



REPUBLIC OF KENYA



KENYA LAW
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**Agine v Republic (Criminal Appeal E061 of 2022)
[2023] KEHC 23167 (KLR) (4 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23167 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E061 OF 2022
GMA DULU, J
OCTOBER 4, 2023**

BETWEEN

THOMAS OPIRI AGINE APPELLANT

AND

REPUBLIC RESPONDENT

*(From the conviction and sentence in Sexual Offence Case No. E024 of 2022
at Taveta Law Courts delivered on C. L. Adisa (SRM) on 6th December 2022)*

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 being that on 17th August 2022 at 0700hours in Taita Taveta County unlawfully and intentionally caused his penis to penetrate the vagina of MMP a child aged 14 years.
2. In the alternative, he was charged with indecent act with a child contrary to Section 11(A) of the *Sexual Offences Act*, the particulars of which being that on the same date, time and place intentionally and unlawfully touched the vagina of MMP with his penis against her will.
3. He denied both charges. After a full trial, he was convicted of the main count of defilement, and sentenced to fifteen (15) years imprisonment.
4. Dissatisfied with the conviction and sentence the appellant has come to this court on appeal on the following grounds:-
 1. That the trial court erred in law and in facts by relying on three ingredients of defilement (age, penile penetration and identification) that were not proved beyond reasonable doubt.



2. The threshold of proving sexual offences were diluted through decisions coming from our courts below the balance of probability. The application of the three stage test (age, penetration, identification) developed by the courts need to be re-examined as it has become too easy to pronounce fulfilment of the conditions even where evidential threshold does not meet the standard set. The new position seems to conflict (with) the general rule of proof in criminal trials of beyond reasonable doubt. There have been many young and very old men in prisons for sexual related offences they did not commit or that have not been proved properly.
3. In the instant case he will strive to prove that as much as the age of the complainant was established (child of 14 years under *Children Act*) and that the appellant was recognised, no evidence was tendered to prove that the appellant defiled the complainant.
4. The standard of proof in criminal trials is that of beyond reasonable doubt. We must continue singing this golden rule of the thumb which seems to have been violated by the trial court in the instant case – (contrary to) *Woolmington =Versus= DPP (1935) AC 462*.
5. The appeal was canvassed through written submissions. In this regard, I have perused and 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 am duty bound to evaluate all the evidence on record afresh and come to my own conclusions and inferences – see *Okeno =Versus= Republic (1972) EA 32*.
7. In the present case, the prosecution called five (5) witnesses. On his part, the appellant tendered unsworn defence testimony and did not call any additional witness.
8. The elements of defilement for which the appellant was convicted, are the age of the complainant, penetration of a sexual nature, and the identity of the culprit.
9. In determining this appeal, I have to bear in mind that the burden was on the prosecution to prove each element of the offence beyond reasonable doubt, and that the appellant had no burden to prove his innocence – see *Woolmington =Versus= DP (Supra)*.
10. I start with the age of the complainant PW1. A birth certificate was relied upon and produced in court as an exhibit. The date of birth was January 2008. The father of the complainant PW2 Paul Dickson Makau confirmed the age of the complainant.
11. I find that the prosecution herein proved beyond reasonable doubt that the complainant PW1 was 14 years old at the time of the alleged incident.
12. Was sexual penetration proved? The evidence on sexual penetration was that of the complainant PW1 alone. Though the medical evidence of PW3 Ombayo George a Clinical Officer was that the hymen of the complainant was broken, there was no medical evidence to confirm forceful penetration, nor any traces of spermatozoa.
13. I note that PW1 stated in evidence that a condom was used thus there would be no traces of spermatozoa.
14. On my part, taking into account the proviso to Section 124 of the *Evidence Act* (Cap.80), that such evidence of a single victim witness of a sexual offence can if believable and believed by the court can sustain a conviction, in my view the totality of the evidence on record wherein the appellant was spotted by a neighbour PW4 Herbert Tumaini who saw complainant enter a house and lock the door at 7p.m, and was ambushed therein after considerable time with a man, I find that indeed sexual intercourse



did occur, as the complainant has nothing to gain by lying on this. The prosecution in my view proved sexual penetration beyond doubt.

15. With regard to the identity of the culprit, I find that the prosecution proved beyond reasonable doubt that the appellant was the culprit through the evidence of PW1, PW2 and PW4.
16. Having said as above however, I find that the defence under Section 8(5) of the *Sexual Offences Act* applies in this case as the complainant PW4 clearly had been behaving as an adult, with respect to her known and previous sexual conduct and, on that particular day, left her water container somewhere and on own volition proceeded to the house of the appellant for the purpose of sexual intercourse. In my view any reasonable man who did not have primary information on the date of birth of the complainant, would have believed that she was an adult. The pendulum tilts in favour of the appellant.
17. On that account alone, I will allow the appeal.
18. 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 OCTOBER 2023 AT VOI.

GEORGE DULU

JUDGE

In the presence of:-

Alfred – Court Assistant

Appellant

Mr. Sirima for State

