



REPUBLIC OF KENYA



**Machupa v Republic (Criminal Appeal E019 of 2023)
[2024] KEHC 5531 (KLR) (16 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5531 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E019 OF 2023**

GL NZIOKA, J

MAY 16, 2024

BETWEEN

SIMON SHIMENGA MACHUPA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the decision of E. Mburu Principal Magistrate (PM) delivered on 20th April 2023 vide Chief Magistrate's Court sexual offences No. E015 of 2021)

JUDGMENT

1. The appellant was charged vide CMCC S/O No. E015 of 2021 with the offence of defilement contrary to section 8(1) of the Sexual Offences Act, No. 3 of 2006 (herein "the Act") in two counts and an alternative count of committing an indecent act with a child contrary to section 11(1) of the Act in two counts. The particulars of each charge are as per the charge sheet.
2. The appellant pleaded not guilty to all the charges and the case proceeded to full hearing. The prosecution, is that, the victims herein (PW1) E.K (herein "the first complainant") aged nine (9) years old and PW2 ABG (herein "the second complainant") aged eight (8) years are sisters. That on the 23rd day of January 2021, they were sent by their mother in the company of their younger brother, X, to fetch water. That the appellant forcefully took them to his house. That he gave the young boy a game on a cell phone to watch while he defiled the victims one after the other.
3. PW 1 E.K. testified that, when they reached the appellant's house he removed her clothes, biker, dress and panty and put her on the bed;3 and then removed his trouser and shirt and put his male organ into her private parts, defiling her. That as he was defiling her, he was holding a chuma (metal bar) and warned the victim that he would hit them with it if they screamed. That before he defiled the, he took something like a balloon, put onto his genitalia (male organ) and then put it in the place she uses to pee. That after he was done with the 1st complainant, he turned to the 2nd complainant.



4. PW2 ABG testified similarly to her sister's that, as they were fetching water, the appellant called them and they refused, and then he pulled them to his house. That he was holding a "kiboko" which looked like firewood and wet. At his house, he removed her clothes, being "blue uniform and white colour" then her pant and defiled her by placing his male organ into her place where she pees from. That as he defiled her, he had put on a condom.
5. The prosecution further case is that, the father of the complainants had been alerted and he went to the appellant's house. That he found the complainants on his bed and he was not fully dressed. That as he tried to run away, he was arrested, taken to the Police station and charged after investigation.
6. At the close of the prosecution case, the appellant was placed on his defence. In an unsworn statement he testified that, on 10th January, 2021, the caretaker, Wanyonyi, went to ask for rent which was late. He did not have it. He swore to punish him. That as he was going to his house to pick a key he had forgotten, he met the complainants' father on a boda boda in the company of two other people. That he accused him of the defilement. However, he did not argue with the accusation, since the complainants had been locked in his house. That he tried to explain that he was from work but they tied him up with a rope, and took him to the police station.
7. The appellant argued that the police officer Margaret was the arresting officer and that, there was no investigating officer in this matter. Further, there was inconsistency in the evidence of the complainant as to whether he had a "chuma" or "stick". Furthermore, had he taken the children from the place they had gone to fetch water, he would have been seen by any members of the public. He termed this case as a frame up by the caretaker.
8. At the close of the case, the trial court vide a judgment dated 20th April 2023, found the appellant guilty of the charges of defilement in both counts, convicted him and sentenced to 50 years imprisonment in each count. The sentence was ordered to run concurrently.
9. However the appellant has appealed on the grounds that: -
 - a. That the learned trial Magistrate heavily misdirected herself in law in shifting the burden of proof to the appellant and further ignoring the defence of the appellant without proper evaluation.
 - b. That the learned trial Magistrate grossly erred in law and in fact in relying on the suspicious and fictitious evidence of witnesses.
 - c. That the learned trial Magistrate failed to test the evidence of the prosecution witnesses and caution the circumstances thereby convicting on flimsy, inconsistent and evidence that was not watertight enough.
 - d. That the learned trial Magistrate grossly erred in law and facts in convicting the appellant against the weight of the evidence.
 - e. That the learned trial Magistrate erred in law and fact without observing that there were no substantive investigations by the investigating officers thereby basing the conviction on mere allegations and fabrication.
10. The appeal was opposed vide ground of opposition dated 29th November, 2023 which states: -
 - a. That the age of the complainants was sufficiently proved to be 9 years and 8 years respectively as provided for under section 8(1) of the [Sexual Offences Act](#). Further, a copy of the birth certificate produced as an exhibit.



