



**Director of Public Prosecution v Kilonzo (Sexual Offence E035 of 2021)
[2023] KEMC 280 (KLR) (29 December 2023) (Judgment)**

Neutral citation: [2023] KEMC 280 (KLR)

**REPUBLIC OF KENYA
IN THE KWALE LAW COURTS
SEXUAL OFFENCE E035 OF 2021
ZK KAGENYO, RM
DECEMBER 29, 2023**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTION REPUBLIC

AND

EMMANUEL KILONZO ACCUSED

JUDGMENT

1. It is said that human life, at least, while covered under the flesh and blood is a phased phenomenon that is characterized by voluntary and involuntary reactions to occurrences. It is such phases that most a time dictate when to crawl, walk, run, speak, freeze, sire or even become technically inactive. Sometimes, such phases may be characterized by too much energy that if unchecked could be destructive.
2. As described by her parents as one who had opted for truancy and frequent running away from home, and by way of her own evidence and description of behavior, it would appear that the complainant herein was no exception to the dictates of such phases and her 15th year in this world was characterized with truancy necessitating her to be a child in need of Care and Protection. To facilitate her placement to a safer place and environment for her, she had to sojourn at Kwale Police Station, unfortunately, at the height of the global pandemic the COVID-19 that delayed her opted placement. It is while at this perceived safer haven that the despicable horrendous alleged atrocities were committed to her allegedly by those who ought to have been protecting her.
3. According to the charges presented before court, the accused person who was on the 1st day of July 2021 arraigned with an indictment of defilement contrary to section 8 (1) as read with sub section 8 (3) of the Sexual Offence *Act No. 3 of 2006* was said that on the 22nd day of May 2021 at Kwale police station female cells toilets, Golini location Matuga subcounty within Kwale county, he intentionally and unlawfully caused his penis to penetrate the vagina of M.M.K a child aged 15 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 22nd day of May 2021 at Kwale police station female cells toilets, Golini location, Matuga subcounty within Kwale county, he intentionally and unlawfully caused his penis to touch the vagina of M.M.K a girl aged 15 years.

4. The accused denied the charges and a trial ensued. He conducted his case partly while out on cash bail of Ksh. 100, 000/= and partly while in remand custody after he flouted the bail terms by attending court for the hearing while highly inebriated thus occasioning frustrations on the trial.
5. The accused person was represented by a series of advocates at different stages but substantively, Mr. Kabiari, Advocate, took the larger portion of the legal representation. At all times of the trial, he was present in court. The matter was conducted in Kiswahili and English languages, the languages of choice by the accused.

The Prosecution's case

6. To prove the guilt of the accused, the prosecution rallied a total of 8 witnesses.
7. According to the prosecution, on the fateful 22nd night of May 2021, the complainant who was hosted at Kwale Police Station awaiting to be processed and admitted at Likoni Remand Home as a Child in need of Care and Protection, was called from the police cell by the accused who opened the cell's door for her. The accused lied to the complainant that she was required by another person in authority but when she got out, she was shocked to hear the accused demand for sex from her and commandeered her towards the toilets with the incessant demands for sex which he finally but very unfortunately got it by force and threatened her that he would kill her if she dared scream. After the ordeal, the accused ordered her to take a shower which she timidly complied with. Due to the threats that she had received and the punctured self-esteem from the traumatizing experiencing, she did not share the ordeal with anyone as soon as is desirably recommended but a few days later, she shared with her mother and the cat having been let out of the bag, the matter was reported at the same Kwale police station and investigations and subsequent arraignment ensued therefrom.

Defence case

8. 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.
9. The defence by the accused was denial and, an attempt to demonstrate an impossibility of the occurrence of the alleged incidence, at least on his part. Without leading the motive, the accused termed the charges as a fabrication against him.
10. Both parties having closed their respective cases, and made their respective closing arguments, they invited the Court to make its determination which I hereby do, having heard the parties at their full lengths and considered the material before me in its entirety.

