



**Director of Public Prosecutions v Guto (Sexual Offence E003 of 2021)
[2023] KEMC 287 (KLR) (29 December 2023) (Judgment)**

Neutral citation: [2023] KEMC 287 (KLR)

**REPUBLIC OF KENYA
IN THE KWALE LAW COURTS
SEXUAL OFFENCE E003 OF 2021
ZK KAGENYO, RM
DECEMBER 29, 2023**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS REPUBLIC

AND

WILSON OGAMBA GUTO GUTO ACCUSED

JUDGMENT

1. On 14th January 2024, the Accused person shall clock 3 years in pretrial detention having been arraigned on the 14th day of January 2021 to face an indictment of defilement contrary to section 8 (1) as read with subsection 8 (3) of the *Sexual Offence Act* No. 3 of 2006 where it was said that on 10th/01/2021 at (Particulars withheld) area in (Particulars withheld) location of Kwale county within Coast region unlawfully and intentionally caused his penis to penetrate the vagina of Y.K a girl child aged 12 years. He faced an alternative count of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No. 3 of 2006 where it was said that on 10th January 2021 at (Particulars withheld) area (Particulars withheld) location of Kwale county within Coast region unlawfully and intentionally used his penis to touch the vagina of Y.K a girl aged 12 years.
2. The accused denied the charges and a trial ensued. He conducted his case while in remand custody even though he had been granted personal bond of Ksh. 400, 000/= with one surety of similar amount which it proves that he could not raise.
3. The accused person was not represented. At all times of the trial, he was present in court. The matter was conducted in Kiswahili language, or its interpretation, 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



The Prosecution's case

4. To prove the guilt of the accused, the prosecution marshalled a total of 4 witnesses.
5. According to the prosecution, in the morning of the 10th day of January 2021, the complainant herein took a dysfunctional phone to the accused's house for repair. She found the accused in his single room house and when the accused saw her, his lustful desires dominated him and locked the complainant into the house and defiled her. After the defilement, the complainant went back home and in the night at 2100 hours when her mother came back, her mother interrogated her of her day's whereabouts and more particularly, what she was doing at the accused's house, locked inside there. After threats of caning by the mother if she continued with her silence, the complainant opened up and told the mother that the accused had defiled her inside that house. Having been briefed as such, her mother reported the matter at Diani police station and investigations and subsequent arraignment ensued therefrom.

Defence case

6. 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 unsworn evidence without calling any witness.
7. The accused termed the prosecution's case as a vengeance scheme hatched by the complainant's mother and one Zakayo. He told the court that at one point, he had hosted Zakayo at his house in Diani and at that time, the complainant's mother was his paramour. During that period, at one time, he caught red-handed the two, Zakayo and the complainant's mother, PW 2, committing the marital offence and worse, inside his room on his bed. Angry with the ungrateful actions by the Zakayo and the betrayal by PW 2, he chased Zakayo away and ended his relationship with PW 2. Afterwards, as if Zakayo was not done terrorizing a fellow man, he stole from the accused's house his household goods causing the accused to report the matter at Diani police station on the 2nd day of November 2020, *vide* OB No. 8 of the day. the outcome of the investigation is unknown.
8. 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.
9. Having heard both parties at their full lengths, the court retired to make its decision.

Analysis and Determination

10. 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.
11. 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.



12. In the present case, the elements of age and penetration were proven beyond peradventure. The minor was said to be born on 10th November 2008 and the offence was said to have been committed on 10th January 2021. Medical evidence showed that there had been penetration into the vagina of the complainant.
13. As such, the court is called upon to determine whether the accused was positively identified as a person who caused his penis to penetrate the vagina of the complainant.
14. From the evidence adduced by the prosecution, I found telltales that made me find in favour of the accused as against the prosecution.
15. Firstly, I note that the complainant told this court that she had taken her phone to the accused at around 0900 hours. However, the mother told the court that Zakayo had told her that the complainant had been locked in the said house at 0700 hours. In my view, these are two different times, very material and too distinct to confuse.
16. Secondly, I note that when the mother was informed that the complainant had been defiled, she proceeded to the police station where she made her report. According to the investigating officer, PW 4, he told the court that PW 2 told them that they need to hurry and arrest the accused as he was planning to flee. This caused the police to arrest the accused with haste. In my view, there was no indication that the accused had planned to flee. The offence had been allegedly committed in the morning but now it appears that the urgency had just sprout. Indeed, there was no indication that the accused had known that he had been reported to the police station and this report by the complainant's mother showed a person who was craving for the arrest of the accused at all cost.
17. Thirdly, I note that the complainant had not told her mother that she had been defiled. Indeed, I was expecting that the earlier phone call said to be made to the mother through the Mama Britty's phone would have been the one to inform the mother but I was wrong. The mother knew of the ordeal through another person. That other person was Zakayo who said that he had been informed by another unnamed person. Neither the named Zakayo nor the unnamed person who seemingly had the information firsthand were called to testify as witnesses. I note that the failure to call them as witnesses was not an oversight from any quota but deliberate steps to keep them away from the court and any information they held if any. The reason is best known by those who took deliberate steps not to present them before court but for me, I can only make an adverse inference against the prosecution for failure to present these crucial witnesses, as the law dictates of me.
18. Fourthly, I note that indeed the accused had made a complaint against the said Zakayo two months prior to the said incidence. There was therefore a severed relationship between the accused and Zakayo. On the part of PW 2, she said that it was Zakayo who gave her the information he had been given by another person. She did not even bother to tell the court who that person was neither did the police investigate the truthfulness of such information. In fact, it was said that it was the prosecution counsel who had directed them to write such statements but even despite the legal counsel therein, the same was not forthcoming. I cannot hesitate to find in favour of the accused's version that indeed he was being set up by a disgruntled estranged mistress and a friend whom he had hosted when he was desperately in need but turned out to be a backstabber. It is sad how the complainant had to be used as a decoy.
19. In my view, such scheme would have been thwarted had the National Police Service upped their investigations including by following the defied counsel of the prosecution counsel, any alibi and heeded to the sentiments by the OCS regarding PW 2 and the previous complaints. With such, the accused would not have spent his 1, 095 plus days in remand custody as he did but for now, he is to regain his liberty as he is a free man henceforth. It is my hope that in future, the criminal justice system



shall be able to sieve ingenuine cases at the earliest and further that for the cases initiated therein, there be an expedited process for the guilt or innocence to be known without causing too much damage in the intervening period.

Disposition

20. From the foregoing, 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 12 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.

21. 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

