



**Muindi v Republic (Criminal Appeal 169 of 2023)
[2024] KEHC 6436 (KLR) (4 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6436 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 169 OF 2023**

DR KAVEDZA, J

JUNE 4, 2024

BETWEEN

FRANCIS KINYAI MUINDI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. M Murage (PM) on 9th October 2023 at Kibera Chief Magistrate's Court, Sexual Offences Case No. 108 of 2019 Republic v Francis Kinyai Muindi)

JUDGMENT

1. The Appellant was charged and after full trial convicted by the subordinate court for the offence of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on diverse dates between November 2019 and 16th December 2019 in [particulars withheld] sub-county within Nairobi County unlawfully and intentionally caused his male genitalia (penis) to penetrate the anus of FS a child aged 10 years. He was sentenced to life imprisonment.
2. Being dissatisfied, he has filed an appeal against the conviction and sentence. In his petition of appeal and amended grounds of appeal, he challenged the totality of the prosecution's evidence against which he was convicted. He contended that the trial court failed to consider his defence. He challenged the sentence as being harsh and excessive. He urged the court to quash his conviction and set aside the sentence.
3. This is the first appellate court and in *Okeno v. R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence that was before the trial court, and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.



4. During his testimony after voir dire examination, the complainant, FS (PW2), recounted that on September 16, 2019, he was residing in Kangemi. He stated that the appellant, who sold 'mutura', asked him to assist in carrying a bucket to his residence. PW2 complied, and upon reaching the appellant's mabati-structured house, the appellant locked the door, leaving PW2's friend playing outside. Subsequently, the appellant gave him *mutura* and 10 Kenyan Shillings. He then undressed him and oiled his penis inserted his penis into his 'buttocks' anus. He then told him not to inform anyone. It was his evidence that the appellant repeated the act many times.
5. After the incident, the complainant told the court that he began to pass stool uncontrollably. He even soiled himself. He informed his aunt who reported the incident to the police. The complainant was also taken to hospital for examination and treatment. The complainant confirmed that he knew the appellant whom he identified who used to give him 'mutura'
6. PW2, the complainant's aunt. She recounted that on 16th September 2019, she found her nephew the complainant herein in the house. He looked weak and complained that he was not feeling well. He was also passing stool uncontrollably. She took him to the hospital and was informed that the child had been sodomized. She reported the matter Kabete Police Station. She also told the court that the complainant was born on 1st November 2009.
7. PW3 Adegu William a clinical officer at Westlands Centre to testify on behalf of Phoebe Wandera who had examined the complainant but was away on maternity leave. The complainant was examined at the facility on 18th December 2019. He was complaining of pain in passing stool. Upon examination, the complainant's anus was normal, with no discharge, with no tears, and no tenderness. There was the presence of puss cells and a few epithelial cells.
8. PW4, the investigating officer summarised the prosecution's case. He told the court that he issued the complainant with a P3 form and escorted him to the hospital for examination and treatment.
9. After the close of the prosecution's case, the appellant was found to have a case to answer and was put on his defence. He gave sworn testimony and did not call any witnesses. In his defence, the appellant admitted that at the material time, he was in the area selling *mutura* which was his normal business. He denied knowing the complainant, his aunt PW2 and committing the offence. He narrated how he was arrested and maintained his innocence.
10. In his submissions the appellant challenged the totality of the prosecution's evidence against which he was convicted. He maintained that the witness account contradicted the medical evidence presented PW3. I have re-evaluated the evidence on record, considered the written submissions and the applicable law.
11. To succeed in a prosecution for defilement, it must be proven that the accused committed an act that caused penetration with a child. "Penetration" under section 2 of the *Act* means,

“the partial or complete insertion of the genital organs of a person into the genital organs of another person.”
12. Further, section 8(1) and (2) of the *Sexual Offences Act*, No. 3 of 2006 provides thus: -
 8. Defilement
 - (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.



(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.

13. Bearing in mind the above provisions, I will now analyse the evidence on record to ascertain whether the essential ingredients of the offence preferred against the appellant were established to the required standard of proof. Regarding proof of age, I wish to state at the outset that the importance of proving the age of a victim, proof of penetration, and positive identification of the assailant in sexual offences is paramount.
14. The complainant's aunt (PW 2) indicated that the complainant was 10 years old at the time of the alleged incident. The trial court considered the birth certificate produced in evidence by the investigating officer PW4, which indicated PW1's date of birth as 1st November 2009, confirming that indeed the child was ten years old at the time of the incident. There is no doubt that PW1 was a child within the meaning of the law.
15. The question I must now grapple with is whether the prosecution adduced sufficient evidence to prove that the appellant defiled the child victim as alleged. PW 1 after a voir dire examination gave an unsworn statement in which he narrated how the appellant lured him to his house and then inserted his penis into his anus. It was his evidence that the incident occurred on many occasions. He maintained that the appellant used to do 'bad manners' to him. That it was only after the ordeal that the complainant began to pass stool uncontrollably.
16. The medical evidence presented by PW3 indicated that the complainant did not present with any injuries. The complainant's anal orifice was normal, had no laceration, no bruises, and there was no tenderness upon examination. Importantly, the examination did not reveal incontinence. The complainant and his aunt however were emphatic he was passing stool uncontrollably as a result of the sexual assault by the appellant. It is instructive to note that the examination of the complainant was done approximately two days after the incident. The sum effect of the above evidence is that it raises some doubts as to the ingredient of penetration. The complainant was categorical that it was none other than the appellant who had defiled him.
17. The trial court found the testimony of the complainant believable and relied on section 124 of the *Evidence Act*. She stated that the complainant was clear on where and how the defilement happened and that he had no reason to doubt his testimony in addition to the medical evidence. In the case of *Mohamed v. Republic* (2006) 2 KLR 138, it was stated:

“It is now settled that the courts shall no longer be hamstring by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful”.
18. In this case however, the medical evidence did not corroborate the evidence of the minor. It follows then that this court must critically evaluate the evidence from the minor that he was defiled by the appellant before it can draw any conclusions. Section 124 of the *Evidence Act* provides exceptions to when the Court can convict on the sole evidence of a minor in the absence of medical evidence. The Court of Appeal sitting in Nyeri in the case of *George Kioji v Republic*, Criminal App No 270 of 2012 held as follows: -

“Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond



reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”

19. On what constitutes penetration, it is the position that penetration may only be ‘slightest and to the surface’ to suffice in law. It, therefore, means that there may be instances where slight penetration, depending on other factors including passage of time, may not be possible to be ascertained by way of medical evidence. Therefore, the failure to prove penetration by medical evidence does not ipso facto mean that there was no penetration. It all depends on the peculiar circumstances of a case and the extent to which the trial Court believes the victim. However, in such instances, the Court must exercise extreme caution as to weed out miscarriage of justice including instances where a victim is framed up for ulterior motives.
20. In this case, medical evidence is at variance with the complainant’s evidence, although the minor was steadfast that he was sexually assaulted by the appellant which resulted in his passing stool uncontrollably. As indicated above, this evidence is contradicted by medical evidence. What really happened in the appellant’s house is therefore still unclear since the complainant was a child of tender years. This does not however mean that the child did not tell the court the truth, but it simply means the appellant had inappropriate contact with the child which may have traumatised him. Had he successfully defiled him, medical examination would have established tenderness, and incontinence. The passing of stool may be as a result of the traumatic experience that he underwent at the hands of the appellant. In addition, he had no reason to frame the appellant who used to give him ‘mutura’ on a regular basis. It is also unlikely that the complainant’s aunt would frame just to settle scores, if any.
21. In the circumstances, it is my view that penetration was not proved, either partial or complete.
22. On whether an offence was committed, I am content to cite the expressions in *Joseph Muasya v Republic* [2018] eKLR that;

“Medical evidence was really not necessary in this case of attempted defilement and indecent act, unless it showed that there was actual defilement which would make it a case of defilement rather than attempted defilement or that there were injuries consistent with attempted penetration, which would only further support the present charges.”
23. From the foregoing analysis, the offence proved by the prosecution is that of attempted defilement contrary to section 9(1) as read with section 9(2) of the *Sexual Offences Act*, No. 3 of 2006 and, I accordingly invoke the provisions of Section 354 of the *Criminal Procedure Code* (cap.75) and find the appellant guilty accordingly.
24. Consequently, the appellant is sentenced to serve ten (10) years imprisonment from the date of his arrest 20th December 2019, pursuant to section 333(2) of the *Criminal Procedure Code*, Cap 75 Laws of Kenya.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 4TH DAY OF JUNE 2024

D. KAVEDZA

JUDGE

In the presence of:-



Appellant present in person

Ms. Tumaini Wafula for the Respondent

Joy Court Assistant

