



**Mogare v Republic (Criminal Appeal E019 of 2022)
[2023] KEHC 23556 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23556 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL APPEAL E019 OF 2022
WA OKWANY, J
OCTOBER 12, 2023**

BETWEEN

ALEX SAMBU MOGARE APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant herein, Alex Sambu Magare, was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that on the 29th day of April 2020, at Riamoni sub-location in Masaba North Sub-county within Nyamira County, intentionally and unlawfully caused his penis to penetrate the vagina of VBM (particulars withheld), a child aged 15 years.
2. The Appellant also faced the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars being that on the 29th day of April 2020, at Riamoni sub-location in Masaba North sub-county within Nyamira County, intentionally touched the vagina of VBM (particulars withheld), a child aged 15 years, with his penis.
3. The Appellant pleaded not guilty to both the main charge and the alternative charge after which the matter proceeded to a full trial before the Lower Court where the Prosecution presented the evidence of 5 witnesses as follows: -
4. PW1, VBM, the victim/minor testified that she was 16 years old having been born on 18th January 2005. Her evidence was that on 29th April 2020, her father sent her to the Appellant's home to get some money. She then proceeded to the Appellant's home where she found the Accused seated on his sofa and no sooner had she entered the Appellant's house than the Appellant grabbed her by the neck, removed her pant and defiled her. She stated that the Appellant did not give her the money but instead warned her not to tell anyone about the incident. She added that she missed her periods in the months



- of May, June and July and suspected she was pregnant in January 2021. She did not tell anyone about the incident until she delivered a baby boy on 23rd January 2021 when she informed her mother that the Appellant was the father of her child. She was referred to the children's office after which the matter was reported to the police. DNA samples were extracted in order to establish the paternity of the child.
5. PW2 I.N. (particulars withheld) the victim's mother testified that PW1 was born in 2005 and that she gave birth to a baby boy on 23rd January 2021. She added that PW1 informed her that the Appellant was the father of her child. She reported the matter to the police.
 6. PW3, Lameck Nyaribo, the Clinical Officer based at Keroka produced the victim's P3 form which showed that she went to the hospital on 12th May 2021 complaining of having been defiled a year earlier and that she delivered a baby on 23rd January 2021. The report revealed that the victim's breasts were engorged and were discharging milk. Other findings on her genitalia were normal. The report recommended that a DNA examination be conducted to confirm the paternity of the child. PW3 produced the treatment notes (P. Exh 2) and the P3 Form (P. Exh3).
 7. PW4, Polycarp Lutta Kweyu, a Government Analyst based at the Government Chemists in Kisumu conducted a DNA analysis on the victim, her baby and the Accused. The report revealed that the Accused was not the biological father of the victim's child. PW4 produced the Exhibit Memo (P.Exh4a) and the Report (P.Exh4b).
 8. PW5 No. 98690 Cpl. Lucy Sein was the Investigating Officer. She received the complainant (VBN) and her mother when they reported the defilement incident. She recorded the complaint in the Occurrence Book and commenced investigations by recording the victim's statement which indicated that she was defiled on 29th April 2020.
 9. At the close of the Prosecution's case, the Accused was placed on his defence. He elected to give a sworn statement and did not call any witnesses. He denied the allegation that he had defiled the victim but acknowledged that he knew the minor and her parents. It was the Appellant's testimony that the DNA report indicated that he was not the father of the minor and noted that the doctor who assisted in the delivery of the baby in question was not called to testify and neither was a birth notification produced as an exhibit.
 10. DW1 also testified that he had a wife and 2 children. He maintained that the allegations against him were untrue.
 11. At the end of the case, the trial court convicted the Appellant on the main charge of defilement and sentenced him to serve 20 years imprisonment. Dissatisfied with the decision of the trial court, the Appellant filed the instant appeal and listed the following grounds of appeal: -
 1. The Learned Trial Magistrate erred in law in finding and holding that the Appellant was culpable of the offences charged without any evidence being tendered to support the said charges.
 2. The Learned Trial Magistrate erred in law and fact in holding that the Respondent/ Prosecution herein had proved their case beyond the requisite standards, whilst the evidence tendered and/or tendered by the Prosecution was riddled and/or replete with pertinent and material contradictions, which negated the probative value of the evidence tendered and/or offered.
 3. In finding and holding that the contradictions evident and/or apparent in the evidence of PW1, PW2, PW3, PW4 and PW5 respectively were immaterial and inconsequential, the Learned Trial Magistrate misconceived and/or misapprehended the substance of the



contradictions, which in any event were material and significant, to the extent that the same casts doubt on the veracity of the evidence on record.

4. The Learned Trial Magistrate erred in law and fact in convicting the Appellant of the offences charged on the face of the evidence tendered particularly the treatment notes, P3 Form and the Government Analyst Report.
 5. The Learned Trial Magistrate erred in law in failing to properly evaluate, appraise and/or analyze the evidence on record and thereby failed to appreciate the material and relevant contradictions which could defeat the proof of the offences charged beyond reasonable doubt.
 6. The Learned Trial Magistrate erred in fact in shifting the burden of proof upon the Appellant and thereby requiring the Appellant to prove his innocence contrary to and in contravention of the established criminal principle that the burden of proof rests on the Prosecution and the same does not shift. The judgment of the trial magistrate is coloured with serious misdirection and error in law.
 7. The Learned Trial Magistrate treated the evidence tendered by the experts in a casual and perfunctory manner and thereby disregarded the salient features of the evidence of the said experts and their reports.
 8. The Learned Trial Magistrate erred in law and in fact in failing to appreciate the fact that the Prosecution did not call crucial witnesses like the complainant's father, school principal (if at all) and the in-charge of the hospital where the purported minor was allegedly born.
 9. The Learned Trial Magistrate erred in law and in fact by failing to understand that the Prosecution was under a duty to refer the Complainant herein to age assessment by a medical practitioner in order to ascertain the exact age of the complainant herein.
 10. The sentence meted out by and/or at the instance of the trial magistrate is manifestly excessive, harsh and/or punitive.
12. The Appeal was admitted for hearing and parties directed to canvass it by way of written submissions.

Submissions

13. The appeal was canvassed by way of written submission.
14. The Appellant submitted that the charge was a frame-up judging from the manner in which the victim and her parents kept the incident secret up to the time that the child was born. According to the Appellant the silence could be interpreted to mean that the victim may have been engaged in sexual intercourse with someone else. It was submitted that the Prosecution's case was riddled with contradictions and that the trial magistrate erred in concluding that the said contradictions were immaterial and inconsequential.
15. The Appellant argued that the fact that the DNA results indicated that he was not the biological father of the victim ought to have exonerated him from blame. He submitted that the trial court was biased as the judgment was not based on the evidence on record. Reference was made to the decision in *Joan Chebichii Sawe vs. Republic Criminal Appeal No. 2 of 2002* where the Court of Appeal held that suspicion however strong cannot be the basis of a conviction.
16. The Respondent, on the other hand, conceded to the appeal and noted that even though the ingredients of the offence, namely; the age of the victim and identification of the perpetrator were adequately proved, the ingredient of penetration was not proved to the required standards.



17. On penetration, the Respondent noted that the victim informed her mother of the offence after she delivered the baby boy. It was submitted that no explanation was given for the delay in making the complaint and getting the examination done on the minor. It was the Respondent's position that the negative DNA favoured the Appellant.

Analysis and Determination

18. I have considered the Record and the submissions by the parties. I note that the main issue for my determination is whether the offence of defilement was proved to the required standards.
19. It is trite that the duty of the first appellate court is to subject the evidence adduced before the trial court to a fresh analysis and re-evaluation in order to arrive at its own independent findings while bearing in mind the fact that it neither heard nor saw the witnesses testify.
20. It is trite that the standard of proof in a criminal trial is beyond reasonable doubt. Lord Denning this standard explained this standard in the case of *Miller vs. Minister of Pensions (1942) A.C.* thus: -

“It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice.”

21. Section 8 (1) of the [Sexual Offences Act](#) provides for the offence of defilement as follows: -

8. Defilement

1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
2. A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
3. A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
4. A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.
5. It is a defence to a charge under this section if-
 - a. it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
 - b. the accused reasonably believed that the child was over the age of eighteen years.

22. In order to secure a conviction on the charge of defilement, the Prosecution must establish the following ingredients: -



- i. Age of the victim
 - ii. Identification of the perpetrator
 - iii. Proof of Penetration
- (See *George Opondo Olunga vs. Republic* [2016] eKLR.)

i. Age of the Victim

23. The importance of proving the age of a victim in a defilement case cannot be gainsaid because age determines the punishment to be meted on a convicted person. In *Edwin Nyambogo Onsongo vs. Republic* (2016) eKLR the Court of Appeal explained the manner in which the age of a victim can be proved as follows: -

“... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim’s age, it has to be credible and reliable.”

24. In the present case, PW2, the victim’s mother, testified that she (the victim) was born on 18th January 2005. PW5, the Investigating Officer, produced the victim’s birth certificate which confirmed the date of birth as presented by the mother. I find that it was therefore not necessary for the court to order for the age assessment of the victim as was suggested by the Appellant’s Counsel. I find that the birth certificate was credible and reliable evidence of the victim’s age.

25. On the identification of the Appellant as the perpetrator of the offence, I find that the issue does not arise as the Appellant himself conceded that he knew the victim and her parents. The Investigating Officer also testified that she visited the scene of crime and noted that the Appellant’s house was barely 50 meters away from the victim’s home. The Prosecution established that the Appellant was well known to the victim because he was her uncle and their area sub-chief. I find that there was therefore no possibility of error in the identification of the Appellant.

26. The question that remains for this Court’s determination is whether the ingredient of penetration was proved.

27. Section 2 of the *Sexual Offences Act* defines penetration as follows: -

The partial or complete insertion of the genital organ of a person into the genital organs of another person.

