



**Mwang'ombe v Republic (Criminal Appeal E023 of 2023)
[2024] KEHC 9543 (KLR) (9 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9543 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E023 OF 2023**

GMA DULU, J

JULY 9, 2024

BETWEEN

BENEDICT MWANG'OMBE APPELLANT

AND

REPUBLIC RESPONDENT

(From the conviction and sentence in Sexual Offence Case No. E025 of 2021 at Voi Law Courts delivered on 14th February 2023 by Hon. C. K. Kitinji (PM))

JUDGMENT

1. The appellant was convicted of defilement contrary to Section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#) No. 3 of 2006, whose particulars were that on 17th March 2021 in Voi Sub County within Taita Taveta County intentionally and unlawfully caused his genital organ (penis) to penetrate the female genital organ (vagina) of FN a child aged 15 years.
2. On conviction, he was sentenced to 20 years imprisonment.
3. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal and relied upon the following amended grounds of appeal:-
 1. That the learned trial Magistrate erred in law and fact by convicting him yet failed to find that the conduct of the complainant did not reveal that she was defiled.
 2. The learned trial Magistrate erred in law and fact by convicting him yet failed to find that penetration had not been established or proved.
 3. The learned trial Magistrate erred in law by convicting and sentencing him yet failed to find that the medical evidence adduced did not corroborate the complainant's evidence.



4. The sentence imposed was both harsh and excessive since it was applied in mandatory terms as provided by the statute and failed to consider the appellant's mitigation and the facts and circumstances unique to the case.
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.
5. This is a first appeal. As a first appellate court, I have to start by reminding myself that 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 their effort to prove their case, the prosecution called five (5) witnesses. On his part, the appellant tendered sworn defence testimony, and called one defence witness DW2 Alfred Kizayo Muyaa.
7. The offence of defilement for which the appellant was convicted has three crucial ingredients. First, the age of the complainant or victim who should be below 18 years of age. Secondly, sexual penetration even if partial. Thirdly, the positive identity of the perpetrator or culprit – see *Charles Wamukoya Karani v Republic* – Criminal Appeal No. 72 of 2013.
8. Was the age of the complainant or victim proved beyond any reasonable doubt? On the issue of age of the complainant, PW2 FMN testified in evidence that she was 16 years old when she testified, and that she was to join Form One. She did not state her date or year of birth or rely on any document. None of the parent testified in court.
9. PW3 TOM her primary school teacher, testified to the complainant being a pupil at [Particulars Withheld] school, and noticing her to be adding weight in 2021 which later turned out to be a pregnancy. This witness also referred to a birth certificate in which the date of birth was entered as 14th September 2006. She did not say how or from where the birth certificate was obtained.
10. PW4 AM, the grand father of the complainant testified that at the time of the alleged incident the complainant was 15 years old.
11. PW5 PC Omar Mwinyifaki Mzee the investigating officer, produced a birth certificate in the name of FN born on 19th April 2006.
12. In my view, from the totality of evidence on record, the prosecution proved beyond any reasonable doubt that the complainant was 15 years old at the time of the alleged offence.
13. Did the prosecution prove sexual penetration? The complainant PW2 testified that she was sexually penetrated. PW1 Dr. Joto Nyawa testified that on medical examination, the complainant was found to have no lacerations in her reproductive organs, but hymen was missing and there was a finding of several months old pregnancy.
14. In my view, from the evidence on record, the prosecution proved beyond any reasonable doubt that sexual penetration did occur on the complainant.
15. Was the appellant the perpetrator? The evidence on this element is that tendered by the complainant PW2, and the appellant DW1. The complainant stated in evidence that the culprit was the appellant, but the appellant denied this allegation in his sworn defence.
16. I note that as the hearing progressed, the child was born from the pregnancy and the appellant did not ask for a DNA test, nor did the prosecution ask for same.



17. I have to be guided by the legal position that under the proviso to Section 124 of the *Evidence Act* (Cap.80), the evidence of a single victim witness of a sexual offence can sustain a conviction without any additional corroboration, provided it is believable and so believed on reasons to be recorded in the proceedings.
18. In the present case, I find no reason why the complainant could lie against the appellant. From the evidence both for the prosecution and the defence, the two knew each other before.
19. As such, I find that from the evidence on record, the evidence of PW2 is believable, and as such the prosecution proved beyond any reasonable doubt that the appellant was the perpetrator or culprit.
20. The appellant has on appeal however, raised the defence contained in Section 8(5) of the *Sexual Offences Act*. He suggests that he was made to believe that the complainant (PW2) was an adult because of her conduct.
21. I note that from the evidence on record PW2 the complainant stated as follows:-

“On 17.3.2021 at 3:00p.m I was with Benedict Mwang’ombe at Wungonyi in the bushes. We made love in the bush. It was not first time. We had agreed to make love. I know my age. I knew what I was doing. He was a boda boda rider.”
22. In my view, with the above evidence of the complainant on record, the complainant, though not legally capable of making enforceable decisions, willingly chose to behave like an adult to a relatively young male person of 20, and any reasonable man of that age could easily be misled to believe that she was an adult, unless she either disclosed her age to him or the man had prior knowledge of her age.
23. In those circumstances, and also taking into account that both the complainant and the appellant were people of relatively young, I find that the defence under section 8(5) of the *Sexual Offences Act* applies herein.
24. On that account alone, I will allow the appeal, quash the conviction, and set aside the sentence herein.
25. 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 9TH DAY OF JULY 2024 IN OPEN COURT AT VOI.

GEORGE DULU

JUDGE

In the presence of:-

Alfred/Trizah – Court Assistants

Appellant

Mr. Sirima for State

