been sodomizing him and would give him Kshs. 20/= and he would forget. He did not inform the family as the Appellant had threatened to kill him. The Complainant was questioned before their school headmaster and confirmed that the Appellant had indeed been sodomizing him.
11. The Complainant himself in his testimony stated that the Appellant defiled him at his house, in the bushes and at a mango tree along the road. The Appellant would undress both himself and the Complainant and tell him to lie on his stomach. He would apply oil on his buttocks then lie on top of him and defile him with the organ that he uses to urinate. He did it more times than he could count. He would then give the Complainant Kshs. 20/= and threaten him with death if he disclosed what he did.
12. PW5 DM, the Complainant's 10 year old brother witnessed the Appellant sodomizing the Complainant. He stated that one evening, they both went to the shop to buy sugar and cooking oil. They then went to the Appellant's house who told him to go and play at PW3 MW's home and the Complainant to remain behind. Later when he went to check on the Complainant, the Appellant told him he had left but he did not see him on the road. He went back to the Appellant's house and found the Complainant leaving the Appellant's toilet. On another evening, PW5 peeped in the Appellant's house and saw the Complainant lying on his back with his legs lifted up. The Appellant was applying oil on his buttocks and the Appellant defiled him. He then told the Complainant to keep quiet or he would kill him. He stated whenever they went to the Appellant's home, he would give the Complainant more sweets than him and PW3.
13. Upon analyzing the testimony of the Complainant and PW5, I am convinced that their evidence was clear enough on the nature of the assault by the Appellant. This evidence was corroborated by the medical evidence of PW7 Musyoki Kisilu, a clinical officer at Mpeketoni sub county hospital. He stated that upon examination, the Complainant was found to have bruises of 0.5 centimeters, around the



anal opening. The bruises could have been caused by sodomy or constipation. However given that the Complainant is reported to have passed stool 5 times before examination and the most likely cause of the bruises is sodomy. The treatment notes and P3 form were produced in evidence.

14. The Appellant's contention that the prosecution evidence contained a multitude of contradictions is unsupported. None of the witnesses' testimony contradicted the other. Even those who reported what was told to them did not give a different account from that of the Complainant and PW5 which is direct. Any difference in dates and time are in my view are inconsequential. Accordingly, I reject the Appellant's contention in this regard. I find guidance in the decision in *Willis Ochieng Odera vs. Republic* [2006] eKLR, where the Court of Appeal held:

As for the contradictions in the prosecution evidence it may be true that such contradictions, particularly with regard to the date indicated on the P3 form as the date of the offence, is different. But that per se is not a ground for quashing the conviction in view of the provisions of section 382 of the *Criminal Procedure Code*.

15. As to the identity of the Appellant, it is not disputed that he is a pastor of a church in and is well known to the Complainant and his family. The evidence shows that the defilement took place several times and the Complainant and PW5 asserted that the assailant was the Appellant. The Appellant himself conceded that he knows the Complainant and his family.
16. The Appellant gave an unsworn statement and stated that the case is meant to tarnish his reputation. He stated that pastors are using people to finish other churches by claiming defilement and that pastors of those 3 other churches are being used to tarnish his name. He further stated that probably a lady was in love with him and he refused her advances. He also stated that churches are always spoilt by own congregations.
17. The claim of fabrication and that the Complainant's family was being used to tarnish his reputation and destroy his church is unsupported by evidence. The Appellant gave no names of the pastors who are using people to finish him or his church. He also did not give the name of the alleged woman who was in love with him. His claim is thus farfetched and improbable and is based on speculation and conjecture. The Appellant's defence did not dislodge the evidence of the prosecution.
18. After carefully reviewing the evidence, I make a finding that the trial Magistrate arrived at the correct decision and cannot be faulted for returning a verdict of guilty. I too find that the evidence against the Appellant was overwhelming and that the ingredients of the offence of defilement were proved to the required standard.
19. The evidence shows that the Complainant used to go to the Appellant's house often clearly indicating that he trusted him. He was evidently lured by the Kshs. 20/= and sweets given to him by the Appellant. He even stated, no doubt due to his diminished mental capacity, that he did not know that what the Appellant did to him was wrong. The evidence further shows that the Complainant's family and the Appellant were friends and would visit each other as such. This, and the fact that he is a pastor, notwithstanding, the Appellant thought nothing of betraying the trust bestowed upon him by violating and sodomizing the Complainant. Adults of sound mind have a moral responsibility to protect children and not to harm them as the Appellant did to the Complainant. The violation and pain he inflicted upon him is unimaginable and will live with him for a long time to come.
20. In the end, and for the stated reasons, the Court finds that the Appeal herein is devoid of merit. Accordingly, both the conviction and sentence are upheld and the Appeal is hereby dismissed.

DATED AND DELIVERED IN VIA MS TEAMS THIS 12TH DAY OF APRIL 2024



M. THANDE
JUDGE

