



**Musambi v Republic (Criminal Appeal E049 of 2022)
[2023] KEHC 22692 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22692 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E049 OF 2022
TM MATHEKA, J
SEPTEMBER 22, 2023**

BETWEEN

MIKE MUTUNGA MUSAMBI APPELLANT

AND

VERSUS REPUBLIC RESPONDENT

(From the original conviction and sentence of Hon.E.M. Muiru (PM) in Kilungu Principal Magistrate's Court Criminal Case No. E037 of 2021 delivered on 9th March 2022)

JUDGMENT

1. The appellant was charged with the offence of 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 diverse dates between 9th and 10th November 2021 at around 1400hrs in Kola Location within Machakos County, the appellant intentionally caused his penis to penetrate the anus of AMK, a child aged 4 years and 10 months.
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](#) No. 3 of 2006. The particulars were that on the said dates, at the same place and time, the appellant intentionally touched the anus of AMK, a child aged 4 years and 10 months with his penis.
3. On 9th March 2022 the appellant was convicted on the main charge and sentenced life imprisonment.

The Appeal

4. Aggrieved by that decision, the appellant filed this appeal on the following grounds;
 - a. That he was sentenced on the case when there was no plea of guilty.
 - b. That he is in dispute with the conviction and sentence imposed on him



- c. That the prosecution did not prove their case beyond reasonable doubt.
 - d. That the honorable magistrate overlooked the inconsistencies which were uncorroborated.
 - e. That the learned trial magistrate erred in law and fact by convicting him without considering whether there was proof of penetration.
 - f. That the learned trial magistrate erred in law and fact by shifting the burden of proof to him, misapprehending and misdirecting herself hence arriving at the wrong conclusion in failing to observe that the evidence by the prosecution witnesses was untenable, unworthy, contradictory and inconsistent.
 - g. That the learned trial magistrate erred in law and fact by convicting him without using section 124 of the Evidence Act in the manner required when the trial was being conducted.
 - h. That the learned trial magistrate erred in law and fact by convicting him on uncorroborated evidence.
 - i. That the learned trial magistrate erred in law and fact when she failed to resolve the grudge which seemed to have made the misunderstanding between him and the mother of the complainant, whereby the trial magistrate convicted and sentenced without giving cogent reasons.
5. The case for the prosecution was presented by four witnesses. The complainant who was a minor aged 4 years 10 months at the time of the alleged offence, her mother, the clinical officer who filled the P3 and the police officer who received the report at Kola Police Station.
 6. The complainant, PW1, testified that the appellant did tabia mbaya to her in her buttocks when she was at home. That she reported to her mother (PW2) and was taken to hospital.
 7. The mother testified that the appellant was her employee and on the material day, he went with the complainant to her (PW2's) shop. She noted that PW1 was walking unusually and the appellant was looking at PW1 strangely. That she sent the appellant home to check on the cattle while she remained with the Complainant whom she interrogated. She testified that PW1 told her that 'Mutunga had removed her clothes and had sex with her on the buttocks '.
 8. She waited until evening when she went back home. She confronted the appellant with the information from the child, which the appellant denied. It is then that she checked the child and noticed there was an injury. And it is then that the appellant admitted the offence and pleaded for forgiveness. She took his Identity card and told him to go home and sleep but in the morning, he was missing. She rang her husband who told her to report to the police, which she did. They were referred to the hospital. She identified the P3, treatment notes and the PRC form. She also produced the birth certificate for the child showing date of birth as 12th January 2017.
 9. She testified that the appellant was later traced to his home area of Kitui where he was arrested and brought to Kola Police Station.
 10. The Clinical Officer PW3 Eric Kasiamani told the court that he was based at Kilungu Sub County Hospital and that he filled the P3 for the child. He said that he relied on the Out Patient Card or treatment notes to fill the P3 but he was not the one who treated the child. That according to the said documents the child alleged to have been defiled and on examination her genitalia was ok. That 'on the anal region there was a wound that looked like it was caused by friction. I concluded that the child



had been defiled in the anus'. On cross examination he said the in the anal region there was evidence of penetration

11. PW4 no. 55562 PC Justus Mutune described himself as the investigation officer. He received the report. According to him, on the 9th and 10th of November 2021, the appellant called the child to his house removed her clothes and sodomised her, and told her not to tell anyone. He produced the exhibits P3 form (P.Ex 1), OP card (P.Ex 2) PRC form (P.Ex 3) and Birth Certificate (P.Exh 4). He said the appellant was arrested after a long time by officers from Kitui.
12. The appellant was put on the defence and gave an unsworn statement and said that on 11th November 2021, he woke up and went to the shamba where he was arrested from. That he was taken to court after 4 days and charges that he did not know were read to him. He denied having ever worked for PW2.
13. Directions were given that the appeal be canvassed through written submissions. Accordingly, the parties complied and filed their respective submissions.

The Appellant's Submissions

14. The appellant submits that the charge sheet was defective thus it was difficult for him to make a smooth cross examination and defend himself thoroughly. He submits that the charge sheet lacked one ingredient and its framers were ignorant. He submits that the word 'unlawfully' was omitted hence the charge sheet was incomplete.
15. He relies on the case of Abel Monari Nyamunga –vs- R; Cr Appeal No. 86 of 1994 for the submission that PW1's evidence required corroboration. He points at PW1's evidence where she said, "you did that to me on 2nd and I was taken to hospital." He submits that PW1 seemed not to know of anything adequate to inform the court. He contends that the evidence falls short of the date of the month that the offence was allegedly committed.
16. He submits that the evidence witnessed in the voir dire examination was very funny and it violated the rights of a fair trial. That a fair trial should be conducted in such a manner which would totally ostracize injustice, prejudice, dishonesty and favoritism.
17. He submits that the trial was conducted in contravention of section 19 of the [Oaths and Statutory Declarations Act](#) which is concerned with the reception and admissibility of the evidence of a child of tender years. That it also contravened Article 4 of [the Constitution](#) and section 2 of the [Sexual Offences Act](#). He contends that so long as evidence, though not an oath is taken down in writing, it amounts to a deposition under Section 233 of the Criminal Procedure Code. He relies on section 125 of the [Evidence Act](#) for the submission that all persons are competent to testify including children.
18. He submits that the complainant was 4 years and 10 months hence the court was called upon to engage her in order to find out whether she understood the meaning and purpose of an oath before allowing her to testify on oath. He contends that an omission in this respect is fatal and vitiates the trial process. He relies on the case of John Otieno Oloo –vs- R [2009] eKLR where the Court of Appeal held that failure to form an opinion on voire dire examination occasioned a miscarriage of justice. He submits that the origin of the rule on voire dire was first applied in the ancient yet landmark English case of R –vs- Braisser (1779) 1 LEACH Vol 1 Case XC VII PP 199-200.
19. He submits that PW2's evidence needed thorough scrutiny and denies admitting the offence and pleading for forgiveness as per PW2's account. He wonders why PW1 did not complain to her mother and why her mother did not notice that she was walking unusually if indeed she had been sodomised on 9th and 10th November 2021



20. He submits that PW3 did not establish any injury after examining the complainant and that makes the evidence of the mother false because when a child of tender years is defiled, she sustains an injury which may result in damage of the whole organ. He relies on R –vs- Harris & Others (2005) EWCA CRIM. 1980 where he submits it was held that; “It is crucial that experts are instructed, who are capable of conveying their findings and conclusions in a way that is easily understood by the lay person. As a participant in the proceedings, the expert was on a duty to ensure that evidence, whether disputed or not is presented in the clearest and shortest way. Reports should be robust, logical, and transparent and balanced (Crown Criminal Procedure Rules 3.2.3 (UR).”
21. He submits that the Clinical Officer failed to assess and come with the right information about the injury sustained by PW1. That from the medical examination (P3), no discharge was noted in the complainant’s anus and the type of weapon which had caused the alleged injury was not established. He contends that there was no link between him and the offence.
22. He submits that the evidence of PW4 is not admissible for exaggerating the information by PW1. That there is nowhere in PW1’s evidence where he (appellant) is said to have warned her not to disclose the alleged incident. It is also his submission that there was no attempt to link the complainant’s purported laceration to him and the complainant was not subjected to a high anal swab to collect traces of sperms/ semen that may have been present. He contends that the medical investigation fell short of the standard procedure recommended in collecting evidence in a defilement case. He refers to the Merck Manual Professional Version on Medical Examination of Rape Victims which recommends that several laboratory tests should be carried out to detect presence of sperms.
23. He submits that for the offence of defilement to be established, the elements of mens rea and actus reus must be present. That the charge sheet in the present case only provides for the element of actus reus. That in order for a criminal act to qualify as a crime, the mental state of the perpetrator must be taken into consideration. Without evidence that the mens rea occurred at the same time, he submits, the charge sheet was defective as it was difficult for him to defend himself sufficiently. He submits that this appeal epitomizes the unfair consequences that are inherent in a critical enforcement of the Sexual Offences Act and the unquestioning imposition of some of its penal provisions.
24. He submits that the evidence by PW1 did not elaborate how the offence was committed. That ‘tabia mbaya’ does not mean penetration of an organ from one person to another person’s organ. He submits that there should have been deep investigations to establish whether the object that injured the anus of PW1 was a penis or any other object.
25. It is obvious, he submits, that when an employee has a dispute with the employer, it becomes difficult for the peace of the employee to be present. That in such a situation, the only option of meeting peace is to be distant for a while. He submits that an attitude of misunderstanding between him and PW2 was triggered when PW2 ordered him to submit his phone and Identity Card. That if he had the intention of fleeing from PW1, he could have gone to a new and unknown area. That his reason of going to his parent’s home was due to the misunderstanding which had been witnessed in the employer’s home.
26. He submits that PW4 did not furnish him with the investigations diary. That the police officer who was given the duty of tracing him was supposed to furnish him and the court with the data which he used in order to prove that he had an intention of fleeing from the alleged offence.
27. He submits that he was prejudiced by being made to stay in the police cells for 4 days yet the laws of our country require a person to be taken to a trial court before 24 hours are over. He submits that he was arrested in his parents’ house because his conduct was not consistent with a guilty mind



The Respondent's Submissions

28. The State, through prosecution Counsel Vincent Maina, submits that the appellant has not stated the specific defect in the charge sheet. That the ingredients of the offence were clearly laid out and the same were understood by the appellant during plea which he was able to respond to and thereafter defend himself. That if there was an error, which is denied, it was a mere technicality that was neither fatal nor prejudicial to the appellant and therefore curable under Article 159(d) of *the Constitution*. He relies on the case of Bernard Ombuna –vs- R [2019] eKLR where the Court of Appeal held;

“In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of charges preferred against him and as a result, he was not able to put up an appropriate defence.”

29. He submits that the prosecution proved its case beyond reasonable doubt and any contrary assertion is misleading and erroneous. He relies on the case of Charles Wamukoya Karani –vs- R; Criminal Appeal No. 72 of 2013 where it was stated that;

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

30. He submits that the ingredients of the offence were proven through oral and documentary evidence. That the age of the complainant was proved through the birth certificate which indicates that she was born on 12/01/2017 thus aged 4 years.

31. With regard to penetration, he submits that PW1's evidence was corroborated by PW2 and PW2's evidence was corroborated by PW3. That when the appellant was questioned, he admitted committing the offence, sought forgiveness and thereafter ran away. That upon examination of PW1, a wound was found around the anal region hence the conclusion that she had been defiled.

32. As to whether the penetration was done by the appellant, he submits that the appellant was identified by PW1 as the culprit, that the offence happened during the day, that it was the appellant who took the victim to PW2 where her unusual walking style was noted and that PW2 identified him as their employee who sought forgiveness before going into hiding. He submits that there is no margin of error as he was very well known to the victim.

33. It is now settled that the duty of a first appellate Court is to scrutinize the evidence on record, make its own findings and draw its own conclusions giving due allowance to the fact that the trial Court had the advantage of seeing and hearing the witnesses.

34. Having looked at the grounds of appeal, the rival submissions and the entire record, it is my considered view that the following issues arise for determination;

- a. Whether the charge sheet was defective.
- b. Whether the complainant's evidence was admitted properly.
- c. Whether there were inconsistencies in the prosecution case.
- d. Whether PW1's evidence required corroboration
- e. Whether the offence of defilement was proved to the required standard.



Whether the charge sheet was defective.

35. According to the appellant, the charge sheet was defective because the word ‘unlawfully’ was omitted from the particulars of the offence.

36. Section 134 CPC provides as follows;

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

37. The appellant was convicted on the main charge of defilement. The charge as drawn contains a statement of a specific offence, namely defilement. The particulars given informed the appellant that he was being accused of causing his penis to penetrate the anus of a child of tender years intentionally. In my view, that kind of act cannot be considered lawful in any circumstances. In the case of Willie (William) Slaney -vs- State of Madhya Pradesh [A.I.R. 1956 Madras Weekly Notes 391], the Supreme Court of India held that:-

“Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of insubstantial technicalities.....We are unable to find any magic or charm in the ritual of a charge. It is the substance of these provisions that count and not their outward form. To hold otherwise is only to provide avenues to escape for the guilty and afford no protection to the innocent.”

38. In this case, the charge was read to the appellant in his native Kamba language which he denied hence triggering a full trial. It is also evident from the record that the kind of questions asked by the appellant in cross examination are consistent with his knowledge of the offence charged. Consequently, the omission of the word ‘unlawfully’ did not prejudice him in any way. It is also my considered view that the omission of the word ‘unlawfully’ is curable under section 382 of the Criminal Procedure Code which states that;

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceeding.”

Whether the complainant’s evidence was admitted properly

39. The appellant’s position is that the learned trial magistrate should have engaged the complainant in order to find out whether she understood the meaning and purpose of an oath before allowing her to testify on oath. The birth certificate shows that the complainant was born on 12/01/2017 hence at the time of testifying on 15/12/2021, she was 4 years and 11 months. She was certainly a child of tender



years. Section 19(1) of the [Oaths and Statutory Declarations Act](#), Cap 15 Laws of Kenya provides as follows;

Evidence of children of tender years

1. Where in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap 75), shall be deemed to be a deposition within the meaning of that section.

40. Section 233 of the Criminal Procedure Code (CPC) was repealed by Act No. 5 of 2003.

41. The record shows that the trial magistrate conducted a voir dire examination of the minor and formed the following opinion; “she does not possess knowledge to understand the meaning of taking an oath to give unsworn evidence.” Evidently and contrary to the appellant’s submission, the complainant did not testify on oath and admission of her evidence was proper.

Whether there were inconsistencies in the prosecution case.

42. The inconsistency pointed out by the appellant was with regard to the date of the offence. PW1 said; “You did that to me on 2nd. I was taken to hospital.” On the other hand, her mother, PW2, said; you committed the act on 10/11/2017. The child said you did that to her twice on 9th and 10th.” The police officer told the court that the offence was committed in the appellant’s house, that the appellant warned her not to tell anyone.

Whether PW1’s evidence required corroboration

43. Having established that PW1 was a child of tender years, it is trite that where such a child gives an unsworn statement, corroboration is necessary. In the case of Johnson Muiruri –vs- Republic, [1983] KLR 445, the Court of Appeal held that;

“Where a child of tender years gives unsworn evidence, then corroboration of that evidence is an essential requisite. But if a child gives sworn evidence, no corroboration is required but the assessors must be directed that it would be unsafe to convict unless there was corroboration.”

44. Similarly in the case of Oloo –vs- R [2009] eKLR, the Court of Appeal held that;

“In our view, corroboration of evidence of a child of tender years is only necessary where such a child gives unsworn evidence.”

45. From the foregoing, it is clear that the evidence of PW1 required corroboration and was properly corroborated by that of the mother and the clinical officer.



Whether the offence of defilement was proved to the required standard

46. There is no doubt that the age of the complainant was established by the certificate of both produced as Pexh. 4. She was born on 12/1/2017.
47. On the penetration - the record shows that the child told the court that - the appellant did “ tabia mbaya to me in my buttocks.”
48. It is noteworthy that the state did not make the effort to elicit what the complainant meant by term tabia mbaya . I am alive to the language limitation that we have as a society when it comes describing matters sex because it is generally a taboo subject. I would not be expecting any graphic descriptions from a child but evidence as to how this happened. The circumstances surrounding the commission of the offence cannot be left out as the risk that the child may be told to say specific words and just leave it at that is high. That is why it is important for the story of the child to come out.
49. I am also aware of the fact that this may be difficult because of the manner in which we elicit evidence during examination in chief. Any times the prosecutor will put questions to the witness, the trial court will record the answers then, the witness will be asked the next question. Sometimes children especially of tender years will find that distracting while all they want is to tell their story in one breath. This cycle of question, then pausing, then writing, then more questions and pausing and writing between the prosecutor and the trial court does inhibit the flow of the child’s testimony. In this case the story is not told. She states” ...someone did to me tabia mbaya. It was Mutunga. He did that to me while I was at home. Mutunga did tabia mbaya to me in my buttocks. I told my mother what he did. I was taken to hospital...I told my mother immediately what you did. I was taken to hospital”
50. Let me point out that the state was bound to elicit from the complainant a description/explanation, in her own words, of what the appellant did to her. The term tabia mbaya per se is not enough. It leaves it to the imagination of the court as to what the child actually means, which may not necessarily be penetration. Under the sexual offence Act it could mean a whole range of things all of which could amount to a sexual offence committed against the child. Hence the need for the investigation officer and the prosecutor in every case involving a child complainant to elicit as much information as is required to support the charge and not to leave it to the imagination of the court cannot be over emphasised because it pits the rights of the child to get justice and the right of the accused to a fair hearing against each other.
51. In this case there is no evidence of the circumstances in which this offence is alleged to have taken place. Section 33 of the Sexual Offence Act state;
- “Evidence of the surrounding circumstances and impact of any sexual offence upon a complainant may be adduced in criminal proceedings involving the alleged commission of a sexual offence where such offence is tried in order to prove
- i. Whether a sexual offence is likely to have been committed towards or in connection with the person concerned”
52. The question as to what actually happened remains largely unanswered? This situation is made worse by the mother’s testimony that the child told her that the appellant had sex with her in the buttocks. Did the child actually state that the appellant had sex with her in her buttocks? Did the child use that language to say that someone had sex with her or would she describe what the person did to her? If indeed the child used those words with the mother - then would she not have been expected to use the same with the prosecutor, and the court? It is noteworthy that even from the mother there is no



- description of what happened? Where it happened? How it happened? What the appellant actually did? This is especially unfortunate because it is alleged that the appellant defiled the child twice on two different dates. The child says she told her mother immediately and she was taken to hospital. That is not what the record states.
53. The clinical officer who testified did not treat the child but filled the P3 using the treatment documents. He said there was an anal injury that appears to have been caused by friction. He concluded that this friction was defilement. It is the prosecution's case that the child was defiled on 9th and 10th November, 2021 - according to the PCR the report was that on each of those days, the appellant made the child lie on the bed, and penetrated her anus. He testified that on the anal region there was a wound that looked like it was caused by friction - he did not examine her. He relied on treatment documents. He could not tell where exactly this friction marks were in the anal region. He gave no explanation for his conclusion that the friction marks were proof of defilement. Penetration is defined as "the partial/complete insertion of the genital organs of a person into the genital organs of another person."
54. I did not find evidence of either partial or complete insertion of the appellant's penis into the anus to the complainant. Without other evidence the record simply shows that the complainant had a wound which appears to have been caused by friction.
55. From the record it is evident that the trial court observed the child and was persuaded that the child was telling the truth, That the child did not understand what sex was, that the child could only say what the appellant had done was tabia mbaya and that the child knew the appellant and identified him by his name and the act he had done to her and where he had done it.
56. As an appellate court, I must be wary of the fact that I did not hear or see the child testify. Even in the light of the misgivings I have with the rest of the evidence I have no reason to doubt that the child was telling the truth, in the only way she knew and it may have been distorted by the adults in the room.
57. Without proof of actual penetration, I find that injury is evidence of an attempt at penetration.
58. In the circumstances charge of defilement Contrary to Section 8(1) as read with 8(2) of the Sexual Offence Act is substituted with attempted defilement c/s 9 of the same Act which states;
9. Attempted defilement
- (1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.
- (2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.
- (3) The provisions of section 8(5), (6),(7) and (8) shall apply mutatis mutandis to this section.
59. Was the appellant identified as the perpetrator? The only issue here is that the learned trial court ought not to have taken into consideration the alleged confession by the appellant to his employer because that is not admissible. The failure by the appellant to call any witness in his defence should not have been held against him. The court ought to have considered the evidence laid out by the prosecution vis a vis the appellant's defence.
60. The appellant's defence was not believable. That police could leave Kola in Machakos and have him randomly from Kitui and brought him all the way to Kola and if he was not connected with those people. The child knew him, and knew his name and identified him in open court, hence his denial that he had never worked for the PW2 was simply a lie.



61. In fact his written submissions paint a different picture - that indeed he was an employee, and he fled the home after his relationship with PW2 became filled with suspicions. That however he could not have been guilty because he only fled to his parents' home.
62. This however is clearly an afterthought - arising from the time spent in custody during the trial he was given the opportunity to make his defence and his defence was that the Pw2 and her family were complete strangers.
63. In the end I find that the appellant was properly identified by the complainant.
64. The appellant was sentenced to the mandatory life imprisonment under Section 8(2) of the Sexual Offences Act. In mitigation he told the court that he had young siblings who depended on him. The prosecution indicated that he was a first offender. This was not taken into consideration.
65. Taking into consideration the sentencing guidelines, and the line of authorities on mandatory minimum sentences I am persuaded that the sentence herein was excessive.
66. In the end the appeal succeeds in part. The conviction is sustained for the offence of attempted defilement. The sentence of life imprisonment is set aside and subtitled with a sentence of 20 years imprisonment to run from the appellant's date of arrest.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 22ND SEPTEMBER, 2023

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MUMBUA T. MATHEKA

JUDGE

CA - Nelima

Appellant - present in person

For state – Ms Omollo

