



**Republic v Njoroge (Sexual Offence E093 of 2021)
[2024] KEMC 130 (KLR) (3 September 2024) (Judgment)**

Neutral citation: [2024] KEMC 130 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
SEXUAL OFFENCE E093 OF 2021
PA NDEGE, SPM
SEPTEMBER 3, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

PHILIP NJOROGE ACCUSED

JUDGMENT

1. The Accused person herein, Philip Njoroge, was arrested on allegations that he had defiled the complainant herein, then a primary school pupil aged 11 years old and in class 5 at their village. The accused is alleged to have lured the complainant and her friend into his house where he committed the sexual offences on them.
2. Philip Njoroge, the Accused herein, was arraigned in Court to answer charges of Defilement and/ or Indecent Act with a Child on 09/06/2021. He was charged with the offences of Defilement contrary to section 8(2) as read with section 8(3) of the *Sexual Offences Act* NO. 3 of 2006 (hereinafter abbreviated as SOA) in the main count. The charge also has an alternative Count of Committing an Indecent Act with a Child contrary to section 11(1) of the SOA. He denied in the main count that on 04/06/2021 at a village in Nakuru North Sub County within Nakuru County, he unlawfully and intentionally committed an act by inserting his male genital organ namely penis into the female genital organ namely vagina of NWM, a child aged 11 years. The accused person herein again denied in the alternative charge that on the same date, and at the same place, he unlawfully and intentionally caused his male genital organ namely the penis to come into contact with the female genital organ namely the vagina of the same child, a girl aged 11 years.
3. Hearing of the prosecution's case took place before Hon. Y. I Khatambi, Principal Magistrate (PM). Upon her transfer, I took over the conduct of this matter and by 21/03/2024, the prosecutions were unable to present any further witnesses in its case, apart from the 5 that had testified before Hon. Khatambi. The court thus declined to allow for any further adjournment on the part of the



prosecution. Consequently, the prosecution was forced to close its case with the 5 witnesses that had earlier testified herein.

4. After the close of the prosecution's case, I delivered a ruling on 16.05.2024, calling upon the accused person herein to make his defence, which he proceeded to do on 11.07.2024. He then closed his defence on the same day and later on 29.07.2024 prayed for a date for this judgment without making any submissions. This matter has therefore been pending for this judgment on whether the prosecution has proved its case against the accused person herein and to the required standards.
5. The accused person herein was unrepresented throughout the trial herein. He was also not able to meet the bond terms fixed herein and has therefore been in remand custody throughout the duration of the trial herein. The prosecution was on the other hand represented by M/s. Omwenga, Mwangi and Ms Chinga, prosecution counsel, duly instructed by the Director of Public Prosecutions, who by virtue of Article 157(6) of *the Constitution*, exercises state powers of prosecution within the Republic of Kenya. The proceedings herein have been well recorded down in the trial notes herein.