- b. That penetration was proved through the evidence of PW1 and PW6 who examined the complainant and produced P3 form and PRC form
 - c. That the trial court considered the appellants defence and subsequently dismissed it
 - d. That in the judgment the trial court noted that the PW1 and PW'2 evidence was cogent and the court noted that they were truthful witnesses whose evidence was incontestable despite the defence adduced by the appellant.
 - e. That the trial court found that the prosecution case was proved beyond reasonable doubt and subsequently convicted him in line with section 215 of the [Criminal Procedure Code](#).
 - f. That the sentence imposed by the trial court was proper and in line with the Sexual Offences Act. Further, that the court considered mitigation and circumstances of the offence and used discretion in sentencing the appellant to fifty (50) years imprisonment.
 - g. That I pray that the honourable court be pleased to dismiss the appeal and uphold both the conviction and the sentence.
11. The appeal was disposed of vide filing of submissions. The appellant submitted that, the trial Magistrate erred in shifting the burden of proof by requiring him to produce evidence corroborating his defence of alibi. He relied on the case of [Mwaura & another v Republic](#) (1980) eKLR where the court stated that, even if an appellant chooses to remain silent the burden of proving the case beyond reasonable doubt lay with the prosecution.
 12. Further, the elements of the offence of defilement as laid out in the case of Charles Wamukuya v Republic Criminal Appeal No 72 of 2013 being penetration, positive identification of the perpetrator and the victim's age, were never proved to the required standard.
 13. The appellant cited the case of [Francis Omuroni v Uganda](#) Criminal Appeal No. 2 of 2000 where the Ugandan Court of Appeal held that, the court can rely on either medical evidence, the birth certificate, the victim's parents or guardian, observation or common sense to establish the victim's age. That in the present case the age of PW2, G.M.A was not proved as her birth certificate was never produced, and PW3, the complainants' father, did not know her age. Further, the appellant, was not provided with the age assessment report prior to the hearing date violating his right to a fair trial in violation of article 50 (2) (b), (c) and (j) and 50(4) of the [Constitution](#) of Kenya, 2010.
 14. The appellant argued that, penetration was not proved as the complainant's were taken to hospital two (2) days after the alleged offence. Further, the medical evidence produced in relation to PW1 belong to different people; the PRC form produced belonged to one Elizabeth Moraa Mukua while the P3 form belonged to Elizabeth Kerubo Onchari. On identification, he argued that both the complainants testified that they did not know the appellant, and that PW2 categorically stated that he was a stranger and did not know his name.
 15. Finally, the appellant submitted that, the prosecution failed to call the caretaker who called and informed PW3 of the alleged offence despite stating in his defence that the said caretaker had a grudge against him. That the failure to call the caretaker violated his right to a fair trial as provided for under article 50 (1) & (2) of the [Constitution](#). He relied on the case of [Bukonya v Uganda](#) (1972) EA 549 where the court stated where the prosecution fails to produce a necessary witnesses the court shall draw a negative inference against it.
 16. However, the respondent in submissions dated 31st August, 2023 argued that, it proved the elements of the offence being proof of age, identification and penetration, beyond reasonable doubt.



17. That the age of the 1st complainant E.K was proved by her evidence she was nine (9) years old at the time of the offence that was corroborated by the evidence of PW3, her father, that she was born on 12th May, 2012 and her birth certificate produced as prosecution exhibit 1.
18. Further, the age of the 2nd complainant, A.O was stated to be ten (10) years old that was corroborated by PW4, the complainant's mother, who testified that she was born on 11th January, 2013 making her eight (8) years old at the time of the offence. Furthermore, PW7 produce an age assessment report indicating she was eight (8) years old at the time of the offence.
19. On the element of penetration, the respondent submitted that, the complainants' testified that they had been sent by their mother to fetch water when the appellant took them into his house and defiled them. That PW3 Onjira was informed by a security guard that the appellant was seen with the complainants' and had locked them in his house. That, when PW3 broke into the appellant's house he found him naked with the complainants. That, he tried to escape but was arrested and taken to the police station. In the circumstances, the appellant was positively identified by the complainants and was caught red-handed and therefore the issue of identification sufficiently proved.
20. The respondent relied on section 2 of the Act that defines penetration and cited the case of *Mark Oiruri Mose v Republic* (2013) eKLR where the Court of Appeal held that penetration is sufficiently proved whether only on the surface and does not require to be deep inside the girl's organ. That, PW6 produced the P3 and PRC forms of the complainants that showed that PW1 had lacerations on the surface of her private parts, while PW2 had lacerations on the outside of her private parts (labia) and lost her hymen. The finding in the medical documents adduced was that there was evidence of defilement. In that regard the element of penetration was sufficiently proved.
21. Lastly, the respondent submitted that the trial Magistrate considered the mitigation of the appellant and sentenced him to fifty (50) years imprisonment on each count. That, the sentence was in accordance with the law and urged the court to uphold it.
22. I note that, in considering the appeal, the role of the 1st appellate court in as held by the Court of Appeal in the case of; *Okeno v. Republic* (1972) EA 32, is to re-evaluate the evidence afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses.
23. In that matter, the court stated as follows: -

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya V R 1975*) E.A. 336 and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M. Ruwala V. R [1957]* E.A. 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that, the trial court has had the advantage of hearing and seeing the witnesses”
24. Pursuant thereto I note that the offence of defilement which the appellant was convicted of is stipulated under section 8(1) of the Act it states: -

A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.



