



REPUBLIC OF KENYA



**KENYA LAW**  
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**Sumba v Republic (Criminal Appeal E036 of 2021)  
[2023] KEHC 17979 (KLR) (2 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 17979 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL E036 OF 2021  
WM MUSYOKA, J  
JUNE 2, 2023**

**BETWEEN**

**NIOSTICK BUYANZA SUMBA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from judgment by Hon. MA Onyango, Resident Magistrate, RM,  
in Mumias CMC Sexual Offence Case No. 4 of 2021, of 24th August 2021)*

**JUDGMENT**

1. The appellant, Niostick Buyanza Sumba, had been charged before the trial court of the offence of defilement, contrary to section 8(1), as read with section 8(3), of the *Sexual Offences Act*, No 3 of 2006, Laws of Kenya. The particulars were that on August 18, 2018, at [Particulars Withheld] Sub-Location, in Mumias East Sub-County of Kakamega County, he caused his penis to penetrate the vagina of MIO, a child of 14 years. There was an alternative charge of committing an indecent act with a child, contrary to section 11(1) of the *Sexual Offences Act*. He pleaded not guilty, a trial was conducted, and 4 witnesses testified.
2. PW1, MIO, was the complainant. She testified that that the appellant, who she described as her boyfriend since 2018, got her pregnant, when she was in Standard 8. She said that they had sex for the first time on June 1, 2018, and then on August 18, 2018. She got pregnant, but aborted after 4 months, in January 2019. She said that the appellant did not force her to have sex, but the relationship ended after she aborted. She said that when the local assistant chief got information that she had been pregnant and had aborted, she was arrested, and taken to hospital.
3. PW2, SOO, was a neighbour of PW1. He testified that on January 10, 2019, he detected a foul smell from his toilet, and as he suspected that PW1 was pregnant, he thought that she might have committed an abortion, and thrown the foetus into his latrine. He informed the grandmother of PW1, who



- informed him that it was the mother of PW1 who had procured the abortion for her. He informed the Chief, who informed the local Assistant Chief. The matter was reported at Shianda Police Station. The police came the following day, and retrieved a foetus from his latrine, which they did not take away as it was rotten.
4. PW3, No xxxx Police Constable Dennis Odhiambo, was the investigating officer. He took PW1 from her home on January 11, 2019, and took her to a hospital at Shianda. PW1 informed him that the person who got her pregnant was the appellant, a student at [Particulars w]Withheld] Secondary School. He went to the school and arrested him, and charged him with defilement. He said that what they retrieved from the latrine of PW2 was rotten, and they did not take it away from there. He stated that PW1 was not charged with abortion.
  5. PW4, Brenda Atieno Opiyo, was the clinician who attended to PW1, and filled the P3 Form. She tested PW1 to confirm whether she had committed an abortion, and the pregnancy test was positive, that there was a complete abortion. PW1 had been seen previously by her colleague, a KO, who had documented a foul smelling discharge from her vagina, and bruises on her vaginal ooze. She said that PW1 was aged 14 years at the time.
  6. The appellant was placed on his defence. He gave a sworn statement, as DW1. He stated that he knew PW1, but denied ever having sex with her. He said that he did not know that she was pregnant. He said he got to know PW1, when she used to come visit her elder sister, who was married in his locality. They became friends, but not lovers. He said that he was 18 years old in 2019, but he did not know how old she was.
  7. After taking evidence from both sides, the trial court found that the offence of defilement had been established against the appellant, convicted him and sentenced him to serve 7 years in jail. The appellant was aggrieved, hence the instant appeal. The grounds are that he was sentenced without evidence, the only evidence against him was that of the clinician and the investigating officer which was not adequate, burden of proof was shifted to him, age and penetration were not proved, and there was no material evidence on the abortion and no deoxyribonucleic acid, DNA, profiling was done.
  8. Directions were given on May 12, 2022, for filing of written submissions. The appeal was canvassed by way of written submissions. None of the parties filed written submissions.
  9. The offence charged is defilement. The 2 critical ingredients are age and penetration. PW1, the complainant, was said to be aged 14, at the time of the alleged defilement. When she testified in court she was in Form 2, and said she was 17 then, and that she was in Standard 8, when the offence was allegedly committed. She produced a birth certificate, which indicated that she was born on July 15, 2003. I have ploughed through the original trial court records, but I have not come across the said certificate of birth, but it had been produced as P. Exhibit 3. That made her to be 15 years 1 month and 3 days old, as at August 18, 2018. The trial magistrate recorded that she saw the certificate of birth, and recorded it as an exhibit. I shall take that to be so. There are other documents that place her age at below 15 at the time. I am talking about the treatment notes, dated January 11, 2019, where her date of birth is indicated as June 15, 2002, and the P3 form, dated January 10, 2019, which put her age at 14 years. However, these documents cannot override the certificate of birth. I shall, therefore, treat the proven age of PW1 to be 15 years 1 month and 3 days as at the date of the alleged defilement.
  10. Was there penetration of PW1? PW1 was the victim of the crime. She testified that she was penetrated, and got pregnant out of it. Her allegation was supported by the medical evidence. The clinician testified that she did a pregnancy test on PW1, which came out positive for pregnancy, which had been terminated. The fact that PW1 got pregnant is proof that she was penetrated by the person responsible for the pregnancy, unless it could be shown that she was artificially inseminated.



11. Did the appellant penetrate PW1? PW1 said that the appellant penetrated her. She was specific on 2 dates, the first time, June 1, 2018, and the next ,August 18, 2018. She was clear that she got pregnant from the contact on August 18, 2018. The issue of identification did not arise. The 2 knew each other. PW1 did not testify on how they met, but the appellant said they met when she used to visit her sister, who was married in his area. They became friends, according to him, but not lovers. There was opportunity for them to have sexual contact from the interaction as friends. The trial court saw and heard the witnesses testify. She believed the version by PW1, and not that by the appellant. I see no reason to interfere with or fault that finding and holding.
12. From the material on record, I find and hold that there was sufficient evidence upon which the trial court could convict.
13. The appellant did not appeal against the sentence. I have considered it though. The appellant and PW1 were both in school. PW1 was 15 years at the time, and the appellant 18. The age difference was just 3 years. The appellant should be treated as a young person, for all practical purposes, straddling that space between childhood and adulthood. He had just turned 18. Turning 18 makes one an adult, but the mind of such an individual would still be that of a young person, still unsure whether he is an adult or a child. It would be unjust to handle an offender, in that bracket, the same way as with a 30 year old, or a 40 year old, or even a 50 year old. A custodial sentence would not serve him well. I shall, accordingly, set aside, the sentence imposed on him, of 7 years imprisonment, and substitute it with a probation order, to be served for 3 years. Orders accordingly.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 2ND DAY OF JUNE 2023**

**W MUSYOKA**

**JUDGE**

**Mr. Erick Zalo, Court Assistant.**

**Appearances**

Mr. Munyendo, instructed by Oscar Wachilonga & Company, Advocates for the appellant.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the respondent.