The Evidence

6. The complainant herein, PW1, N. W., comes from the same village with the accused person herein¹. She was at all material times herein a primary school going pupil in a school within the village. She informed the court while on oath that on the material day, she was with her friend, PW2, V. N., and were on their way to one A. N.'s home. It was raining at the time and accused person appears to have taken advantage of the situation to call them to his home. They responded and headed to a mud hut house belonging to the accused. That the accused then pushed PW2 to his bedroom which was separated from the sitting room where she was playing with a bedsheet. She was shocked to see him have sexual intercourse with PW2. She tried to pull PW2 away, but in the process, she tripped and fell down. The accused person who was then still naked, got hold of her and threw her onto the same bed. That the accused person lowered her trouser and panty up to the knee level. That he then used his organ used for urinating (penis) and inserted it into her corresponding organ (vagina).
7. Meanwhile, PW3, F. W., a sister to PW2, was at their home. She decided to go look for PW1 and PW2, who had their umbrella which she wanted to use. She passed by PW1's home and did not find them. She found the complainant's mother, PW4, C.W., who informed them that she had given the children herein the umbrella. She then remembered that the children were fond of playing at the home of the accused person herein. She headed there and called out the accused person's name. She however found that the door to the house was slightly open. She then heard him promise someone some money. She then realised that it was PW2, her sister who was then coming out of the house. She then saw the complainant herein, PW1, emerge out of the bedroom.
8. The two victims, PW1 and PW2, stated that the accused had threatened to kill them if they reveal what he had done to them to any other person. They were therefore hesitant to inform PW3 what had been done to them. PW3 nevertheless informed PW1's mother, PW4, C.W., about what she had witnessed.
9. PW4, C.W., informed the court that PW1 was at first hesitant to inform her what had transpired at the accused person's home. That she was later able to calmly speak to her. She then revealed to her that the accused person herein defiled them. Their father, PW5, A. N., was then informed.
10. The 2 victims were then taken to Kabatini Health Centre from where they were referred to Maili Kumi Hospital. Whereas PW4, the complainant's mother, informed the court that she was born

¹ According to DW2, the complainant's mother, their homes are 100m apart



on 12/09/2010, her father, PW5, informed the court that she was born on 12/09/2009. Neither the birth certificate nor the medical evidence/ exhibits were produced herein.

11. In his evidence in defence, the accused person herein, testifying as DW1, denied committing the offence. That the charges herein have been preferred against him because of a land dispute between him and the complainant's father. That the victims herein were taken to the hospital for examination which did not reveal anything unusual.

Issues, Burden and Standard of Proof

12. The offence herein is that of defilement or indecent act. Defilement has been defined in section 8 of the SOA thus: 'A person who commits an act which causes penetration with a child is guilty of an offence termed defilement'. Justice George Dulu, in JUMAAHIRIBA KOMORA VRS REPUBLIC [HIGH COURT OF KENYA AT GARISSA CRIMINAL APPEAL NO. 53 OF 2017, UR] at page 7, paragraph 9, held that in a defilement case, 3 elements are to be proved by the prosecution beyond reasonable doubt. They are firstly the age of the complainant, secondly penetration, and thirdly the identity of the culprit.
13. The late Justice Majanja (RIP), in Peter Mokami Nahashon Vrs Republic [2014] eKLR stated as follows on the offence of Defilement: -
 13. A person is said to have committed an act of defilement under section 8(1) of the Sexual Offences Act when the person commits an act which causes 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. (Emphasis supplied)
14. Indeed, under section 2(1), SOA, penetration means the partial or complete insertion of the genital organ of a person into the genital organ of another person. Genital organs have been defined as the whole or part of male or female genital organs and includes the anus. The same section 2(1) of the same Act defines indecent act to mean: -

...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 any act that causes penetration;
 - (b) exposure or display of any pornographic material to any person against his or her will
15. In the alternative charge, the prosecution was just therefore supposed to prove to the same standard of beyond reasonable doubt that the accused person herein intentionally touched the vagina of the same complainant with his penis. As noted herein, the burden of proof herein lies with the prosecution and going by how the case against the defendant herein proceeded in trial herein, and mainly the nature of the evidence adduced herein, I do not find any such burden that shifts to the defendant except as he could have raised a defence under section 8(5) of the SOA.

Determination

16. To begin with, I do find no reason or evidence that the charges or complaints herein have been maliciously raised against the accused person herein. The witnesses herein confirmed that the accused person herein is known to them and that he is in fact a close neighbour. The alleged land dispute issue was not raised during cross-examination of the witnesses herein and the same therefore appears made up. I do therefore dismiss the same as a diversionary tactic by the accused person herein.



17. The accused person is a person well known by all the witnesses herein. Any grudge or issue that the parents herein had with him appear to have been because of the sexual acts on the complainants herein and not anything else. I have not found any other reason that could have caused the complainants herein to falsely implicate him with the shameful sexual assault acts herein. There was nothing peculiar or unusual with him which might offered the complainants herein an opportunity to benefit from by falsely or maliciously implicating him with the offence herein.
18. This is however not a case of a sole evidence of the complainant, but one with corroborating evidence of the PW2 witnessing the accused herein penetrate the complainant's vagina with his penis, after he had penetrated hers. The victims herein were used to the accused person and he appears to have taken advantage of the same and I do therefore find that the accused person had the opportunities to defile, and has been confirmed to have defiled, the complainant as has been charged herein.
19. The complainants in fact described the sexual acts in detail. I do hereby find them to be impressive witnesses on the sexual acts, and the identity of the perpetrator, the accused herein who is an adult male. Hence, relying on the complainant, PW2 and her PW3, her sister's, evidence, I have found that it has been proved to the required standard of beyond reasonable doubt that the accused person herein was with the complainant herein during the ordeal.
20. As foretasted, the victim's evidence was in fact sufficiently corroborated by the evidence of PW2 and PW3, who confirmed that the accused was with the complainants at the material time of the alleged act. Such kinds of evidence that mainly proves the opportunity to commit defilement were found to be corroborative even in those old days where corroboration of the evidence of a child of tender years was required by the law, the old section 124 of the *Evidence Act* before the enactment of the proviso. The Court of Appeal in *Sibo Makovo Vrs Republic*, The Court Of Appeal At Nakuru Criminal Appeal No. 39 OF 1996 [UR] held as follows:

[T]his corroboration was provided by PW1(the victim's mother) who said that PW2 (the victim) was outside the house when the appellant left the house and her frantic efforts to reach the appellant's house. ... This factor was further indirectly corroborated by the appellant himself who confirmed that he saw PW2 on the road when she was allegedly coming to his (the appellant's) house to borrow 'unga'. There was no need for PW2 to go to borrow flour at the appellant's house. What the appellant said confirms that he was with PW2 after he left the house of PW1.

21. The evidence on penetration herein is mainly oral. There was no medical evidence presented herein. The High Court considered a similar scenario in *Peter Mokami Nahashon Vrs Republic* [2014] eKLR; an appeal from my judgment and sentence in a trial where the medical evidence of penetration was completely excluded, a fact which made me to find that penetration and hence defilement was not proved, but I still proceeded to convict in the alternative charge of Committing an Indecent. In the appeal case, Justice Majanja held as follows: -

18. In my view, the medical evidence would only go to corroborate the testimony of PW 1. The testimony of PW 1 does not require corroboration as the proviso to section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) states that,

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.



19. Taking PW 1's testimony together with that of PW 3 and PW 4 and the chain of events leading to the arrest of the appellant, I find and hold that penetration was proved beyond reasonable doubt, lack of medical evidence notwithstanding (Emphasis supplied)
22. In *Sibo Makovo Vrs Republic*, supra, the Court of Appeal considered similar circumstances where the medical evidence was found to have been improperly received and hence was not to be considered in arriving at the decision therein. The Court of Appeal held as follows:

The P3 form which was filled in by the Medical Officer, Naivasha District, was produced by PW3 (a police officer²). The record does not show that the contents of the P3 form were explained to the appellant. Nor does the record show that the maker of the report (P3 form) was laid so as to produce the P3 form by a person there than the maker thereof. It is trite law that if the maker of a document is not available the document can be produced only after another person identifies the signature of the maker and in terms as laid down in Section 33 of the *Evidence Act* (Cap 80, Laws of Kenya) so far as relevant. It appears to us that production of P3 forms in Courts is not taken seriously and we wish to impress upon trial magistrates to be careful in admitting P3 forms when the maker is not called.

23. Having been impressed by the complainants' evidence herein, and having found some elements of corroborations that the accused person herein had the opportunities to defile the victim herein, and going by the above decisions, I do hereby find that the prosecution has proved its case against the defendant herein to the required standards of beyond reasonable doubt. Penetration has been proved by the impressive oral evidence of the victim herein that by virtue of section 124 of the *Evidence Act*, does not require corroboration, the absence of the medical evidence (P3 form) notwithstanding. And even if it requires corroboration, then the evidence of PW2 has sufficiently corroborated the same. Further, the evidence of PW3 that she found the victim herein while emerging from the accused person's bedroom proves that the accused had the opportunities to defile and the same is also sufficient corroboration to the complainant's evidence that she was penetrated by the accused person herein who was well known to them.
24. Consent or absence thereof is not an issue worth consideration when it comes to defilement of children. As held by Justice Majanja in *Peter Mokami Nahashon Vrs Republic*, supra, proof of age is required to establish that the victim is a child and secondly to establish the level of punishment where the offence is that of defilement under section 8 of the *Sexual Offences Act*. Section 2(1) of the SOA refers us to the *Children Act*³ for the definition of a child. Section 2 of the *Children Act*⁴ defines a child to mean any human being under the age of 18 years, where the age may also include the apparent age.

² Added

However, the P3 form did not add to the prosecution case in the magistrate's court. There was evidence of the condition in which PW2 was found which evidence showed that PW2 was in fact defiled.

Accordingly, we see no reason to differ from the concurrent findings of the two courts below and we order that this appeal be dismissed.

³ Cap 141, Laws of Kenya

⁴ *Ibid*



25. Proof of age is a question of fact and in this case, I am content to cite the case of Fappyton Mutuku Ngui Vrs Republic [2012] eKLR where it was held:-

... That “conclusive” proof of age in cases under *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases

26. In this case however, there was a great amount of contradiction as to the age of the complainant herein. She stated that she was 11 years old. She might however not be the best witness to her date of birth as she cannot exactly remember the date of her birth. This leaves us with the evidence of her parents who, unfortunately, contradicted themselves. Her mother even went further to contradict the date of her birth as indicated in the birth certificate, which was however, not produced. The 2 witnesses however put her date of birth as either 12/09/2010⁵ or 12/09/2009⁶ and in either case, she was a child under 18 years. So as to grant the accused the greatest advantage caused by this contradiction, I will go by the father’s date of birth, which then puts the age of the complainant at 11 years and 10 months as at the time of the offence. This therefore removes the offence herein from the provision of section 8(2) of the SOA, which provide for stricter sentence for cases where the victim is 11 years and less. In this case, the victim is found to have been a few months past 11 years, and there appears to be a legal lacuna with regards to cases such as this one where a victim is between the ages of 11 and 12 years. This is because the next provisions in section 8(3), provides for victims between ages 12 and 15 years. The charge herein did not also assist. It charged the accused with the offences of Defilement contrary to section 8(2) as read with section 8(3), and I do wonder whether this was deliberate given the finding on the lacuna herein.

27. The only option remaining herein is not to acquit, but to consider the alternative charge. The provisions of section 11(1) of the SOA are not stratified into age classes of the victims. The accused must have used his penis to touch the vagina of the victim herein during the sexual penetration herein. This is because there cannot be penetration without the genital organs coming into contact with each other. I do therefore find the charge in the main count herein not tenable and I therefore instead, find the accused person herein guilty of the offence of Indecent Act with a Child C/S 11(1) of SOA.

Conclusion

28. Pursuant to the provisions of section 215 of the *Criminal Procedure Code*⁷, I do hereby convict the accused person of the offence of Indecent Act with a Child C/S 11(1) of SOA as charged in the alternative charge.

**DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT (BUT IN CAMERA)
THIS 03rd DAY OF September , 2024**

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Court interpreter: Janet

Prosecution counsel: Chinga

⁵ Per PW4, her mother

⁶ Per PW5, her father

⁷ Cap., 75, Laws of Kenya



Accused:Present

Victim:

Victim's guardian/ parent:

