



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Vyukusenge v Republic (Criminal Appeal E077 of 2022)
[2024] KEHC 17236 (KLR) (12 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 17236 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E077 OF 2022**

TM MATHEKA, J

JULY 12, 2024

BETWEEN

ELISHA VYUKUSENGE APPELLANT

AND

THE REPUBLIC RESPONDENT

JUDGMENT

1. On 21/12/2021, the appellant Elisha Vyukusenge was sentenced to 10 years' imprisonment. He had been tried, found guilty and convicted for the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge in Makueni CM CR (S.O) E029/21 were that between the 4th and 14th October 2021 at unknown time at Wote Township, Wote location in Makueni sub-county within Makueni County he intentionally caused his penis to penetrate the vagina of P.N, a child aged 15 years. In the alternative and on the same particulars he was charged with the offence of indecent act with a child contrary to section 11(1) of the same Act.
2. The case for the prosecution was set out by four witness – the mother of the victim, the aunt, the victim and the clinical officer. The appellant was put on his defence; he testified on oath and called one witness.
3. The case for the prosecution was that on 4/10/2021, 15 years old PN was sent by her mother PW1 to go “home” – home is not named or described by the witness. She later rang ‘home’ and was told that PN had not arrived home. She reported to an unnamed police station that her daughter was missing.
4. A few days later, she received a call from the victim’s, aunt, PW2 that the said PN was with her.
5. PW2 EK the victim’s aunt told the court that she saw PN on 4/10/2021 who had come to her mother PW1 – saying that she had run away from her grandmother – and that her mother had sent her back to go come back with her sibling.



6. Tat the victim came to her house on 14/10/2021. When she asked the victim where she had been for “14” days she told her that she did not know where she had been. She was crying and that is when EK called the victim’s mother who came – and she told them that she had been at home of Elisha on the same plot with her.
7. She said that the complainant’s bag was recoverable from the house of Elisha.
8. The victim testified that on 4/10/2021 her mother sent her to collect her sibling at Kalamba. She went to the bus park then to Elisha’s house. She said Elisha was her friend – and he told her not to go home. That she stayed with him for 11 days having sex. He would leave in the morning and come back at night – and it is when she knew she was being looked for that she decided to go to the house of her aunt EK– which was on the same plot as that of accused. That EK rang her mother who came, they went to the Makueni Police station and then to the hospital for treatment – she said that the accused was her friend 5 months prior to this incident. She said her mother found her in the house of accused.
9. On cross examination she said that her aunt’s house was near that of the accused and her aunt saw her leaving the accused’s house.
10. The Clinical Officer Stella Nthambi Muasya testified that she examined her on 18/10/2021 with a history of disappearing and defilement. She had normal vagina and broken hymen. The prosecution closed its case and the accused was put on his defence.
11. He testified on oath, he told the court that he lived on the same plot as E.K their houses were opposite to each other – he lived with his friend DW2 – he played keyboard for his church – there was a pastor who wanted him to leave his church to play keyboard for his other pastor’s church he declined to abandon his church – this story was confirmed by his friend Dw2.
12. In his Memorandum of Appeal, the appellant challenges the conviction and sentence on the grounds that the prosecution failed to prove the charge beyond a reasonable doubt, the evidence was marred with contradictions and inconsistencies establishing that it was a frame up, and that the prosecution failed to call crucial witnesses.
13. Both sides filed written submissions which I have considered and in my view the only issue for determination is whether there was evidence beyond a reasonable doubt to establish the ingredients of the offence of defilement.
14. The state submitted that these have been established through various authorities – The State cited *Lukas Muli Nzioka v Republic* [2019] e KLR, the appellant – *George Opondo Olunga v- Republic* [2016] e KLR age of the victim, proof of penetration as defined by the *Sexual Offences Act* identity of the perpetrator – The age of the victim is not in dispute – she was 15 years at the time of the alleged offence.
15. To arrive at the proof of penetration and identity of the perpetrator we must – if necessary to examine the circumstance of the offence. This calls for the analysis of the evidence as required by *Okeno v R* and other subsequent authorities on the duty of the 1st appellate court. The court was told that the victim disappeared from home on 4/10/2021 and a report was made to the police. No such evidence was tendered before court – of any report of the alleged disappearance of the child – for 14 days as testified to by PW4. Neither the mother nor the aunt told the court what was going on between the 4/10/2021 and 17/10/2021 when it is alleged that she was found – no police officer testified to such a report. If indeed the child was missing for 14 days – what was going on during that period? This gap in the case for the prosecution creates the impression that the alleged disappearance for that length of time did not happen –there would have been evidence of the search for the child.



16. It is alleged that for all this period of time the victim was living with the accused in his house opposite the aunt's (PW2's) house on the same plot. That the accused would leave each day for work and leave her in the house – for 14 days and no one even noticed – that she was in that house – the fact that the accused lived with another person DW2 – was not disputed by the prosecution, or that the accused person received visitors in his house – how would it have gone unnoticed for 14 days, that he was living with a child? There are gaps as to what was happening for those 14 days. What would the victim be doing? How did the accused keep her in the house while away? Where was his friend at that time? What did the police find out when they investigated the case?
17. In addition, the evidence of PW2 was that the victim went to her house and at first refused to say where she had been saying she did not know where she had been all this time, she later told her she had been in the house of the accused. The same victim told the court that her mother found her in the house of the accused. In cross examination she said it is her aunt who saw her leaving the house of the accused while at the same time her aunt told the court that the victim is the one who went to her house from an unknown place. It is only on re- examination that the victim said that she had known the accused for five months before she went to live with him.
18. There was no evidence in chief that before she allegedly went to live with the accused there was any relationship. These contradictions are not idle as alleged by the prosecution who submitted that they were relying on *Ali Mohamed Ibrahim vs Republic*.
19. Was there penetration? The appellant relied on *Mercy Chelangat v Republic* [2022] e KLR for the proposition that penetration is defined by section 2 of the *Sexual Offences Act* and will be proved by way of evidence of the victim, corroborated by the medical evidence – on the child alone and accepted through section 124 of the *Sexual Offences Act*. The victim simply stated in court that “... We stayed for 11 days ... we used to have sex with the accused ...”
20. There is no description of how the offence was committed or what she meant by ‘sex’ in the first place – how would the court arrive at the determination that there was penetration – the partial or complete insertion of the penis of the accused into the vagina of the complainant on this stamen alone? There was nothing before the court – other than the court's own imagination of what this ‘sex’ was.
21. The argument by the State that there was penetration established by the evidence of the victim – is not tenable. The State argued that the medical evidence established penetration and relied on *Joseph Mwangi v Republic* [2015] e KLR and section 124 of the *Sexual Offences Act* *GOA v R* [2018] eKLR.
22. What was the medical evidence? – a normal vagina with a broken/missing hymen? That was all. The appellant cited – *PKW vR* [2012] e KLR where the Court of Appeal was clear that a broken or missing hymen per se cannot be proof beyond reasonable doubt of penetration. The court clearly stated that that is an erroneously assumption – as the hymen would break from other reasons.
23. On the evidence on record there was no proof of penetration. It cannot be said on any accounts on record that indeed there was evidence of penetration that was corroborated by the medical report – no such evidence was tendered by the prosecution.
24. Did the accused commit the alleged offence? He gave a defence that clearly raised a doubt to the case for the prosecution. He testified – a fact corroborated by the prosecution witnesses that his house was opposite that of PW2 – the aunt of the complainant on the same plot – he lived with a friend – whom the state did not investigate and whose evidence was not sought. He told the court that PW2's children had broken his television and he demanded to be compensated for it. That established that PW2 had children, with her at the plot - who could have noticed their cousin. It also establishes the possibility of



- a grudge but that besides – that the complainant could not have lived with the accused for two weeks unnoticed.
25. The accused’s house was visited. It is alleged that the victim’s bag was found there – he said it had been brought by PW2 for repair. The version of the appellant stands because there is no evidence that the victim’s clothes or any other personal item were found in that house other than the alleged bag – even DW2 confirmed that he is the one who received the bag when it was brought for repair.
 26. There was another issue where it was confirmed by PW2 that the victim was supposed to be taken to a witch doctor – and that could have been the reason she ran away. The victim denied the same yet her aunt confirmed that there were plans to take the victim to a witch doctor. Clearly there were other issues with this family that would have led to their child running away from home but the evidence before the trial court and before me the prosecution only proved the age of the complainant but no proof of penetration or that the appellant did it –
 27. In the circumstances the appeal succeeds.
 28. The conviction is quashed, the sentence set aside and appellant be set at liberty forth with unless otherwise legally held.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 12TH DAY OF JULY 2024.

MUMBUA T MATHEKA.

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

DATE: 2024-07-25 14:34:15

The Judiciary of Kenya.

