



Director of Public Prosecutions v Mwandanda alias Mwaboza (Criminal Case 091 of 2019) [2023] KEMC 265 (KLR) (29 December 2023) (Judgment)

Neutral citation: [2023] KEMC 265 (KLR)

**REPUBLIC OF KENYA
IN THE KWALE LAW COURTS
CRIMINAL CASE 091 OF 2019
ZK KAGENYO, RM
DECEMBER 29, 2023**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS REPUBLIC

AND

RASHID JUMA MWANDANDA ALIAS MWABOZA ACCUSED

JUDGMENT

1. According to the amended charge sheet that was amended on the 10th day of June 2021, the accused person who was on the 26th day of August 2019 arraigned with an indictment of defilement contrary to section 8 (1) as read with 8 (3) of the Sexual Offence *Act No. 3 of 2006* where it was said that on the unknown date during the month of December 2018 at Fathi Madrassa in Diani location of Kwale county within coast region he unlawfully and intentionally caused his penis to penetrate the vagina of H.R a child aged 13 years. He faced an alternative indictment of having committed an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No. 3 of 2006 whereby it was said that on the unknown date during the month of December 2018 at Fathi Madrassa in Diani location of Kwale county within coast region unlawfully and intentionally caused his penis to touch the vagina of H.R a child aged 13 years.
2. The accused denied the charges and a trial ensued.
3. The DPP's case was conducted by learned Principal Prosecution Counsel Ms. Mwaura while the accused person was not represented by counsel and conducted his case while in remand custody although he had been granted a personal bond of Ksh. 200, 000/= with one surety of similar amount. At all times of the trial, the accused person was present in court. The matter was conducted in Kiswahili language, the language of choice by the accused. The matter was presided over by 2 Judicial Officers, Hon. Omido, SPM, and myself taking over after Hon. Omido was transferred to Shanzu Law Courts effective 23rd January 2023, and now it seems that a 3rd Judicial Officer is to come on board.



The Prosecution's case

4. To prove the guilt of the accused, the prosecution rallied a total of 4 witnesses.
5. According to the prosecution, the complainant in the matter was a Madrassa learner and the accused was her teacher. On one Saturday in the month of December 2018, as the complainant was attending her Madrassa lessons together with other students, the accused person engaged her thrice;
 - a. Firstly, he engaged her when he told her to wait for him to teach other students and that he would teach her later;
 - b. Secondly, he engaged her when he thereafter called her and caressed her thighs and when she told him to stop, he shouted at her and told her that she was there to learn. After he was done with the caressing, he told her to go back to the class and recite, an order which she complied with; and
 - c. Thirdly, he engaged her after the class when, after the day's lessons, the accused systematically released all the other learners and was left with the complainant only. When he was left with the complainant alone, the accused asked her to get closer to him, he stood behind her and held her mouth. Thereafter, he laid her down on a mat by her back, he removed the panty she was dressed on, opened his trousers' zip, pulled out his penis and penetrated it into the complainant's vagina. When he was done, the accused told the complainant that he would beat her up if she dared tell anyone.

After the horrendous ordeal, the complainant left the mosque's precincts and proceeded home crying. When she got home, her mother enquired from her what the issue was but due to fear, she lied to her that her crying was caused by the caning by a teacher, which appears to have eased the mother's anxiety.

6. Life went on as usual and late in the year 2019, it was said that a girl was found at the accused's house in circumstances that were said to be child abuse, and more particularly sexual abuse. Whereas it is not clear how it came to be known that the complainant was also a victim of such acts by the accused, the complainant's family received an unusual call which was summoning them to Diani police station. At the police station, having been assured of positive reception upon disclosing the ordeal, the complainant fearlessly let the cat out of the bag. Thereafter, investigations and subsequent arraignment ensued therefrom.

Defence case

7. The accused person was placed on his defence under section 210 of the Criminal Procedure Code, and section 211 of the Criminal Procedure Code and Article 50 (2) (i) having been explained to the accused person, he, in person, elected to defend himself by way of tendering sworn evidence without calling any witness.
8. The defence by the accused was denial and pleaded that the matter before court was a vendetta and vengeance by his jealous estranged wife who could not come to terms that their relationship had been terminated and the accused was moving in with another woman. To this end, the accused attempted to tell the court that he was married to one Saumu Hamadi with whom they sired two children and he started seeing another woman namely Mwanasiti Shafi and the former felt so aggrieved that he hatched a scheme to punish him and the scheme was this present court case.



9. Both parties having closed their respective cases, the Court invited them to put in their closing arguments, but none opted to put in any, each placing their reliance on the record in the court file and invited the court to make its judgment based on the material available in the file.
10. Having heard both parties at their full lengths, the court retired to make its decision.

Analysis and Determination

11. Section 8(1) of the *Sexual Offences Act* provides the key elements of the offence of defilement. The said elements were also stated in the case of *George Opondo Olunga -v- Republic* [2016] eKLR where the court held thus;

the critical ingredients forming the offence of defilement are;

- a. Age of the complainant;
 - b. Prove of penetration; and
 - c. Positive identification of the assailant.
12. About the standard of proof of these elements, it was said by the Court of Appeal in *John Mutua Munyoki -v- Republic* [2017] eKLR that the prosecution must prove each of them beyond reasonable doubt.

a. Age of the Complainant

13. Rule 4 of the Sexual Offences Rules of Court, 2014 states that;

When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document.

14. By way of a Certificate of Birth produced as P. Exh 4, indicating the Date of Birth as 19th January 2007 and its holder as H daughter of R.R.M and Z.H.C, the element of age was proved beyond reasonable doubt. The authenticity of the said document or any entry within it was not attacked by the defence. Through it, it can therefore be safely said that, as at 31st December 2018 the complainant was just but 19 days shy to clocking 13 years and hence a minor as defined in section 2 of both the retired *Children Act*, 2001 and the operational *Children Act*, 2022. The fact that it was indicated that she was 13 years old did not prejudice the accused and in any case, the same falls within the same bracket for the purpose of sentencing.

b. Penetration

15. By way of medical evidence adduced orally by PW 1 and also documented evidence at the Medical Treatment Notebook dated 9th August 2019, Post Rape Care Form (PRC) dated 9th August 2019 and a Medical Examination Report (Police Form P3) dated 16th August 2019 and produced as P. Exh 1, 2 and 3 respectively, the element of penetration was proven beyond peradventure.

c. Positive identification

16. The complainant said that the accused caused his penis to penetrate her vagina. According to her, the ordeal happened when it was only her and the accused and no one else witnessed the atrocity as it happened.



17. Section 124 of the *Evidence Act* enjoins me to take note that survivors of Sexual and Gender Based Violence and more particularly rape and defilement experience the horrendous acts in the absence of other people who cannot corroborate their accounts and the only two or more persons who know of the same are the people involved in it. However, the Act requires the court to record the reasons why it would believe the complainant.
18. I take note that the complainant testified, after three solid years since the act was done to her. Further, I take note that she had taken positive steps to conceal the same for 9 months and consequently naturally hoping to forget it before it was realized by the authorities. To this end, I remind myself that human memory is subject to fading away and is not a perfect repository of information that can thereafter be retrieved with the exactness of the details to the minutest of such of the initial information.
19. In my view, the evidence of the complainant was straightforward without beating any corners. The accused told her to hold on and she would be taught later and the later turned out to be a sexuality lesson where it would appear that the same was a caressing lesson. Having successfully done the prologue and assessed the naivety and cooperation of the victim, the accused temporarily let her go and would call her later hoping that she had programmed her mind with the expectations by her teacher.
20. To conceal his intention and obliterate any future suspicion, the accused let the other 11 learners go home one by one. It must have been his hope that at a future day, these learners would say that that was the modus operandi of the teachings and the ending of the days and nothing suspicious at all. If nothing happened to the 11th learner to leave, nothing therefore ever happened to the 12th learner, the complainant. Little would those other learners know that they were just but being used as a disguise.
21. I do take notice of the now soured former special relationship of the complainant and the accused as a learner and a teacher respectively and appreciate the innocence and naivety a learners have with their teachers, a special feeling that extends even with adults with their religious leaders, teachers, instructors of even coaches.
22. In the end, I do believe the minor when she says that the accused closed her mouth, undressed her pantie and caused his penis to penetrate into her vagina.
23. Turning on to the defence by the accused person, I find the same to be a fancifully scripted theory which was an afterthought. He named a stranger into these proceedings as the one framing him over a love gone sour. Such a defence is non-starter. Unbeknownst to him, such defence to acquire credence before a court, it has to be firmly grounded at the cross-examination stage of the prosecution witnesses or else corroborated by credible evidence. Surprisingly, in this case, none of the allegations that came out at the defence stage by the accused person as DW 1, were put forth to the 4 prosecution witnesses by the accused person while they were at the witness stand neither were they corroborated.
24. I do warn myself that the accused had no duty to prove his innocence. However, it is my view that even though he had no duty to prove his innocence, he had to prove whatever he told the court or at the very least, his theory had to be believable, which however was not. There was no relationship established between the complainant or her family and either the said Mwanasiti Shafi or Saumu Hamadi. The court has read the file over and over again and attempted to see any such relationship, even by mere likeness of names but none was forthcoming. On the part of the complainant and the accused, the accused did not cite anything that would portray the complainant as a disgruntled learner who was after punishing her teacher or else how she was being used as a decoy in the case.
25. In the end, I find the defence by the accused as just but a poorly imagined and developed script intended to mislead this court and avert justice. The script was poorly done and porously sealed that its porosity leaked the lies intended to conceal but unfortunately to him, but fortunately to the course of justice



which is said to be naked, blind and open for everyone to see, his scheme could not detract the finding of this court.

Disposition

26. From the foregoing, I make a finding that the Prosecution has furnished evidence before this court proving beyond reasonable doubt that indeed the accused person defiled the minor victim whom I have initialized as H.R and I thus find him guilty of the same and convict him under section 215 of the Criminal Procedure Code for the main count of defilement of a child said to be aged 13 years which is proscribed by section 8 (1) as read with section 8 (3) of the *Sexual Offences Act*.
27. Turning on to the alternative count, having made a finding in the main count, the alternative count rests determined.
28. Given his modus operandi, the breach of trust and resolve of him to commit the heinous act against a child, pursuant to section 39 (1) of the *Sexual Offences Act*, 2006, I do declare the accused person as a dangerous sexual offender.
29. The accused person is hereby informed of his right to lodge an appeal against this judgment and the conviction in the High Court within 14 days from today's date if dissatisfied with this court's finding.

JUDGMENT WRITTEN, DATED AND SIGNED AT NAIROBI ON THIS 29TH DAY OF DECEMBER, 2023.

KIONGO KAGENYO

RESIDENT MAGISTRATE

This Judgment has been Delivered in Open Court at Kwale on this 15th day of January, 2024, by Hon. C. K. Auka in accordance with the provisions of section 200 (1) (a) of the Criminal Procedure Code, upon the transfer of Hon. Kiongo Kagenyo (Mr.) (RM), to Milimani Small Claims Court effective 11th September 2023.

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In the presence of:

Mr. Khamis the Prosecutor

Mr. Hud the Court Assistant

Accused