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 1, indicating the Date of Birth as 12th September 2005 and its holder as M.M daughter of K.B and L.M, 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 22nd day of May 2021 the complainant was just but 15 years and 8 months old and hence a minor as defined in section 2 of both the retired *Children Act*, 2001 and the operational *Children Act*, 2022.

b. Penetration

15. By way of medical evidence adduced orally by PW 6 and also documented evidence at the Medical Examination Report (Police Form P3), Post Rape Care Form (PRC) and a Medical Treatment Notebook all dated 27th May 2021 and produced as P. Exh 2, 3 and 5 respectively, the element of penetration was proven beyond peradventure. However, save as for the oral evidence by the complainant, the recency of the proven penetration could not be determined from the medical record or any other form of evidence.

c. Positive identification

16. The complainant said that the accused caused his penis to penetrate her vagina. As observed earlier, even though there was proof of penetration into the vagina of the complainant, the age of such penetration could not be determined. The medical evidence described the genital organs in a manner that suggested that there was no notable recent interference by external forces.
17. I am well guided that 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.
18. To make a finding on whether to wholly rely on the evidence of the minor or not, I endeavoured to analyze the evidence as a whole and it was my finding that there were telltales that made me not believe in entirety the version of the minor and caused doubt in my mind.
19. Firstly, I note that when the minor was testifying before Court, she vehemently denied knowledge of whether the accused used a condom or not. She repeatedly informed the accused that she did not know whether she used it or not. However, according to her mother, as she was testifying, she told the court that the complainant told her that the accused used a condom as he defiled her. This was the same version given by the complainant to the medical practitioner as seen in the evidence of PW 6.



20. Secondly, I note that when she was testifying before this court, the complainant told the court that when the accused summoned her from the police cells that night, he told her that
- ...the children officer Pauline who deal with children matters wanted to see me. I asked him that it was much late and Pauline could not come out at that time. He insisted and finally I came out of the cell. I went to the Report Office. At the Report Office I found no one. Not even his fellow officer. Then Kilonzo told me that he was not calling me because Pauline wanted me but because he wanted to have sex with me. After that, as I wanted to go back he grabbed my hand. We walked past the boys' and girls' cells corridor, to a toilet which is there. At the toilet he removed my biker and pantie. As I tried to defend myself, he threatened me that he could kill me.....
- However, while being interrogated by the OCS in the presence of her mother, according to the evidence of her mother, the mother said that,
- ...M(complainant) said that she had been called by the male officer that night on the pretext of that she was being called by the madam OCS..when M(complainant) stepped out, the male officer who was armed with his riffle held her mouth and told her to shush and if she dare scream she will be killed..
21. In my opinion, the sampled discrepancies are self-evident from the captioned set of facts above. It is my view that the staggering versions of the incidences as seen above, though could be seen to be trivial, are so material that they deprive me of any reasons to record my satisfaction that make me believe that the victim is telling the truth to overlook the need for corroboration as is the dictate of section 124 of the *Evidence Act*.
22. Further, although with a lot of caution, I took notice of the craving by the complainant to have alternative amenities such as meals as she said that she did not like the meals being provided by the station.
23. Turning on to the other pieces of evidence, from the onset, I wish to clarify that contrary to the assumption and assertion by the investigating officer, PW 7, that one Jane said to be a fellow cellmate as the complainant on that fateful night testified before this court, she never testified as alleged. To that end, the evidence reproduced by the investigating officer is hearsy and of no much impetus before this court.
24. I will now look at the chronology of events at that night. In my re-reading of the proceedings, it appears that it is not in issue that indeed the accused person opened the cell's door for the complainant to walk out of the cell on that night. What is in issue is the motive behind such opening of the door, on one part the prosecution alleging that it was for the accused to satisfy his distasteful lustful desires while on his part, the accused maintaining that it was for the complainant to answer to a call of nature.
25. It was further not in contention that the toilets and the cells are, together barricaded by one common door, being the door at the Report Office in that for any outsider to get to the cells or the toilets one has to go through that door at the Report Office.
26. Further, there is a concurrence in evidence of PW 1, the complainant, and PW 8 that on that day, both of them saw each other, when PW 1 said that she was coming from the toilet and PW 8 said that he was at the Report Office, from the outside.
27. The evidence of PW 8 and PW 5 demonstrated that the accused person was outside the precincts of the Report Office and consequently the cells and the toilets. Indeed, the evidence of PW 8 was to the effect that as PW 1 was leaving the toilets, as she told him, the accused was nowhere near the said toilets, cells or Report Office. Neither PW 5 nor PW 8 saw the accused in any manner that would be described as having walked from the toilets or the alley thereat with the complainant.



