



**Republic v Wamuyu (Sexual Offence E093 of 2022)
[2024] KEMC 172 (KLR) (3 September 2024) (Ruling)**

Neutral citation: [2024] KEMC 172 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
SEXUAL OFFENCE E093 OF 2022
PA NDEGE, SPM
SEPTEMBER 3, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

JOSEPH MACHARIA WAMUYU ACCUSED

RULING

1. The Accused person herein, Joseph Macharia Wamuyu, was on 13/10/2022 charged with the offences of Defilement and, in the alternative, Indecent Act with a Girl, contrary to sections 8(1) as read with 8(2); and 11(1), of the *Sexual Offences Act* No. 3 of 2006, respectively.
2. He denied in the main count that on 10.10.2022 at a centre in Rongai sub-County within Nakuru County, he unlawfully and intentionally committed an act by inserting a male genital organ (penis) into the female genital organ (vagina) of MM a girl aged 1-year and 9months, which caused penetration. He also denied in the alternative that on the same day, date and place, he unlawfully and intentionally committed an indecent act to MM a girl aged 1 year 9 months by touching her private parts (vagina).
3. The prosecution was only able to call 4 witnesses in its case. It is however common ground that the parties herein are immediate neighbors and well known to each other. PW1, WWW, the mother to the victim herein stated that on the material day she was at her saloon working on a girlfriend of the accused person herein. That the accused was also used to, and fond of, the victim herein, whom he used to treat kindly. That on the material day, the accused took the victim herein, then 1 year and 9 months old, and went with her away as usual. That at around 6.00pm, the accused person returned without the child. That the accused informed her that the child was asleep. She had by then closing. The accused did not want to bring the child to the saloon where he had taken her from, but instead was willing to leave her at a neighbor's home (PW2). That at 7.00 pm, she left to go home and that along the way, she passed by PW2's place and saw the child herein while resting on a chair therein. That she left her there and proceeded to her house. That after a short while, a son to PW2 brought



her home while awake and crying. That the child told her that: - 'Joseph -hapa-chungu' while pointing at her genital area. She examined her and noted that there were some blood stains at her diapers. She dressed her together with the diapers and took her to Solai Health Centre where she was examined and given some medicine. That the examination confirmed that she had been sexually assaulted. They were then referred to the police station for a report. They went with the police, including PW3, No. 256830 PC Mark Liyayi, and PW4, No. 231677 PC John Musyoki, to the accused person's place. That after a vigorous knock, the accused open the door and was then arrested and taken to the police station.

4. In cross-examination, she confirmed that she was also at one point arrested during the investigations herein. That the police arrested her for appearing not serious or co-operative with the report herein. Further that at one point, she attempted to negotiate this matter with the accused person, whereby she demanded a sum of Kshs. 300,000/- so as to have the case and report withdrawn. That there is a similar defilement case involving a neighbor where she is a witness.
5. PW2, MM, is a neighbor and sister-in-law to the complainant's mother, PW1. She confirmed that on the material evening she cleared her work and went home, where she found the victim herein lying on her chair. That her mother, PW1, then came for her and took her away. That after some time, PW1 went back to her with a report that the child was crying and in pain. That she had been defiled and that she was taking the child to the hospital. She therefore decided to accompany her to the hospital. They then went to the police station after the examination of the child at the hospital. That the doctors at the hospital had informed them that the child was sexually assaulted with a finger, but not defiled. That the victim was not speaking at the time, but that her mother, PW1, informed her that it is the accused person herein who had committed the act on the child. She confirmed that the accused was fond of the child, and she was surprise that he could commit such an act on her.
6. In cross-examination, she confirmed that she found the child while sleeping peacefully on her chair. That it is her mother, PW1, who took the child away and not her son as claimed by PW1. That she did not hear the child mention the accused person or anybody else's name.
7. Towards the end of the prosecution's case, a counsel, Ms. Awuor, appeared for the accused person. Her main involvement in the trial herein was during submissions stage. Written submissions dated 25/07/2024 were filed and highlighted on 29/07/2024.
8. The submissions were basically on a case to answer, that is whether the prosecution's evidence had established a prima facie case sufficient to have the accused person herein called upon to make his defense. Learned counsel submitted that the evidence of the star witness herein, PW1, was full of contradictions. That if it is indeed true that the child herein was taken to her by PW2's son, and since no one saw the accused person herein commit the act, then it is not clear who between the accused and PW2's son committed the act on the child victim herein. That further, PW1 admitted to have asked Kshs. 300,000/= from the accused person in order to withdraw the case and that this further point out to the fact that the police and the complainant schemed a long way back to frame the accused person in order to extort money from him. That the witness further admitted that she has a similar defilement case pending in this court. That PW2 however contradicted PW1's evidence that the child was taken away from her house by PW1 herself. That the child was safe, peaceful and not crying when she was taken away by her mother, PW1. That insufficient evidence has been tabled before the court coupled with shoddy investigations since the investigating officer failed to visit the scene of crime and also failed to collect appropriate sample for scientific testing to ascertain whether the accused person committed the crime. That none of the witnesses saw the accused person commit the offence. That the totality of the foregoing leaves no doubt that the prosecution has terribly failed to discharge its burden of proof as required and evidential and legal benchmark have not been met to warrant the finding of guilt on



the part of the accused. The learned defense counsel therefore urged the court to find and hold that the accused person is innocent and acquit him under section 210 of the Criminal Procedure Code.

Determination

9. 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 *Jumaahiribaekomora v Republic* [high Court Of Kenya At Garissa Criminal Appeal No.53 of2017, 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. In the case of *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013, it was stated that: 'The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.'
10. Further, the late Justice Majanja, in *Peter Mokami Nahashon v 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)
11. 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
12. In the alternative charge, the prosecution was just therefore supposed to prove to the same standard of beyond reasonable doubt that the defendant 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.
13. Firstly, on the issue of penetration, I find no evidence, as at the close of the prosecution's case, to support the fact that the victim herein was penetrated in any way. Even though no medical report was filed herein, penetration can even be proved through other evidence, including oral testimony that the child appeared penetrated, or the blood-stained diaper that the prosecution also failed to produce herein. The High Court considered a similar scenario in *Peter Mokami Nahashon v 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)

14. In *Sibo Makovo v 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 officer¹). 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.

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

15. The blood-stained diaper was the nearest we had to prove at least some bleeding from the victim’s genital. The same was however not produced herein. This evidence, if well corroborated, would have at least proved that the victim’s genital was penetrated, or at least interfered with. The victim herself could communicate with her mother in a satisfactory way. That is if we are to believe her mother, PW1. Then she ought to have been called as witness so as to testify through an intermediary, her mother, PW1. She was however also not called. The medical evidence of examination on her were also not availed. Furthermore, there was a contraction between PW1 and PW2 on whether the findings were of a defilement or sexual assault.

¹ 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.



16. The case of *Bukenya & Others v Uganda*[1972] E.A.549 is the locus classicus on the issue of failure to call crucial witnesses where the Court of Appeal for Eastern Africa held that:

“The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case. Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.”

17. In *Julius Kalewa Mutunga v Republic*[2006] eKLR, the Court of Appeal held that:

“...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.”

18. In the case of *Bukenya & Others v Uganda*(supra), the court was clear that the prosecution is not expected to call a superfluity of witnesses. The adverse inference will therefore only be made by the court if the evidence by the prosecution is not or is barely adequate. Accordingly, adverse inference will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case.

19. This is because under Section 143 of *Evidence Act* (Cap 80) Laws of Kenya, no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact. In the case of *Keter v Republic* [2007] 1 EA 135 the court held inter alia that: ‘The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.’

20. I have already found no sufficient evidence herein to prove that the victim herein was sexually assaulted as alleged. Moreover, the credibility of the complainant’s mother, PW1, has greatly been impeached herein. Her evidence heavily contradicted the other evidence herein and she did confirm that she attempted to use this case to extort some money Kshs. 300,000/-, not a small amount in these economic hardship times- from the accused so as to share with the police with the view to have the charges against the accused person withdrawn. She even confirmed that she is a participant in a similar defilement case before a different court in Nakuru. She could thus be a professional complainant given that she confirmed that she attempted to extort money in this case. With all these contradictions and evidence of extortion, I find it hard to believe her evidence, bare as it is, without sufficient corroboration, which is lacking herein. PW2 who was to support her evidence gave a contradictory evidence. On this I find his evidence not that reliable on these accounts and as held by the court of appeal in *Ndungu Kimanyi v Republic*[1976-1980] KLR 1444:

We lay down the minimum standard as follows. The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person or raise a suspicion about his trustworthiness or to do or say something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence.

21. I need not go far herein, the upshot is that I find that the evidence herein is insufficient to establish a prima facie case against the accused person and as such I enter a finding of not guilty, dismiss the charges against the accused person herein pursuant to the provisions of section 210 of the CPC and



consequently do hereby acquit the accused person of the offences of Defilement C/S 8(1) as read with 8(2); and Indecent Act with a Girl C/S 11(1); all of the SOA. His cash bail of Kshs. 100,000/- be refunded back to the depositor.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 03RD DAY OF SEPTEMBER, 2024

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Court interpreter: Janet

Prosecution Counsel: Chinga

Defense Counsel: Awuor

Accused: Present

Victim/ guardian:

