



**Muendo v Republic (Criminal Appeal E014 of 2023)
[2024] KEHC 17228 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 17228 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E014 OF 2023
TM MATHEKA, J
SEPTEMBER 20, 2024**

BETWEEN

VINCENT MUENDO APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant Vincent Muendo was charged with defilement contrary to section 8(1) as read with sub section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The Particulars were that on diverse dates between 22nd April 2022 and 29th April 2022 at [Particulars withheld] village in Mukaa sub-county within Makueni County he intentionally caused penetration of his genital organ to genital organ of CMM a child aged 13 years.
2. In the alternative he was charged with committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. It was alleged that on diverse dates between 22nd April 2022 and 29th April 2022 at [Particulars withheld] village in Mukaa sub-county within Makueni county intentionally touched buttocks, breasts and the genital organs of CMM a child aged 13 years.
3. He pleaded not guilty on 4/5/2022.
4. After a full trial involving 7 prosecution witnesses and the appellant's sworn statement of defence – the appellant was found guilty of the main charge, convicted and sentenced to serve 20 years imprisonment.
5. Aggrieved he filed this appeal on the following grounds: -
6. That he is in dispute with the sentence which was imposed by the law court magistrate.
7. That he was convicted and sentenced when he had pleaded not guilty to the offence.
8. The law points and facts used in the court were all framed and not true.



9. That he humbly prays this Hon. Court to come up with its own findings and decision in this appeal application.
10. That upon receipt of the proceedings an judgment do hereby pray that if need be he would be accorded leave to file additional, supplementary, substituted or either amend grounds of appeal pursuant to section 350(v) of the Criminal Procedure Code Cap 75 Laws of Kenya.
11. Thereafter he filed his written submissions and set out the grounds he would argue thus: -
 1. That the trial magistrate erred by failing to observe that the trial was conducted under defective charge sheet and in contravention of Article 50(2) (j) of the Constitution as well as in violation of section 19 of the Oaths and Statutory Declarations act, and section 124 of the above Evidence Act, and section 169 of the CPC.
 2. He will also argue that the fatal contradicting evidence by the prosecution did not prove penetration which is an essential ingredient in a case of this nature and that his defense had created weighty doubts and had actually discharged the prosecution.
 3. He argues that the charge was defective and submits that he should not have been convicted on a defective charge sheet. That this violated his right to a fair trial.
 4. He also submits that he was not given sufficient time to prepare his defense hence his trial was unfair.
 5. He argues that the case for the prosecution was full of contradictions and did not prove the charge against him.
 6. That the trial court failed to conduct voire dire examination.
 7. That the sentence was harsh and unfair for failing to take into consideration the Sentencing Guidelines.
12. For the State it was submitted that the prosecution had established the ingredients that prove defilement –
13. The issues for determination are: whether the charge of defilement was proved beyond a reasonable doubt, whether the sentence was harsh and unfair.
14. This being a 1st appeal the offender is entitled to a re-examination of the evidence on record – the court keeping in mind the limitation presented by the written record and the absence of live witnesses.
14. The case for the prosecution was set out as follows;

“PW1 CMM told the court that she was a class 8 pupil at M... primary. That she was born on 10/4/2009. She did not have a certificate of birth and identified in court a health (Immunization) card bearing her name PMFI . She stated On 22/4/2022 to 29/4/2022 I was at home at Iyunguni village and went to see my aunt at Mukaa. When I left my aunt’s place at 3pm, I met with Vincent to take me home. He had a motorbike. I boarded and he did not take me home. He took me to his home and left me there. His place is at Uvete. He came back at night and I stayed there until 29/4/2022 when he told me that when he comes back he should not find me there. I left his home and went to a plot at Uvete and sat there. While there an officer spotted me and took me to Uvete police post. When I spent the night at accused home, I just slept. His grandmother was at said home and said nothing to me. On



22/4/2022 Muendo returned home and slept with me. He had sexual intercourse with me. He inserted his private organ into my private organ."

He did that to me on 23/4/2022. On the following day as well.

- 15 I did not leave his home because I did not know how to return home. I also did not have money. While at the plot someone saw me and asked my name and I told him and he called the police. I was taken to Kilome police station and I recorded my statement. I was also taken to hospital. I was examined. Treatment notes PMFI – 2, P3 form 4, PRC form PMFI – 3. I told police what Vincent Muendo did not me. Vincent told me his name. I do not know how Vincent was arrested. I only know he was found in Uvete. I did not know Vincent before. Vincent is accused before court. I stayed at his home from 22nd to 29th."

On Cross examination by accused in Kiswahili she stated

"I know you. You told me your name. I know only two of your names. I recorded a statement. I was defiled. You defiled me. You defiled me on 22nd. I would go out. Nobody knew me at that place. I did not know where to ran to. I did not know you before. I have told the truth. You told me you were taking me home. I was arrested after I came from your home. I was at your home. You will be lying to say I was not there. You chased me from your house. I have evidence that you defiled me."

16. Upon Re-examination by prosecutor she stated Accused passed me through a route. I did not know hence I did not know how to go back home.
17. PW2 was GN the mother to the PW1. She told the court that on 22/4/2022 she was at work and returned home at 4 pm and did not find complainant. She thought she was in church. She looked for her in vain and informed the area manager and the assistant chief and who advised her to report at Kilome police station which she did. She was asked to send her photographs, to continue looking for her and give a report if the complainant was spotted. The following Saturday while at work she received a call to return home. She arrived arrived to find officers there. They told her that her daughter was found in Uvete, Kitaingo ward.
19. She found her at home with police officers. She did not know how she ended up in Uvete and what happened to her there. She did not know accused before court.

On Cross examination by accused in Kiswahili.

20. She told the court that she did not know the accused; that she heard he was with her daughter; that she had reported her daughter was missing and she was found at the accused's home area.
21. PW3 was Joseph Muindi Musau from Uvete Kitaingo. His testimony was that on 29/2/2022 at 2pm he had left work he had left work and passed by a place that has water and saw children with a new child as he headed to his home. He spoke to the child and she told him her name is C. When he enquired he was informed she was Vincent's visitor. That Vincent was also his child who was 23 years old at the time. He testified that he did not know that C was a school going child.

On Cross examination by accused in Kiswahili.

22. He told the court that the accused had his own house. That he was lying to court to say he had been threatened by anybody. That the accused had a motor bike, had his own house and was capable of fending for yourself. That it was the accused's behavior that had brought him to court.



23. PW4 Benedetta Mwelu was Vincent's grandmother. She told the court that on 22/4/2022 at 9am while at home washing clothes some people came and told her they wanted Muendo . She told them he was not home. They said Vincent had come with a girl at home who had stayed with for 3 days. She went to work. When she returned and asked where the girl was she was told that the girl went to Uvete. She later learnt from a neighbor that the girl had been locked in at Uvete. She said that C came to their home and lived there for 3 days with Muendo the Accused.

On Cross examination by accused in Kiswahili.

24. She told the court that she had never threatened to harm him. That the accused had come with his mother in 1994 and she had raised him and educated him. That the Accused had a house that was built for him. That his mother dumped him and she had raised him as her own but that the accused had stressed her a lot yet his siblings were all in school and even one of his brother's was in employment.

On Re-examination by prosecutor

25. She told the court that they had not falsely accused the Accused who was her eldest grandchild. That she would not do him any harm.
26. PW5 No. 240738 PC Esther Mutisya of Kitaingo police post under Kilome police station testified that on 29/4/2022 at 6pm she was at the station when a member of public reported of a girl at the market that looked lost and was crying. She and her colleague CPL Chepkwony went to the market and found the girl. She had been surrounded by a crowd and was crying She told them that was CM.. They took her to the station and on interrogation she told them she had been on the way home and met with accused on 16/4/2022.that accused Vincent Muendo spoke to her and told her they walk together to go and see accused's mother. They went to accused home where he lived with his parents. That he lived with her as his wife from that time until he chased her on the date they found her at the market. She told them she was chased that in the morning left and stayed at the market.
27. On 31/4/2022 PW5 with her colleague CPL Mwaniki went to Lyunguni to look for complainant's parents. They found her mother who accompanied them to hospital where the complainant was examined. The doctor confirmed that complainant had been defiled.