28. According to the description of the accounts by the complainant, she said that she showered for about 10 minutes and as she was going back to the cell and while standing at the cell's door, she saw an officer taking the key at the Report Office table and thereafter, the accused came from the toilet, and he immediately started looking for the keys. The complainant told the court that she did not tell the accused that she had seen anyone taking the keys and the accused kept on looking for the keys until the officer who had taken them came back.
29. Clearly, from the narration of the complainant, it would appear that, as she was showering for the ten minutes, the accused was still at the toilets and only came back after the complainant had taken the shower and was standing adjacent to her cell's door and therefore, at no point had the accused left the enclosure within the Report Office, cells and the toilets. However, the corroborated evidence by other prosecution witnesses proved otherwise and I find in favour of the accused person that indeed he was outside the precincts of the Report Office, cells and toilets area at one point, and which is the most material point to this case.
30. From the foregoing, I find that there is doubt, highly reasonable doubt, that the accused could have defiled the complainant as is alleged.
31. Before I pen off, I wish to express myself on two issues that bothered me which are;
- a. Human dignity for the detainees at this time and era; and
 - b. The need to adhere to the rules and regulations put in place.
32. On the first limb of my concern, when PW 4 was testifying, he told the court that the practice at the police station is that,

.....persons held in police remand are not allowed to move out of the cells for call of nature in the night between 1800 hours and 0600 hours.....remandees should not go for call of nature from 1800 hours. They use buckets.....

PW 1 testified as much that they were sleeping on lesos. I presume this to be in contrast to mattresses or other forms of cushioned surfaces.

From these disturbing but very living facts, the Court sees an enlivened, on a daily basis, scene of the eye soaring and eternally traumatizing scene in the Nairobi Half Life film where the sterling actor, Mwas, at minutes 18 to 20 of the film, is made to clean the disgusting aftermath of the bucket business in the cells at the "Central" Police Station. Surely, as a nation that just celebrated its 60th Jamhuri day and taking pride of the very progressive Constitution entrenching the Social rights and a broad spectrum of human rights within it, we cannot afford to be turning a blind eye to such state facilitated norms and practices that rob off the human dignity of the detained persons. It is my very humble view that it is only good if we treat prison cells, police cells and other areas of detention, as dormitories that each one of us, frankly speaking, is a candidate of boarding. A classic example is the accused herein who was the one locking the doors for detained persons but has the doors locked for him now as a detainee. I dare say that once a person is arrested, the only human right limited at that juncture is the freedom of movement but human dignity which is the fabric and oomph for human emancipation, remains intact. It would appear that the dictates of Chapter 15 Paragraph 12 of the National Police Service, Service Standing Orders are too good on paper and were well thought by the visionary drafters but are far from being actualized. As sad as it is, to this end, I implore the National Council on the Administration of Justice to put in place measures that will wipe out this outdated norm of relieving oneself in a bucket in the presence of the other detainees and in order to spark a conversation, I do urge the parties herein, and do direct this Court's Court Administrator to, within 30 days of delivery



of this judgment, have the Judgment placed before the Kwale County Court Users Committee and the National Council on the Administration of Justice for development of a strategy and measures towards curbing the indignity occasioned on the detainees as aforementioned.

33. On the second limb of my concerns, Chapter 15 Paragraph 22 (1) (d) (iii) to (v) of the National Police Service, Service Standing Orders provides the instructions to be followed for the integrity of process in handling female detainees by stating thus;
- iii. A male police officer shall not enter cells meant for holding female detainees unless accompanied by a female or another police officer;
 - iv. the officers-in-charge of a police stations shall ensure that not less than two police officers are always on duty at the police station; and
 - v. the door of the cells meant for holding female detainees shall be secured by two locks and each of the two police officers on duty shall retain possession of the key to one lock only.
34. Had the administration at the Kwale Police Station adhered to the above provisions, the mystique in this matter could have been demystified a long time ago but there was no indication that there was a female officer around and in any other case, that there were two padlocks in which the accused held one key while PW 4 held the other. In my very considered view, the policy formulators in a sector, government and even the country, do invest heavily in terms of human resource, time and monetary resources in the formulation of such policies. The policies, rules and regulations are aimed at addressing a certain gap and once issued should not be applied on election if they do not provide that luxury of choosing when to apply or not to apply the same. It is only proper if our police stations adhere to the Standing Orders such as that of managing the cells accommodating the female prisoners for such instructions were formulated for a very cogent reason.

Disposition

35. Having analysed the evidence, I find that there is doubt, reasonable doubt for that matter, that on the 22nd day or night of May 2021 the accused person touched the complainant as alleged or committed the offences alleged to have been committed, and consequently this court hereby dismisses the case against the accused person and forthwith acquits him under Section 215 of the Criminal Procedure Code for both the main count of defilement of a child aged 15 years proscribed under section 8 (1) as read with section 8 (3) of the Sexual Offences Act, 2006 and for the alternative count therein of committing an indecent act with a child proscribed under section 11 (1) of the Sexual Offences Act, 2006.
36. Accordingly, I order that the accused be set at liberty forthwith unless he is otherwise lawfully held.

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