28. Penetration is proved through the testimony of a victim and corroborated by medical evidence. In instances of sexual offence charges, the court can rely on the sole testimony of the victim to convict an accused person in line with the provisions of Section 124 of the *Evidence Act* which states as follows: -

124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him.



Provided that, where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

29. In the present case, it was the victim's testimony that the Appellant defiled her. She stated as follows in her evidence in chief: -

".....I went and on reaching his place, I found the accused was alone, he was seated on his sofa set. I knocked and entered the house, he then held me by my neck. I was in his sitting room where there's a sofa, T.V. I was wearing a black skirt. He then held me by my neck, removed my panty and he lifted up my skirt, he then removed his long trousers, he then removed his penis... He removed his urinating thing and inserted on my urinating thing. When he finished, he told me to take my clothes and warned me not to tell anyone, that if I told anyone, he would beat me.....

...On 22/1/2021 I had a stomach ache. I was taken to Oasis Hospital and I delivered on 23/1/2021 a baby boy....I then informed my mother that the child I had given birth to belongs to our chief (the accused)....

30. The victim testified that she did not have sexual intercourse with any other person apart from the Appellant which intercourse resulted in her pregnancy. It is noteworthy that the victim claimed that she was defiled on 29th April 2020 and only discovered that she was pregnant the following year in January 2021. It was also clear from the evidence on record that PW1 was examined more than 3 months after she had given birth to the baby and close to a year after the date of the defilement. It turned out that the physical examination of the victim could not establish that the Appellant committed the act of penetration due to the long period of time from the date of the alleged act of defilement and the date of examination.

31. The medical evidence indicated that the victim's genitalia was normal and that there were no stretch marks on her save for the fact that she had engorged breasts owing to her breastfeeding. These findings led the Clinical Officer to recommend a DNA test to establish the paternity of the child. The Report P. Exh4b stated as follows: -

"Based on the findings, Alex Sambu (accused) is excluded as the biological father to JB (particulars withheld) (child), who is VB's (particulars withheld) (complainant's) biological child."

32. It was not in doubt that the complainant was a victim of defilement going by the undisputed fact that she fell pregnant and delivered a baby while she was still a minor. The victim testified that she had not engaged in sexual intercourse prior to the incident in question. She also informed her mother that the Appellant was responsible for her pregnancy. The DNA report however exonerates the Appellant. My finding is that if indeed the Appellant defiled the victim and was therefore responsible for her pregnancy, then the DNA report should have corroborated her allegations.

33. I find that the victim's evidence was not credible and cannot be relied upon because it contradicts the scientific findings by the Government Chemist (PW4). The DNA report reveals that someone else was responsible for the victim's pregnancy other than the Appellant.

34. This Court also finds it odd that it took the victim a whole 9 months to inform her mother that she was expectant and further, that it took her parents a further 3 months to report the matter to the Police.



It was also curious to note that the victim's father and school teachers were not called to testify so as to corroborate her testimony on the circumstances under which she was defiled. In particular, I would think that her father's evidence would have been paramount in confirming whether he indeed sent her to go get money from the Appellant on the fateful day that she was allegedly defiled by the Appellant. In *Bukenya & Others vs Uganda* [1972] EA 549 the court considered the implications of failing to call crucial witnesses and held that: -

- “(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.
- (ii) That Court has right and the duty to call witnesses whose evidence appears essential to the just decision of the case.
- (iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution.”

35. My finding is that the failure to call crucial witnesses was detrimental to the Prosecution's case as it left gaps that create doubts on the Appellant's involvement in the offence. I am inclined to believe the Appellant's defence that the case was premised on a personal vendetta. It is my finding that even though the ingredient of penetration was proved owing to the victim's pregnancy, the Appellant was not the one who committed the said act.

36. I find that the charge of defilement was not proved to the required standard and that the conviction by the trial court was therefore unsafe.

37. I will turn to address the alternative charge of committing an indecent act with a child. Section 11 of the [Sexual Offences Act](#) provides of the as follows: -

11. (1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

38. Section 2 of the [Sexual Offences Act](#) defines what constitutes an indecent act as follows: -

“indecent act” means an unlawful intentional act which causes-

- a. Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.
- b. Exposure or display of any pornographic material to any person against his or her will.

39. I have considered the ingredients of the offence of indecent act and tested them against the victim's testimony. In view of the fact that I have already found that the complainant was not truthful in the claim that she was defiled by the Appellant, I find that it is even more difficult for this Court to conclude that the Appellant committed an indecent with her.

40. In the end, I find that the Prosecution did not prove the main charge of defilement or the alternative charge of committing an indecent act with a minor. Consequently, I find that the instant appeal is merited and I hereby allow it. I therefore quash the conviction and set aside the sentence passed by the trial court. I direct that the Appellant be set at liberty forthwith unless he is otherwise lawfully held.



41. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS
THIS 12TH DAY OF OCTOBER 2023.**

W. A. OKWANY

JUDGE

