



REPUBLIC OF KENYA



KENYA LAW
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**Mwambeyu v Republic (Criminal Appeal E101 of 2021)
[2023] KEHC 22591 (KLR) (3 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 22591 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E101 OF 2021
A. ONG'INJO, J
AUGUST 3, 2023**

BETWEEN

SAMMY BANDE MWAMBEYU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the decision of Hon. D. Odhiambo (RM) on 18th November 2021 in Shanzu Senior Principal Magistrate's Court Sexual Offence Case No. 108 of 2020, Republic v Sammy Bande Mwambeyu)

JUDGMENT

Background

1. The Appellant, Sammy Bande Mwambeyu, was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No 3 of 2006.
2. The Particulars of the offence are that Sammy Bande Mwambeyu on the 17th August 2020 in Bamburi Location in Kisauni Sub-County within Mombasa County intentionally and unlawfully caused his penis to penetrate the vagina of PM a child aged 17 years.
3. The appellant was found guilty, convicted for the offence defilement and sentenced to serve 15 years imprisonment.
4. The appellant being aggrieved by the conviction and sentence, he preferred the appeal herein on the following amended grounds of appeal filed on June 6, 2022: -
 1. That the trial court magistrate erred in law and fact by convicting the appellant without observing that the ingredients of the offence of defilement was not proved beyond reasonable doubt, thus rendered the appellant to suffer a prejudice.



2. That the trial court magistrate erred in matters of law by failing to observe that the appellant herein was not accorded a right to fair trial guaranteed by Article 25 (c) of the Constitution of Kenya
3. That the trial court magistrate erred in law and fact by failing to note that the prosecution side failed to discharge its burden thus the case was not proved beyond reasonable doubt.
4. That the court faulted in points of law and fact by failing to observe that the prosecution evidence mainly PW1 (2) and (4) was insufficient, inconsistent and unreliable and thereby arrived at the erroneous decision to convict the appellant herein.
5. The Appellant prayed that the conviction is quashed, sentence set aside and he be set at liberty.

Prosecution's Case

6. PW1, MD, testified that the complainant was her daughter and aged 18 years old and that the incident happened when she was 17 years old. That on May 15, 2020, she was at home when she was sent by her father to get the phone from where it was being charged. That she left but did not come back and that at 7.00 pm, PW1 started looking for her in the neighbourhood and at 9.00 pm, he got a message telling him not to look for her as she was with Karisa. That the following morning, PW1 received another message saying that she should not look for her as Elvis was with her. That she was told to go and look for her at Enzaye if she had doubts and that she went to Enzaye and asked the residents where Elvis was. That she could not find Elvis and that when she went back home, she found her daughter had come back. That the complainant said she did not know where the phone was and that she had slept in the bush. That she said she had gone to a certain boy whom she did not know by name but could recognize him.
7. PW1 further testified that they took the complainant to Action Aid offices in the company of her father and that they found Lizzie and Halima. That they then proceeded to Makadara and found Fatuma and went to Kiambeni Police Station. That on the 3rd day, her daughter told her what happened. That after she had taken the phone, she met Sammy on her way home who told her that he had been sent by her uncle Said. That they then went to the bush and Sammy raped her and left her in the bush where she stayed the whole night. That they went to look for him and when they saw him, she identified him and the complainant said she thought his name was Elvis. That PW1 went to talk to him and when he saw Fatuma, he went to hide inside the pub and managed to escape and even moved out and went to stay elsewhere. That when the appellant was arrested, the complainant went to the police station and identified him.
8. PW2, Dr Reinab Bag, the medical officer from Coast General Hospital said that she had a P3 Form filled on July 26, 2021 but the accused said he did not have the P3Form so she was stood down.
9. PW3, PM the complainant herein testified that on May 15, 2020 at 6.00 pm, he was on his way to the shop when he met Sammy whom he knew very well as an uncle. That he told her that he wanted to send her to another uncle and she followed him. That along the way, he jumped on her and dragged her to the bush and told her he wanted to have sex with her. That she refused and he said he would teach her a lesson. That he then removed her clothes and had sex with her. That she told him to take her home and he refused. That they then slept in the bush and when she woke up in the morning, she found that she was alone. That she went home and told her mother what happened and she was taken to Kiambeni Police Station where she recorded her statement and they proceeded to Makadara for treatment. That on July 26, 2021, she went back and the P3 Form was filled. She testified when she was 18 years old and that she was born on September 22, 2002.