On Cross examination by accused in Kiswahili

28. She said she was not the investigating officer and did not know the witnesses who had testified; That she told the court what she saw and what complainant told her ;that they found the girl surrounded by a crowd crying; that they did not see Muendo at scene where they found the girl. They took her to station alone... That she did not see the complainant at home of the accused.
29. PW6 No. 61465 CPL Patrick Mwaniki of Kilome police station was the investigating. He told the court that on 26/04/2022 at 12 pm the complainant's mother GN Nduku came to station and reported that her daughter CM aged 13 years old and a class 7 pupil at M Primary school had gone missing.They began investigations and looking for the said girl. They received a report from Kitaingo police post that there was a student found at the market and her name was not known. On 30/4/2022 he went to Kitaingo police post and found CM and confirmed she was the missing child. She was interrogated by PC Esther and she said where she had been and who she had been with. She said they had been living as husband and wife and were having sex.
30. He took the complainant and went to look for her parents. He found her mother at Kiyongoni village. Together with the mother they took the to Kilungu sub-county hospital. She complainant was examined and found to have been defiled. A P3 form and PRC forms were filled. On same day they



received a call from Kitaingo police post and were informed that the suspect Vincent Muendo had been arrested. The Complainant told him that on 17/4/2022 she had been sent by her mother and met with accused who is a boda boda rider. He offered her a lift and then took her to his home and began to live with her as husband and wife until 29/4/2022 when he threatened her and chased her. She went to the market where she was found by police officers. The motorcycle used by accused was also confiscated but did not have registration details. Photographs of it were taken. The police visited the home of the accused and his grandmother confirmed to have seen complainant at said home for several days and she was the one giving them food. He took the accused to Kilome police station and had him charged with offence before court.

29. On Cross examination he told the court that he had 15 years' experience in police work. That the complainant's parents had made a report on a missing child. He went to complainant's home and confirmed she was missing. That the Complainant went missing on 17/4/2022. That he was relying on report made at their station on 26/4/2022. He relied on the complainant's statement. She identified the accused and took them to his home. He did not take the complainant to hospital. The doctor filled the p3 form and was the one who knew the findings.
30. PW7 Eric Kasiamani based at Kilungu sub-county as a clinical officer. He had the P3 form for CM aged 13 years old. She complained of having been defiled by someone known to her. On examination, he found complainant's genitalia had been perforated and vaginal hymen was wide open. He concluded there was defilement. He relied on Out Patient from Kilungu sub-county hospital. He also relied on the PRC form that contains same information as the P3 form. He relied on the immunization card that showed she was born on 10/4/2009. He produced
31. Immunization card p exhibit No. 1, Treatment notes P exhibit No. 2 PRC form P exhibit No. 3 P3 form P exhibit 4.
32. On Cross examination he told the court that he did not treat complainant. She told him that she began living with accused on 16/4/2022. She did not say which date the accused defiled her. That the Complainant was availed for examination to see whether she had been defiled, that a 13 years old child should not have a perforated hymen. That the Complainant had bathed and had changed clothes at time of examination. She did not avail any clothes at the time of the examination. He testified that the Complainant other than the perforated hymen, had no mark on her to show she had been defiled.. She did not know the age of the perforation, that the complainant said she knew who defiled her.
33. In his defence the accused told the court that his name was Vincent Muendo Muindi and he lived in Uvete market and that he understood the charges against him. He stated that it was on a Sunday and he went about his normal duties and prepared himself to go to church. On that day there was a ceremony at a church at it is far from home. He went and the service ended at 2:30 pm. He later returned home and there was no one He changed clothes and went to a nearby market and opened my barber shop. He began business as usual. At 5:30 pm he saw a motor vehicle stop outside his shop and three people alighted and came to the shop . They told him they were police and took him to Uvete police post. He asked why he had been arrested and he was told he would know in court. In court charges were read and he denied. He testified that the witnesses were his step father and his grandmother.
34. That his stepfather had chased his mother and also chased me and he had to sleep at the market. That his stepfather had even threatened to burn his house. He also noted that the complainant knew his grandmother. He believed that they had colluded in order to have him jailed so that he could leave the said home. On Cross examination by prosecutor he told the court that he was employed at a barber shop. He did not know the complainant before. That he did not own a motor cycle. That on the date of incident the incident he was in Nairobi having been sent by his boss whose name is Yalo and lives



in Kikongoni. He travelled in the m/v that was ferrying the bottles his boss had sold. He was with the driver. He said he called his boss and he told him he was busy. He did not have the driver's number. He told the court that people know he worked in a barber shop. He confirmed that he had not availed any witness prove this. He testified that there was a chief in his area. That he reported his stepfather's issues of chasing him at Uvete but did not have the OB.

1. Both the sides filed written submissions.
2. The appellant submitted that the failure by the court to conduct *voire dire* fatally affected the prosecution case and that is a benefit for the appellant as it impeaches the testimony of PW1. That the remedy would be to allow the appeal and set aside the conviction and sentence and set the appellant free. He also submitted that the prosecution ought to have proved both the *Mens rea* and *actus reus* of the charge in that the prosecution is bound to prove their case beyond reasonable doubt and when glaring doubts appear in a matter the prosecution cannot be said to have met the standard of proof required in law.
3. The appellant submitted that in defilement penetration means the partial or complete insertion of the genital organ of a person into the genital organ of another person. That the Clinical Officer found that the only evidence of defilement was the broken hymen. He submitted that it has been held that a broken hymen is not a conclusive evidence proof of penetration. There are many established reasons and ways which can cause the hymen to be ruptured including riding of bicycle, playing etc. and that the evidence of the hymen broken was not sufficient to sustain his conviction. That the clinical officer clearly stated it was not a fresh injury and he did not know the age of the perforation, there were no bruises or abrasions around the complainant's thighs hence the evidence could do not conclusively point to the culpability of the appellant.
4. He submitted further that there were contradictions in the case for the prosecution. First the dates when the complainant is alleged to have been lost. She said 22nd to 29th while the police said 16th, the Clinical Officer, 17th. The evidence of how and where the complaint was found did not add up and there was no evidence that the appellant did boda boda work.
5. On the sentence he submitted that 20 years in this instant case was harsh and excessive. That in any event the appellant in the period he was in custody decided to make peace with himself and with God. It was hard at first but through constant counseling from the church and other life mentors he accepted himself. To achieve this, the appellant felt the need to engage himself with many rehabilitative programs in prison and learn skills like carpentry and masonry, which may be of help to him when he leaves prison. He became a productive member of the prison community seeks a favorable sentence considering the following mitigation factors which he set out thus: that

The appellant comes from a very humble background and was a young man at the times of incident...

The appellant is first offender.

The appellant was un-armed against the complainant The appellant has been remorseful up to now.

The appellant is ready for re-integration with the society. The appellant is well rehabilitated.

35. The Prosecution submitted that the appeal was not merited.



36. On penetration they relied on Joseph Mwangi v- R [2015] e KLR ; GOA v R [2018] e KLR; That the court could rely solely on the evidence of the victim and in GOA v Republic [2018] e KLR the court was of the view that in fact a court of law can convict solely on the evidence of the victim. The court held as follows:

“... Section 124 of the Evidence Act comes to play. The section is clear that no corroboration is necessary in criminal cases involving a sexual offence. Infact a court can even convict on the sole evidence of the victim if the court records the reasons for believing the victim an also records that it was satisfied that the victim was telling the truth ...”

37. On Contradiction of prosecution witnesses the state relied on Eric Onyango Ondeng’ v Republic [2014] e KLR where the court pronounced itself on the need to establish significant inconsistencies in the evidence of witnesses for the court to reject such evidence. The court citing the case of Twehangane Alfred – Uganda Crim App NO. 139 of 2001, [2003] UGCA, a Ugandan case held as follows:

“... With regard to contradiction in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case ...”

38. On sentence they relied on Sabastian Sila Kakovu v Republic [2020] e KLR where the court was called upon to determine the issue of sentence in a similar case and the court held as follows:

“... In respect of the sentence, I make a finding that the evidence speaks about the fact that Pw1 was aged 15 years .. section 8(3) of the Sexual Offences Act provides for a minimum sentence of 20 years. Consequently, the appellant shall be sentenced to 20 years in accordance with section 8(1) as read with section 8(3) of the Sexual Offences Act ..”

39. Further that in SKM V Republic [20210 e KLR the court held that sentencing is a discretion of the trial court. The sentence meted out by the trial court should not be interfered with unless it is found to be illegal or unsafe. The court held as follows:

“... The sentencing is the discretion of the trial magistrate. The discretion was exercised judicially in the circumstances of this case. I find no reasons to interfere with the sentence. In conclusion I find that the prosecution proved its case beyond any reasonable doubts. This appeal is without merits and is dismissed”

40. And in Benson Nkaramata Sakita v Republic [2018] e KLR the court reiterated the principles to be considered in determining whether or not to review a sentence as follows:

“The principles upon which appellate court will act in exercising of its jurisdiction to review sentences are firmly established .. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in James v Republic 19 EACA 147, “it is evident that the judge has acted upon some wrong principles or over looked some material factor. To this, we would also add a third criteria, namely that the sentence is manifestly excessive in view of the circumstances of the case”



41. Having considered the record of evidence and the submissions by both parties, and guided by the authorities on the duty of the first appellate court, I find that the main issue is whether the appeal has merit through the following questions;

1. was the charge defective?

