



**Mwasenzi v Republic (Criminal Appeal E005 of 2024)  
[2024] KEHC 11367 (KLR) (24 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11367 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CRIMINAL APPEAL E005 OF 2024  
GMA DULU, J  
SEPTEMBER 24, 2024**

**BETWEEN**

**AUSTINE MWARUNGU MWASENZI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the conviction and sentence in Sexual Offence Case No. E010 of 2022 at Voi Law Courts delivered on 13th March 2024 by Hon. A. M. Obura (Mrs.) CM)*

**JUDGMENT**

1. The appellant was convicted after a full trial for the offence of 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 offence were that on diverse dates between early March 2022 and 22<sup>nd</sup> March 2022 in Voi Sub County within Taita Taveta County intentionally caused his penis to penetrate the vagina of GN a child aged 14 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 grounds:-
  - a. The learned trial magistrate erred in both law and fact when she misdirected herself
  - b. The learned trial magistrate erred in both law and facts when she shifted the burden of proof from prosecution to the appellant.
  - c. The learned trial magistrate erred in law when she considered the evidence adduced by prosecution full of massive contradictions.



- d. The learned trial magistrate erred in law in convicting the appellant on poor investigation adduced by prosecution.
  - e. That the learned trial court magistrate erred in law and fact by convicting the appellant to 20 years imprisonment without considering that sentence meted on him was harsh and excessive
  - f. That the learned trial court magistrate erred in law and fact by convicting him the appellant to 20 years imprisonment without considering his reasonable defence.
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 Public Prosecutions.
  5. This being a first appeal, I have to bear in mind that I am bound to evaluate all the evidence on record afresh, and come to my own independent conclusions and inferences – see *Okeno v Republic* [1972] EA32.
  6. I have also to bear in mind that the burden was on the prosecution to prove the case against the appellant. This legal burden is codified under section 107 of the *Evidence Act* (Cap 80). This being a criminal case also, the standards of proof is beyond reasonable doubt.
  7. In proving their case, the prosecution called four (4) witnesses. On his part, the appellant tendered sworn defence testimony and called one defence witness.
  8. The crucial elements of the offence of defilement are the age of the victim or complainant. Secondly, sexual penetration even if partial. The third element is the positive identification of the culprit or perpetrator.
  9. As regards the age of the complainant, she testified as PW1. She relied upon a birth certificate. Her mother PW2 SM also testified to the date of birth of the complainant.
  10. In my view, the prosecution proved beyond any reasonable doubt that PW1 was 14 years old at the time of the alleged incident.
  11. With regard to penetration, in my view, the prosecution did not prove this element beyond reasonable doubt.
  12. In this regard, though the evidence of PW1 the victim did not require corroboration in order to prove the allegation in terms of the proviso to section 124 of the *Evidence Act* (Cap. 80), in my view her evidence on sexual penetration was not believable.
  13. PW1’s evidence is not believable firstly, as she was severally reluctant to tell her mother that she had sexual intercourse. It is thus clear that she was an unwilling person and could not be truthful.
  14. Secondly, though there was an allegation of mobile telephone communication between PW1 the appellant, no verification was done on the mobile phone to confirm this either by PW2 the mother, or the police investigating officer. In the result, the said communication remains an allegation and not evidence to be considered and relied upon by a court of law.
  15. Thirdly, the medical evidence of PW3 Dr. Joto Nyawa relied upon, did not indicate any signs of recent sexual intercourse.
  16. Thus, though it is obvious that the appellant and the complainant PW1 knew each other before, there was no evidence to prove the alleged sexual intercourse between them. On that account alone, the appeal will succeed.



17. With regard to the identity of the culprit, as I have found that sexual intercourse was not proved, I also find that the prosecution did not prove beyond reasonable doubt that the appellant was the culprit.
18. For the above reasons, I allow the appeal quash the conviction and set aside the sentence imposed. I order that the appellant be set at liberty unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED THIS 24<sup>TH</sup> DAY OF SEPTEMBER 2024 IN OPEN COURT AT VOI VIRTUALLY.**

**GEORGE DULU**

**JUDGE**

In the presence of:-

Alfred – Court Assistant

Mr. Sirima for State

Appellant

