



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mbwika v Republic (Criminal Appeal E053 of 2021)  
[2023] KEHC 3986 (KLR) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 3986 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CRIMINAL APPEAL E053 OF 2021**

**GMA DULU, J**

**MAY 4, 2023**

**BETWEEN**

**BENSON MWALYO MBWIKA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the conviction and sentence in Sexual Offence Case  
No. 38 of 2020 at Makueni Law Court by Sagero – SRM)*

**JUDGMENT**

1. The appellant was charged in the Magistrate's court with defilement Contrary to Section 8 (1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of offence were that on diverse dates between 1<sup>st</sup> August and 22<sup>nd</sup> August 2020 in Mukuyuni Sub Location in Makueni County intentionally and unlawfully caused his penis to penetrate the vagina of IN a Kamba juvenile aged 14 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*, the particulars of which being that between the same dates and at the same place intentionally and unlawfully touched the vagina of IN (name withheld) a Kamba juvenile aged 14 years.
3. He denied both charges. After a full trial, he was convicted on the main count 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 and relied on the following grounds:-
  1. The trial Magistrate erred in law and facts by convicting him without observing that the evidence fell short of the proof before (sic) reasonable doubt as required by the rule of law.



2. The trial Magistrate erred in law and facts by convicting him without considering that there was no evidence to prove penetration without which the prosecution could not prove the offence of defilement to the required standard in the law beyond reasonable doubt.
3. The trial Magistrate erred in law and facts in shifting the burden of proof to the appellant, misapprehending and misdirecting himself on the evidence, hence arriving at the wrong conclusion by failing to observe that the prosecution evidence was untenable, unworthy, contradictory, inconsistent and full of lies which required him to resolve the doubts in favour of the appellant.
4. The trial Magistrate erred in law and facts when he dismissed his sworn defence which alleged the possibility of being framed up due to a dispute of land and never gave cogent reasons.
5. The trial Magistrate erred in law and facts by convicting him without properly applying Section 124 of the Evidence Act and for using uncorroborated evidence to convict and sentence him.
5. The appeal was canvassed through written submissions. In this regard, I have considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions.
6. This being a first appeal, I have to start by reminding myself that I have a duty to consider and evaluate the evidence on record afresh and come to my own independent conclusions and inferences – see Okeno =Versus=Republic (1972) EA 32.
7. In proving their case, the prosecution called five (5) witnesses. On his part, the appellant tendered sworn defence testimony and called no additional witnesses.
8. The elements of the offence of defilement for which the appellant was convicted are the age of the complainant, the act of sexual penetration even if partial and thirdly, the identity of the culprit.
9. On the age of the complainant PW1, she said that she was 14 years old. She did not mention the date or year of birth. She also did not rely on any document.
10. PW1's grandmother PW3 KM stated that she did not know the age of PW1 as she was too old. PW2 MM the Uncle of PW1 also did not state the age of PW1.
11. There was however, the evidence of PW5 Stella Nthambi Muasya a Clinical Officer at Makueni Referral Hospital who produced an age assessment report prepared by Doctor Kitisya, in which the age of PW1 is described as between 10 – 11 years.
12. In my view, the prosecution did not prove the age of the complainant PW1 beyond any reasonable doubt. The first reason is that the age of the complainant being an important ingredient of the offence, the person who carried out the age assessment was a crucial witness and the prosecution should have availed him at the trial.
13. Thus the person who assessed the age of PW1 should have testified in court to confirm that her age was assessed, and also explained the process undertaken in the age assessment, which did not happen in the present case. One cannot thus say that there was scientific age assessment done on the complainant.
14. Secondly, while the complainant PW1 said in evidence that she was aged 14, and the charge sheet clearly states that she was aged 14, the age assessment report tendered in evidence puts her age between 10 – 11 years which is a different age bracket. In my view, that wide difference in the alleged age of 14 years and the age assessed at 10 years, makes the whole evidence on age of the complainant PW1, tendered before the trial court to be guesswork, and suspect.



15. The prosecution cannot prove an element of an offence on wild guesswork. As such, the court could not say whether the complainant was a minor or an adult as the age element was treated rather casually by the prosecution side. The trial court thus erred in finding that the age of the complainant was proved.
16. I come to the conclusion that the prosecution failed to prove the age of the complainant PW1 beyond reasonable doubt.
17. With regard to the act of sexual penetration, the complainant PW1 stated that she was sexually penetrated more than once. The medical evidence was that her hymen was broken, but not freshly.
18. In my view, from the evidence on record, the prosecution proved beyond reasonable doubt that the complainant PW1 was penetrated sexually.
19. Was the appellant the culprit? On this issue there is the evidence of PW1 the complainant, who stated in court that she was sexually penetrated by the appellant about four times, on different dates.
20. Her grandmother PW3 KM stated in evidence that she had noticed the appellant giving PW1 money on a number of occasions before. She also stated that on the material day, she saw the appellant talk to the complainant and then the complainant disappeared forcing PW3 to tell PW2 MM to go and look for the complainant at night, in the house of the appellant.
21. On his part PW2 stated in evidence that when he arrived at the appellant's house the appellant became hostile and assisted the complainant to escape through a window.
22. The medical evidence of PW5 Stella Nthambi a clinical officer was that the hymen of the complainant was broken, though not freshly.
23. The appellant on his part said that the case was a frame up against him, and that he was assaulted by PW2 and another.
24. In my view, the evidence of PW1 the complainant is corroborated by that of PW2 and PW3. The complainant was in the house of the appellant at night on 22<sup>nd</sup> August, 2020. Her evidence on sexual intercourse with the appellant was believable.
25. I find that the prosecution proved beyond any reasonable doubt that the appellant had sexual intercourse with the complainant as alleged.
26. In the result, I find that the prosecution proved that sexual penetration on the complainant occurred. I also find that the prosecution proved that the culprit was the appellant. However, in my view the prosecution did not prove beyond reasonable doubt that the complainant was below 18 years of age. Thus the trial Magistrate erred in finding that the age of the complainant was proved to be 14 years. Due to the failure of the prosecution to prove the age of the complainant (PW1), the conviction has to be quashed and sentence set aside. I will allow the appeal on lack of proof of age only.
27. I thus allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED THIS 4<sup>TH</sup> DAY OF MAY, 2023 VIRTUALLY FROM VOI.**

**GEORGE DULU**

**JUDGE**

**In virtual presence of:-**



Appellant

Mr. Kazungu for State

Mr. Mwendwa Court Assistant

