



**Mwakangalu v Republic (Criminal Appeal E058 of 2023)
[2024] KEHC 9214 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9214 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E058 OF 2023
GMA DULU, J
JULY 25, 2024**

BETWEEN

RAMADHAN GEORGE MWAKANGALU APPELLANT

AND

REPUBLIC RESPONDENT

(From the conviction and sentence in Sexual Offence Case No. E007 of 2023 at Taveta Law Courts delivered by Hon. C. L. Adisa (SRM) on 11th July 2023)

JUDGMENT

1. The appellant was convicted in the Magistrate's court with defilement contrary to Section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006, the particulars of which being that on diverse dates between the months of September 2022 to 14th January 2023 at unknown time at CTaveta Sub County within Taita Taveta County, intentionally and unlawfully inserted his penis into the vagina of C.N.A a minor aged 15 years.
2. On conviction, he was sentenced to twenty (20) years imprisonment.
3. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal on the following amended grounds:-
 1. That the learned trial Magistrate erred both in law and fact by failing to find that no any medical examination was done upon him at all.
 2. That the learned trial Magistrate erred both in law and fact by convicting and sentencing him by the evidence of a single witness of framing and fabrication and also evidence of incrimination.



3. That the learned trial Magistrate erred both in law and fact by failing to find that no DNA was done to prove that he was the one who impregnated the said girl CNO, the (minor) girl of 15 years old.
 4. That the learned trial Magistrate erred both in law and fact by failing to find that the crucial witnesses were never availed in court i.e. arresting officers and the father of the girl who is said to have informed his wife, aunt of the girl that there is a man who has been jumping over the fence, having sex with the girl and also the neighbours who told him.
 5. That the learned trial Magistrate erred both in law and facts by relying on the evidence of hearsay and evidence of being told not of eye witness.
 6. That the learned trial Magistrate erred both in law and facts by relying on contradicted evidences which were inconsistent, having discrepancies, immaterial and cannot base a safe conviction upon the accused person.
 7. That the learned trial Magistrate erred both in law and fact by relying on circumstantial evidence which could not sustain a safe conviction upon him at all.
 8. That the learned trial Magistrate erred both in law and fact by convicting and sentencing him by poor investigation conducted upon him.
4. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions. I note that the Director of Public Prosecutions has conceded to the appeal on the ground that the appellant was not positively identified as the culprit.
 5. This being a first appeal, I am duty bound to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences – see *Okeno v Republic* (1972) EA 32.
 6. In doing so, I am not bound to agree with the findings of the trial Magistrate, nor to agree with the submissions of the Director of Public Prosecutions.
 7. In proving their case, the prosecution called four (4) witnesses. On his part, the appellant tendered unsworn defence testimony.
 8. The main ingredients of the offence of defilement on which the appellant was convicted are first, the age of the complainant who should be less than 18 years. The second ingredient is sexual penetration even if partial. The third ingredient, is the positive identification of the culprit.
 9. From the evidence on record from the complainant PW1 CNA, who testified that she was 15 years old, and the evidence of PW2 JNS PW1's guardian, who produced the birth certificate of PW1 in court as an exhibit with an entry that PW1 was born on 16th August 2007, in my view the prosecution proved the age of the complainant beyond any reasonable doubt.
 10. With regard to sexual penetration, PW3 George Ombayo a Clinician at Taveta Sub County hospital testified to medical ultrasound examination done on PW1 at Amina Dispensary by a sonographer Mr. Kirwa, and a Clinician called Felicia, to establish a pregnancy of 18 ½ weeks in the womb of PW1.
 11. In my view, this evidence was hearsay evidence and it did not comply with the requirements of Section 77 of the *Evidence Act* (Cap.80), as PW1 neither stated that he knew and worked with the alleged examining medical officials, nor knew their handwriting. Such evidence, in law, cannot be used to establish a fact.



12. I thus find that the prosecution did not prove sexual penetration on the complainant beyond any reasonable doubt.
13. With regard to the identity of the appellant as the culprit, I find that the evidence of PW1 the complainant, and PW2 her guardian, did not prove that the appellant was the culprit, as the evidence of PW2 was to the effect that she was informed by her husband who was also informed by somebody else, that the appellant was the culprit.
14. That evidence was thus hearsay evidence and it not being able to be tested through cross-examination, cannot establish a fact.
15. I thus agree with the Prosecuting Counsel that the prosecution did not prove beyond any reasonable doubt that the appellant was the culprit.
16. Thus the prosecution not having proved two of the crucial ingredients of the offence of defilement, this appeal will succeed.
17. Consequently and for the above reasons, I allow the appeal quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 25TH DAY OF JULY 2024 IN OPEN COURT AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Alfred – Court Assistant

Appellant

Mr. Sirima for State

