



REPUBLIC OF KENYA



**KENYA LAW**  
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**Makokha v Republic (Criminal Appeal E011 of 2021)  
[2024] KEHC 8517 (KLR) (10 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8517 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL APPEAL E011 OF 2021  
SM MOHOCHI, J  
JULY 10, 2024**

**BETWEEN**

**JOHN KISOYI MAKOKHA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal originating from the judgement a sentence of Hon Y. I. Khatambi (SRM) delivered on 17th May, 2021 in Nakuru Chief Magistrate's Court Sexual Offence Case No 02 of 2021)*

**JUDGMENT**

1. The Appellant was on 2<sup>nd</sup> January 2019 charged with the offence of Defilement contrary to Section 8(1) as read with Section 8 (3) of the Sexual Offence Act No. 3 of 2006. The Particulars of the charge are that-

On Diverse dates between 25<sup>th</sup> December 2018 and the 28<sup>th</sup> December 2018 in Rongai sub-county within Nakuru County, unlawfully and intentionally committed an act causing his male genital organ (penis) to penetrate into the female genital organ (vagina) of MC a child aged 13 years.

2. The Appellant also faced an alternative charge of Indecent Act with a child contrary to Section 11(1) of the Sexual Offence Act No. 3 of 2006. The Particulars are that:

On Diverse dates between 25<sup>th</sup> December 2018 and the 28<sup>th</sup> December 2018 in Rongai sub-county within Nakuru County, unlawfully and intentionally committed an Indecent act to MC a child aged 13 years by touching her private parts(vagina)

3. The Appellant pleaded not guilty to all the charges and the case went to full trial on the 19<sup>th</sup> January 2020 the prosecution called five (5) witnesses. At the close of the prosecution's case, the Court found



that the Appellant had a case to answer and put him on his defense under Section 210 of the Criminal Procedure Code. The Appellant gave sworn statement and did not call any witnesses. The Judgement was delivered and the Appellant was convicted on the main charge and sentenced to serve Twenty (20) years imprisonment.

4. The Appellant being dissatisfied with the entire Judgement and sentence filed this Appeal seeking that this Court allows his Appeal, quashes the lower Court's conviction and set aside Twenty (20) years imprisonment.
5. The Appeal was argued based on the grounds in the undated Amended grounds of appeal that the suit was never proven beyond reasonable doubt, that the Appellants defence was disregarded and that there were contradictions in the prosecution's case

### **Appellant's Submissions**

6. The Appellant submitted on grounds one (1), two (2) and three (3) that, all the evidence adduced during the whole trial by those (5) witnesses are totally lies according to the trial record and that, all the evidence adduced before the trial Court during the trial process were totally lies according, that the evidence adduced by PW1 where the prosecution confirmed that the minor was very competent to give the evidence in oath.
7. That the witness lied because during the time of trial she gave different evidence, the first time and the second time, that on page 13 line 9 and the Appellant quotes "I prepared meal for him", that, this statement shows clearly that the complainant was not credible at all. Because during the second time there is nowhere she says she prepared the food to the Appellant, she only said that at the time of incidence she was not cleared. That, this witness testified that, at the VOIR DIRE she had (14) years and the second time during the evidence says that she had (15years) old.
8. That, this issue of age the Appellant heard from the witness who testified before the Court about the age of complainant even himself during the cross-exam of VOIR DIRE says she had (14 yrs.) was a total lie.
9. This is because during this trial, the mother of the complainant produced a birth certificate of PW1 to prove the age of PW1, indicates that PW1 was born in 2004.
10. The Appellant submitted that, all of the evidence adduced about the age of the PW1 were total lies in Court. he relied on the case of. IN UGANDA VS. JOSEPH MULNDWA (1975) H.G.B 206. It was held that in defilement  

" the prosecution must prove the age of the complainant and the fact that the accused had knowledge that the complainant was below age."
11. That, this case nothing like this happened to the case. According to the trial record, that the Appellant is a neighbour and the house where he lived with the mother of PW1 and were separated with iron sheets. page 24-line 8 quote, "our houses are separated by iron sheets."
12. The Appellant submits that it was impractical to hold hostage MC for over four (4) Days in a room separated by mabati where she could easily raise alarm.
13. The Appellant further Submits on contradictory evidence by the witnesses with regards to the Age of M.C where there were contradictions in ages of 13 years, 14 years and 15 years tendered in evidence



and sought to rely on the case of; PETER MAINA –VS- REP (2016) ECLR HCCR. No.152/010 in which the Lady Justice Odero sitting at Nakuru held that,

“the question of age is a fact requiring concrete and tangible proof. Age is a fact and issue in sexual offences thus the age of the victim must be proved beyond reasonable doubt. A mere declaration by the complainant, no birth certificate, vaccination card, baptism certificates, and school enrolment form or age assessment were produced in Court.”

14. That owing to the contradiction on the Age the Court was in error to arrive at the Age of 14 years being M. C's Age and thus denied the Appellant the benefit of the doubt.

15. The Appellant submits that, nothing that happened to PW1 and that a grudge between him and the PW2 mother to PW1 gave rise to this case as he had loaned MC's mother Ksh 700/- which she had refused to pay him back he relied on the case of: RAMKISHAN PADYA Vs Rep 1957) E.A 112.339 where the Court of Appeal for Eastern Africa said: -

“illustrate that, where the evidence is contradicted or inconsistent, the Court should not rely upon”

16. And the case of Mohammed Bin Alu (1942) EA.CA.72 says that:

“once a mistake is made, however honestly the witness gives his evidence it's difficult to matter right”

17. That, all those mistakes done by the prosecution side he leaves them on the Courts hands and believe in the grace of God this Court is going to give him a lesser sentence which can enable him join his family again, or set him at liberty.

18. The Appellant faulted the prosecution for not subjecting him to medical examination just as they had done with M.C. The Appellant faulted the arresting officer being the investigating officer.

19. The Appellant urges this Court to put more reliance on his defence evidence and change this sentence imposed of twenty (20) years imprisonment to a lesser sentence relying on the case of JANE NYAMULE VS. Rep (1953) CR.APP 121 where Court of appeal stated that;

“it is not enough only to set out a defence but it must be considered with highly of all evidence before the Court has to explain why the defence is unacceptable,

20. The Appellant urged the Court to evaluate all the evidence adduced during the trial and reach to his acquittal, leaving all those mistakes done by the prosecution side on the Court's hand and I believing in the grace of god that the Court shall overturn the sentence of 20yrs imposed him giving him a chance to join his family.

### **Respondent's Submissions**

21. The Appeal is opposed by the Respondents written submissions dated 13<sup>th</sup> May 2024, in a nutshell the Respondent submits that the Appeal lacks merit as the Appellant was properly tried, convicted and sentenced when his charges were proven beyond reasonable doubt.

22. That the critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.” were proved in this case that the complainant's mother testified as PW2 that the complainant was born on 20<sup>th</sup> May, 2004 and produced a birth



certificate as conclusive proof that the complainant was 14 years old at the material time. She was therefore between the age of 12 and 15 years as per the dictates of Section 8 (3) of the [Sexual Offences Act](#).

23. With regards to penetration, that PW1 testified that the Appellant caused her to lie on her back, laid on top of her and did bad manners to her. She stood up and touched her crotch area stating that she felt pain when she was defiled. Her testimony was indicative of penetration which was further corroborated by the medical evidence of PW4 who was a Medical Officer at Bahati Sub-County Hospital who testified that upon examination, it was noted that the complainant's hymen was torn with slight bleeding and tears on the vaginal opening. Penetration was sufficiently proved through the oral testimony of the complainant and the oral and medical evidence of PW4 to the satisfaction of the provisions of Section 2 of the [Sexual Offences Act](#).
24. The Respondent submits that, the Appellant was well known to the complainant. The evidence of identification presented was that of recognition. The appellant was a neighbor and the complainant referred to him as John. The evidence of identification by recognition pointed to the appellant as the perpetrator.
25. The Respondent submits that, the contradictions in evidence pointed out by the Appellant were not material and did not go to the root of the prosecution case. Considering the evidence adduced at trial, the prosecution case was proved beyond reasonable doubt by cogent evidence. The defence mounted by the Appellant did not shake or dislodge the case of prosecution. The Appellant was therefore rightfully convicted and sentenced and the Court is urged to dismiss the Appeal and confirm the conviction and sentence.

### **Duty of the Court**

26. As a first Appellate Court, this Court is obliged to revisit and re-evaluate the evidence, asses the same and make its own conclusion bearing in mind the unique position the Trial Court was in since it had the advantage of hearing the witnesses and also observing their demeanor during trial.
27. Mohamud Omar Mohamed v Republic [2020] eKLR in determining the appeal, considered principles account the laid down in the case of Okeno vs. Republic (1972) EA 32 where the Court of Appeal for Eastern Africa stated that:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the junction of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; it must make its own findings and draw its own 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 1978) E.A. 424.”

### **Issues for Determination**

28. Upon consideration of the facts of this case, the evidence on record, the grounds of appeal and the submissions made by the parties, the following issues are pertinent for consideration:
  - a. Whether the offence of defilement was proved to the required threshold;



- b. Whether there was failure to call all crucial witnesses and was it fatal to the prosecution;
  - c. Whether there were contradictions to the prosecution's case;
29. The offence of defilement is embedded on three ingredients namely; the age of the victim, proof of penetration and the positive identification of the perpetrator which are provided for under Section 8(1) of the *Sexual Offences Act*.
30. Further, for a conviction to stand the test of time, those three ingredients have to be proven. This was espoused in *Opondo Olunga vs Republic* [2016] eKLR