10. PW4, Dr Deepkum Nukashri, from Coast General Hospital said that she had a P3 Form signed by Dr Reinab whom she had worked with and that she knew her handwriting. That the P3 Form was filled for PM aged 17 years who had changed her clothes. That she stated she had been defiled by a person well known to her. That she was in fair general condition and the approximate age of the injury was 11 months. That the probable weapon used was a blunt object his penis and she was put on PEP and STI treatment. That the degree of injury was maim, the outer genitalia was normal, there was healed laceration reddening on the vulva, and the hymen had a scar. That there was no discharge and tests done were normal. She produced the P3 Form as PExh 1.
11. PW4 also said she had the PRC Form filled by Loice Hamis on August 19, 2020 for the complainant. She said she had worked with her and that she was a clinic nurse. That she knew her handwriting and signature and that the victim said she was lured by the accused to the bush who penetrated her forcefully and that she knew the person physically. Her clothes were not presented at the time of examination and the outer genitalia was normal. That the vagina had healed lacerations and hymen was broken. That there was also reddening on the vaginal wall. She was put on PEP and STI treatment. That the tests done were normal. She produced the PRC Form as PExh 2. Consent to examine her was given by her mother which was produced as PExh 4 and the parasitology report as PExh 5.
12. PW5, CPL Fatuma Zary No 2xxx33 the investigating officer from Kiembeni Police Station testified that on August 19, 2020, he received a case of defilement which he was given to investigate. That the complainant said she was on the way to the shop when she met the accused who told her she wanted to send her to her uncle. That she recorded her statement and that of her mother and that she then got a P3 Form and birth certificate then arrested and charged the accused. She produced the birth certificate as PExh 6.

Defence Case

13. DW1, the accused, Sammy Bande Mwambegu gave an unsworn testimony that on August 16, 2020, a grandmother by the name MD went to him in the morning at 6.00 am and that he was sleeping and that his wife went to wake him up. That there was a grandfather who had woken up and that the accused was told to follow her to where the grandfather was. That Maku Dume told the grandfather that she had been looking for her daughter for three days. That M received a message on her phone and that she gave her phone out for the message to be read. That the message said 'usitafute msichana yako, niko nayeye Elvis.' That she asked who Elvis was and she was told there was nobody called Elvis in the area. That they tried to call the number but the phone was not picked. That the phone was picked on second attempt and the girl who was being looked for picked the phone and said she was far away and should not be looked for and that she switched off the phone.

DW1 said that on August 31, 2020, he was arrested at 11.00 pm by the police and taken to Kiembeni Police station where he was received by Fatuma Zari and was forced to sign something he did not know. That he was then brought to court and charged with defilement which he denied because he did not commit the act.
14. DW2, Ruth Nyiro testified that on August 16, 2020, MD went to their home and found her washing dishes. That she asked if her husband was around and that she then called her husband and he got out. That she then called their grandfather and told them her daughter had disappeared. That before she started talking, she showed them the message on her phone which said the person had the girl in Thika. That another message was received asking what they wanted. That she called and talked to the man when Sammy was there. That the person hung up and when called again he said he was in Ngindo. That DW2's sister then called the number and introduced herself as her aunty and that she said she



was far away and hung up. That DW2 took the number and sent money and that it showed MD. That at that time her husband did not have a phone.

15. The appeal herein was canvassed by way of written submissions.

Analysis and Determination

16. This being the first appellate court, it is guided by the principles in *David Njuguna Wairimu v Republic [2010] eKLR* where the court of appeal held: -

' The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.'

17. After considering the grounds of appeal, records of the trial court and the submissions, main issues for determination are as follows: -

1. Whether ingredients of the offence of defilement were proved to the required standard
2. Whether the sentence was harsh and excessive in the circumstances

Whether ingredients of the offence of defilement were proved to the required standard

18. On proof of age, PW5, CPL Fatuma Zary produced the birth certificate as PExh 6 confirming the complainant was 17 years at the time the offence was committed. PW1 the mother of the complainant also gave evidence as to age.
19. On penetration, PW3, the complainant said she met the appellant on her way home and she knew him as an uncle and he made her believe he wanted to send her to another uncle and he followed her only for him to lead her into a bush where he defiled her overnight. That when she came to, she found she was alone and she walked back home. She said along the way, he jumped on her, dragged her to the bush where he undressed and defiled her. PW3 said the appellant who was known to her as Sammy told her he was Elvis. PW3 was examined and Dr Zainab used treatment notes and PRC Form to fill the P3 Form. She said there was healed lacerations with reddening on the vulva and hymen had a scar. The evidence that the accused had sex with the complainant was corroborated by medical evidence of PW4 that the complainant was defiled and there was penetration.
20. On identity of the appellant, PW1 said the appellant was a grandson to her sister and that she knew him. PW3 the complainant identified him and when the police were zeroing in on him, he escaped and was arrested on August 31, 2020 when he returned to the area where he had committed the offence. The complainant met the appellant at 6.00 pm and this is a case of recognition rather than identification.
21. In conclusion, this court finds that the appeal on sentence succeeds partially and the sentence is substituted with 10 years which are to run from August 31, 2020. Right of appeal within 14 days explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 3RD DAY OF AUGUST 2023.



HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for the Respondent

Appellant present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

