



**Munyao v Republic (Criminal Appeal E022 of 2023)
[2024] KEHC 14362 (KLR) (19 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14362 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E022 OF 2023
DR KAVEDZA, J
NOVEMBER 19, 2024**

BETWEEN

MICHAEL MANDELA MUNYAO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered on 14th November 2023 by Hon. Temu (S.P.M) at Kibera Chief Magistrate’s Court Sexual Offences Case no. E885 of 2020 Republic vs Michael The appellant Munyao)

JUDGMENT

1. The appellant Michael Mandela Munyai was charged and after a full trial convicted for the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act*, No. 3 of 2006. He was sentenced to serve ten (10) years imprisonment. Being aggrieved, he filed an appeal challenging his conviction and sentence.
2. In the petition of appeal and amended grounds of appeal, he raised the following main grounds: The appellant challenged the totality of the prosecution’s evidence against which he was convicted, stating that the prosecution did not discharge the burden of proof. He urged the court to quash his conviction and set aside the sentence imposed.
3. This is the first appellate court and in *Okeno v. R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence that was before the trial court, and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.
4. To succeed in a prosecution for defilement, it must be proven that the accused committed an act that caused penetration with a child. "Penetration" under section 2 of the Act means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person."



5. Further, section 8(1) and (4) of the *Sexual Offences Act*, No. 3 of 2006 provides thus: -

8. Defilement

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(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.

6. Bearing in mind the above provisions, I will now analyse the evidence on record to ascertain whether the essential ingredients of the offence preferred against the appellant were established to the required standard of proof. Regarding proof of age, I wish to state at the outset that the importance of proving the age of a victim, proof of penetration, and positive identification of the assailant in sexual offences is paramount.

7. PW1, CKM (name withheld) told the court that she was born on 17th September 2005, and in Form Two. She stated that on 23rd August 2020, her mother had left her with her younger brother PW2, and had told her to buy some vegetables for supper. PW1 headed to Ngando shopping centre at 4 p.m. in the company of PW2 and was on the way met by the appellant who offered to buy some chips for both of them. Afterwards, she sent her brother home and proceeded to walk with the appellant to a mutual friend's house, whose name was Vinny. Vinny was not around at the time. PW1 recounted that after discovering Vinny was not home, the appellant invited her to his house, located nearby.

8. Once inside, the appellant locked the door and began making advances towards her. Despite her protests, he overpowered her, undressed her, and defiled her. She said that after the incident, the appellant warned her not to tell anyone about what had happened and let her go.

9. PW1 stated that she went home and, fearing her mother's reaction, did not initially disclose the incident. However, a few days later, she started experiencing pain and discomfort, which led her to confide in her mother. Her mother immediately took her to the hospital for treatment and reported the matter to the police.

10. On cross-examination, PW1 maintained that the appellant had coerced her, and she had not consented to any of the advances. She acknowledged that they were acquainted but denied having any previous intimate relationship with him. When questioned whether she had had any sexual encounter with another individual named Musyoka, she denied it but not convincingly as noted by the trial court.

11. PW2, GK (name withheld) the complainant's brother, corroborated PW1's testimony regarding how he met the appellant. He told the court that the appellant threatened to pinch his ears if he did not go back home.

12. PW3, RNK averred that PW1 was her child born on 17th September 2005 and was at the time fifteen years old. She recounted that on 23rd August 2020, she left PW1 and PW2 in the house, having given PW1 Kshs. 100 which she told her to use to buy vegetables for supper. Upon her return, she found PW2 alone in the house, and inquired on the whereabouts of PW1, when PW2 told her that she went ahead with a young man whom he recognised.

13. Immediately, PW3 went out to look for PW1 assisted by her older brother William, and upon inquiry, they were informed that she was spotted walking around with the appellant. Her husband (PW4) went to report this matter to the police station. The next day, when she and PW4 and her friends went to look



for PW1 a second time, she met the appellant who told her that he had been with PW1 the previous day up until 7 p.m. when they parted ways. The appellant was subsequently arrested.

14. Dr. John Njoroge (PW5) testified on behalf of Lucy Njoroge, who examined the complainant on 26th August 2020. The examination revealed fresh bleeding, hymenal and vaginal tears, and whitish discharge. Lab tests confirmed a urinary tract infection. He produced the PRC and P3 forms as evidence. In addition, the complainant's parents reported to the medical examiner that she had run away from home on 23rd August 2020.
15. During cross-examination, PW5 stated that the complainant reported the alleged sexual encounter occurred on the same day as the examination.
16. PW6, CPL Akiza Susan, the Investigating Officer, testified that the incident was reported on 27th August 2020 by the complainant's parents. She recorded their statements and issued a P3 form to PW1. PW6 stated that the complainant disclosed the appellant was her boyfriend and that she loved him. She confirmed that only the appellant was arrested, as evidence indicated he was the sole perpetrator.
17. On cross-examination, PW6 confirmed that the appellant denied the allegations, asserting that he and PW1 were merely friends and that no intimate act occurred. She also noted that DNA samples were not collected from the appellant.
18. On cross-examination, PW5 noted that the appellant denied the allegations, stating that he and PW1 were friends, but no intimate act took place. PW5 further confirmed that DNA samples were not collected from the appellant.
19. In his defence, the appellant stated that on 23rd August 2020, he met the complainant and her siblings at a chips point in Ngando, Dagoretti. The complainant and her siblings, who had no money, were given chips by the shop owner. The appellant knew the complainant from the movie shop where he worked. After receiving the chips, the complainant stayed outside with Kelvin Ndwaro, a friend of the appellant.
20. Later, the appellant saw the complainant crying and claiming she had been beaten by her father. She said she was going to her mother's house but did not want to call her mother. The following morning, the appellant was contacted by the complainant's mother, who was searching for her daughter. After speaking with Kelvin, the appellant confirmed the complainant was safe but did not disclose her location.
21. The appellant was later stopped by the complainant's family and taken to the chief's camp, where the complainant allegedly said he was the last person with her. After questioning, the appellant was released. The appellant in the company of the complainant's parents searched for the complainant but could not find her. On 26th August, he was informed the complainant had been found and was taken to the chief's office. There, she revealed her father had beaten her and accused him of paying the police to arrest the appellant.
22. The appellant was then taken to Satellite Police Station, where he met Musyoka, another individual arrested in connection with the case. Musyoka later informed the appellant that the case would be withdrawn. The appellant maintained that he was not involved in the complainant's disappearance, and the testimony against him came solely from the complainant's family.
23. In his submissions, the appellant challenged the totality of the prosecution's evidence against which he was convicted. He maintained that the prosecution's evidence was marred by contradictions and inconsistencies. In addition, the prosecution witnesses were unreliable.



