



**Republic v Nyamu (Sexual Offence E009 of 2023)
[2024] KEMC 4 (KLR) (15 March 2024) (Ruling)**

Neutral citation: [2024] KEMC 4 (KLR)

**REPUBLIC OF KENYA
IN THE GITHONGO LAW COURTS
SEXUAL OFFENCE E009 OF 2023
AT SITATI, SPM
MARCH 15, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

JAPHETH MWITA NYAMU ACCUSED

RULING

1. In Count I, the Accused person denied the charge of defilement contrary to section 8(1), 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 24th November, 2022 within Imenti Central Sub-County of Meru County, the intentionally caused his penis to penetrate the vagina of J.C. (initials- A Minor) aged 15 years old.
2. In the alternative count, he denied the charge of committing an indecent act contrary to section 11(1) of the *Sexual Offences Act*. The particulars were that on 24th November, 2022 within Imenti Central Sub-County of Meru County, the intentionally caused his penis to touch the vagina of J.C. (initials- A Minor) aged 15 years old.
3. The DPP’s case was conducted by Prosecution Counsel Kimathi Kibiti while the Accused person was represented by Miss Mbumbuya Advocate.

The DPP’S Case

4. PW1 J.C. (initials) swore that she was born aged 15 years old as per the birth certificate produced in Court. She told the court that on 24th November, 2022 at 9am she was headed to the local market to sew her clothes when she passed by a man who was cutting down her father’s coffee bushes. She added that she stopped and asked the stranger why he was destroying her father’s coffee plantation. No sooner had she asked the man the question than the man turned hostile and charged furiously at her. He gave chase after and caught up with her and forcefully pinned her to ground before he removed her panty



and dress. The man then stuffed her mouth with soil to muffle her scream before he went ahead and inserted his penis into her vagina and had sexual intercourse by force.

5. The witness added that after he finished, she got up and ran off semi-naked and dressed up. Thereafter she first went to the local chief to make a report but found the chief in a meeting so she went home. Later the incident was reported to the police at Kariene Police Station. She sought medical attention at Kanyakine Sub-County Hospital and had the necessary medical documents prepared. She told the court further that prior to the alleged sexual offence, the Accused person was a complete stranger to her.

In cross-examination, the following evidence came to light:

1. The witness had recorded in her initial statement that she had seen one Mwitacutting down her father's coffee bushes as she went to the local market. In her further initial statement, she had recorded that the said Mwitawas known to her as a person who had leased a portion of her father's farm.
2. In spite of her having written his name, she insisted that the meeting on 24th November, 2022 was the First Time that she had ever met the suspect.
3. She admitted that in her first written report she did not give out the name Mwitabut recorded only a physical description as a tall, black and slightly built man. She conceded that no identification parade was conducted for the said tall, black and slightly built up man.
4. In further cross-examination, she admitted that her father gave her the name Mwitaand told her to say this name to the police.
5. She admitted that she did not submit the alleged torn panty to the police for use as an exhibit.
6. She admitted that there was a protracted land dispute between her father and the accused person over the land portion that the accused person had leased from her father.
7. She admitted that no scene visit was done to confirm the alleged cutting down of the coffee bushes.

No questions were asked in re-examination.

5. PW2 L.N. (initials) the father to PW1 told the court that on 24th November, 2022 he received a call from the police asking him to go to Kariene Police Station. On arrival, he found his daughter there. She told him that the man who had leased the farm had just defiled her on her way to the local market to sew clothes. PW2 said that he had not told PW1 about the identity of the lessee but she knew that the land was leased. Her disclosure that the lessee was the defiler made him know that it was Mwita as the culprit and he told the police this name. As a result, the police tracked down Mwita and arrested him.

In cross-examination, the following came to light:

1. PW2 and his brother had received legal services from Miss Mbumbuya Advocate on 22nd November, 2022 over a lease between PW2 and the Accused person. He admitted that during that visit, the said PW2 impersonated the Accused person and demanded the surrender to PW2 of the lease agreement so as to revoke the lease but that Miss Mbumbuya Advocate discovered the impersonation thus nipping in the bud the attempt by PW2 to unlawfully and fraudulently revoke the lease between PW2 and the Accused person.
2. PW2 admitted that his impersonation was captured by photographic evidence which he was by Miss Mbumbuya, Advocate during the cross-examination.



3. He admitted that after this impersonation was foiled, the issue of the alleged defilement erupted within 48 hours of the discovery of the impersonation. He admitted that he had leased the farm for 8 years from 22nd November, 2022.
4. PW2 emphatically admitted that PW1 did not know the identity of the lessee of the land and that he had never told PW1 about the leasing of the farm to anyone.
5. The court record shows that when Miss Mbumbuya specifically asked PW2 how his daughter came to know the name MWITA, the witness (PW2) evaded the question and refused to answer it. He, however, admitted that PW1 only gave a description of the suspect.
6. The Accused person was still cultivating the leased portion.
6. PW3 S/NO. 101196 PC Lucy Ashikongo testified as the Investigating Officer. She told the court that on 24th November, 2022 at 6:46pm the Complainant lodged her report that she had been waylaid and defiled earlier that day at 9AM. She stated that she was on her way to the local market when the Accused person who had leased her father's land grabbed and had sexual intercourse with her by force in the coffee plantation. In her report, the witness said that Japheth Nyamu was cutting down her father's coffee bushes and when she asked him why he turned against her.
7. After the initial report was recorded, the minor went for medical attention but her P3 Form was not filled. On 30th November, 2022 PC Ashikongo arrested the accused person and charged him as presently. After the accused person was arrested, the Minor and her father vanished and the P3 Form was never filled.
8. On 30th June, 2023 PW2 assaulted the Accused person and was arrested and brought to court. It was during his detention at Kariene Police Station that the earlier report was revived whereupon the present accused person was summoned and re-arrested. The complainant was traced on 24th July, 2023 and asked to record her statement about the alleged incident of 24th November, 2022. The accused person denied any knowledge of the alleged defilement. In support of her testimony, PC Ashikongo produced the birth certificate of PW1 as P.Ex.1.

In cross-examination, the following came to light:

1. It was true that the accused person had leased a portion of land from the complainant's father.
2. In her first report to the police, the Complainant claimed that she knew the accused person well and named him.
3. PC Ashikongo did not produce the alleged soiled clothes of the alleged victim.
9. PW3 Clinical Officer Severina Kaimatheri of Kanyakine Sub-County Hospital produced the treatment notes dated 24th November 2022, Post-Rape Care Form and the P3 Form dated 24th July, 2023 as P.Ex.2, 3 and 4 showing that the Minor had normal external genitalia with no lacerations and no bleeding noted. Her hymen was broken.
10. At the end of her testimony, the DPP closed their case and the court was called upon to determine if the DPP had established a prima facie case against the accused person.

Issue For Determination: Prima Facie Case

11. In order for the court to place the Accused person to his defence, the court must be satisfied that a prima facie case has been established. What constitutes a prima facie case has been well explained in the authority of *Ramanlal Trambaklal Bhatt v Republic* [1957] EA 332 which has recently been re-



applied in the case of Republic v Benard Nthiwa Makau [2019] eKLR (Wakiaga J.) where the latter superior court had this to say:

“4. At this stage of the proceedings all that the court has to determine is whether the prosecution has established a prima facie case to enable the court place the accused person on his defence. Prima facie case has been defined in the case of Ramanlal Trambaklal Bhatt V v Republic [1957] EA 332 as follows:-

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot argue that a prima facie case is merely one which on full consideration might possibly be thought sufficient to sustain a conviction.

This is perilously near suggesting that the court could not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case, nor can we argue that the question whether there is a case to answer depends only on whether there is “some evidence irrespective of its credibility or weight sufficient to put the accused on his defence.”

A mere scintilla of evidence can never be enough nor can any amount of worthless discredited evidence... It may not be easy to define what is meant by prima facie case but at least it must mean one on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.” (Emphasis added)

12. The learned Mr. Justice Wakiaga in Nthiwa Makau (supra) went on to pronounce the law as follows:

“5. In the case of Republic v Jagjivan M. Patel & Others (1) TLR as follows:-

“ All the court has to decide at the close of evidence of the charge is whether a case is made out against the accused just sufficiently to require him to make a defence, it may be a strong case or it may be a weak case. The court is not required at this stage to apply its mind in deciding finally whether the evidence is worthy of credit or whether, if believed, it is weighty enough to prove the case conclusively, beyond reasonable doubt.

A ruling that there is a case to answer would be justified, in my opinion, in a borderline case where the court, though not satisfied as to conclusiveness of the prosecution evidence, is yet of opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conviction.” (Emphasis added)

6. Justice J.B. Ojwang as he then was in the case of Republic v Samuel Karanja Kiria CR. Case NO.13 Of 2004 Nairobi [2009] eKLR had this to say on prima facie case:-

“The question at this stage is not whether or not the accused is guilty as charged but whether there is such cogent evidence of his connection with the circumstances in which the killing of the deceased occurred, that the concept of prima facie case dictates as a matter of law that an opportunity be created by this court for the accused to state his own case regarding the killing. The governing law on this point is well settled . . .

The Court of Appeal Criminal Appeal No. 77 of 2006, the Court of Appeal expressed that too detailed analysis of evidence, at no case to answer stage is undesirable if the court is going to put the accused onto his defence as too much details in the trial court’s ruling could then compromise the evidentiary quality of the defence to be mounted.” (Emphasis added).

In Mohamud Omar Mohamed v Republic [2020]eKLR (C.Kariuki J.) held that:



20. This being a case for defilement what was to be proved are the ingredients of the offence of defilement and in the case of *George Opondo Olunga v Republic* [2016] eKLR, it was stated that the ingredients of an offence of defilement are; identification or recognition of the offender, penetration and the age of the victim.

The learned Judge went on to hold:

“31. The test to be applied inter alia to the principles in the cited cases elsewhere in this analysis is to be found in the case of *Bassita v Uganda S. C. Criminal Appeal No. 35 of 1995* where the Supreme Court held:

“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victims evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt.”

“For evidence to be capable of being corroborated it must:

- (a). Be relevant and admissible *Scafriot* {1978} QB 1016.
- (b). Be credible *DPP v Kilbourne* {1973} AC 729
- (c). Be independent, that is emanating from a source other than the witness requiring to be corroborated *Whitehead J* IKB 99
- (d). Implicate the accused”

13. In the present case, there was only one witness to the alleged offence, namely Pw1 herself. This brought the operation of section 124 of the *Evidence Act* into operation.

124. Corroboration required in criminal cases

Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material 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.

14. The Court of Appeal interpreted the above section in the following manner in the authority of *Geoffrey Kioji v Republic*, NYR Crim. App. No. 270 of 2010 (UR):

“Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be



convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”

15. Applying the foregoing principles to the present case leads this Honourable Court to make the following findings:

1. The age of the complainant was proved at 15 years old as per the birth certificate produced in evidence as P.Ex.1.
2. There is no medical evidence to prove penetration. The alleged torn panty was not produced in court as an exhibit.
3. The tested oral testimony of the Complainant was found Nottruthful on the occurrence of the event and the identity of the alleged perpetrator. In her initial report she had only given a physical description of the alleged offender as tall, black and slightly built. She did not know him at all and no identification parade was ever done to confirm the identity of the proper suspect.

16. Later, PW1 changed her story after she had met and consulted her father outside the police station and after this consultation PW1 then named Mwitaas the alleged offender. This consultation amounted to coaching and severely diminished the truthfulness of the witness as was held in *Terekali S/OKorongozi & Another v Rex* [1952]EACA 259 recently applied in *Bernard Gathiaka Mbugua & 4 Others v Republic* [2016]eKLR

“Evidence of first report by the Complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statement may be gauged and provides a safeguard against later embellishment or made up case. Truth will always come out in a first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with others...”

4. PW2 had 48 hours earlier unsuccessfully attempted to frustrate the lease agreement between himself and the accused person by way of a fraudulent impersonation but was caught in the scheme red-handed by Miss Mbumbuya Advocate who had drawn the lease between the accused person and PW2. After his impersonation was discovered, within 48 hours he had come up with a dangerous and crafty scheme to fix the accused person so as to deny him the enjoyment of the leased land. This scheme is well supported by the conduct of the father and his daughter who, shortly after procuring the arrest of the accused person vanished from November, 2022 up to July 2023 to ensure that the accused person rotted in custody. When the father resurfaced in July 2023 he assaulted the accused person and was arrested himself but revived the earlier report of defilement to curtail his own prosecution for assault.
5. The misconduct of the father (PW2) manifested in court when he exhibited evasiveness in answering critical questions about his coaching of his daughter to fabricate the evidence against the accused person. The conduct of impersonation, disappearing acts for 9 months and evasive actions in court were relevant to the untruthfulness of PW1 and PW2 within the meaning of section 8(1) and section 8(2) of the *Evidence Act* which provides:

8. Facts relating to motive, preparation and conduct



- (1) Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.
 - (2) The conduct of any party, or of any agent of a party, to any suit or proceeding, in reference to such suit or proceeding or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto. (underlining mine)
6. The totality of the cross-examination shredded to pieces the evidence of PW1 and PW2. The court finds that these 2 witnesses were not truthful and were not worth of credit. In the result, there is no evidence to prove that the accused person committed any offence against the complainant.
 7. The Accused person has no case to answer and is acquitted of all the charges under section 210 of the *Criminal Procedure Code* and is set at liberty unless otherwise lawfully held. The sureties and their securities are discharged. Right of appeal is 14 days.

DATED, READ AND SIGNED AT GITHONGO LAW COURTS THIS 15TH DAY OF MARCH, 2024

HON. T.A. SITATI

SENIOR PRINCIPAL MAGISTRATE

GITHONGO LAW COURTS

