



**Musyoka v Republic (Criminal Appeal E109 of 2022)
[2024] KEHC 17221 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 17221 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E109 OF 2022
TM MATHEKA, J
SEPTEMBER 20, 2024**

BETWEEN

JOSEPH MUTUNGA MUSYOKA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the Judgment of 7/7/2022 of Hon E Kemei RM Makueni MCCRC SO E012 of 2022)

JUDGMENT

1. On 7/7/2022, after a full trial the appellant Josphat Mutunga Musyoka was found guilty and convicted of the offence of defilement contrary to section 8(1) as read with 8(3) of the [Sexual Offences Act](#) No. 3 of 2006.
2. Thereafter after he was sentenced to 12 years' imprisonment.
3. He was aggrieved and filed this appeal on 3/10/2022 via "Memorandum of Appeal" stating:
4. I am in dispute of the sentence which was imposed by the law court magistrate.
5. I pleaded guilty of the offence out of ignorance.
6. I had hired a motor cycle from the owner for use for the day.
7. The offence was fabricated by the owner of the motor cycle.
8. The law points and facts used in the court were all framed and not true.
9. In a separate document headed "petition of appeal" he states –
10. I pleaded guilty to the charges.
11. I plead with the court to allow me to mitigate my case out of time.



12. The appeal is against the sentence.
13. I wish to be present during the hearing of this appeal.
14. Memorandum ground of appeal herein is attached in a separate sheet”.
15. With his submissions he filed the following grounds: That the learned trial magistrate erred in law and facts by convicting the accused on defective charges, by telling contracting evidence inconsistent by failing to observe that prosecutor had failed to prove the charge beyond a reasonable doubt, by dismissing the accused’s defence which was cogent and plausible.
16. From the record the accused was charged with defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act* – and it was alleged that on 17/3/2022 at 1300hrs at [Particulars Withheld] Kathulumbi location, Mbooni East sub county within Makueni he intentionally and unlawfully caused his penis to penetrate the vagina of FNK a girl aged 13 years.
17. The alternative charge was committing an Indecent Act with a child – that he did so by touching the vagina of FNK – a girl aged 13 years.
18. The case for the prosecution was that at all material times the complainant was living at her grandmother’s place where she would visit during the school holidays. The appellant was employed by the uncle of the complainant, and would stay in the uncle’s house within the same compound. They would do farm work together herd cattle, goats together, get cattle feed together and in the evenings would sit and watch television together in the uncle’s house.
19. On the 17/3/2022 while they were fetching cattle fodder, the appellant requested to have sex with the complainant. She declined.
20. They finished the work and went home.
21. The complainant cooked food – which the appellant requested that she take to him at the uncle’s house. She took the food there. However, on entering the house the appellant held her, removed her clothes laid her on the bed and did sex to her. She said she did not have energy. She said she was feeling bad after the act. She went home and took a bath and told no one.
22. The results of this would show later when she began vomiting. When her grandmother took her to hospital she was found pregnant. Her grandmother called her mum, who came from Nairobi – and they went and reported at Kathiani police post, issued with an OB number then referred to Kalawa police station. She was interviewed by No. 23467 PC Jane Mutie and they proceeded to the health centre where she was issued with P3 form. She had known the accused for four years. She confirmed that they did not have a relationship. She told the court that it was the first time she had sexual intercourse. She told the court that the accused person had first wanted to sleep with her on 17/3/2022 at 1:00 pm, that it was a Thursday that when she was tested for pregnancy it was one month and one day old.
23. Her mother CK told the court that she was a painter in Kiambu. She confirmed receiving the report from her own mother – she stated that the defilement happened on 17/2/2022 when schools had closed. She testified that when she reached home she reported the matter at the police station and that the accused called her and confirmed the incident that he wanted them to settle the issue and when he came home for that purpose she had him arrested and refused to negotiate with him. She said the accused was arrested in April. She said she was called before the accused was arrested that the pregnancy was 7 months. She said the accused came to her home with an elder.



24. PC Jane Mutua confirmed that the report was made on 19/4/2022. That the complainant told her the story of how accused had asked for sex earlier, then forcefully had sex when she took food to the accused. She said she visited the scene – and saw the complainant’s clinic card – showing she was born on 20/8/2009. She testified that accused had escaped to Katii and was arrested by officers from Kathulumbi.
25. The Clinical Officer PW4 Augustus Maundu examined the complainant on 19/4/2022 she told him she was sexually assaulted on 17/3/2022 by a person well known to her – she had ruptured hymen indicating perforation and she was about a month pregnant.
26. Upon closure of the case for the prosecution the accused was put on his defence.
27. He told the court on oath that on the material day he was working on the farm. That he had issues with his boss; that he left the job and went to work at Wote. That the minor’s mother called him to her home – he went there and found her and her father. That they asked him to go to the station and upon going there he was arrested – that this was on 19/4/2022. He testified that he left the employment on 23/3/2022 – that he had been in employment since 2019. He confirmed that they would do farm chores with the complainant. He confirmed that on 17/3/2022 he was still working at the farm. He denied that when he left he was a running away – he testified that it was a weekend and he was going home. He stated that the mother of the complainant and her brother had employed him but it was the latter who paid his salary. He told the court that the mother of the complainant told him he would be punished for leaving but could not explain why she would threaten him. He denied trying to settle the matter. He testified that it was the mother of the complainant who had summoned him. He confirmed that he lived in a separate house at the farm – but that the complainant could cook and he would go and collect his food. He said they lived four of them in the home and him, the complainant and her grandparents.
28. In his submissions the appellant argued as follows: -1st – that the charge sheet was fatally defective and duplex – that it is contrary to Article 50(2) (j) of the *Constitution* of Kenya (2010), section 19 of the *Oaths and Statutory Declaration Act* section, 124 of the *Evidence Act*, section 169 of the *Criminal Procedure Code*, that the prosecution did not prove penetration, that the court dismissed his defence without reason yet it created weighty doubts.
29. The appellant likened section 8(1) of the *Sexual Offences Act* to section 296(2) of the *Penal Code* arguing that it causes confusion as it does not define the ingredient of the offence. He submits further that he ought to have been charged under section 8(1) as read with section 8(4) of the *Sexual Offences Act* in compliance with section 137 of the *Criminal Procedure Code*.
30. He poses the question why the prosecution did not wait for the baby to be born so that DNA could be carried out to confirm that he was the one responsible. He drew attention to the dates in the proceedings – 17/2/2022 and 17/3/2022 in the charge sheet.
31. He submits that the charge was fatally defective and relied on *Isaac Nyaro Kimitu & Another* [2014] eKLR and *Cholmondeley v Republic* [2008] eKLR for the submission that failure to supply witness statements amounts to unfair trial.
32. He submits further that *voire dire* was not done as required and hence affected the case for the prosecution.
33. The appellant submits that penetration was not proved because no DNA was conducted to prove he was responsible for the pregnancy. He submits that a broken hymen with an old scar cannot be proof of defilement and further that the evidence of the complainant was not corroborated.