42. The appellant argued that the charge read ‘contrary to s. 8(1) (4)’. I perused the charge and I confirm that the one I saw in the file was properly drafted and there was no defect in it. It clearly states that he was charged contrary to s. 8(1) as read with s. 8(3) of the SOA. S. 8(1) defines the offence as the act of causing penetration with a child. S. 8(3) sets out the penalty.

2. Was voire dire conducted and if not what is the import of the evidence of the complainant?

43. The complainant was 13 years at the time of the alleged offence. The *Oaths and Statutory Declarations Act* at section 19 provides for Evidence of children of tender years and states;

1. Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the *Criminal Procedure Code* (Cap. 75), shall be deemed to be a deposition within the meaning of that section

44. The record speaks for itself that the child was 13 years at the time, yet the trial court did not conduct voire dire to determine as required by law that the child understands the nature of an oath, ...[s]he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth

The effect of that failure could have impeached the testimony of the complainant however, I noted that the complainant was cross examined by the appellant and gave cogent evidence. The solution would be to treat her testimony as unsworn testimony and analyses the evidence she gave vis a vis the evidence of all the other witnesses as to whether the charge was proved against the appellant. For this I rely on s. 33 of the SOA which provides for the consideration of Evidence of surrounding circumstances and impact of sexual offence It states

“Evidence of the surrounding circumstances and impact of any sexual offence upon a complainant may be adduced in criminal proceedings involving the alleged commission of a sexual offence where such offence is tried in order to prove-

- (a) whether a sexual offence is likely to have been committed-
 - i. towards or in connection with the person concerned;
 - ii. under coercive circumstances referred to in section 43; and (b) for purposes of imposing an appropriate sentence, the extent of the harm suffered by the person concerned” (Emphasis added)



was defilement proved as required?

45. The Age of the complainant was established and the appellant was identified. The record will show that the child indicated that the appellant lived with her for about a week, and her sexual intercourse with her, The Clinical officer testified that she had a perforated hymen and the area was wide open an abnormality for a 13 year old. His conclusion was there had been sexual inter course.

What other evidence was available?

46. The circumstances surrounding the alleged defilement come together to support the case for the complainant despite the contradictions in dates given by the one police officer and the clinical officer I would consider those to be minor inconsistencies that do not go to the root of the case.
47. The complainant was in the home of the appellant, His own grandmother saw her and confirmed that she was there for three days , His own step father also saw her on the and spoke to her. She also took the police to the place where the appellant lived. These witnesses placed the complainant with the appellant in the period of time she was missing and the time she told the court that the appellant had sexual intercourse with her.
48. The appellant's position was that his step father and his grandmother had conspired with the complainant to have him jailed. However, it was evident from the grandmother that the appellant was of questionable character yet he was her eldest grandchild and she had taken care of him and had no reason to harm him. The trial court heard her and found her evidence credible and I have no reason not to believe her.
49. The stepfather confirmed that the appellant had his own private space and denied threatening him
50. There was no evidence to show that the grandmother knew the complainant or her parents or that there was any reason at all for them to conspire to have him imprisoned.
51. It is evident that the complainant had disappeared from home, a report was made to the police and she was found and clearly pointed out to the appellant as the person who took her to his home. The step father told the court that he had his own house and was old enough to fend for himself. He denied threatening him. The grandmother denied threatening to harm him. She told the court that the appellant had stressed her a lot, yet his mother had dumped him and she had raised him.
52. From the circumstances of the offence I find that the testimony of the complainant was corroborated by that of her mother, that of the grandmother of the appellant and his step- father, the clinical officer and the police officers despite giving differing dates. The evidence that the complainant was in the company of the appellant on the stated days and the he had sexual intercourse with her was overwhelming.
53. I find that the offence of defilement was proved against him.
54. On sentence , 8(3) of the SOA states A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
55. The learned trial court imposed the sentence set down by law and this court would have no reason to interfere with it.
56. Hence I find that the appeal has no merit.
57. The conviction is sustained; the sentence is upheld.



58. Right of Appeal 14 days

**DATED, SIGNED AND DELIVERED IN OPEN COURT ON 20/9/2024 MUMBUA T
MATHEKA.**

JUDGE

CA Ms. Nelima

Court Prosecutor Ms Nyakibia Appellant present

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

**DATE: 2024-09-20 15:54:24

