



REPUBLIC OF KENYA



KENYA LAW
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**Fundi v Republic (Criminal Appeal E016 of 2022)
[2023] KEHC 23080 (KLR) (4 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23080 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E016 OF 2022
GMA DULU, J
OCTOBER 4, 2023**

BETWEEN

GEOFFREY FUNDI APPELLANT

AND

REPUBLIC RESPONDENT

*(From the judgment in Sexual Offence Case No. 10 of 2018 at Taveta Law
Courts delivered on 30th July 2020 by Hon. Khapoya S. Benson (PM))*

JUDGMENT

1. The appellant was charged in the Magistrate's court with defilement of an imbecile contrary to section 146 of the *Penal Code*. The particulars of offence were that on February 18, 2018 at about 22:30hours within taita-Taveta County unlawfully and intentionally had carnal knowledge of MR against the order of nature.
2. In the alternative, he was charged with committing an indecent act with an adult contrary to section 11(A) of the *Sexual Offences Act* No. 3 of 2006, the particulars of which being that on the same date, time and place unlawfully and intentionally touched the buttocks of MR with his penis against his will.
3. He denied both the charges. After a full trial, he was convicted on the main count of defilement of an imbecile and sentenced to fourteen (14) years imprisonment.
4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal and relied on the following grounds:-
 1. That the learned trial Magistrate erred both in law and facts convicting him in present case yet he failed to find that the case was not of defilement.



2. That the learned trial Magistrate erred both in law and facts by failing to find and observe that this case was of a grudge and it was poorly investigated. He having two cases from the same family members.
 3. That the learned trial Magistrate erred both in law and facts when he convicted him and failed to find that the case was framed against him by the family members charged with defilement and attempted rape.
 4. That the learned trial Magistrate erred both in law and facts by failing to find that the evidence are contradicted and it had discrepancies, and is not material enough to base a conviction.
 5. That the learned trial Magistrate erred in both law and fact alleging that the complainant he could not talk and testify and answer questions.
 6. That the learned trial Magistrate erred both in law and facts by failing to evaluate the trial evidence in page no. 17 lines 25 what PW2 said.
 7. That the learned trial Magistrate erred both in law and facts for failing to differentiate between defilement and sodomizing in the charge which is defective in format and in drafting.
 8. That the learned trial Magistrate erred both in law and facts by denying the appellant right under article 50(g)(h) and (b) of the Constitution of Kenya 2010.
 9. That the learned trial Magistrate erred both in law and facts by convicting the appellant without enough evidence to sustain conviction.
 10. That the learned trial Magistrate erred both in law and facts by failing to find that, the offence was defective it was not proved to the required standard.
 11. That the learned trial Magistrate erred both in law and facts for calling an intermediary of a person who talks and over 18 years old.
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. I note that the appellant filed additional submissions.
 6. This being a first appeal, 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. At the trial, the prosecution called six (6) witnesses. On his part, the appellant tendered sworn defence testimony and did not call any other witness.
 8. The elements of the offence for which the appellant was convicted, are first whether the victim was an imbecile. Secondly, whether there was sexual penetration of the complainant in this case through the anus. Thirdly, whether it was the appellant who penetrated the complainant.
 9. In determining all these elements, I have to bear in mind that the burden was on the prosecution to prove each of the elements of the offence beyond any reasonable doubt, this being a criminal case.
 10. Was the complainant an imbecile? The evidence on record on this element was that of PW1 PSH who stated that the complainant (PW4) also was mentally retarded. PW2 DNK, the guardian of PW4 stated that the said PW4 was mentally challenged. PW4 himself was said to have testified through an intermediary whose name was not indicated on the record.



11. Other than the oral evidence of the above two witnesses PW1 and PW2, there is no medical evidence tendered to support or confirm the mental status of the complainant PW4. The Clinical Officer PW3 Patterson Mwapulu did not testify to the mental status of the complainant, nor the apparent mental status of the said complainant.
12. In my view, with the medical facilities and personnel currently in place, the prosecution should have produced in evidence a mental report on the complainant in order to discharge their burden to prove that he was mentally unstable. They did not do so.
13. In my view, the fact that somebody is slow in responding to questions alone, need not be associated with mental retardation, but could have been caused by other factors like poor hearing ability and need not necessarily be described as being an imbecile.
14. I thus find that the prosecution did not prove beyond reasonable doubt that PW4 was an imbecile.
15. With regard to penetration of a sexual nature, in my view the prosecution did not also prove this element. It is imperative to note that none of the members of the public who were involved in arresting and handing over of the appellant to the police, was called as an independent witness to support the evidence of PW1 and PW2, who had to be recalled for no apparent reason on record, other than filling some gaps thus their evidence was suspect.
16. Secondly, the entries in the medical examination form do not in my view contain any information which would confirm sexual penetration. The fact that an anus is tender or even painful can in my view be caused by hard stool, not necessarily by sexual penetration.
17. Thirdly, though the complainant PW4 was recorded as having testified to sexual penetration by the appellant, it is of note that the intermediary was not named on record, nor sworn, nor are there any details on record on how the said intermediary understood what PW4 said, and how the said intermediary communicated same to court.
18. I thus find that sexual penetration was not proved beyond reasonable doubt.
19. As to whether the appellant was the defiler, in my view, with the failure of the prosecution to call crucial witnesses on the arrest of the appellant, and the unexplained recall of PW1 and PW2 to give further evidence, the defence of the appellant that he might have been implicated because of a dispute over payment for alcoholic drinks could as well be true.
20. I thus find that the prosecution did not prove beyond reasonable doubt that the appellant sexually penetrated the complainant. I will thus have to quash the conviction and set aside the sentence.
21. 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 IN OPEN COURT.

GEORGE DULU

JUDGE

In the presence of:-

Appellant – present

Mr. Sirima for State – present

