



**Mwera v Republic (Criminal Appeal E039 of 2023)  
[2024] KEHC 12004 (KLR) (2 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12004 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CRIMINAL APPEAL E039 OF 2023  
RPV WENDOH, J  
OCTOBER 2, 2024**

**BETWEEN**

**SAMMY MARWA MWERA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From original conviction and sentence by Hon. M. Obiero – Senior Principal Magistrate in  
Kebancha Senior Principal Magistrate’s Court S.O. No. E021 of 2022 delivered on 3/7/2023)*

**JUDGMENT**

1. Sammy Marwa Mwera has filed this appeal against the judgment of the Senior Principal Magistrate, Migori, in which he was convicted for the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act*. In the alternative, the appellant faced a charge of committing an indecent Act with a child contrary Section 11 (1) of the *Sexual Offences Act*.
2. The particulars of the charge are that on the 7<sup>th</sup> day of June 2022, at Ntimaru Sub County, within Migori County in the Republic of Kenya, intentionally caused his penis to partially penetrate the vagina of FBM a child aged 8 years old and in the alternative; intentionally touched the vagina of FBM a child aged 8 years old with his penis and finger.
3. The appellant denied the offence and the case proceeded to full hearing with the prosecution calling a total of five witnesses in support of their case ,namely; PW1, the complainant child FBM., PW2 Omahe Zachary James a clinical officer at Ntimaru Sub-County Hospital; PW3, PC LB the Complainant’s mother, PW4 DC and lastly PW5 PC Kevin Otieno of No. 232858 the investigating officer attached to Ntimaru Police Station.
4. When placed on his defence, the appellant gave an unsworn statement and did not call any witness.



5. Upon conviction, the appellant was sentenced to serve life imprisonment. He is aggrieved by both the conviction and sentence which has culminated in this appeal. The grounds of appeal filed in court on 11/07/2023 are as follows that: -
1. The trial court erred in both law and facts by failing to comply with Article 50 (2) (g) and (h) of the Constitution
  2. The trial court erred in both law and facts by not observing that the ingredients of the offence herein were not proved as required in law.
  3. The trial court erred in both law and facts by not observing that the case herein was a fixed one to score goals.
6. The appellant therefore prays that the Appeal be allowed, conviction quashed, sentence set aside.
7. The Appeal was canvassed by way of written submissions. The appellant filed written submissions dated 12/01/2024 while the Prosecution counsel Ms. Ikol Esaba opposed the appeal through their submissions dated 21/03/2024.
8. This being a first appeal, this court is required to re-examine all the evidence tendered in the trial court, evaluate and analyse it and arrive at its own conclusion. The court has to however make allowance for the fact that this court neither saw nor heard the witnesses testify, an opportunity which the trial court had. This court is guided by the decision of *Okeno vs. Republic* (1972) EA 32 where the Court of Appeal said: -
- “ An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v R.*, [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post*, [1958] EA 424.”
9. PW1, gave unsworn testimony; upon conducting *voire dire*, the trial court made a finding that she may not understand the nature of oath and will therefore give unsworn testimony and the accused would be given an opportunity to cross examine her. She told the court that she is 8 years old and is in Grade II. On the day of the incident, she was on her way to school when she met the appellant near the market stage where he lives; the appellant removed her pant and put his finger into her “dudu,” he then removed his trouser and asked her to suck his “dudu”. Mama C found them, asked him what he was doing. She took her to the police station and thereafter to the hospital. She explained that she uses her “dudu” to urinate and reiterated that the accused put his finger in her “dudu”.
10. PW2 stated that he examined the victim on 7/6/2022 and noted that upon examination of the genitalia, it was a normal genitalia, there was no discharge, there was laceration on the labia minora, the hymen was intact. On further examination, all tests done turned out negative. He further explained that the lacerations may have been caused by a blunt object that was inserted into the vagina which caused injuries on the vaginal wall. An impression of defilement was made. He produced the P3 Form and the treatment notes as Exhibit 1 and 2 respectively.



