



**Muthami v Republic (Criminal Appeal E045 of 2021)
[2023] KEHC 23854 (KLR) (17 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23854 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL APPEAL E045 OF 2021
RK LIMO, J
OCTOBER 17, 2023**

BETWEEN

KIMANZI MUTHAMI APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal against the judgement in Kitui Chief Magistrate's Court Sexual Offence Case No. 54 of 2016, appealing against the conviction and sentencing)

JUDGMENT

1. Kimanzi Muthami, the appellant herein was charged with the offence of defilement contrary to section 8(1) as read with subsection 3 of the [Sexual Offence Act](#) No. 3 of 2006. The particulars of offence are that on 19.10.2015 at about 2130 hours in Katulani Sub-County within Kitui County, he intentionally caused his penis to penetrate the vagina of MM a child aged 13 years.
2. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offence Act](#) No. 3 of 2006. The particulars of the alternative charge, which is relevant to this appeal, are that on the same day and place, the appellant willfully and unlawfully did an act of indecency with MM a child aged 13 years by touching her private parts namely buttocks, breasts, vagina and thighs with his hands.
3. The appellant denied committing the main offence or the alternative one but after trial he was acquitted of the principal charge for lack of medical evidence but convicted of the alternative count and sentenced to serve 10 years' imprisonment.
4. The appellant felt aggrieved and filed this appeal but before I look at the grounds below is a summary of the evidence tendered at the trial.



5. The Prosecution presented just three witnesses, the complainant, the father to the witness and an eye witness to the incident.
6. MM (PW1) the Complainant in the case testified that she was 16 years old as of 29th August, 2018 when he testified and that on 19.10.2015 she was sent home at around 8PM by her mother from a nearby kiosk/hotel which was being operated by her parents. She stated that as she was in the process of collecting firewood at their home, the appellant emerged and dragged her inside their home and defiled her inside her bedroom and threatening her in the process. She stated that her elder sister named LWM (PW3) went home and caught the appellant in the bedroom which made him to stop the act. She testified that the sister called the father from the kiosk who quickly arrived. She testified that the father called 2 boda boda operators on phone after failing to reach the Area Chief and that the boda boda ferried them to the Police Station but on the way, the appellant jumped off the motorbike and escaped.
7. She further testified that despite the appellant's escape, they proceeded to Itoleka Police Station where they reported the incident and recorded statements.
8. GMM (PW2), the father to the Complainant testified and majorly corroborated the evidence given by PW1. He added that, upon receiving a mobile SMS from her daughter named LWM (PW3) he rushed home and found the appellant at his house together with LWM and the Complainant.
9. He testified that he tried reaching the area chief in vain and opted to call 2 boda boda operators with a view to ferrying them to Itoleka Police Station to report the incident.
10. He testified that the appellant escaped along the way by jumping off the boda boda and that he was in hiding for one year before he was finally nabbed. He added that the appellant was a relative to him and was well known to him.
11. LWM (PW3) testified that on the material day, she had gone to the Shopping Centre to get paraffin and found her mother at the kiosk from where she learnt PW1 had been sent home which was nearby to fetch firewood. She testified that when she got home she heard her sister scream, "sitaki! Sitaki!" and when she rushed in to find out what was happening, she found the appellant putting on his trouser and her sister on the bed with her dress torn. She testified that he engaged the appellant asking him why he had done that as he sent an SMS message to her father who was at the kiosk to rush in.
12. She stated that her father shortly arrived and called 2 boda boda riders who took them to Itoleka Police Station to report with one boda boda carrying her with the sister while the other carried the father and the appellant. She added that the appellant escaped while on the way to the Police Station. She testified that nevertheless, they proceeded to Itoleka Police Station where they reported the incident and recorded statements.
13. When the appellant was placed on his defence, he opted to remain silent and the trial court proceeded to assess the evidence tendered and rendered a conviction.
14. The trial court in its judgement identified and listed 3 issues for determination which were: -
 - i. Whether there was penetration
 - ii. Whether the age of the victim was established and
 - iii. Whether the appellant was positively identified
15. On the first issue of penetration, the trial court found that the evidence tendered by the Prosecution fell short because there was no medical evidence to establish the same.



16. On age, the trial court took judicial notice of the age of the Complainant as she testified and found that she was a child at the time of the incident.
17. On identity of the appellant, the trial court found that the appellant was positively identified by PW2 and PW3.
18. The trial court found that the Prosecution's Case on the main charge of defilement could not be sustained due to lack of medical evidence but found that the alternative charge of committing an indecent act had been proved and found the appellant guilty and convicted him.
19. As stated above, the appellant felt aggrieved and preferred this appeal raising the following grounds namely: -
 - i. That the appellant was not properly informed of the consequences of remaining silent and as a result he claims there was a miscarriage of justice.
 - ii. That the trial court erred by making the assumption that the offence of indecent act was proved based on penetration.
 - iii. That the trial court erred by making an assumption on the age of the complainant.
 - iv. That the ingredients of the offence of indecent act were not proved.
 - v. That the trial court erred by not properly evaluation the evidence tendered and thereby arrived at the wrong conclusion.
20. In his written submissions done through his Learned Counsel M/s Daudi Ng'ola & Kitheka Advocates, the appellant faults the trial court for failing to evaluate the evidence tendered by the Prosecution properly, contending that the trial court based its decision on possibilities and assumptions. He submits that, having found that the element of penetration had not been proved, the trial court could not have assumed based on the same finding that there was an indecent act. He submits that the Complainant never mentioned during trial that her buttocks, breasts and vagina were touched by the appellant. He relies on a decision by Mrima J. (citations not) submitting that the offence of indecent act with a child was not proved beyond reasonable doubt.
21. He contends that the complainant was unreliable since she gave two contradictory testimonies. He contends that the testimony given on 20.5.2019 appeared to have been coached.
22. He submits that the age of the Complainant was not well established through medical evidence.
23. He points out when the Complainant testified, she stated that she was 16 years old while the charge sheet indicated she was 13 years old. He faults the trial court in its finding that the victim appeared to be a child without giving the descriptions. He submits that no evidence was tendered to show she was in class 7 at the material time.
24. He further faults the trial court for violating his constitutional right as envisaged under article 50 of *the Constitution* of Kenya by not informing him in a language he understood the import and implications of opting to remain silent in his defence. According to him that omission occasioned him substantial injustice because he was unrepresented. He relies on *Fredrick Paala Otieno versus Republic* [2018] eKLR to buttress his contention.
25. The State through the Office of the Director of Public Prosecution has expressed no opposition to this appeal vide written submissions dated 29.06.2023 by the Learned Counsel Pauline Mwaniki.



The State concedes that there was no evidence to support the trial court's finding that the victim was aged 13 adding that it failed to avail the Investigating Officer in the case. It further conceded leaving huge gaps in their case during trial which made the conviction unsafe.

26. This Court has considered this appeal and the response made.

This is a first appeal and the role of this court as a first appellate court is well defined. It is to re-assess and re-evaluate the evidence tendered with a view to making own conclusion.

27. This appeal though unopposed, shall be determine on its merit and there are 2 issues raised in it which I find important to determine which are: -

- i. Whether the age of the Complainant was established.
- ii. Whether the Prosecution's Case established and proved the alternative charge of indecent act with a child.

28. To begin with the first question of age, this court finds that age is a matter of fact that is founded on facts/evidence presented. I have gone through the evidence tendered and it is true that the girl testified that she was 16 years at the time she testified which was 20.05.2019. The charge sheets indicate that she was 13 years, at the material time the offence occurred on 19.10.2015 which means that if she was 13 years old the material time when she testified on 29.08.2018 she was 18 years and some few months. However, what appears contradictory and hence a cloud of doubt is that when she first testified on 20.08.2018 she informed the trial court that she was 16 years' old which obviously could not be factual.

29. The critical information regarding age in my view is missing even from the evidence tendered by the victim's father (PW2). The Prosecution should have at least endeavored to get the crucial information like birth certificate, birth notification or even the clinical card from the father to establish the age. The father's knowledge regarding the age of her daughter was also not extracted which really left the Prosecution's Case hanging on a thin thread. That perhaps informed the trial court's reliance on the physical attributes of the minor to determine the age based on its judicial notice. The trial court however misdirected itself by not listing down those "physical features" which made it take judicial notice of the age and that really rendered the conviction rather unsafe. It is true that a trial court can make a finding on age based on other evidence other than documentary evidence like birth certificate but the same should be definite and clear. If it is the size of the child, demeanor and other attributes of a child, a trial court should clearly state so.

30. On the question of proof, this court agrees with the appellant and the state that the evidence in the absence of medical evidence was insufficient to found a conviction. This is not to say that a conviction on sexual offences is only founded on medical evidence. That certainly is not the case because the trial court can even on the evidence of the complainant alone can render a conviction under section 124 of *Evidence Act* so long as it has reasons to believe that the complainant is speaking the truth. A Court should in addition record the reasons it perceives makes it believe that the victim is speaking the truth. It should for example describe the demeanor of the victim and how she/he answers the questions put to him/her.

31. It was also a misdirection that because the main charge of defilement was not proved, the alternative count was proved without showing how the ingredients of indecent act was established and proved. The Complainant did not state that the appellant fondled her breasts or touched her buttocks or her private parts. It was presumptuous to find that because the appellant was found in the house with the Complainant he must have committed an indecent act with her.



There was no hard evidence to support that finding. PW3 did not state that she found the appellant committing indecent acts on her sister. Her evidence was that the appellant was defiling the complainant but there was no medical evidence to sustain that claim of either defilement or indecent act.

In sum this court find merit in this appeal and allows it based on the above findings. The conviction on the alternative charge and the sentence meted out on the appellant is set aside. He shall be set free, unless otherwise, lawfully held.

DATED, SIGNED AND DELIVERED AT KITUI THIS 17TH DAY OF OCTOBER, 2023

HON. JUSTICE R. K. LIMO

JUDGE