34. For the state it is submitted that on penetration no corroboration was required as per section 124 of the *Evidence Act* and *Joseph Mwangi v Republic* [2015] eKLR and that the court can convict on the sole evidence of the victim as per *G.O.A v- Republic* [2018] eKLR.
35. That the identity of the accused is not in dispute.
36. That there were no significant contradictions or inconsistencies to warrant the rejection of the case for the prosecution.
37. That as per *Sabastian Sila Kakovu v Republic* [2020] eKLR and *SKM v Republic* eKLR the sentence was legal and no reason had been established to warrant the interference with the sentence – see also *Benson Nkaramata Sakira v Republic* [2018] eKLR.
38. I have carefully considered the record and the submissions. The issues that arise for determination are:
39. Whether the charge sheet was defective
40. Whether the appellant’s right to fair trial was violated.
41. Whether the case for prosecution was proved beyond a reasonable doubt.
42. On age: The victim was born on 29/8/2009. The offence was committed on 17/3/2022 – the child was 12 years and about 6 months old. The child was between 12 and 15 years old as provided for by section 8(3) of the *Sexual Offences Act*. Hence the age of the child was proved, and the appellant was charged under the correct penalty section as per the age of the complainant.
43. On the issue of confusion as to what he was charged with; the question is Is section 8(1) as read with section 8(3) of the *Sexual Offences Act* confusing to an accused person? Section 8(1) clearly states that it is the act of penetration with a child that is an offence. The act of penetration is described and defined in the law and described in the particulars to be; where – the accused inserted his penis into the vagina of the victim. Surely there cannot be more clarity than that; and the child – is described by the age – of the child – hence the appellant’s argument that the charge was confusing because of the manner in which it is drafted in the law that is not correct. That ground must fail.
44. On the supply of witness statements – it is evident that on the day of plea the court directed the prosecution to supply these and all documentary evidence to the appellant. That was on 20/4/2022. On 11/5/2022 the appellant was ready to proceed and nowhere is it indicated that he raised any issue in this respect.
45. On the question of penetration, he argues that because there was no proof that he was liable for the pregnancy, then the matter was not proved beyond a reasonable doubt.
46. I have looked at the record. The appellant had lived in the same home with the complainant and her grandparents for four years – from when she was 9 years old – and they did chores together and no issue had ever arisen. On this particular day – he asked her for sex and she refused. It appears to me that the girl had grown and to the appellant she was ready for sex. When she refused, he did not take her seriously and later forced himself on her. She describes clearly how she felt – she said she smelt bad – and the first thing to do was to take a bath and not to tell anyone. That is not unusual for a victim of sexual assault to feel dirty and due to the closeness of the abuser, not to say anything. In this case, the appellant had lived in the complainant’s family for long and I found no reason for the child to lie against him. It took the pregnancy for her to reveal that she had been defiled and to reveal who the defiler was. It is noteworthy that immediately the issue arose she was not hesitant to tell who had done it when, and what circumstances. The appellant defence that it all had something to do with him



leaving the employment of the family was clearly an afterthought and the trial court was right to reject this defence. In the circumstance, it is my considered view that penetration was proved by the evidence of the complainant and supported by the medical evidence – and the evidence of the other witnesses. The dates differences in my view were minor as in her evidence in chief the victim clearly stated when the incident occurred.

47. On the question of DNA it was not necessary in the circumstances as the testimony of the complainant was credible and admissible under section 124 of the [Evidence Act](#).
48. Having said that I find that that penetration was proved and that ground must fail.
49. On voire dire: the record shows that the trial court conducted *voire dire* and satisfied itself that the witness could give sworn testimony.
50. In the totality of the record, submissions the appeal is not merited and must fail.
51. The appeal is dismissed. The conviction is sustained and the sentence upheld.
52. Right of Appeal 14 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT ON 20TH SEPTEMBER 2024

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

JUDGE

Ms Nelima

Ms Nyakibia for State Appellant

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

DATE: 2024-09-20 15:50:40

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