



**Mwenda v Director of Public Prosecutions (Criminal Appeal
E134 of 2023) [2024] KEHC 7208 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7208 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E134 OF 2023
TW CHERERE, J
JUNE 13, 2024**

BETWEEN

ERIC MWENDA APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

*(Being an appeal against conviction and sentence in Meru Criminal S.
O No. E013 of 2021 by Hon. D.W.Nyambu (CM) on 19th October, 2023)*

JUDGMENT

1. Eric Mwenda (Appellant) was charged with the offence of defilement contrary to Section 8 (1) as read with 8(2) of the [Sexual Offences Act](#) No. 3 of 2006. The offence was allegedly committed between 25th December, 2020 to March, 2021 against NK a girl aged 10 years' old. Appellant also faced an alternative charge of committing an indecent act with the child contrary to Section 11 (1) of the [Sexual Offences Act](#) No. 3 of 2006 by unlawfully touching NK's vagina.
2. An age assessment report PEXH. 4 reveals that complainant was 9 years old. Complainant stated that Appellant used to visit her grandmother's home where she lived and had defiled her on several occasions. FK noticed complainant walking with difficulties on December 25, 2020 and upon being interrogated by her grandmother stated she had been defiled by Mwenda.
3. On 20th April, 2021, LK noticed that complainant had a foul smell. In the presence of complainant's mother inspected complainant's private parts and noticed that it was swollen and complainant said she had been defiled by Erick Mwenda.
4. Upon being examined by a Clinical Officer on April 21, 2021, complainant was found with a torn hymen, whitish discharge and swollen and reddened genitalia as shown on the P3 form dated April 23, 2021 PEXH. 1.



5. Appellant confirmed that complainant was a neighbor. He stated he was framed by FK after quarrelling with her for getting a job for his wife as a result of which she abandoned him with a small child. RK stated she was complainant's minder and denied that she had been defiled. GM stated Appellant had quarreled with FK after she took his wife to work in Mombasa.
6. After considering both the prosecution and the defence, the learned trial magistrate found the prosecution had proved the charge of defilement, convicted and sentenced to serve 20 years' imprisonment.
7. Dissatisfied with both the conviction and the sentence the appellant lodged the instant appeal and by amended the grounds of appeal raised the following issues: -
 - a. That the learned trial magistrate erred in law and fact by failing to find that the key witnesses were not called to establish the truth in this case
 - b. That the learned trial magistrate erred in law and fact by failing to note that there was need for identification parade to be conducted to prove beyond reasonable doubts that the perpetrator is the appellant herein.
 - c. That the learned trial magistrates erred in law and fact by failing to note that the clinical officer report does not support penetration in this case.
 - d. That the learned trial magistrate erred in law and fact by failing to find that the whole case against the appellant was based on suspicion which the same cannot form a basis for a conviction.
 - e. That the learned trial magistrate erred in law and fact by dismissing the appellant defense which was supported by the complainant relatives without cogent reasons of dismissing it.
8. This being a first appeal, this court is guided by the principles set out in the case of David Njuguna Wairimu vs Republic [2010] eKLR where the Court of Appeal stated: -

“The duty of the first appellate court is to analyze 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.
9. In the case of Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013 [2015] eKLR). 40, the court stated that:

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”
10. In the case of JOA v Republic [2019] eKLR, it was held as follows regarding the issue of age;

“whereas proof of age of a complainant in defilement cases is a duty of the prosecution, to establish the age of the victim of defilement, it is equally trite law that proof of age or apparent age can be done by other means other than documentary evidence in the form of birth certificate, birth notification, baptismal card or the child Health or Immunization



Card. In addition, proof of age can be by observation by the court, or testimony by the parent or guardian as long as the court believes that they are saying the truth and makes such observations on the apparent age of a victim.”

11. In this case, the evidence of age was clearly proved by way of an age assessment report dated October 25, 2021, conducted by Dr. Magara at Meru Level 5 Hospital and was produced as PEXH. 4 by the Investigating Officer. The age assessment report confirms that complainant was a child aged 9 years.
12. Concerning penetration, complainant was found with a torn hymen, whitish discharge and swollen and reddened genitalia as shown on the P3 form dated April 23, 2021 PEXH. 1. The finding by the trial magistrate that penetration had been proved was thus well grounded.
13. Concerning Appellant’s culpability, I have considered the case of *Stephen Nguli Mulili v Republic* [2014] eKLR where the Court of Appeal had this to say regarding reliance on Section 124 of the *Evidence Act* to convict:

“as a general rule of evidence embodied in Section 124 of the *Evidence Act*, an accused person shall not be liable to be convicted on the basis of the evidence of the victim unless such evidence is corroborated. The proviso to that section makes an exception in sexual offences and provides as follows:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”
14. The evidence on record reveals that the Appellant was not a stranger to the complainant. That he was a neighbor to PW3. Complainant’s evidence was that Appellant had defiled her on several occasions.
15. Whereas Appellant’s defence was that he was framed by FK, it is worth noting that Appellant did not cross-examine FK concerning the said allegation. The allegation was only raised at the time Accused gave his defence thereby denying the witness the opportunity to confirm or deny the allegation that she framed him.
16. Having considered the defence, I find as did the trial magistrate that the defence was an afterthought that did not cast doubt on the evidence by the complainant that was corroborated by medical evidence and the defence was therefore rightly is rejected.
17. Concerning sentence, Section 8(2) of the *Sexual offences Act* under which Appellant was convicted provides that:
 - (2) 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.
18. Appellant was sentenced to 20 years. The conviction is upheld but the 20-year sentence is substituted with a 10 years’ imprisonment term which will be computed from the date of his conviction on October 19, 2023 for the reason that he was on bond during the trial.

DELIVERED AT MERU THIS 13TH DAY OF JUNE 2024

WAMAE. T. W. CHERERE

JUDGE



Appearances

Court Assistants - Kinoti/Munene

Appellant - Present in person

For the DPP - Ms. Rotich (PC-1)

