



REPUBLIC OF KENYA



**Muchuma v Republic (Criminal Appeal 21 of 2023)  
[2024] KEHC 5390 (KLR) (16 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5390 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CRIMINAL APPEAL 21 OF 2023  
FN MUCHEMI, J  
MAY 16, 2024**

**BETWEEN**

**PAUL WAFULA MUCHUMA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal against the conviction and sentence in the Senior  
Principal Magistrate Court in Ruiru by Honourable J. A. Agonda (PM),  
in Criminal Sexual Offence Case No. E006 of 2022 on 5th January 2023)*

**JUDGMENT**

**Brief Facts**

1. The appellant lodged this appeal against the judgment of the Principal Magistrate Ruiru. He was convicted of the offence of defilement contrary to Section 8(1) as read with 8(3) of the [Sexual Offences Act](#) No. 3 of 2006 and sentenced to serve twenty (20) years imprisonment.
2. Being aggrieved by the decision of the trial court, the appellant lodged the instant appeal citing 4 grounds of appeal which are hereby condensed as follows:-
  - a. The learned trial magistrate erred in law and in passing the judgment convicting the appellant whereas the prosecution had not proved its case by discharging the required burden of proof;
  - b. The learned trial magistrate erred in law and in fact in failing to find that the essential witnesses were not called to prove the basic facts.
3. Parties disposed of the appeal by way of written submissions.



## The Appellant's Submissions

4. The appellant relies on the case of *Charles Wamukoya Karani v Republic* Criminal Appeal No. 72 of 2013 and submits that the prosecution did not prove the elements of defilement. Relying on the cases of *Mutie Musauli v Republic* (2019) eKLR; *Daniel Kiplimo Cherono v Republic* [2014] eKLR and *Bassita Hussein v Uganda* Supreme Court Criminal Appeal No. 35 of 1995, the appellant submits that the medical evidence produced by the clinical officer who examined the complainant on 29<sup>th</sup> January 2022 did not prove the element of penetration. The appellant argues that save for the complainant's evidence claiming that he defiled her, there was no evidence of penetration as provided in the Act. Furthermore the appellant submits that the medical evidence shows that the complainant did not suffer any genital injuries and that the medical officer did not make a conclusion that the victim was defiled. The appellant further raises doubts on the occurrence of the incident as he states that PW4, the investigating officer testified that the victim was defiled between 8<sup>th</sup> January and 27<sup>th</sup> January 2022 which is barely one day before the complainant was taken to hospital.
5. On the element of age, the appellant relies on the case of *KM v Republic* [2023] KECA 289 KLR and submits that although the complainant testified that she was 11 years old at the time she was defiled. The birth certificate of the minor was not produced and the investigating officer testified that she was not sure about the age of the complainant. The appellant further submits that the learned magistrate erred by stating in his judgment that the mother of the complainant testified while that was not the case as there were no records in the trial proceedings of any such witness. The appellant submits that PW4 testified that he took the complainant to Thika level 5 Hospital for age assessment however no assessment report was produced in court and nor was the person who conducted the age assessment produced to testify.
6. The appellant relies on the cases of *Kenneth Nyaga Mwige v Austin Kiguta & 2 Others* [2015] eKLR; *Des Raj Sharma v Reginam* (1953) 19 EACA 310 and *Michael Hausa v The State* (1994) 7-8 SCNJ 144 and submits that the learned magistrate erred by relying on an exhibit that was never produced in evidence and whose authenticity and contents were never formally proved. Furthermore, the trial magistrate relied on a report dated 8<sup>th</sup> January 2022 which was prepared before the alleged offence was committed.
7. The appellant further relies on the cases of *David Ojeabuo v Federal Republic of Nigeria* [2014] LPELR 22555CA; *Twehangane Alfred v Uganda* Criminal Appeal No 139 of 2001 [2003] UGCA 6; *Joseph Maina Mwangi v Republic* CA No. 73 of 1992 Nairobi; *John Cancio De SA v N. Amin* Civil Appeal No. 27 of 1993 [1934] 1 EACA 13; *Njuki v Republic* (2002) 1 KLR 77 and *Dickson Elia Nsamba Shapwata & Another v Republic* Criminal Appeal No. 92 of 2007 and submits that the identity of the complainant is in contradiction as the charge sheet indicates that the minor is J.M, PW1 testified that her name is Joan Murimi whereas PW2 testified that she recorded the victim as Sarah Nafula in the school register. Further the appellant states that he produced a birth certificate of the minor bearing the correct names of the complainant as Sarah Nafula Muchuma.
8. The appellant further submits that the testimony of PW1, the minor and the PW3, the clinical officer do not corroborate each other as to the date the appellant defiled the minor. The appellant argues that PW1 told PW3 that he defiled her one day before she was taken to hospital yet the evidence does not show any proof of any injuries as captured in the P3 Form and PRC Form. The appellant submits that the complainant is not being truthful and credible and thus the trial court ought not to have relied on the minor's evidence.