25. The ingredients of the offence are settled by case law. In the case of, *Samson Mumbaa Murigi v Republic* [2020] eKLR the Court of Appeal stated that: -

“The three ingredients necessary to prove the offence of defilement include the age of the victim, penetration and identification of the accused as the perpetrator.”

26. On the element of age, the charge sheet states PW1 was 9 years old whereas PW2 was 8 years old. The prosecution produced a birth certificate No.4292418 for EK (PW1) showing she was born on 12th May, 2012. The offence is said to have been committed on 23rd January, 2021. Thus she was nine (9) years old and four (4) months. The birth certificate is adequate proof of her age.

27. On the other part, the prosecution produced a medical certificate of age dated 4th August 2021, which shows that GM was approximately eight (8) years old. The evidence is acceptable in that, it was given by a medical profession attached to Naivasha County Referral Hospital. It is treated as expert evidence. In the absence of any other evidence to the contrary, I find that the age of both the complainants was proved.

28. As regards penetration, I find the definition thereof under section 2 of the Act as follows: -

“the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

29. The complainants testified that, the appellant defiled them in turns. Their father PW3 David Mukuo Onjari testified that, he found the appellant without clothes and the children on the bed their panties had been removed. He took them to Naivasha Referral County Hospital where P3 forms and Post Rape Care Forms were filled. In addition PW6 Benjamin Kuria attached to Naivasha District Hospital as the clinical officer in charge, testified and produced P3 and PRC forms as evidence of the clinical findings upon examination of the complainants. He testified that, E.K.O aged nine (9) years old was found to have been a victim of sexual assault, that, her private parts showed lacerations on the surface. That she had lost her virginity.

30. PW6 Kuria also produced a PRC form dated 23rd January 2021 prepared by one Eliud Kabura which showed she had laceration on her private parts. That she had lost her hymen. He noted that, the second and third names of the complainant in the P3 form and PRC form were different but could not explain the reason why.

31. That G.M aged eight (8) years was also examined and found to have laceration on outside part of her private (labia). He also produced PRC form in respect of the victim G.M.M, filed by Eliud Kabura which had similar findings as that in the P3 form. That it showed that she had laceration and injuries on the labia area of her private parts.

32. Pursuant to the afore, the trial court found the element of defilement had been proved. I have considered the submissions by the appellant that the names of the victims in P3 and PRC forms differed from those in the charge sheet. I note that PW1 is described in the charge sheet as E.K.O. She testified as E.K. The P3 form is in the name of E.K.O. The PRC is in the name of E.M.M. There was no explanation for the discrepancy in the name. The simple reason is that whoever, filled the PRC did not testify.

33. Be that as it were, even if the court were to disregard the evidence in PRC form, the evidence in the P3 form is corroborative of the PW1's evidence in proof of penetration. The laceration noted on the private parts of PW1 are clear evidence thereof.



34. As regards PW2, the charge sheet describes her as G.M.A. She testified as A.O. On her recall, she testified as A.G.M. Her father PW2 referred to her as G.M. The P3 form describes her as G.M, aged 8 years. The PRC refers to G.M.M. The analysis of the names reveals that, the name in the P3 and PRC share one name G.M. Therefore the discrepancy of a different name “M” in PRC cannot be adequate to conclude, these are not sets of names of one and the same person. I find that the G.M, clearly describes PW2 and the medical evidence in P3 and PRC forms relates to her, proving penetration element.

35. On the identification of the perpetrator, PW1 and PW2 identified the appellant as the perpetrator. They described the appellant as Machupa, the name they heard being called by his mother. The complainants testified that the incident took place in the daytime. In fact, it does appear that was not the first time the appellant lured them to his house and defiled the complainants. At page 10 of the proceedings PW2 is indicated to have stated in cross-examination:

“ You defiled us many days. All the time we used to come to fetch the water.”

36. Furthermore PW3 O, the complainant’s father, testified the complainants were found inside the appellant’s house on the bed and without all clothes. The complainants had testified that, their father found them in the appellant’s house. That evidence is thus corroborative.

37. It also suffices to note that the appellant confirmed that, he was staying at Hopewell. It is the same place PW3 O and the complainants were staying. Furthermore, the appellant did not rebut these evidence in his unsworn statement. To the contrary he testified to the events of his arrest without stating where he was and what he was doing on the date he is alleged to have committed the offence.

38. Further still, he evolved a different version of evidence at the defence level of a grudge by one Wanyonyi. He did not allude to the same during the prosecution case. Therefore it is an afterthought. Further, the allegation of a grudge is not levelled against the complainants nor their parents. As such they have no reason to have fixed him with defilement, which has been established. I therefore dismiss the appeal on conviction as I find sufficient evidence.

39. As regard sentence section 8(2) of the *Act* states: -

“ A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

40. Therefore the sentence of 50 years is unlawful and illegal. I set it aside and substitute with a sentence of life imprisonment on each count. As that sentence cannot be served consecutively it shall run concurrently.

41. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 16TH DAY OF MAY, 2024.

GRACE L. NZIOKA

JUDGE

In the presence of:

The appellant present virtually

Mr. Abwajo for the respondent

Ms. Ogutu: Court Assistant