11. PW3, the complainant's mother told the court that the victim is 8 years old; that on 7/6/2022, the victim went to school; at about 9:00am Tsent someone to call her. They went to the police station where they found her daughter and the accused. She was then informed that the accused had defiled her daughter. she however stated that when she found the child at the police station she was not bleeding.
12. PW4 stated that on 7/6/2022 at about 7:30am, she was on her way to the market; she tried accessing the store through the other door when she heard the voice of a child; she entered the door and found the accused sitting down with the child on his thighs; that when the accused saw her, he pushed the child away; that he had removed his trouser halfway and had also removed the girl's pant. PW4 raised an alarm and boda boda riders went, identified the child and they took the child to their home. She thereafter took the child to the police station and explained what had happened and the accused was arrested. On cross examination, she reiterated that when she found the accused, he had removed his trouser halfway, he pushed the girl and put on his trouser and when the other people responded he had already put on his trouser.
13. The investigating officer (PW5) stated that on 7.6.2022 at around 1040hrs, PW4 went to station in the company of a minor aged about 8 years and made a report; he then interviewed the victim who explained in detail what had happened; that the accused removed her pant and also removed his trouser, the appellant then asked the minor to suck his penis and also attempted to put his penis into her vagina. In the process PW4 found them and alerted the public. The appellant was then arrested and he denied the offence and stated that he had gone to the hospital on the alleged morning of the incident. The witnesses recorded their statements and the appellant was positively identified. The minor was thereafter taken to hospital, examined, P3 Form filled and an Age Assessment Report prepared. He produced the Age Assessment report as Exhibit4. He also stated that the incident took place at around 7:00 am in the morning when the minor was going to school, the scene was in the stores near the market and the boda boda stage.
14. The appellant denied committing the offence; that in the morning of the day of the incident, he had gone to Mofat Hospital in Ntitaru where he was treated and went back home and slept; that at around 11:00am, police officers went to his home and asked him to accompany them to the police station. He was later charged with the offence.
15. In support of the appeal, the appellant submitted that there was a gross violation of his constitutional rights as guaranteed under Article 25 and 28 of the *Constitution* for the reason that the sentence meted was a mandatory sentence of life imprisonment which is unconstitutional and his mitigation was not considered.
16. On penetration, it was his submission that PW2 observed that the genitalia was normal, there was no discharge, there were lacerations on the labia minora, the hymen was intact and concluded that an impression of defilement was made. He thus maintained that from the testimony of the medical officer, that the hymen was intact and the genitalia normal meant that there was no penetration. Further, that the allegation by PW1 that he had put his finger in her "dudu" was not corroborated by the testimony of the medical expert to the required standard. On the testimony by PW2 that the lacerations on the labia minora could have been caused by a blunt object inserted into the vagina of the victim; it is his submission that the same is contradicting his earlier evidence that the hymen was intact. He maintained that the blunt object could have broken the hymen and that the same ought to have been treated as a fabrication and an afterthought.
17. It was also his submission that from the testimony of the I.O (pw5) the evidence was of an attempt "to put his penis into the vagina" and the same does not corroborate the evidence of pw1 that the appellant inserted his finger in her "dudu". It was his conclusion that penetration was not proved



beyond reasonable doubt to warrant a safe conviction. He relied on the decision of Mrima J. in *JOO vs Republic* [2015] eKLR in emphasizing the need for the prosecution to prove their case beyond reasonable doubt.

18. He also submitted on the issue of identification which he maintained was not done beyond reasonable doubt; he averred that there was a contradiction on the testimony of pw3 when she stated that she was informed that a lady known as T found the appellant with the victim. PW1 on her part stated that one Mama C found them and raised an alarm. The appellant thus submits that it is not clear whether pw4 (DC) is the same as Tand Mama C to prove positive identification of the appellant as the perpetrator of the offence. He maintained that the evidence of one T would be crucial to the case as she is the one who allegedly found the appellant and the victim and that the evidence of pw4 DC is hearsay. It was his conclusion that positive identification was marred with glaring contradictions and was not properly proved. He thus urged the court to allow the appeal.
19. In her submissions, Ms. Ikol for the Prosecution submitted on the ingredients of the offence of defilement and whether the same had been proved to the required standard of proof by the prosecution. She also responded to the allegations raised in the appellant's submissions.
20. On the age of the victim, it was her submission that PW1 in her testimony stated that she was 8 years old; pw3, the victim's mother also testified that the child was 8 years old. PW5 produced an Age Assessment Report that indicated that the minor was approximately 8 years old. She thus maintained that the victim was below 18 years old at the time of the incident and the prosecution had therefore proved the age of the victim beyond reasonable doubt.
21. On penetration; It was her submission that the testimony of the victim was corroborated by PW2 the clinical officer who produced the P3 Form and the treatment notes which indicated that there was proof of penetration; that on page 8 line 2, PW2 indicated that the lacerations were caused by an object that was inserted into the vagina, she thus submitted that the act of the appellant inserting his finger to the vagina of the victim is penetration. The testimony of the victim was cogent and was corroborated by the testimony of PW2 who examined her. The prosecution therefore proved penetration to the required standard.
22. Lastly, on the identification of the appellant; it was submitted that the victim positively identified the appellant and gave a clear account of the incident and everything that happened. Further, the testimony of pw4 placed the appellant at the scene of the crime and she positively identified him. In response to the allegations raised by appellant in his submissions that the trial court misinterpreted Mama Caro and T to mean DC; she submitted that it was the testimony of pw4 that she was the first responder to the scene and a clear description of what she saw, therefore an issue of misrepresentation does not arise. Further, on the issue of inconsistencies in the testimony of the witnesses. She relied in the case of *Denis Okelo Mateba vs Republic* Criminal Appeal No. 110 of 2014 and submitted that the minor inconsistencies in the case are inconsequential; that the sentence meted is the same provided for in the Act and the same cannot therefore be termed as harsh or excessive. In conclusion, she urged the court to dismiss the appeal in its entirety and uphold the sentence and conviction of the trial court.
23. I have carefully read and considered the grounds of appeal, record of appeal and the rival submissions. This being an offence of defilement, the prosecution had the duty to prove beyond any reasonable doubt the following: -
  1. Proof that the complainant was a minor;
  2. Proof of penetration;
  3. Proof of identification of the perpetrator.



### **Proof that the Complainant is a minor.**

24. Proof of a victim's age is a key ingredient to prove an offence of defilement given that the penalty is dependent on the complainant's age. I have carefully looked at the Record of Appeal, particularly the testimonies of PW1 and PW5. It was the testimony of PW1 that she was 8 years old in Grade II at the time of the incident. PW5 produced an Age Assessment Report as exhibit 3 which indicated that the complainant is approx. 8 years old.
25. While it is common ground that the best evidence in relation to the age of a person is a Birth Certificate, an Age Assessment Report by an expert has been accepted and used as a sufficient mode to determine the age of a person in the absence of the conventional documents used as a reference of a person's age.
24. Rule 4 of the *Sexual Offences Rules*, 2014 provides that:-

"When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar documents."
25. This position was further buttressed by the Court of Appeal in the case of *Mwalango Chichoro Mwanjembe vs. Republic*, Mombasa Criminal Appeal No. 24 of 2015 [2016] eKLR held as follows: -
26. The question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense..... "
27. Consequently, it is my finding that the Age Assessment Report produced as Exh. 3 is prima facie proof of the age of the victim to the required standard. She was 8 years old at the time of the incident and hence a minor.

### **Proof of penetration.**

28. Penetration has been defined under section 2 of the *Sexual Offences Act* as "partial or complete insertion of the genital organs of a person into the genital organ of another person."
29. PW1 in her testimony gave a detailed narration of what the appellant did to her on the day of the incident; that she was on her way to school when she met the appellant where he lives; the appellant removed her pant and put his finger into her "dudu", he then removed his trouser and asked her to suck his "dudu". She explained that she uses her "dudu" to urinate.
30. PW2 in his testimony stated that the complainant was examined on 7/6/2022 and his findings were that; there were lacerations on the labia minora even though the hymen was intact. He explained that the lacerations may have been caused by a blunt object that was inserted into the vagina and as a result caused the injury on the vaginal wall. He however made an impression of defilement and produced exhibits 1 and 2.
31. PW4 found the appellant sitting down with the complainant on his thighs; he had removed his trouser half-way and had also removed the girl's pant.
32. The question that therefore follows is whether there was actual penetration as per the definition in section 2 of the Act. From the evidence of pw1 and which was corroborated by pw2; the appellant



used his finger to penetrate the vagina of pw1. Does the act of the appellant of inserting his finger into PW1's vagina amount to penetration and consequently defilement.

33. The Court of Appeal in the case of *Mark Ouiruri v Republic* (2013) eKLR, expressed itself on what amounts to penetration as follows: -

"..... In any event, the offence is against penetration of a minor and penetration does not necessarily end in the release of sperms into the victim. Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and the penetration need not be deep inside the girl's organ...."

34. On allegation that the evidence on penetration was contradictory, I wish to point out that the appellant's allegations are misplaced. Penetration must not necessarily translate to the hymen breaking, because there are instances of partial penetration and which may not result in the breaking of the hymen. Further, the fact that the genitalia was normal does not negate penetration and/or defilement.
35. However, upon consideration of PW1 and PW2's testimonies in relation to the charge herein, it is evident that the appellant used his finger to penetrate the vagina of the child. This in my considered opinion does not amount to penetration as per the definition in section 2 of the Act. It is therefore my finding that penetration was not sufficiently proved to the required threshold.
36. The appellant was charged with an alternative charge of Indecent Act with a child. There is overwhelming evidence that the appellant touched the complainant's genitalia with his fingers and I will find that he did commit an Indecent Act with a child as envisaged under section 11 (1) of the SOA.

#### **Proof of Identification of the Perpetrator of the offence.**

37. The evidence of pw1 and pw4 are cogent and consistent and clearly demonstrates that the appellant was positively identified as the perpetrator of the offence. Pw4 placed the appellant at the scene of the incident; she was the first responder and walked in and saw what the appellant was doing to the child. Her testimony corroborated that of the complainant and was sufficient. Moreover, the incident happened at around 7:30 am in the morning and at the time there was sufficient light to clearly identify the appellant.
38. In his defence, the appellant raised the defence of alibi to the effect that on the day of the incident, he had gone to Mofat Hospital in Ntitaru, where he was treated and he went back to his home. It is well established that the burden of proving falsity, if at all, of an accused's defence of alibi lies on the prosecution; See Court of Appeal decision in *Victor Mwendwa Mulinge vs. Republic* [2014] eKLR.
39. In *R v Mahoney* {1979} 50 CCC it was held:
- "The governing principle on alibi defence is that a failure to disclose an alibi at a sufficiently early time to permit it to be investigated by the police is a factor which may be considered in determining the weight given to it."
40. This alibi defence was only raised after the appellant had been put on his defence. The appellant did not raise the same during the cross-examination of the prosecution witnesses and was thus raised late in the day. The appellant was charged on 8/6/2022. Raising an alibi defence on 9/5/2023, about a year later is an afterthought and goes to demonstrate that his demeanor is not truthful.



41. Be that as it may, I must state that it is the duty of the court to weigh the appellant's defence of alibi against the prosecution's case and evidence in its entirety in determining whether the same was disproved or not. In this case, the prosecution's witnesses (pw1 and pw4) confirmed that the appellant was indeed at the scene of the crime and not at the hospital as alleged. His defence was therefore disproved and I disregard the same.
42. The appellant also alleged that there was non-compliance with the provisions of Article 50(2) (g) and (h) of the Constitution. The said sections outline the need for legal representation. I have looked at the record of appeal; the trial court duly informed the appellant of his right under Article 50 (2) (g) to choose to be presented by an Advocate and was encouraged to exercise the said right. As for the right under Article 50(2)(h), the applicant did not demonstrate that substantial injustice would result to the appellant if Counsel was not availed to him at the state expense. That has not been demonstrated.
43. With regards to contradictions highlighted by the appellant in his submissions, I am guided by the Court of Appeal decision in Jackson Mwanzia Musembi –Vs- Republic (2017) eKLR where the court cited with approval the Ugandan case of Twabangane Alfred –Vs- Uganda, Criminal Appeal No. 139 of 2001 (2003) UG CA,6 where the court held that: -
44. with regard to contradictions 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.”
45. Guided by the above decision, it is the finding of this court that the alleged contradictions are minor and the same do not go to the root of the prosecution's case are hereby disregarded as minor contradictions which does not negate the proven facts. Further, the appellant did not challenge the testimony of pw4 and/or proved that she was not Mama Caro as identified by PW1.
46. In the end, I quash the conviction on the offence of defilement and substitute it with a conviction on the alternative charge of committing an Indecent Act with a child contrary to section 11(1) of the Sexual Offences Act (SOA). I hereby sentence the appellant to ten (10) years imprisonment. The sentence will commence on 8/6/2022 when he took plea. It is so ordered

**DELIVERED, DATED AND SIGNED AT KAPENGURIA THIS 2<sup>ND</sup> DAY OF OCTOBER, 2024.**

**R. WENDOH**

**JUDGE**

In presence of; -

Mr. Majale for the state

Appellant Present virtually

Court Assistants – Juma