9. The appellant submits that the prosecution failed to call all the material witnesses for instance the medical officer who conducted the age assessment. The appellant argues that the said witness could have authenticated the evidence of the age assessment process as credible.
10. The appellant states that although the trial magistrate in his judgment stated that the prosecution called five witnesses amongst them being the mother of the complainant, the contentions are false as they were only four prosecution witnesses and the mother of the complainant did not testify. The appellant submits that the mother of PW1's evidence could have shed more light on the age of PW1 and the circumstances under which the complainant was moved from Kakamega to Kitale and Ruiru. The appellant argues that the complainant is a person of sufficient intelligence and it is suspicious how she was lured by a total stranger over the fence without notifying her parents. Furthermore, there was no report of mission children in any police station. Thus, the appellant submits that the story does not add up and appears to be choreographed.

### **The Respondent's Submissions**

11. The respondent relies on the case of *Charles Wamukoya Karani v Republic Criminal Appeal No. 72 of 2013* and submits that the prosecution proved its case beyond reasonable doubt by proving all the elements of the offence of defilement. On the element of age, the respondent relies on the case of *Mwalango Chichoro Mwanjembe v Republic* (2016) eKLR and submits that age assessment was conducted on the complainant and the report indicated that she was 13 years old and therefore in the bracket defined by Section 8(3) of the *Sexual Offences Act*. The respondent further states that PW4, the investigating officer produced the age assessment report proving the age of the victim.
12. The respondent further relies on Section 2 of the *Sexual Offences Act* and the case of *Mark Oiruri Mose v Republic* (2013) eKLR and submits that PW1 testified that the appellant defiled her on the material dates and the evidence was corroborated by the doctor's report which both proved the element of penetration.
13. On the identity of the perpetrator, the respondent submits that the appellant was well known to the complainant and further it was the appellant who took the complainant from the rural home in Kakamega and took her to Ruiru where he lived and enrolled her to school. The respondent thus argues that from the evidence that was adduced during the trial, it is clear that the appellant is the person who defiled the victim and there was no possibility of mistaken identity.
14. The respondent submits that the complainant was not coached to implicate the appellant. The respondent further submits that the complainant was truthful and reliable witness and furthermore the appellant did not establish that the complainant framed him of the offence and his defence did not impeach the otherwise overwhelming prosecution case.
15. The respondent submits that the trial court correctly found that the testimonies of the prosecution witnesses namely PW1, PW2, PW3 and PW4 to be believable that the appellant committed the offence. Moreover, the respondent submits that the prosecution can call the number of witnesses it wishes to rely on and in the present case, the witnesses called to testify were enough to prove the prosecution case beyond reasonable doubt.
16. The respondent submits that the appellant's defence was analysed and considered by the trial court but the prosecution case was overwhelming against him. Further, the respondent submits that all the prosecution witnesses were consistent and corroborated each other.



## Issues for determination

17. The appellant has cited 4 grounds of appeal which can be compressed into two main issues:-
  - a. Whether the prosecution proved its case beyond any reasonable doubt;
  - b. Whether the prosecution called all the material witnesses needed to establish the truth;

## The Law

18. This being a first appeal, this court is guided by the principles set out in the case of *David Njuguna Wairimu v Republic* [2010] eKLR where the Court of Appeal stated:-

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.

19. Similarly in the case of *Okeno v Republic* [1972] EA 32 where the Court of Appeal set out the duties of the appellate court as follows:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v Republic* [1957] EA 336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala v R* [1957] EA 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 finding and 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, see *Peters v Sunday Post* [1958] EA 424.” This was also set out in the case of *Kiilu & Another v Republic* [2005] KLR 174.

## Whether the prosecution proved its case beyond any reasonable doubt

20. In order to establish whether the prosecution proved its case beyond a reasonable doubt I shall address the following issues
  - a. Whether there was conclusive evidence of all the ingredients of defilement;
  - b. Whether the prosecution’s case was filled with material inconsistencies and contradictions.

## Whether there was conclusive evidence of all the ingredients of defilement.

21. Relying on the case of *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013 where it was stated that:- “The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”



22. On the age of the victim, the court of Appeal in *Edwin Nyambogo Onsongo v Republic* [2016] eKLR, the court stated as follows in respect of proving the age of the victim in cases of defilement:

“...the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim’s age, it has to be credible and reliable.

23. PW1 testified that she was 11 years old at the time of giving the testimony. PW3, the clinical officer who examined the complainant testified that she was 13 years old. PW4, the investigating officer took the complainant for age assessment at Thika level 5 hospital and as per the age assessment report produced, the complainant was between 13 – 15 years old. I have perused the age assessment report dated 8/1/2022 and noted that the report indicates that the minor was between the age of 13-15 years. The appellant contests the authenticity of the document arguing that the document is invalid as age assessment on the complainant could not have been undertaken before the commission of the offence. On perusal of the evidence, PW4 testified that on 29<sup>th</sup> January 2022 she took the complainant for an age assessment which proves that the complainant did undergo age assessment despite the wrong date been written on the report. Furthermore, PW4’s evidence has been corroborated by PW3 who confirmed that the minor was 13 years old. Thus it is my considered view that the prosecution proved the age of the minor.

24. Section 2(1) of the *Sexual Offences Act* defines penetration as:

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

25. On the element of penetration, PW1 testified that she knew the appellant as Baba Rebecca and he promised to bring her and her sister to Nairobi promising to buy them stationery and pay their school fees. PW1 further testified that he removed her and her sister from their home in Kakamega, told them that he was their father and dropped her sister at Webuye taking her to his home. PW1 further testified that the following day, the appellant did not go to work, he told her to call him dada and told her to remove her clothes. The complainant testified that on 5<sup>th</sup> January 2022, the appellant asked her if she was feeling hot and he removed her clothes and laid on top of her, removed his penis and inserted it in her vagina and told her not to tell anyone. On 6<sup>th</sup> January 2022, the appellant defiled the complainant when he came from work when he found her sleeping, he bathed, ate and told the complainant to wake up. The complainant testified that the appellant placed her on the bed and he laid on top of her, he inserted his penis in her vagina and threatened to kill her if she told anyone.

26. Stelina Nyambu, a clinical officer, PW3 testified that she examined the minor on 29<sup>th</sup> January 202 and filled the P3 Form. She testified that the complainant did not have any injuries and that there was no injury to her vagina or any abnormal discharge. The witness testified that the complainant had changed her clothes and bathed after been defiled. PW3 produced the Post Rape Care Form and P3 Form as exhibits.

27. In a case of defilement of the complainant’s testimony requires to be corroborated by the medical evidence. The medical evidence did not indicate any visible injuries in the complainant’s genitalia but that does not mean that she was not defiled. The testimony of the complainant was to the effect that she was defiled on 5<sup>th</sup> and 6<sup>th</sup> January 2022 and she bathed and changed her clothes. Furthermore, the



complainant was taken to MSF Clinic for examination on 29<sup>th</sup> January 2022 which is about 3 three weeks after she was defiled. Hence there were no injuries seen on her external vagina. Thus, it is my considered view that from the analysis of the evidence, there is ample evidence to prove that penetration did occur.

28. On the issue of identification, PW1 testified that the appellant took her from their rural home in Kakamega and brought her to Ruiru and they lived in his rented house in Ruiru. The complainant further testified that she knew the appellant as Baba Rebecca and that he told her his name is Paul Wafula Muchuma. She further testified that the appellant took her to school and used to pick and drop her at the school. PW2, the class teacher of the complainant's class testified that the appellant would drop and pick the minor from school. The court record shows that the testimony of PW1 and PW2 positively identifies the appellant as the perpetrator. The appellant was well known to the complainant and the identification was by way of recognition. In my view that the appellant was positively identified as the perpetrator. As such, I find that the prosecution proved the element of identification.
29. The appellant further argues that the prosecution's case was filled with material inconsistencies and contradictions thus causing doubt on the alleged offence as there are inconsistencies on the identity of the complainant and when the incidents occurred. Relying on the case in the Court of Appeal Tanzania of *Dickson Elia Nsamba Shapwata & Another v The Republic* Cr App. No. 92 of 2007, addressed the issue of discrepancies in evidence and concluded as follows:-

“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”

30. PW1, testified that her name is Joan Murimi. PW2 testified that the complainant, was brought to her class and she entered the child name in the register as Sarah Nafula. The witness further testified that PW1 told her that the appellant had changed her name as she was Joan Musimu and not Sarah Nafula as changed by the appellant. On cross examination the witness testified that she confirmed from PW1's mother that the minor's real name was Joan Musimu. It is evident that the minor testified that her real name was Joan Murimi. Moreover, the minor's name does not go to the root of proving the case. The clarification by PW1 and PW2 on the name and identity of the complainant is sufficient in this regard.
31. The appellant further argues that the complainant is not truthful and her evidence is not credible as she told PW3 that the appellant had defiled her on Thursday of that week. The appellant asserts that the complainant was defiled a day before she was taken to hospital and yet no visible injuries could be observed after the complainant was examined. The record shows that PW1 testified that the appellant defiled her on 5<sup>th</sup> and 6<sup>th</sup> of January 2022. PW2 testified that the complainant told her that the appellant began defiling her three days after he brought her to his house. PW3 testified that the complainant told her that she could not recall the last date the appellant defiled her. The offence was reported on 29<sup>th</sup> January 2022 and the appellant was arrested on the same date. It is my considered view that the discrepancy of the dates does not affect the proof of the case for it is very evident that the minor was defiled on more than one occasion. Furthermore, the prosecution evidence supports the fact that the last incidence had occurred some weeks back for there were no visible injuries on the complainant's genitalia. The P3 Form also indicates that there were no visible injuries in the complainant's genitalia thus buttressing the evidence of the minor that she was defiled on 5<sup>th</sup> and 6<sup>th</sup> January 2022. Notwithstanding the discrepancy in the last date, the minor was very consistent in her evidence as how the appellant defiled her and describing the occurrence in vivid details. Her testimony was cogent, consistent and was not shaken during cross examination.



### Whether the prosecution failed to call the material witnesses needed to establish the truth.

32. The appellant faults the evidence adduced by the prosecution witnesses stating that the prosecution failed to call essential witnesses namely the mother of the complainant and the person who conducted the age assessment of the minor.
33. The principles to consider in determining the issue of crucial witnesses was dealt with in the leading case of *Bukenya & Others v Uganda* 1972 EA 549 where the court held:-

The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution...

The prosecution's burden in regard to witnesses is to call witnesses who are sufficient to establish a fact. However it is not necessary to call all the people who know something about the case. The issue is whether those called are sufficient to aid the court establish the truth, whether the evidence is favourable to the prosecution or not.
34. Similarly in *Julius Kalewa Mutunga v Republic* [2006] eKLR, the Court of Appeal held that:-

.....As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.
35. In the instant case, the appellant contends that the mother of the complainant ought to have been called as a witness as she could have shed light on the age of the complainant and how the complainant moved from Kakamega to Kitale then Ruiru. As discussed beforehand, the age of the complainant was proved through the age assessment report and the evidence of PW3. Thus, it was not necessary for the mother of the complainant to testify.
36. PW1 further testified that the appellant whom she knew as Baba Rebecca lured her and her sister with money from their rural home in Kakamega and brought her to his house in Ruiru. PW2, a class teacher of the complainant testified that the appellant used to drop and pick the complainant from school which evidence was not controverted. The appellant said the trial magistrate erred in his judgment by stating that the mother if the complainant testified while there was no such a witness. In this regard, the appellant was right in that it is the class teacher of the complainant PW2 who testified but not the mother. However, there was no finding in the judgment that was based on this discrepancy and as such, no prejudice was caused to the appellant.
37. Accordingly, it is my considered view that the prosecution proved the offence beyond any reasonable doubt. The conviction was based on cogent evidence and I hereby uphold it.
38. Although the appellant did not challenge the legality of the sentence imposed or claim that the same was excessive, it is important that this court examines its fidelity. Section 8(3) of the *Act* provides for a maximum sentence of not less than twenty (20) years imprisonment. The appellant was sentenced to twenty (20) years imprisonment. In mitigation, the appellant said he is a father of six (6) children and his mother is ..... the accused was a first offender and this fact ought to have been considered. The court of appeal in the case of *Manyeso v Republic* held that the Supreme Court decision that declared mandatory sentence unconstitutionally should be applicable to her offences including sexual offences. Jurisprudence has also developed over the years on minimum sentences. The trial court ought to have applied the principle in the *Manyeso* case for the benefit of the accused who was a first offender.



39. The record shows that the appellant was in custody since his arrest for he was not able to raise a surety. He was arrested on 29/01/2022 and was sentenced on 05/01/2023. As such, he spent one year in custody which period was not taken into consideration during sentencing contrary to the provision of Section 333(1) of the *Criminal Procedure Code*.
40. I hereby review the sentence by setting aside the sentence of twenty years imposed on the appellant. The accused is hereby sentenced to serve twelve (12) years imprisonment to commence from the date of arrest 29<sup>th</sup> January 2022.
41. It is hereby so ordered.

**JUDGMENT DELIVERED, DATED AND SIGNED THIS 16<sup>TH</sup> DAY OF MAY 2024 AT THIKA.**

**F. MUCHEMI**

**JUDGE**

