



**Kithinji v Republic (Criminal Appeal E068 of 2022)
[2023] KEHC 523 (KLR) (2 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 523 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E068 OF 2022
TW CHERERE, J
FEBRUARY 2, 2023**

BETWEEN

SAMWEL KITHINJI APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the conviction and sentence in Meru Criminal S. O
E018 of 2021 by Hon. M.A. Odhiambo (RM) on 27th April, 2022)*

JUDGMENT

1. Samwel Kithinji Appellant) was charged with defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No 3 of 2006 (the Act). Appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No 3 of 2006. The offences were allegedly committed on June 13, 2021 against DN a child aged 14 years.
2. Complainant recalled that on June 13, 2021, her cousin took her to the house of a man and left them with the man for the night within which time the man defiled her. She stated that the said man introduced himself to her as Kithinji Mwititi and she state that was the said man but was unknown to her before that date. When Complainnat met her father the following day, she stated that she was defiled by M and another person she did not name.
3. Complainant was examined on June 16, 2021 and was found with bruises in her genitalia, and her underwear was bloodstained. Appellant was arrested on June 17, 2021 after he was identified by the Complainant.
4. Appellant in his sworn defence denied the offence. He stated that he saw the Complainant for the first time in court. E M who was alleged to have taken Complainant to the house of Appellant denied it.



5. After considering both the Prosecution and Defence cases, the learned trial magistrate found the Prosecution case proved and on April 27, 2022 convicted and sentenced Appellant to serve 20 years' imprisonment
6. Dissatisfied with both the conviction and sentence., Appellant filed this appeal mainly on two grounds. Firstly, that the evidence of his identification was not conclusive and secondly that there was no prove of penetration.

Analysis and determination

7. In considering whether the Prosecution case was proved beyond any reasonable doubt, I will be guided by the elements constituting the offence of defilement which are proof of penetration, the age of the minor and the identity of the assailant (See *CWK v Republic [2015] eKLR*), the evidence on record and the grounds of appeal.
8. It is trite that the age of a minor is a critical component of a defilement charge and that it is an element which must be proved by the prosecution beyond reasonable doubt. (See *Kaingu Kasomo vs Republic Criminal Appeal No 504 of 2010*).
9. Proof of the age of a victim of defilement is crucial because the prescribed sentence is dependent on the age of victim. (See [Hadson Ali Mwachongo vs Republic Criminal Appeal No 65 of 2015 \[2016\] eKLR](#) & [Alfayo Gombe Okello vs Republic Cr App No 203 of 2009\[2010\] eKLR](#)).
10. Complainant was born on September 6, 2007 as shown on his certificate of birth and the trial magistrate's finding that she was 14 years at the material time was well founded.
11. Upon examination, Complainant was found with was found with bruises in her genitalia, and her underwear was bloodstained and the learned trial magistrate's determination that defilement was proved was equally well founded.
12. Concerning identification of the perpetrator, it is trite that visual identification in criminal cases can cause miscarriage of justice and should be carefully tested. The court in *Wamunga v Republic (1989) KLR 424 at 426* had this to say:

' Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.'
13. In the case of [R v Turnbull, \(1976\) 3 All ER 551](#) Lord Widgery CJ observed as follows on identification:

' the quality of identification evidence is critical; if the quality is good and remains good at the close of the defence case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger.'
14. The difference in approach between identification and recognition was expressed thus by Madan JA in [Anjononi and Others vs The Republic \[1980\] KLR](#);

' ...This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of



a stranger because it depends upon the personal knowledge of the assailant in some form or other.'

15. The trial magistrate correctly appreciated that the Complainant and Appellant were strangers. Complainant stated the person that defiled her was unknown to her. It did not come out clearly how Appellant was identified. There was no evidence led that he was one and the same person as Kithinji Mwiti that allegedly defiled Complainant.
16. Mativo, J (as he then was) in [*Elizabeth Waithegeni Gatimu vs Republic \[2015\] eKLR*](#) stated as follows:

' The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him...'
17. The standard of proof in criminal case such as this one must be beyond reasonable doubt enough to lead to a conviction. Our criminal justice system is pegged on Article 50(2) (a) of the [*Constitution*](#) which guarantees individual freedoms under the Bill of Rights, particularly, the aspect of innocence until proven guilty. It cannot be gainsaid that this burden of proof rests on the State and does not shift to the Accused.
18. English case law is also replete with decisions which elucidated this standard of proof in a criminal case. Lord Denning in the case of [*Miller vs Minister of Pensions \(1942\) AC*](#) stated as follows: -

' It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice.'
19. The degree of proof in criminal cases was properly established in the classicus English case of [*Woolmington vs DPP 1935 A C 462*](#). Similarly, in *Bakare vs State 1985 2NWLR*, Lord Oputa of the Supreme Court of Nigeria adopted the principle as follows at page 465: -

' Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability.'
20. I associate myself with the foregoing holdings and I find that Accused having denied the offence and the evidence of his identification having not been conclusive, he was entitled to the benefit of doubt.
21. From the foregoing analysis, I find and hold that the conviction and sentence imposed on Appellant were unsafe. Accordingly, the conviction is quashed and sentence set aside. Unless otherwise lawfully held, it is hereby ordered that Appellant shall be set at liberty forthwith.

DELIVERED AT MERU THIS 02nd DAY OF February 2023.

WAMAE. T. W. CHERERE



JUDGE

In the presence of:-

Court Assistant - Kinoti

Appellant - Present in person

For the State - Ms. Kitoto (PPC)