### Age

31. For starters, in order to establish age of the victim the Court in *Cosmas Koech v Republic* [2021] eKLR placed reliance in the case of *Francis Omuroni v Uganda Court of Appeal*; Criminal Appeal No. 2 of 2000, is explicit on proof of age of the sexual victim that:
- “In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense...”
32. The age of the victim in sexual offences is very important because it sets apart the offence of defilement and rape further it sets out the penalty based on the age. In this particular case the age of the victim determines the sentence.
33. Section 8 (1) of the *Sexual Offences Act* provides for the offence of defilement and 8 and (3) the penalty thereof where the victim is a child of 15 years or less as follows:
- 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.
  - 3. A person who commits an offence of defilement with a child aged Fifteen years or less shall upon conviction be sentenced to imprisonment for not less than Twenty (20) Years
34. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No 3/2006. The particulars were that on diverse dates between 25<sup>th</sup> December 2018 and the 28<sup>th</sup> December 2018 in Rongai Sub-County within Nakuru County, unlawfully and intentionally committed an act causing his male genital organ (penis) to penetrate into the female genital organ (vagina) of MC a child aged 13 years.
35. The Appellant was charged with an alternative offence of committing an indecent act with a child contrary to Section 11 of the *Sexual Offences Act* No. 3 of 2006 with particulars that on Diverse dates between 25<sup>th</sup> December 2018 and the 28<sup>th</sup> December 2018 in Rongai sub-county within Nakuru County, unlawfully and intentionally committed an Indecent act to MC a child aged 13 years by touching her private parts (vagina).



36. The Appellant pleaded not guilty to both main and alternative counts and the matter proceeded for hearing after the Court conducted *voire dire* and five (5) witnesses testified upon which the trial found the charges proven beyond reasonable doubt.
37. As for Age of the victim in sexual offences can be proved by, the direct evidence of parents or guardian or by observation by the Court. In the alternative in the absence of a birth document, immunization cards or a parent or guardian to inform the Court on the age of the victim, the Courts are guided by medical documents which then guide the Court in sentencing in *Thomas Mwambu Wenyi v Republic* (2017) eKLR cited *Francis Omuromi v Uganda*, Court of Appeal Criminal Appeal No. 2 of 2000 which held that:
- “In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who would professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may be proved by birth certificate, the victim’s parents or guardian and by observation and common sense.”
38. In the instant case, proof of age of the complainant was determined from the produced a copy of the birth certificate. On proof of age of the victim, the Sexual Offence Rules of Court 2014 Rule 4 provides that: -
- “When determining the age of a person, the Court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document.”
39. In this case, the trial Court was right in determining that MC was fourteen (14) years when the offence was committed.

### **Proof of penetration**

40. The prosecution had a duty to proof full or partial penetration by the Appellant and relied on Section 2 of the *Sexual Offences Act* of 2006 which defines penetration as:
- ‘The partial or complete insertion of the genital organ of a person in the genital organ of another person.’
41. In determining penetration, Courts often rely on the evidence of the victim which is then corroborated by medical evidence. However, regarding reliance on Section 124 of the *Evidence Act*, the Court of Appeal in the case of *Stephen Nguli Mulili v Republic* [2014] eKLR the Court of Appeal had this to say:
- “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 make 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.”



### **Identification of perpetrator.**

42. In this instance the Appellant was well known to both PW1 and PW2. The Court of Appeal in Francis Muchiri Joseph v Republic (2014) eKLR held that:

“In LESARAU v R, 1988 KLR 783, this Court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name”.

43. The identification of the Appellant was based on recognition and by name. The above case shows that heavy reliance is based on recognition of a perpetrator. The ingredient of identification therefore meets the test of time.

### **Whether there were contradictions to the prosecution’s case?**

44. The Appellant has advanced the argument that there were contradictions in the prosecution’s case which ought to have cast doubt to the prosecution’s case, that the Trial Court relied on evidence that was contradictory with regard to Age of MC and whether MC did prepared food for the Appellant or not. The Respondent submitted that the evidence was not contradictory.

45. This Court has a duty to examine the evidence and determine whether there were contradictions in the evidence tendered and if there were any, were the contradictions so material that the Court ought to have rejected the evidence? Were the contradictions so material that they may persuade this Court on them?

46. This Court has considered the contradictions raised and find the same not to have had material bearing on the outcome and could not displace the proven case, as such do not affect the substance of the case.

47. The duty placed on this Court is to consider the evidence, re-evaluate, and satisfy itself that the chain of events, statements must be so well elaborated in order to rule out the Appellant’s innocence.

48. The evidence presented by the prosecution on proof of defilement fulfilled the ingredients to the required legal standard therefore burden of proof had been met beyond reasonable doubt.

49. Section 124 of the *Evidence Act* allows the evidence of the victim to be relied upon even in absence of corroboration. In this case the evidence of PW1 was corroborated by medical evidence.

50. The allegation of there being a grudge between the victims’ mother and the Appellant was never proven, the Appellant never called any evidence in support of this assertion. The solo defence offered by the Appellant could not displace the overwhelming evidence by the prosecution.

51. From the foregoing I must now reach to the conclusion that, the instant Appeal lacks merit. The Appeal is disallowed, the Trial Court, Conviction and Sentence is hereby confirmed.

52. The Sentence shall run from 31<sup>st</sup> December 2018

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAKURU**

**THIS 10<sup>TH</sup> DAY OF JULY 2024.**

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**MOHOCHI S.M.**



**JUDGE**

