



REPUBLIC OF KENYA



KENYA LAW
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**Mukeli v Republic (Criminal Appeal E0115 of 2021)
[2023] KEHC 1073 (KLR) (13 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1073 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E0115 OF 2021
GMA DULU, J
FEBRUARY 13, 2023**

BETWEEN

MATHALE MUKELI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original judgment of Hon. E.M Muiru in Kilungu Principal Magistrate's Court CMCR (S.O) No.74 of 2018 pronounced on 29th November 2021)

JUDGMENT

1. The appellant was charged in the magistrate's court with defilement contrary to section 8(1) (2) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of offence were that on 2nd December 2018 at [Particulars Withheld] Sub-Location [Particulars Withheld] Location in [Particulars Withheld] Sub-County within Makueni County intentionally caused his penis to penetrate the vagina of FM a child aged 12 years.
2. In the alternative, he was charged with indecent act contrary to section 11(1) of the [Sexual Offences Act](#), the particulars of which being that on the same date and at the same place intentionally touched the buttocks and vagina of FM a child aged 12 years who was mentally retarded.
3. He denied both charges. After a full trial, he was convicted on the main charge of defilement, and sentenced to twenty (20) years imprisonment.
4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal, on the following grounds –
 1. That the magistrate erred by not considering the defence evidence from the accused person.
 2. That the magistrate erred by not considering whether the complainant was actually defiled.



3. The learned magistrate erred by not evaluating both the untruths and truths of the evidence.
 4. The magistrate erred in not considering the evidence by the prosecution side never proved their case beyond the standard required by this kind of a criminal case.
 5. The trial magistrate erred by (not) considering that the evidence adduced by the complainant was neither voluntary or guided evidence.
 6. The trial magistrate erred when the court never considered the fact that section 36(1) of the *Sexual Offences Act* states that the trial magistrate may order body samples from the complainant and the accused person for DNA tests forensic tests and scientific tests in order to ascertain evidence implicating the accused.
 7. The trial magistrate erred by not considering the fact that no witness was availed in court – key witness was intentionally ignored.
 8. The trial magistrate erred in not considering whether there was actus and men rea established and whether it was availed at the trial.
5. The appeal was canvassed through filing of written submissions. In this regard, I have perused and considered the submissions filed by the appellant and those filed by the Director of Public Prosecutions.
 6. This being a first appeal, I have to be guided by the legal principle that I am expected and required to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences – see *Okeno v Republic* (1972) EA 32.
 7. In proving their case, the prosecution called three (3) witnesses. I note that the Investigating Officer was not called to testify. On his part the appellant tendered sworn defence testimony and did not call any additional evidence.
 8. The elements of the offence of defilement for which the appellant was convicted and sentenced are – age of the victim who should be below 18 years. Secondly, the act of sexual penetration even if of partial nature. Thirdly, the identity of the culprit.
 9. Was the age of the victim (Pw1 FM) proved to be 12 years? Pw1 did not testify to her age. She neither gave her date of birth nor did she say how old she was. Her mother Pw3 stated that Pw1 was born on 21/06/2006 and relied on a child clinic card which was not contested. I find and hold that the prosecution proved beyond any reasonable doubt that the victim was aged 12 years at the time of the alleged incident.
 10. Was sexual penetration proved? The victim Pw1 stated that she was sexually penetrated that day. Her mother Pw3 stated that Pw1 came back home late and on her enquiry she said “Babu Elijah defiled her in the sisal plants”. Pw2 Erick Kasiamani the Clinical Officer testified that the hymen of Pw1 was perforated and vaginal lumen was wide open.
 11. In my view, the prosecution did not prove beyond reasonable doubt that the victim (Pw1) was sexually penetrated that day. The first reason was that the perforation of the hymen was not fresh. In any case, perforation of the hymen can be caused by reasons other than sexual intercourse. The second reason is that Pw1’s evidence contradicts that of Pw2 her mother as regards the scene of incident. While Pw1 stated that the incident occurred in the house, Pw3 stated that the incident occurred in the sisal plantation. Thirdly, Pw3 stated that Pw1 had a problem of mental confusion.



12. All the above observations meant that the evidence of Pw1 regarding sexual penetration is not believable and should not have been believed by the trial court, as it is not saved by the proviso to section 124 of the *Evidence Act* (cap 80). I thus find that the prosecution did not prove beyond reasonable doubt that sexual penetration did occur as alleged.
13. With regard to the culprit, also for the above reasons, I find that the prosecution did not prove that the appellant was the culprit. In addition to the above reasons, I find that the failure of the prosecution to call the Investigating Officer, who would be the only independent witness on the consistency of evidence of the identity of the appellant as the culprit, greatly weakened the prosecution case. The benefit of the doubt as to whether the Investigating Officer was going to support or not support the prosecution evidence has to be given to the accused, and I do so – see *Bukenya v Uganda* (1973) EA.
14. The appeal herein will thus succeed, conviction quashed and sentence set aside.
15. Consequently, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

DELIVERED, SIGNED & DATED THIS 13TH DAY OF FEBRUARY 2023, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE

