



**Munywoki v Republic (Criminal Appeal E018 of 2022)
[2023] KEHC 3974 (KLR) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 3974 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E018 OF 2022**

GMA DULU, J

MAY 4, 2023

BETWEEN

JACKSON MULINGE MUNYWOKI APPELLANT

AND

REPUBLIC RESPONDENT

*(from the conviction and sentence in Criminal Case
No. 80 of 2019 of the SPM Court at Makindu)*

JUDGMENT

1. The Appellant was charged in the Magistrate's Court with defilement Contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence were that on an unknown date in July 2019 at [Particulars Withheld] village in Nzau Sub-County within Makueni County intentionally and unlawfully caused his male genital organ namely penis to penetrate into the female genital organ namely vagina of FNM (name withheld) a child aged 9 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 on the same unknown date and at the same place unlawfully and intentionally touched the vagina of FNM a child aged 9 years with his penis.
3. He denied both charges. After a full trial, he was convicted on the main count of defilement and sentenced to 30 years imprisonment to run concurrently with the sentence imposed in Sexual Offence Criminal Case Number 81 of 2019.
4. Dissatisfied with the conviction and sentence, the appellant has now come to this court on appeal relying on the following grounds:-



1. The learned trial Magistrate erred in law and fact in shifting the burden of proof to the appellant misapprehending and misdirecting himself on the evidence, hence arriving at a wrong conclusion by failing to observe that the prosecution evidence was untenable, unworthy, contradicting, inconsistent and full of lies which required him to resolve the doubt in favour of the appellant.
2. The learned trial Magistrate erred both in law and fact 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 of law beyond reasonable doubt.
3. The learned trial Magistrate erred both in law and facts by convicting him without properly applying Section 124 of the *Evidence Act* for using uncorroborated evidence to convict and sentence the appellant.
4. The learned trial Magistrate erred both in law and fact when he dismissed his sworn defence which alleged the possibility of being framed up due to existing grudge without giving cogent reasons.
5. The appeal was canvassed through written submissions. I have perused and considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions.
6. As a first appellate court, I am duty bound 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. PW1 was Sylvester Waita a Clinical Officer who examined the victim PW2 and found the hymen partially perforated. PW2 was FNM the alleged victim who stated in evidence that the appellant lay on her and partly penetrated her sexually.
8. PW3 was NK the father of the victim (PW2), who produced the victim’s birth certificate and stated that in July 2019 he heard Jackson Mulinge and James Muthenya quarrelling at his parents home and when he proceeded there, he saw them fighting and on enquiry James Muthenya told him that Jackson Mulinge had a love affair with DN.
9. When put on his defence, the appellant tendered sworn defence testimony. He denied committing the offence and claimed that it was a cousin Muthenya Mukusu who had claimed that he was found with DNN.
10. The elements of the offence of defilement are the age of the victim, penetration of a sexual nature and the identity of the culprit. The prosecution had the burden of proving each of these elements beyond any reasonable doubt.
11. From the evidence on record, I have no doubt and agree with the trial court that the age of the victim PW2 was proved, based on the evidence of the said PW2, PW3 NK her father, and the birth certificate relied upon, which was produced as an exhibit.
12. With regard to penetration of a sexual nature, the victim PW2 said that she was penetrated. The medical evidence of PW1 Sylvester Waita a clinical officer, is that the hymen of PW2 was partly perforated. In my view sexual penetration was not proved as the evidence of the alleged victim PW2 could as well have been fabricated due to the incident of the quarrel between Muthenya and the appellant. It is instructive to note that before that quarrel PW2 did not make any report to anybody regarding sexual assault on her, and even during the quarrel the subject of



discussion on sexual relationship was Doreen Ndunge and not the alleged victim herein. The mere fact of partial breaking of PW2's hymen did not prove sexual penetration. I find that the prosecution did not prove the alleged sexual penetration on PW2 beyond reasonable doubt.

13. With regard to the culprit, I also find that the prosecution did not prove beyond any reasonable doubt that the appellant was the culprit as the evidence of PW2 is not believable. In addition, key witnesses Muthenya and the investigating officer were not called by the prosecution to testify in court and no reason was given for such default. As such the adverse inference in the case of *Bukenya v Uganda* [1973] EA applies as the prosecution evidence is very weak without the crucial witnesses evidence. I thus find that the prosecution did not prove beyond reasonable doubt that the appellant was the culprit.
14. The prosecution not having proved sexual penetration on the alleged victim, and failed to prove the identity of the culprit, the conviction and sentence herein cannot stand. I will allow the appeal on that account.
15. Consequently and for the above reasons, 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.

DATED, SIGNED AND DELIVERED THIS 4TH DAY OF MAY, 2023 VIRTUALLY FROM VOI.

GEORGE DULU

JUDGE

In the virtual presence of:-

The appellant

Mr. Kazungu for state

Mr. Mwendwa court assistant

