



REPUBLIC OF KENYA



**Monthe v Republic (Criminal Appeal E008 of 2023)
[2024] KEHC 17201 (KLR) (21 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 17201 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E008 OF 2023
TM MATHEKA, J
JUNE 21, 2024**

BETWEEN

JOHN MWANZIA MONTHE APPELLANT

AND

THE REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of Hon. Otieno – RM
Makueni CMCR (S.O) E014 of 2020 delivered on 30/09/2020)*

JUDGMENT

1. On 30/03/2020 John Mwanzia Monthe was charged with defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006. It was alleged that on 22/3/2020 at around 1800 hours at Kalawa location, Mbooni East Sub County within Makueni County he unlawfully and intentionally did cause his penis to penetrate the vagina of W.K a girl aged 13 years. In the alternative and on the same particulars he was charged with committing an indecent act with a child contrary to section 11(1) of the same act – that he touched the vagina of WK.
2. He pleaded not guilty and after a full trial in a judgment delivered on 30/3/2020 he was found guilty of defilement. On 6/10/2020 he was sentenced to 10 years' imprisonment.
3. Aggrieved, he filed this appeal – on the grounds that the charges were fabricated against him.
4. He filed written submissions – which I have considered.
5. I did not see the submissions of the Prosecution.
6. It is settled that on appeal an appellant is entitled to a re-hearing of the evidence and as the 1st appellate court, I am alive to my shortcomings, as I have to rely on the record of the subordinate court – not having heard or seen any of the witnesses testify.



7. Upon considering the evidence and the submissions – the only issue for determination is whether or not the charges were fabricated against the appellant – whether or not the State proved the charges against the appellant beyond a reasonable doubt.
8. To deal with the issue we must answer the question; Did the State establish the ingredients of defilement – age, penetration, identification – the totality of the circumstances of the offence?
9. The appellant argues –
10. That the complainant testified that this was the 5th time the appellant had defiled her and queries why were the other four times not reported?
11. Pw2 told the court she saw appellant touch complainant’s breasts but she never raised any alarm – why
12. That the clinical officer confirmed that the hymen of the complainant was not freshly broken – hence he the appellant could not have been the perpetrator.
13. That the complainant told the court that she was examined and stitched – but there was no such evidence in the PRC.
14. That the age assessment by the doctor revealed that the complainant was between 15-16 years – hence the guesswork on age could mean that she was actually an adult and not a child.
15. That the sentence was unfair.
16. When the complainant testified she told the court-

“I am WK. I school... school. I cannot tell my age. I am in class 6. On 22/3/2020 at 6pm I had gone to fetch water when I felt someone behind me. He was Mwanzia. He chased me and placed me on the ground. He removed my skirt and inner pant. He slept on top of me. He gave me three sweets and Kshs.30. he strangled me, I couldn’t talk. He removed his trouser and inner wear. Before sleeping on top of me. He touched my breasts with his hands. He slept on top of me. This was the 5th time the said Mwanzia was defiling me. He would then give me sweets and money. He also touched my stomach with his hands.”

The prosecutor sought to stand her down for being “incoherent”.

17. She was stood down and recalled later when she testified: -

“When he touched my breast he then inserted his kia, penis in my peeing thing. When I went home, I saw blood emerging from my vagina. I told my father. my aunt had witnessed the incident though I never saw her. She is N. She told me to fetch water and we went home. Mwanzia woke up after seeing N. I was taken to Makueni referral hospital.

On Cross examination she stated:

“N saw us, she was carrying a baby. She was standing hidden among trees. You left to herd cows, while N ordered me to fetch water. I never screamed nor called out. We had not agreed.

You grabbed me. You gave Kshs.40 and sweets. I was examined

“and was even nikashonwa a stitch. I said it was Mwanzia. My testimony is true.



On Re-examination she stated:

“He gave me Kshs.40. he had in previous occasions given me Ksh. 30. The bleeding was periods. You forced me.