24. I have re-evaluated the evidence on record and considered the written submissions and the applicable law.
25. Regarding proof of age, I wish to state at the outset that the importance of proving the age of a victim, proof of penetration, and positive identification of the assailant in sexual offences is paramount.
26. The complainant's mother (PW3) indicated that the complainant was born on 17th September 2005. The trial court considered the birth certificate produced which indicated PW1's date of birth confirming that indeed the child was 15 years and 11 months at the time of the incident. There is no doubt that the complainant was a child within the meaning of the law.
27. The question I must now grapple with is whether the prosecution adduced sufficient evidence to prove that the appellant defiled the child victim as alleged. The complainant gave evidence that she escorted the appellant to his house where he subdued her and defiled her. At the time, he was a person known to her and a friend to Vinny whom she was looking for. It was her evidence that the incident took place on 23rd August 2020.
28. The medical evidence however indicates that the complainant was examined on the material day of the incident 26th August 2020. Upon examination, she had fresh bleeding, hymenal and vaginal tears, and whitish discharge. The question is whether the incident occurred on 23rd or 26th August 2020.
29. The complainant's parents testified that she went missing on 23rd August 2020 and was found on 26th August 2020. The appellant admitted he was with her on the 23rd but left around 7 pm, claiming he did not know her whereabouts thereafter. The complainant maintained that it was the appellant who had defiled her, a statement corroborated by her earlier testimony. When asked about any sexual encounters with Musyoka, she denied it, but the trial court found her denial unconvincing.
30. With that in mind, there is a need to analyse the medical evidence in support of the prosecution's case. The complainant was examined three days after the alleged incident. The medical evidence revealed that the complainant had fresh hymenal and perineal tears, indicative of penetration. The injuries were consistent with multiple fresh hymenal and perineal tears, leading to fresh bleeding. The question that arises is whether the complainant could still have been bleeding three days after the alleged incident, given the natural healing process of the human body. Medically, bleeding from lacerations would stop within minutes to hours due to the body's clotting mechanism, and by the third day, healing would begin, often resulting in a different type of discharge, such as a purulent or serosanguineous exudate. Fresh blood discharge after three days would be unusual medically as it would indicate an injury occurring more recently.
31. The complainant's hymenal and perineal injuries were likely to have been grade 1 lacerations, with no indication of deep wounds requiring stitches. Given the lack of evidence that the complainant had been treated for deep wounds or continued bleeding beyond the third day, it is medically improbable that she would still be bleeding freshly. If the complainant had indeed been defiled three days earlier, she should have been experiencing a different type of discharge, not fresh blood, particularly considering the bacterial presence in the vaginal and perineal area.
32. In my hypothesis, the evidence suggests that the victim had likely been defiled between 6-12 hours before the medical examination, as fresh bleeding would not persist beyond this timeframe. Furthermore, the complainant did not mention that she was bleeding when she arrived at Shiro's house and had not complained of bleeding prior to being examined. The trial magistrate observed that the victim was hesitant and unconvincing when questioned about other possible incidents with a different individual, Musyoka, which casts doubt on her testimony. The inconsistencies in the



complainant's account and the implausible medical findings suggest that the charge of defilement against the appellant cannot be substantiated.

33. It is essential to determine whether the contradiction in the complainant's testimony and medical evidence is minor or substantial as laid out in the case of *Sigei v Republic* [2023] KECA 154 (KLR):

“In assessing the impact of contradictory statements or discrepancies on the prosecution's case, our understanding is that firstly, for contradictions to be fatal, it must relate to material facts. Secondly, such contradictions must concern substantial matters in the case. Thirdly, such contradictions must deal with the real substance of the case.”

34. From the above authority, it is clear that contradictions and inconsistencies, unless satisfactorily explained, would usually, but not necessarily, result in the evidence of a witness being rejected. The contradictions must be grave and point to deliberate untruthfulness.
35. Having analysed and re-evaluated the evidence on record, it is my finding that the complainant was an untruthful witness as evidenced by the contradictions and inconsistencies in her evidence. The said contradictions are so substantial as they relate to material facts and therefore affected the complainant's credibility.
36. For the foregoing reasons, I find the appeal merited and hereby quash the conviction and set aside the sentence of ten (10) years imprisonment imposed by the trial court. The appellant is thus set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 19TH DAY OF NOVEMBER 2024

D. KAVEDZA

JUDGE

In the presence of:

Akisa h/b for Ouma for the Appellant

Mburugu for the Respondent

Achode Court Assistant