18. Pw2 was MNM. She told the court that on 22/3/2020 at 6pm, she was at home when the complainant arrived from breaking stones. She came took a jerrican and headed to the river. She followed her behind and saw her pass the water pan. Mwanzia herding cattle and when she reached where he was she head Mwanzia said oh Wavinya umekuja? She stood about 10 m away. She was carrying her young child. The place was full of trees and was bushy and saw him hold her and touching her breast, and give her some coins and sweets. He removed her inner pantie after removing her ‘skin tight’. He placed her on the ground. He removed his trouser and inner pant, and she saw him remove his penis and insert it in her vagina. She heard the owner of cattle loudly shouting why Mwanzia would leave the cattle to graze on the farm. It was then that Mwanzia stood up picked his radio and entered the farm. On her part she shouted at the child and told her to fetch water for her grandmother. she followed her because every time she would come from herding. She would come with money. Upon enquiry, she would insult her.
19. She identified Mwanzia as on the man in the dock whom she used to see on several occasions herding in the neighborhood.
20. She reported the incident to the complainant’s grandmother who alerted her father. She recorded her statement at Kalawa police station. On cross examination she asserted that she saw the appellant defiling the girl after following her, but that she couldn’t do much because she was carrying a toddler. She said she wanted to establish the truth. She went and told her grandmother. The did not arrest the appellant but opted to go to the police station. She said the appellant gave the complainant 3 sweets and Ksh 30/= . The child was chewing on them on her way home. That they took the clothes she had worn to the station but she did not know the results.
21. Pw3 was clinical officer Stella Ndambi Muasya who testified that the complainant stated that there had been defilement four times before. On examination she observed normal cervix, vagina, and discharge, the hymen was not intact – she said the PRC was filed by her colleague one Nicholas Yamuli and proceeded to produce it together with the PR. She said the victim had bathed after the incident, that she had bruises from an assault by her grandmother. She produced the treatment card, and an age assessment report by Dr. Kitisya Dalmas to the effect that the child was aged between 15-16 years old.
22. Pw4 testified that he was No. 56674 Cpl Stephen Kibet attached at Kalawa police station. On 23/3/2020 he was that the station when members of public accompanied by the accused and the complainant reported a case of defilement of WK by John Mwanzia who had followed her while fetching water at the river dragged and defiled her and gave her 3 sweets and Kshs.30/= That the aunty who had been hearing rumors of the accused’s affair with WK had followed and observed the incident. A female colleague escorted the complainant to hospital. He re-arrested the suspect who was the accused in court. He had never met him before. He escorted the minor to Makeni referral hospital for age assessment.
23. On cross examination he confirmed that the appellant was brought by members of the public to the police station.
24. The appellant was put on his defence –
He denied the offence. He told the court that the complainant’s father had assaulted her mother. That the complainant would sleep in her grandmother’s house and that her father would come home drunk



and demand that the girl goes back home. It was his theory that the girl's father had defiled her and the aunt had fixed him. He was insistent that he was innocent, that the case was fabricated against him.

1. It is from this evidence that the court found that the charge against the accused had been proved beyond a reasonable doubt.
2. I have carefully considered the evidence;
3. On age – the complainant told the court she was 13 years – the charge sheet said that as well.

However, at the behest of the prosecution the age assessment determined that she was between 15-16 years old. True, the prosecution needed to have amended their charge sheet accordingly to the proper section of the law and age. However, this does not make the charge fatally defective – but only raises the age for the purpose of sentencing. This was the position of the Court of Appeal in *Moses Nato Raphael –vs- Republic* [2015] eKLR

25. On the challenge posed by the uncertainty in the complainant's age, this court had occasion to deal with a similar issue in *Tumaini Maasai Mwanja –vs- R, Mombasa CR.A Mo. 364 of 2010*, where we held that proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. As long as there is evidence that the victim is below 18 years, the offence of defilement will be established. The age, which is actually the apparent age, only comes into play when it comes to sentencing ...”
26. The appellant would be entitled to the least punishment provided for in the circumstances, and in this case – the age of the complainant would be settled at 15 or 16 years old. In this case it would appear the learned magistrate settled at 16 years old – and sentenced the appellant to 10 years' imprisonment. That was within her discretion and the sentence appears reasonable.
27. Was there defilement? The evidence points the picture of a sexual relationship between the complainant and the accused – That is the only way one can interpret the evidence on record and the eye witness of PW2 – hence it is my view that there was evidence of sexual intercourse between the appellant and the complainant concedes she had sex with the accused four times before the day they were caught. She did not report it because she did not want to until the aunt caught them. It is evident from PW2's evidence that she had suspected that there was something going on between the complainant and the accused – and on this day she followed them and saw them. The accused wonders why PW2 did not scream for help, but not everyone reacts the same way in any situation. PW2's was to go and report to the grandmother of the complainant. I have no doubt that there was defilement. The accused attempted from afar to suggest the possibility that the complainant was an adult while at the same time denying any sexual intercourse with her. Why would he have any interest in her age if indeed he never had any sexual relations with her? What is clear from the eye witness of the complainant's aunt is that there was a relationship which she confirmed was sexual. On this specific day there was sexual intercourse. The appellant was an adult the complainant, a minor.
28. What about the identity of the appellant as the perpetrator? He appellant was seen by Pw2 – and his identity was not in dispute. Pw1 named him. The identity of the perpetrator was not in issue.
29. From the foregoing it is evident that the appellant and the complainant had sexual intercourse more than once – the complainant was below 18 years old and that is the offence. I would find that the appellant was guilty of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act*. The mandatory minimum sentence provided for is 15 years' imprisonment.



30. The learned trial magistrate did not impose the mandatory minimum sentence of 15 years but imposed the sentence of 10 years' imprisonment. That sentence is fair in the circumstances of this case.
31. Ultimately the appeal fails.
32. The conviction is sustained. The sentence of 10 years' imprisonment is sustained to run from 23/03/2020.
33. Right of Appeal Explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT ON 21/6/2024

MUMBUA T MATHEKA

JUDGE

In attendance: Appellant, Mr. Kazungu Prosecutor, Ms. Elizabeth Court Assistant NB paragraphing distorted by the system

